Protecting Children's Rights in Civil, Criminal and International Law – under a Touch of Digitalization

edited by Cocou Marius **Mensah**

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Foreword

COCOU MARIUS MENSAH

Rapid advancements in technology mark the contemporary era. The intersection between children's rights and the digital landscape has become increasingly pronounced. As digitalization permeates every aspect of society, from education to entertainment and beyond, it inevitably influences the legal frameworks governing the rights and protections afforded to children in civil, criminal, and international law contexts.

The book explores how children's rights interact with the digital world in civil, criminal, and international law. It analyses various aspects of children's rights (e. g., right to be heard, right to education, right to play, ….) and the state's role in promoting and protecting children and their rights, especially in civil and criminal court proceedings. The authors polemnize in their works about the role of the state and obligations to protect children in need (e.g., children in armed conflicts, child marriages, children in detention). They also emphasize, that effective and adequate protection of children's rights in national or international matters requires comprehensive legal frameworks, robust enforcement mechanisms, and ongoing efforts to promote awareness, education, and advocacy for children's rights at local, national, and international levels.

The book, with its content, is undoubtedly welcomed by anyone involved in the field of children's rights. Its diverse content, as it covers civil, criminal, and international law topics, will undoubtedly serve as a resource for seeking answers and expanding horizons and as a tool for students, judges, legislators, and policymakers, especially since it addresses children's rights in light of contemporary trends and the impact of digitization on them.

As the editor of this volume, I extend my heartfelt gratitude to all the authors whose contributions have enriched this work immeasurably. I would like to express a special thank you to Prof. dr. Suzana Kraljić whose dedication and expertise have played a major role in shaping this important contribution to the field of children's rights.

Legal Protection of Children in Armed Conflicts

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This chapter highlights the mechanisms and means used by international law to protect children in armed conflict situations. Children frequently find themselves as participants in both national and international conflicts and face the dual challenges of victimisation or coercion into taking up arms for the sake of war efforts. International law responds to these challenges by offering legal instruments, notably conventions and protocols, explicitly designed to address the unique vulnerabilities of children living in conflict zones. The author analyses the comprehensive international legal framework engaged in the battle against the infringement of children's rights during times of war and the profound consequences arising from such violations. By highlighting the important role of child protection within the international legal arsenal, this chapter substantially contributes to the ongoing discourse surrounding the fortification of mechanisms designed to safeguard children's rights in the complexities of armed conflict.

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Prispevek poudarja mehanizme in sredstva, ki jih mednarodno pravo uporablja za zaščito otrok v situacijah oboroženih konfliktov. Otroci se pogosto znajdejo kot udeleženci tako v nacionalnih kot mednarodnih konfliktih in se soočajo z dvojnimi izzivi žrtvovanja ali prisiljevanja k nošenju orožja v imenu vojnih prizadevanj. Mednarodno pravo odgovarja na te izzive z nudenjem pravnih instrumentov, zlasti konvencij in protokolov, ki so izrecno zasnovani za obravnavanje edinstvenih ranljivosti otrok, ki živijo v območjih konfliktov. Avtor analizira celovit mednarodni pravni okvir, ki se vključuje v boj proti kršitvam otrokovih pravic v času vojne in globokih posledic, ki izhajajo iz takšnih kršitev. Z osvetlitvijo pomembne vloge varstva otrok v mednarodnem pravnem okolju to poglavje bistveno prispeva k trenutnemu diskurzu o utrjevanju mehanizmov, zasnovanih za varovanje otrokovih pravic v kompleksnostih oboroženih konfliktov.

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1 Introduction

Children are the future of any society; therefore, their protection and safeguarding are of paramount importance. Regrettably, there is a concerning trend where children are increasingly subjected to the harsh realities of life, becoming entangled in the theatres of war, which negatively impact their lives (Kousar & Bhadra, 2022, pp. 269–285). Both adults and children directly exposed to the ravages of armed conflict experience issues with their mental health (Catani, 2018). The consequences are intolerable, as noted by Lee-Koo (2018), with many children ending up being recruited as child soldiers, subsequently experiencing trauma and victimisation. In this sense, Hill and Tisdall (1997, p. 19) mention that their capacities have been underestimated and their views undervalued. Before discussing the protection of children in times of insecurity or armed conflict, we must first agree on the scope of their age. According to article 1 of the United Nations (UN) Convention on the Rights of the Child (CRC), anyone under the age of 18 can be considered a child. It should be noted from the outset that this age choice was deliberate, with the sole aim of extending the protection and rights of children to the broadest possible age range. The UN, during preparations for the International Year of Youth in 1985 and ratified by the General Assembly (see A/36/215 and Resolution 36/28, 1981), defined "youth" as individuals aged 15 to 24, while institutions like the World Bank frequently employs the 0-14 age bracket to denote children (World Bank, 2023). Consequently, it is common to encounter children categorised within the under-fifteen age cohort. In alignment with these definitions, Additional Protocol II to the Geneva Conventions, article 4(3c) stipulates that individuals under 15 years old should not directly participate in hostilities, thereby establishing the minimum age for involvement in armed conflict. However, the CRC takes a broader approach, seeking to safeguard children universally. As part of this effort, the convention extends the age range for children up to 18 years, aiming for comprehensive protection across all nations. Our chapter will be based on article 1 of the CRC, and we will consider a child to be an individual under the age of 18. According to the latest data from UNICEF, by December 2023, the global population of people under 18 will exceed 2.3 billion (UNICEF, 2023). This is a significant percentage of the world's population and deserves all the legal, political, and economic attention necessary to ensure its development. This is why, as early as 1959, the United Nations General Assembly adopted the Declaration of the Rights of the Child. This founding document enshrines the fundamental rights of children, including

protection, education, health care, housing, and adequate nutrition. Under international law, countries must incorporate international agreements such as the CRC into their constitutions or create the appropriate legal framework to implement these texts. In this way, we find in every constitution the various rights of children in accordance with international standards. States are, therefore, the guarantors of children's safety and protection. Unfortunately, even with constitutional provisions, laws concerning children, and adherence to international and regional conventions, children remain inadequately protected from various threats. Among the risk situations that affect children, we can note climate change, mass migrations, armed conflicts, and other emergencies. Specialised mechanisms have been designed to safeguard children in conflict zones to address the specific concern of the protection of children during armed conflicts (Malescu, 2019, pp. 192–199). Notably, the United Nations Security Council (UNSC) unanimously adopted Resolution 1612 on July 26, 2005, creating a monitoring and reporting framework to address the use of child soldiers. In 2022, according to the report of the Secretary-General on children and armed conflict, there is an increase in the number of children exposed to warfare (United Nations, 2023). A total of 27,180 serious violations, of which 24,300 occurred in 2022. These violations affected 18,890 children (13,469 boys, 4,638 girls, 783 of unknown sex). The most widespread violations included the killing (2,985) and mutilation (5,655) of 8,631 children, followed by the recruitment and use of 7,622 children and the abduction of 3,985 children (United Nations, 2023).

The escalation of violence against children and the persistent violation of their rights does not stem from a lack of legal mechanisms aimed at safeguarding them (Oberg et al. et al., 2023, pp. 427–430). In contrast to previous conflicts where children were often unintentional victims, today, they are increasingly being targeted as deliberate casualties of warfare (Shenoda et al., 2015, pp. e309–e311). The protection of children, a complex undertaking, relies on a multifaceted approach encompassing national measures (Olusegun & Ogunfolu, 2019, p. 33; Desai & Desai, 2020, pp. 393–415), international conventions, and even sustainable development goals (Olusegun, 2021, p. 155). These frameworks collectively establish a comprehensive foundation, delineating the rights and protections owed to children globally. Although a comprehensive examination of all national existing legal instruments related to the protection of children during warfare is beyond the scope of this chapter, we will concentrate on international elements. Specifically, we will focus on significant conventions and protocols, such as the CRC, that are crucial in shaping

the child protection landscape (Rasakandan & Tehrani, 2022, p. 230). The UN CRC (United Nations, 2023) is at the heart of global child protection efforts, a landmark treaty ratified in 1989. This convention represents the most comprehensive international framework for safeguarding children's rights. Holistically, it defines a spectrum of civil, political, economic, social, and cultural rights for children. Fundamental principles enshrined in the CRC include non-discrimination (article 2), prioritising the child's best interests (article 3), the right to life, survival, and development (article 6), protection from torture, cruel, inhuman or degrading treatment or punishment (article 37), the right to a fair trial and rehabilitation (article 40), and the right to express their views on matters affecting them directly (article 12).

Complementing the CRC, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), adopted in 2000 by the General Assembly, constitutes a crucial legal instrument and "reflects on how child soldiers are portrayed in international law and policy" (Vandenhole et al., 2019, p. 424). OPAC specifically targets the protection of children from recruitment and use in armed conflicts. It mandates an increase in the minimum age for recruitment into armed forces and categorically prohibits the use of children in hostilities (articles 1-4). In line with the commitment to accountability, article 5 of the OPAC addresses the issue of criminal jurisdiction, emphasising the importance of state parties establishing jurisdiction over offences covered by the protocol, while article 6 mentions the criminal responsibility of those who recruit or use children in hostilities. Article 6 significantly contributes to the deterrence of child recruitment by holding perpetrators accountable for their actions and reinforces the commitment to shielding children from the devastating impacts of armed conflicts. Article 7 underscores the need for collaborative efforts among state parties, international organisations, and civil society to prevent the involvement of children in armed conflicts. It calls for assistance in the physical and psychological recovery, as well as the social reintegration of children affected by armed conflict, emphasising a broader societal commitment to support the healing and reintegration of these vulnerable individuals. This further strengthens the legal framework to combat child recruitment, ensuring states can prosecute individuals within their territory or nationals engaging in such activities.

To promote awareness and compliance, articles 9 and 10 stress disseminating information about the protocol and incorporating training on its provisions into the curricula of relevant military and police institutions. This approach aims to ensure that personnel are aware of and understand the rights of children during armed conflict, fostering a proactive stance in preventing child recruitment.

Moreover, articles 11, 12, and 13 contribute to transparency and accountability. While article 11 emphasises the need for state parties to include information on measures taken to implement the protocol in their reports to the Committee on the Rights of the Child, article 12 establishes this committee as the overseeing body responsible for monitoring the implementation of the protocol and article 13 introduces an inquiry procedure to investigate grave or systematic violations of the rights outlined in the protocol. Articles 14 and 15 further promote commitment and adaptability. by encouraging states that have not ratified the protocol to consider doing so, fostering a broader commitment to preventing the involvement of children in armed conflicts. A mechanism for adapting the agreement to evolving circumstances is provided in article 15, allowing state parties to amend the protocol and ensure its continued relevance in the face of new challenges. In this comprehensive manner, the OPAC serves as a robust framework for protecting children from the scourge of armed conflicts, emphasising prevention, accountability, and international cooperation.

Another legal tool protecting children in general and in particular against sexual offences is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, child prostitution, and child pornography (OPSC), also adopted in 2000. This protocol addresses the alarming issues of sexual exploitation and abuse faced by children. It confronts critical concerns related to child trafficking, child prostitution, and child pornography, emphasising the need for a comprehensive approach to shield children from the scourge of sexual exploitation. In articles 3-4, the OPSC criminalises child prostitution by emphasising the need for legal measures to prevent the sexual exploitation of children through prostitution. Article 5 goes further by mandating the criminalisation of producing, distributing, and possessing child pornography, addressing a critical aspect of protecting children from sexual exploitation. Article 7 is a path toward accountancy and international justice because it ensures that state parties establish jurisdiction over offences covered by the protocol when committed by persons within their territory or nationals. By doing

so, the protocol strengthens the legal framework to hold perpetrators accountable. Articles 8, 9, and 10 highlight international cooperation by requiring state parties to include offences covered by the protocol as extraditable offences in any relevant extradition treaties, Mutual Legal Assistance (article 9), Training and Cooperation among state parties (Article 10).

In times of armed conflicts, these provisions within the OPSC remain critically important. By criminalising and prohibiting the sale of children, child prostitution, and child pornography, the protocol serves as a robust legal framework even in challenging wartime conditions. The jurisdiction, extradition, and mutual legal assistance provisions enhance international cooperation, crucial for addressing cross-border crimes. Training initiatives (article 10) ensure that personnel involved in enforcing these provisions are well-equipped, and the emphasis on evidence collection and victim protection (article 11) remains paramount, even in the chaos of conflict. The committee established by article 12 provides ongoing oversight, promoting transparency and accountability in the protection of children against sexual offences both in normal times and during warfare. Overall, the OPSC represents a comprehensive and adaptable instrument for safeguarding children's rights in peace and wartimes.

To comprehensively address the legal dimensions of safeguarding children during times of war, it is imperative to conduct a comprehensive analysis of additional international regulations and mechanisms designed to protect the youngest and most vulnerable members of society. In this chapter, our examination begins by focusing on the foundational legal frameworks that underpin the protection of children. Subsequently, we will focus on the pivotal role played by the International Criminal Court (ICC) in ensuring the welfare of children in conflict zones. The chapter culminates with a nuanced exploration of specific case studies, offering practical insights into the application and effectiveness of these legal provisions during conflicts. We finally conclude by formulating recommendations aimed at enhancing the security and protection of children entrenched in the tumultuous battlefields.

2 In-depth analysis of legal regulations protecting children during conflicts

The legal architecture in protecting children during armed conflicts encompasses Conventions, Protocols, Resolutions, Principles, and Commitments on Children Associated with Armed Forces or Armed Groups. The UNSC is a primordial organ for peace and security in the world. That prerogative is primarily outlined in Chapter V of the United Nations Charter. In the context of protecting children during wartime, the Security Council's authority, as derived from article 24, provides the legal basis for its resolutions and initiatives aimed at addressing the impact of armed conflicts on children, showcasing the collective commitment of the international community to mitigate the impact of armed conflicts on children. As part of that commitment, the UN Security Council Resolution (UNSCR) 1612 exemplifies the importance of safeguarding the rights and well-being of children in conflict zones. Adopted by the UNSC on July 26, 2005, during its 5235th meeting, Resolution 1612 represents a pivotal and comprehensive framework for addressing the critical issue of protecting children affected by armed conflict. This resolution, like any other emanating from the UNCS, is of high priority, calling upon national governments to proactively provide effective protection and relief to all children impacted by armed conflicts. The urgency embedded in Resolution 1612 underscores the heightened responsibility of states to provide immediate protection and relief, prioritise safeguarding children during times of conflict, and actively promote access to justice. Furthermore, states are expected to prosecute individuals responsible for heinous crimes such as genocide, crimes against humanity, war crimes, and other egregious acts perpetrated against children. The implementation of children's rights during armed conflicts is not merely a recommendation but is deemed of paramount importance by the UN, proving that the international community is resolute in its conviction that the protection of children in armed conflict should be considered a cornerstone in conflict resolution and the construction of an equitable society. Recognising the vulnerability of children in situations of armed conflict, the Resolution emphasises the need for robust measures to ensure their safety, well-being, and the restoration of their rights. UNSCR 1612, as mentioned earlier, is also a monitoring and reporting mechanism, a watchdog, meticulously observing and documenting the situations children face in conflict zones. This mechanism facilitates a deeper understanding of the challenges and enables the international community to respond effectively to the evolving needs of children affected by

armed conflict. The periodic reports on the state of children and armed conflict, produced as a result of this resolution, play a crucial role in informing policymakers, organisations, and the global community about the evolving dynamics of the situation. These reports are invaluable tools that shed light on the gravity of the challenges children face and provide insights into potential areas of intervention. By consistently assessing the state of children affected by armed conflict, the UNCS demonstrates its commitment to staying informed and responsive to the changing landscape of crises.

Overall, UNSCR 1612, among others, can be seen as a catalyst for change. It serves as a foundational document that not only outlines the responsibilities of states but also calls for collaborative efforts at the international level. The resolution invites states to work collectively to establish and strengthen mechanisms for the protection of children.

In addition to UNSCR 1612, other resolutions adopted by the UN Security form an integral part of a comprehensive framework, reinforcing the imperative to protect children and hold perpetrators accountable for grave violations. Each resolution contributes a unique perspective and set of mandates to ensure the well-being and rights of children affected by warfare.

UNSCR 1261 (adopted in 1999) (United Nations Security Council, 1999) calls for a halt to the use of children in armed conflict and urges all parties to armed conflicts to ratify or accede to the OPAC. Building upon this foundation, UNSCR 1379 (adopted in 2001) (United Nations Security Council, 2001) expresses grave concern about the recruitment and use of children by armed groups. It calls for swift and effective measures to end this reprehensible practice, marking a significant step towards creating a protective environment for children caught in the throes of conflict. UNSCR 1460 (adopted in 2003) (United Nations Security Council, 2003) marks a pivotal moment by welcoming the establishment of the Monitoring and Reporting Mechanism (MRM) on Children and Armed Conflict. Recognising the need for its full implementation, this resolution highlights the importance of a systematic approach to monitor and report on violations against children in conflict zones. UNSCR 1539 (adopted in 2004) (United Nations Security Council, 2004) emphasises the imperative of releasing all children associated with armed groups and underscores the need for their successful reintegration into civil society. This

resolution underscores the commitment to not only ending the exploitation of children but also facilitating their rehabilitation into normalcy.

UNSCR 1882 (adopted in 2009) (United Nations Security Council, 2001) focuses on the devastating impact of sexual violence on children during armed conflict. It urges all parties to take concrete measures to prevent and respond to such crimes, acknowledging the unique vulnerability of children to these egregious violations.

UNSCR 1998 (adopted in 2011) (United Nations Security Council, 2011) calls for a comprehensive end to all violations against children in armed conflict. It encourages the development of national action plans, aligning with a broader strategy to protect children and provide a structured response to their challenges.

UNSCR 2068 (2012) ((United Nations Security Council, 2012) reiterates the significance of the MRM and urges cooperation from all parties involved in armed conflict. This emphasis ensures the sustained effectiveness of the monitoring and reporting mechanism, a critical tool in protecting children.

UNSCR 2143 (2014) (United Nations Security Council, 2014) calls for strengthening the MRM and robust implementation of its recommendations. By focusing on enhancing the mechanism's capabilities, this resolution reinforces the ongoing commitment to evolve and adapt strategies for the protection of children.

UNSCR 2225 (2015) (United Nations Security Council, 2015) underscores the critical importance of protecting children from the use of explosive weapons in populated areas, recognising the unique vulnerabilities and dangers faced by children in conflict zones.

UNSCR 2427 (2018) (United Nations Security Council, 2018) takes a decisive step by calling for the accountability of perpetrators involved in grave violations against children. This resolution stands as a firm declaration that those responsible for atrocities against children will be held answerable for their actions. Finally, UNSCR 2601 (2021) (United Nations Security Council, 2021) reaffirms the importance of the MRM and continues to emphasise the necessity for cooperation from all parties in armed conflict. By reaffirming the commitment to the monitoring and reporting

mechanism, this resolution ensures the continuity of efforts to protect children and address violations against them, highlighting the leading role played by the UNSC.

Another framework worth exploring in terms of children's protection in wartime is the set of regulations provided by International Humanitarian Law (IHL), a crucial legal framework for safeguarding the rights and well-being of civilians, particularly children, during armed conflicts. The cornerstone of IHL is the Geneva Conventions (International Committee of the Red Cross, 1949), supplemented by their Additional Protocols (International Committee of the Red Cross, 1977a; International Committee of the Red Cross, 1977b; International Committee of the Red Cross, 2005), along with the Hague Conventions (International Committee of the Red Cross, n.d.a) and their relevant protocols.

The Geneva Conventions, adopted in the aftermath of World War II, established fundamental principles to protect individuals not actively participating in hostilities, including children. The four Geneva Conventions of 1949 and their Additional Protocols of 1977 address various aspects of the treatment of civilians, prisoners of war, and other non-combatants. Regarding children, common article 3, found in all four Geneva Conventions, addresses the protection of children during armed conflicts that are not of an international character. It requires humane treatment for all persons not taking part in hostilities, emphasising the prohibition of violence to life and person, as well as cruel treatment and torture. Additional Protocol I, article 77, outlines the special protection afforded to children during international armed conflicts. It prohibits the recruitment or use of children under the age of 15 by parties to the conflict and calls for their special protection and care.

Additional Protocol II, article 4(3)(c) for non-international armed conflicts prohibits violence to the life, health, and physical or mental well-being of children. It emphasises that children should not be recruited into armed forces or groups, nor should they take a direct part in hostilities.

The Hague Conventions of 1899 and 1907, complementing the Geneva Conventions, primarily focus on the regulation of the conduct of hostilities. While the Hague Conventions do not explicitly address the protection of children, they are relevant in the measure that, for example, the Hague Convention (IV) calls for the respect of the Laws and Customs of War on Land (1907) (International Committee

of the Red Cross, n.d.b). While not directly addressing the protection of children, this convention provides a general framework for the humane treatment of children and other civilians during warfare on land. The principles of distinction and proportionality contained in the convention indirectly contribute to protecting children as non-combatants.

In summary, the Geneva Conventions, their Additional Protocols, the Hague Conventions, and relevant protocols collectively constitute a comprehensive legal framework under International Humanitarian Law. These instruments provide essential protection for children during armed conflicts, addressing their special vulnerability and emphasising the prohibition of their recruitment and direct participation in hostilities.

The following framework that plays an important role in limiting the role of children and protecting them from the consequences of armed conflicts is the Paris Principles and Commitments on Children Associated with Armed Forces or Armed Groups (UNICEF,2007). However, before addressing those Principles, it is noteworthy to mention their predecessors: The Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa were adopted on April 26, 1997, in Cape Town, South Africa (United Nationes, 1997). The Principles highlighted fundamental causes of child soldier recruitment, advocated for the protection of children and also provided extensive support for their rehabilitation and successful reintegration into society (United Nationes, 1997). The Key Aspects of the Cape Town Principles were:

Tailored for Africa: These principles are specifically crafted to address the unique context of Africa, where the issue of child soldiers is notably widespread due to conflicts in Congo, Uganda, Sierra Leone, Liberia, Rwanda, etc.

Preventive Focus: The principles underscore the importance of preventing the initial recruitment of children, addressing the root causes that fuel this alarming practice.

Holistic Approach: The framework promotes a comprehensive strategy encompassing legal reforms, disarmament, demobilisation, and reintegration (DDR) programs, along with psycho-social support and active community engagement.

Child-Centric: A central tenet of the principles is a dedicated focus on the rights and well-being of children. Ensuring their protection and support is prioritised throughout the entire DDR and reintegration process.

In addition to the Cape Town Principles, which primarily serve as a regional instrument, it is noteworthy to highlight another impactful African regional initiative. Numerous legal frameworks exist to safeguard the rights of children in armed conflicts, and Africa, attuned to its distinctive challenges, frequently adopts regional tools customised to address its specific needs. A notable illustration of this approach is the African Charter on the Rights and Welfare of the Child (Organization of African Unity, 1990).

Adopted by the Organization of African Unity (now the African Union) on July 11, 1990, the African Charter on the Rights and Welfare of the Child, a regional instrument to protect children, entered into force on November 29, 1999, following ratification by a sufficient number of African Union member states. Noteworthy is the time span it took for the Charter to become effective. This period coincided with a multitude of conflicts, civil wars, and armed struggles across the African continent during the 1990s and late 1990s. The adoption and eventual enforcement of the Charter occurred amidst these challenges, reflecting the pressing need for a comprehensive legal framework to address the complexities of protecting children during conflicts such as:

- Liberian Civil War (1989–1997): The Liberian Civil War, which began in 1989, continued into the 1990s and involved various factions vying for control of the country.
- Sierra Leone Civil War (1991–2002): The Sierra Leone Civil War started in 1991 and continued for more than a decade, marked by widespread human rights abuses, including the recruitment of child soldiers.
- Rwandan Genocide (1994): The genocide in Rwanda occurred in 1994, resulting in a significant loss of life and widespread displacement.
- First Congo War (1996–1997): The First Congo War involved multiple African countries in the mid-1990s.
- Second Congo War (1998–2003): The Second Congo War, often referred to as the Great War of Africa, started in 1998 and involved multiple African nations.

These conflicts, among others, had profound humanitarian consequences, including the displacement of populations, human rights violations, and the involvement of children in armed conflicts. The African Charter on the Rights and Welfare of the Child was adopted in the midst of these challenges, reflecting the regional commitment to addressing the specific rights and protections needed for children affected by armed conflicts in Africa.

From a legal perspective, what mechanisms does the ACRWC possess to function as a vital regional instrument for safeguarding children's rights? Several provisions within the Charter explicitly focus on the protection of children in the context of armed conflicts.

1. Article 22(2) emphasises the right of children to be protected against any exploitation or use in armed conflicts, underscoring the African Union's commitment to preventing the recruitment and abuse of children in conflict zones.

2. Article 38 of the ACRWC further reinforces the right of children to protection in times of armed conflict. It states that state parties shall take all feasible measures to ensure the protection and care of children who are affected by armed conflict, with a specific focus on the prevention of their recruitment and use in hostilities.

3. Article 39 underscores the commitment to the physical and psychological recovery and social reintegration of child victims of armed conflicts. It highlights the importance of providing necessary support systems and rehabilitation measures for children who have been subjected to the traumas of armed conflict.

To implement the provisions of the ACRWC Regional courts, such as the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights, serve as important institutions for ensuring justice and accountability for crimes committed against children in armed conflicts.

4. The African Court on Human and Peoples' Rights has jurisdiction over cases related to the interpretation and application of the ACRWC. It provides a platform for individuals and non-governmental organisations to bring cases before the court, seeking justice for children who have been victims of abuse in armed conflicts.

5. African Commission on Human and Peoples' Rights: The African Commission also plays a vital role in promoting and protecting the rights of children. It monitors state compliance with the ACRWC and can receive complaints from individuals and organisations concerning violations of children's rights in armed conflicts. The Commission works towards ensuring that member states adhere to their obligations under the Charter.

6. Other African Mechanisms: Additionally, various regional initiatives and mechanisms, such as national human rights institutions and civil society organisations, contribute to the protection of children in armed conflicts. These entities work to raise awareness, provide support to affected children, and advocate for stronger legal frameworks and enforcement mechanisms.

Shifting back our focus to universal frameworks, we can now examine The Paris Principles on Children Associated with Armed Forces or Armed Groups. This set of principles represents a substantial advancement in tackling the problem of children unlawfully recruited or used in conflict situations, not only within the African context but on a global scale. Initiated nearly a decade after the Cape Town Principles, UNICEF conducted a comprehensive global review that underscored the necessity for two distinct documents. The first is a concise overview called "The Paris Commitments to Protect Children Unlawfully Recruited or Used by Armed Forces or Armed Groups," and the second is a more detailed and complementary document known as "The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups" (the Paris Principles). This dual-document approach aims to provide comprehensive guidance for those involved in implementing programs to protect children affected by armed conflicts. The Paris Principles, rooted in international law and standards, build upon the foundation laid by the Cape Town Principles. This document incorporates the accumulated knowledge and lessons learned and emphasises the informal ways boys and girls become associated with and leave armed forces or armed groups. Adopting a child rights-based approach, the Principles highlight the humanitarian imperative to secure the unconditional release of children from armed forces or armed groups, regardless of the ongoing conflict and for the entire duration of the conflict. Similar to the CRC, the Paris Principles define children as individuals under the age of 18, reflecting a commitment to protecting a broad spectrum of young individuals by not limiting the age threshold to 14, for example. Moreover, the Principles align with

fundamental CRC principles such as non-discrimination, the best interests of the child, and children's rights to justice. Unlike the Cape Town Principles, which were regionally focused on Africa, the Paris Principles extend their reach worldwide and endorsed local initiatives, educational programs, the promotion of family unity, and the specific consideration of the situation of girls in armed conflicts. By acknowledging the importance of prevention, the Paris Principles contributed to breaking the cycle of recruitment and use of children in armed conflicts. They introduced innovative and groundbreaking measures in the areas of release and reintegration. The process is designed to be inclusive, addressing the multifaceted needs of children returning to or integrating into their communities after being associated with armed forces or armed groups. The inclusive approach to reintegration acknowledges that the process is not a one-size-fits-all solution and must consider each child's unique circumstances and needs.

Material assistance is identified as a critical component of the release and reintegration process. This involves providing necessary resources, support, and services to facilitate the child's transition from a life associated with armed forces or armed groups to a more stable and secure environment. It recognises that children may face various challenges, including psychological trauma, lack of education, and disrupted family ties, and aims to address these issues comprehensively.

Family tracing is another essential element of the release and reintegration process outlined in the Paris Principles. This involves efforts to locate and reunite children with their families, acknowledging the importance of family ties in the well-being and stability of the child. Reconnecting children with their families helps provide a supportive environment for their reintegration and contributes to their overall social and emotional well-being.

Support for families and communities to which children return or integrate is a crucial aspect emphasised by the Paris Principles. Recognising that successful reintegration extends beyond the individual child, the document highlights the importance of community-based support systems. This includes reducing stigma, promoting understanding, and creating a conducive environment for the child's acceptance and reintegration within the community.

Overall, the Paris Principles on Children Associated with Armed Forces or Armed Groups represent a comprehensive, universally applicable framework for addressing the complex challenges faced by children affected by armed conflicts.

Before concluding this part of the chapter about legal regulations, it is important to highlight once again the role of the CRC, even if it was partly examined earlier. Talking about children and their rights to be protected during armed conflicts and other life-defying situations. One cannot ignore article 6 of the CRC - Right to Life, as in the context of armed conflict, this right becomes of paramount importance and state parties to the CRC are obligated to take all necessary measures to ensure the survival and development of the child, with specific attention to situations of armed conflict. Another provision lies in article 19, highlighting the right of every child to be protected from all forms of physical or mental violence, injury, abuse, neglect, or negligent treatment. This right must be implemented not only in times of peace but also in the context of armed conflict, as protecting children becomes even more critical when they are direct or indirect victims of violence, including recruitment into armed forces, displacement, and exposure to various forms of abuse. The CRC supports state parties in proactive measures such as taking legislative, administrative, social, and educational measures to ensure the protection of children from all forms of violence during armed conflicts. In the same framework, article 22 can be tagged as a special one in the context of this chapter as it deals with the problem of refugee children, which is particularly pertinent in situations of armed conflict where displacement is common. In this case, regardless of their status, children must receive appropriate protection and humanitarian assistance, including respect for their basic rights, such as access to education, healthcare, and measures for social integration. Article 37 of the CRC also provides an interesting insight when it comes to the protection of children in armed conflicts as it tackles Torture and Cruel Treatment. The prohibition of torture and cruel, inhuman, or degrading treatment or punishment in peacetime or in conflict situations must be guaranteed for everybody, including children who are particularly vulnerable to various forms of abuse. Additionally, it explicitly prohibits the imposition of the death penalty or life imprisonment without the possibility of release for offences committed by persons below 18 years of age. This safeguards children from severe punitive measures, even in conflict-related contexts.

Article 38 recognises the right of children affected by armed conflict to receive special protection and assistance. States are mandated to respect and ensure respect for international humanitarian law rules relevant to the child's age and the nature of armed conflict. This article underscores the importance of providing appropriate care for children who have suffered due to armed conflict, including physical and psychological recovery. Efforts are to be directed toward reintegration into society, ensuring that children have access to education, vocational training, and other necessary support to rebuild their lives. Finally, article 39, about Rehabilitation and Reintegration, builds upon article 38, emphasising the right to physical and psychological recovery and social reintegration. Though the Paris Principles greatly cover this provision, it shows that children who have been victims of armed conflict should receive appropriate support for rehabilitation and reintegration into society. This involves measures to address trauma, restore a sense of normalcy, and facilitate the child's return to a community. As recommended by most UN institutions and mostly the UNSC, nations are called upon to collaborate with international organisations to ensure the provision of necessary resources and expertise to effectively implement all the legal existing arsenal available to prevent, protect and reintegrate children affected by armed conflict.

3 The role of the ICC and other courts in protecting children in armed conflicts

In the preceding sections, we underscored the paramount significance of legal frameworks in safeguarding children during armed conflicts. The synergy of the Cape Town Principles and the Paris Principles, coupled with the CRC, UN Security Council Resolutions, and additional legal instruments, form a robust and comprehensive framework dedicated to the protection of children amidst the dangers of armed conflicts. These foundational documents thoroughly outline explicit obligations and measures designed to prevent and address children's challenges in conflict zones. The breach of the aforementioned regulations and other treaties intended to protect children invests the ICC with institutional authority to demand accountability and justice. In instances where crimes against children occur—ranging from recruitment and abduction to the egregious use of child soldiers, sexual violence, and the denial of humanitarian access—the ICC emerges as the paramount institution for dispensing justice. It becomes the fulcrum of justice, wielding the power to hold perpetrators accountable for their actions and ensuring

that grave violations against children during armed conflicts do not go unpunished. By holding individuals accountable for their actions, the ICC contributes to breaking the cycle of violence and impunity, fostering a global environment where the protection of children is not negotiable. Its role extends beyond the courtroom; it is an integral part of the larger effort to create a world where children are shielded from the horrors of war, where their innocence is preserved, and their rights are upheld.

Established in 2002, the ICC stands as a permanent international Court vested with the authority to investigate and prosecute individuals accused of the most serious international crimes, including genocide, crimes against humanity, war crimes, and crimes of aggression.

The Rome Statute (United Nations, 1998), the foundational legal framework for the ICC, stands as a cornerstone in the global endeavour to address and prosecute crimes against humanity. Its particular significance lies in establishing a robust legal foundation, empowering the ICC to hold perpetrators accountable for acts committed against children in conflict zones (KC, 2018).

A legal analysis of the Rome Statute enables us to highlight articles 7 (Crimes against Humanity) and 8 (War Crimes), which collectively contribute to addressing the unique vulnerabilities of children in times of war. Article 7 of the Rome Statute delineates crimes against humanity, encompassing a spectrum of acts causing severe suffering affecting both adults and children. This provision assumes paramount importance when considering the special plight of children in armed conflicts. The specified acts within article 7 related to children include torture, rape, sexual slavery, forced prostitution, forced pregnancy, and forced sterilisation. The intentional infliction of severe physical or mental suffering upon a child, coercive engagement in sexual intercourse without consent, and subjecting a child to sexual exploitation are explicitly recognised as crimes against humanity. Moreover, deliberately causing a child to become pregnant against her will and forcibly preventing a child from having children constitute offences that underscore the ICC's commitment to addressing the unique vulnerabilities of children during armed conflicts. By explicitly acknowledging and criminalising such acts, the Rome Statute establishes a robust legal framework to hold perpetrators accountable for crimes committed against children in the context of armed conflicts. The provisions within article 7 of the Rome Statute recognise the distinctive vulnerabilities of children and affirm the

ICC's commitment to providing them with specialised protection during armed conflicts. The gravity of these crimes against children is underscored by the stringent legal standards set forth in the statute. Through these provisions, the ICC aims not only to punish perpetrators but also to deter such heinous acts, sending a clear message that crimes against children in armed conflicts will be met with legal consequences.

Moving on to article 8 of the Rome Statute, this section addresses war crimes, a category of offences that significantly impact children during armed conflicts. The conscription or enlistment of children under the age of 15 into armed forces or groups, as well as their use in active hostilities, is explicitly prohibited under article 8. This provision is applicable to both international and non-international armed conflicts, reflecting the international community's commitment to safeguarding children from the adverse effects of war.

The prohibition against conscripting or enlisting children involves forcibly involving children under the age of 15 in armed forces or groups, recognising the inherent vulnerability and incapacity of children to engage in armed conflicts knowingly. Similarly, the prohibition against using children in hostilities addresses the active engagement of children in armed conflict, exposing them to violence and harm. These provisions within article 8 recognise the need for special protection for children during armed conflicts and align with the broader international legal framework, including the CRC.

There are no additional specific articles in the Rome Statute that explicitly address the protection of children in armed conflicts beyond articles 7 and 8; however, it's worth noting that the Rome Statute provides a comprehensive legal framework that indirectly supports the protection of children through established legal Principles.

3.1 Complementary principle (article 17)

The principle of complementarity ensures that the ICC is a Court of last resort, stepping in only when national legal systems are unwilling or unable to prosecute crimes within its jurisdiction. This principle indirectly contributes to the protection of children by encouraging and recognising the role of domestic legal systems in holding perpetrators accountable for crimes against children in armed conflicts.

Should domestic Courts lack the capacity or, for any reason, be unable to ensure the protection of children by bringing the accused to justice, the ICC will assume jurisdiction.

3.2 Universal jurisdiction

While not explicitly stated in the Rome Statute, the principle of universal jurisdiction allows states to prosecute individuals for crimes against humanity and war crimes, irrespective of where the crimes occurred. This principle reinforces the idea that perpetrators of crimes against children can be held accountable beyond the jurisdiction of the ICC, providing an additional layer of protection. In this context, the significance of national institutions cannot be overstated. Nevertheless, the ICC serves as a universal watchdog uniquely positioned to address crimes that undoubtedly impact children, particularly war crimes and crimes against humanity.

3.3 Principle of non-discrimination

The Principle of Non-Discrimination underscores the Court's commitment to treating all individuals, including children, as equals entitled to impartial protection under the law. This foundational principle guarantees that the ICC's proceedings meticulously address the distinct vulnerabilities and rights of children, fostering a system where anyone committing crimes against children is subject to prosecution without regard to their wealth, social status, or connections. It thereby promotes a fair approach to cases involving crimes against children, ensuring accountability for all, irrespective of their background or influence.

3.4 Best interests of the child principle

Though this Principle is best described in CRC or in the Paris Principles, the Rome Statute, when interpreted in conjunction with those legal instruments, upholds the child's best interests as a primary consideration. This principle guides the ICC in making decisions that impact children, ensuring their well-being is a central focus.

3.5 Principle of individual criminal responsibility (article 25)

Article 25 of the Rome Statute establishes individual criminal responsibility, emphasising that individuals are responsible for their actions. This principle ensures that those who commit crimes against children in armed conflicts cannot evade accountability, reinforcing the protection of children by attributing responsibility to the perpetrators.

3.6 Principle of gender sensitivity

While not explicitly outlined in the Rome Statute, the ICC has recognised the importance of a gender-sensitive approach, just like in the Paris Principles (Women's initiatives for gender justice, 2012). This principle acknowledges that children, particularly girls, may experience conflicts differently, emphasising the need for the ICC to consider gender-specific vulnerabilities in its proceedings related to crimes against children. This chapter will propose Case studies later (see The Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06).

3.7 Principle of gradual recognition of the age of criminal responsibility

The Rome Statute does not specify a minimum age of criminal responsibility, but it implicitly acknowledges the progressive recognition of the age of criminal responsibility. This principle aligns with international standards that advocate for setting a reasonable minimum age, ensuring that children are not held criminally responsible at an age incompatible with their mental and emotional development. In this context, The Paris Principles and the CRC play a pivotal role in protecting children and advancing justice accountability, considering their mental and emotional development. As highlighted earlier, these principles are dedicated to safeguarding the rights and well-being of children, particularly within juvenile justice systems. Their focal point is a child-sensitive approach, emphasising that legal proceedings and accountability measures must account for children's distinct vulnerabilities and developmental stages. In alignment with this framework, the United Nations Economic and Social Council (ECOSOC) Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime provide essential guidance (United Nations Economic and Social Council, 2005). These guidelines ensure that children engaged in legal proceedings are treated with utmost sensitivity,

acknowledging their age, development, and potential impact on their well-being. Similarly, the Istanbul Protocol (Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment) (UN Office of the High Commissioner for Human Rights, 2022) aligns with the shared cause. While not exclusively tailored for children, the Istanbul Protocol offers guidelines for documenting evidence of torture. In cases where children might be victims, these guidelines contribute significantly to the protection of their mental and emotional well-being during investigative processes.

Notably, the Omar Khadr case (Supreme Court of Canada, 2016) further exemplifies the critical importance of these principles. It illustrates the necessity to consider children's mental and emotional well-being in matters of justice accountability, echoing the principles set forth by the Paris Principles, CRC, ECOSOC Guidelines, and the Istanbul Protocol. This collective framework underscores a shared commitment to upholding the rights and ensuring the holistic well-being of children within legal systems worldwide.

3.8 Principle of reparations (article 75)

The Principle of Reparations, as articulated in article 75 of the Rome Statute, serves as a crucial instrument for the ICC to address the specific needs and vulnerabilities of children who have endured harm in the context of armed conflicts. This article empowers the ICC to order reparations for child victims, ensuring that they receive redress for the suffering they have endured due to crimes falling within the court's jurisdiction. By providing avenues for reparations, this principle becomes a cornerstone in the ICC's commitment to the rehabilitation and well-being of children affected by armed conflict, recognising their unique rights and the imperative to restore their lives in the aftermath of violence, as suggested in the Paris Principles, for example.

3.9 Principle of humanitarian assistance

While not explicitly outlined in the Rome Statute, the ICC, through its work, indirectly supports the principle of humanitarian assistance. This underscores the importance of assisting and supporting children affected by armed conflicts, aligning with broader international humanitarian principles.

3.10 Principle of international cooperation (article 86)

Article 86 of the Rome Statute emphasises the principle of international cooperation. This principle supports collaborative efforts between the ICC and other entities, including international organisations and non-governmental organisations, to enhance the protection of children in armed conflicts through joint initiatives, sharing of information, and coordinated actions. These principles represent critical aspects and considerations that, when applied in conjunction with the existing articles of the statute, contribute to the overarching protection of children in armed conflicts within the legal framework provided by the ICC.

Overall, in executing its mandate, the Court cares about the impact of armed conflicts on the lives of children around the world, and the UNSC can seize it to bring Justice. The unique vulnerability of children in armed conflicts is obvious; therefore, their rights must be actively protected, and accountability must be brought to criminals throughout the investigative and judicial processes. Beyond prosecutions, the ICC assumes a preventive role by actively contributing to the development of international law and standards pertaining to the protection of children in armed conflicts. Through its decisions and case law, the Court sends a clear signal. It provides guidelines that elucidate the scope of international criminal law, thereby bolstering the protection of children's rights within the context of armed conflicts. The Court approach not only seeks justice for past transgressions but also actively works towards preventing future atrocities and fostering a global environment where the rights of children are prioritised and safeguarded.

Developing further the idea of Courts that have sentenced individuals for crimes against children in armed conflict, except the ICC, which is relatively young and actually the newest in the international legal arsenal when it comes to international accountancy to war crimes, crime against humanity, etc., we can also mention the results achieved by the predecessors of the ICC and other Courts that have parallelly worked according to the Principle of complementarity and the Principle of International Cooperation. Here, the message is still the same: the International Justice system and the international community will not tolerate the use of child soldiers or other violations against children in armed conflict. We can mention the 'International Criminal Tribunal for the Former Yugoslavia' (ICTY).

The UNSC mandated the establishment of the ICTY through UN Security Council Resolution 827 adopted unanimously on 25 May 1993 (United Nations Security Council, 1993). This resolution officially created the ICTY to address serious violations of international humanitarian law committed during the conflicts in the former Yugoslavia. The resolution granted the tribunal the authority to prosecute individuals responsible for war crimes, crimes against humanity, and other offences. The ICTY holds jurisdiction over crimes committed on the territory of the former Yugoslavia between 1991 and 2001. The ramifications of the conflict were profound, with over 100,000 lives lost and more than two million people—over half the population—forced to flee their homes during the war that unfolded from April 1992 to November 1995, when a peace deal was brokered in Dayton (United Nations, 2023). The conflict also saw the systematic rape of thousands of Bosnian women, highlighting the gravity and scale of the atrocities committed.

3.11 The Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) (Residual Special Court for Sierra Leone, n.d.), established through an agreement between the UN and the government of Sierra Leone in 2002, played a significant role in addressing impunity for serious crimes committed during the Sierra Leone Civil War (1991–2002) (Jalloh, 2013). While the SCSL primarily focused on prosecuting individuals responsible for war crimes, crimes against humanity, and other grave violations of international law, its impact on the protection of children in armed conflict was notable. It contributed to the broader international justice and accountability framework, aligning with the principles outlined in documents like the Paris Principles on Children Associated with Armed Forces or Armed Groups. These principles emphasise the need to prevent the recruitment and use of child soldiers, ensure the demobilisation and rehabilitation of child soldiers, and hold accountable those responsible for violations against children in armed conflicts. The Paris Principles, along with international humanitarian law and human rights conventions, provided a foundation for the SCSL to address the recruitment and use of child soldiers during the Sierra Leone Civil War. The court, through its prosecutions, sent a strong message about the criminal responsibility of individuals who exploited and abused children in the context of armed conflict.

3.12 The Special Court for Cambodia

During the Khmer Rouge regime, children in Cambodia were subjected to horrific abuses, including forced labour, separation from families, and exposure to violence and trauma. The Special Court for Cambodia's(SCC) role in investigating and prosecuting crimes committed during the Khmer Rouge regime underscores its significant impact on the protection of children in armed conflict (Extraordinary Chambers in the Courts of Cambodia, n.d.). Through legal accountability, restorative justice measures, documentation of crimes, and international collaboration, the SCC has contributed to advancing the well-being and rights of children affected by historical atrocities. The SCC, established in 2006, played a crucial role in addressing the atrocities committed during the Khmer Rouge regime from 1975 to 1979. Focused on investigating and prosecuting individuals responsible for crimes against humanity and grave breaches of the Geneva Conventions, the SCC's impact on the protection of children in armed conflict is significant. The SCC's mandate provided an avenue for justice and accountability, contributing to the broader international effort to protect children affected by armed conflict. While there is a perception that the Pre-Trial Chamber (PTC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has become non-functional in Cases 003 and 004 (Vasiliev, 2020, p. 730), the outcomes of the SCC's proceedings directly affected the protection of adults and their children. By holding individuals accountable for crimes committed during the Khmer Rouge era, the SCC not only delivered justice but also sent a powerful message about the consequences of perpetrating violence against civilians, including children. The trials and prosecutions served as a deterrent, discouraging future atrocities and contributing to the prevention of similar crimes against children in armed conflicts.

4 Case studies

4.1 AFRC: The Prosecutor vs. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu

In the context of the legal case "AFRC: The Prosecutor vs. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu (Residual Special Court for Sierra Leone, n.d.)," "AFRC" stands for "Armed Forces Revolutionary Council". The AFRC was a military junta that ruled Sierra Leone from May 1997 to February 1998.

The three defendants in the case were all members of the AFRC and were accused of committing crimes against humanity and war crimes during the country's civil war. The AFRC was notorious for its **use of child soldiers** and its brutal tactics. The SCSL initiated the trial in Freetown on March 7, 2005, focusing on former commanders within the Sierra Leonean military. Subsequently, on June 20, 2006, three defendants were pronounced guilty on 11 out of the 14 counts outlined in the indictment. The SCSL was established to prosecute individuals accountable for the egregious violation of international humanitarian law and Sierra Leonean statutes during the civil war. Operating as an independent hybrid court, the Special Court was brought into existence through a collaborative agreement between the UN and the Government of Sierra Leone, sanctioned by UN Security Council Resolution 1315 (2000). Governed by its statutory framework and guided by its Rules of Procedure and Evidence, the court assumes jurisdiction over a spectrum of offences (Residual Special Court for Sierra Leone, n.d.).

The prosecutorial focus of the Special Court encompasses crimes against humanity, including particular serious violations delineated in article 3 Common to the 1949 Geneva Conventions on the Protection of War Victims and those articulated in the 1977 Additional Protocol II. In addition to these international humanitarian law breaches, the court addresses other severe transgressions and specific offences under Sierra Leonean law.

The Court approved indictments against the accused individuals, namely Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu—former commanders within the Sierra Leonean military who face indictments for crimes against humanity, notably the recruitment and use of child soldiers. The comprehensive indictment comprises a total of 14 counts, encompassing crimes against humanity and violations of international humanitarian law. The accused individuals confront seven counts of crimes against humanity, ranging from murder, extermination, rape, sexual slavery, other forms of sexual violence, and other inhumane acts (including physical violence) to enslavement (Counts 3, 4, 6, 7, 8, 11, and 13, respectively).

Furthermore, the charges extend to six counts of violations of article 3 Common to the Geneva Conventions and Additional Protocol II. These encompass acts of terrorism, collective punishments, violence against life, health, and the physical or

mental well-being of persons (including murder and mutilation of civilians), outrages upon personal dignity, and pillage (Counts 1, 2, 5, 10, 9, and 14, respectively).

Additionally, the accused individuals face charges for another serious violation of international humanitarian law, specifically related to the conscription or enlistment of children under the age of 15 years into armed forces or groups or their active participation in hostilities (Count 12). The gravity and complexity of these charges underscore the Special Court's dedication to addressing severe violations and ensuring accountability for heinous acts committed during the conflict, including enlisting children under the age of 15 years into armed forces or groups or using them to participate in hostilities (Count 12) actively. On June 20, 2006, all three defendants were convicted on 11 out of the 14 counts specified in the indictment. Alex Tamba Brima and Santigie Borbor Kanu were individually handed down sentences of 50 years of imprisonment, while Brima Bazzy Kamara received a 45-year sentence.

4.2 The Thomas Lubanga Dylio case

4.2.1 General

An examination of justice and accountability concerning the infringement of children's rights in armed conflicts provides valuable insights into the capabilities and realisation of international justice mechanisms post-warfare. A pivotal illustration of this is the ICC Thomas Lubanga Dyilo case (International Criminal Court, 2012), which has played a transformative role in addressing the critical issue of child soldier recruitment. Beyond the borders of the Democratic Republic of Congo (DRC), a nation marked by multiple wars and pervasive political instabilities that have repeatedly violated the universal rights of its children, this case serves as a beacon illuminating the potential scope of international justice mechanisms. The case's impact extends beyond the specific circumstances of the DRC, a country that has been through multiple wars and whose children have seen their universal rights infringed countless times due to political instabilities. The case has contributed to shaping international norms and standards regarding the protection of children in armed conflicts. Efforts to prevent the use of child soldiers, rehabilitate former child soldiers, and prosecute those responsible have gained momentum in various regions, partially due to the precedents set by cases like Lubanga's who, On 14 March 2012,

was convicted of committing, as co-perpetrator, war crimes consisting of enlisting and conscripting of children under the age of 15 years into the Force patriotique pour la libération du Congo [Patriotic Force for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute).

The case's background revolves around criminal activities in the Ituri region of the DRC between 2002 and 2003. The conflict in Ituri involved ethnic rivalries, control over resources, and political power struggles. Lubanga was accused of recruiting and conscripting child soldiers, who were subsequently used in hostilities, committing war crimes in the process.

4.2.2 Legal frameworks infringed

Rome Statute (ICC): Lubanga was charged under the Rome Statute with war crimes, specifically for conscripting and enlisting children under the age of 15 into armed groups and using them to participate actively in hostilities. Additional Protocols to the Geneva Conventions (IHL Databases, 2023): the recruitment and use of child soldiers constitute violations of international humanitarian law (article 77 of Additional Protocol I of the Geneva Conventions and article 4(3)(c) of Additional Protocol II).

4.2.3 Relevance to the protection of children in armed conflicts

The Lubanga case is highly relevant to the protection of children in armed conflicts as it acknowledges the vulnerability of children in conflict zones and emphasises the need to hold accountable those who exploit and victimise children in armed conflicts.

4.2.4 Deterrence and impact

The conviction of Thomas Lubanga at the ICC serves as a significant deterrent against the use of child soldiers. It sends a clear message that individuals responsible for recruiting and using children in armed conflicts will be held accountable before

the international community. The case has contributed to establishing a precedent that such actions are morally reprehensible and punishable under international law.

4.2.5 Conviction

Thomas Lubanga Dylio, a key figure in the Democratic Republic of Congo, was found guilty on 14 March 2012 of enlisting and conscripting children under the age of 15, using them as child soldiers. The Trial Chamber sentenced him to 14 years of imprisonment on 10 July 2012, a verdict and sentence later confirmed by the Appeals Chamber on 1 December 2014.

4.3 The Hadzihasanovic and Kubura case

The next case analysis in the matter of protecting children in armed conflicts can be exemplified through the Hadzihasanovic and Kubura Case (International Criminal Tribunal for the former Yugoslavia, 2008), a pivotal episode before the ICTY. The case happened within the complex dynamics of the Bosnian conflict, where children were victims of wartime atrocities. In 2004, Enver Hadzihasanovic and Amir Kubura, former Bosnian Muslim military commanders, faced conviction for their failure to take all necessary measures to prevent the recruitment and use of child soldiers by their troops. This case provides a noteworthy lens through which to assess the responsiveness and application of international justice mechanisms in addressing crimes against children in times of armed conflict.

The ICTY's verdict against Hadzihasanovic and Kubura underscores the gravity of their oversight in failing to prevent the recruitment and utilisation of child soldiers by forces under their command. The charges levied against them highlight a breach of duty in protecting the most vulnerable during a tumultuous period marked by conflict. The sentencing of both commanders to five years in prison reflects the seriousness with which the international community regards the failure to shield children from the horrors of armed conflicts.

While distinct in its particulars, the Hadzihasanovic and Kubura Case resonates with the broader global discourse on the protection of children in armed conflicts. It emphasizes the legal imperative for military commanders to proactively prevent the

involvement of children in hostilities, recognizing their unique vulnerability and the need for concerted efforts to shield them from the direct impact of war.

The conviction of Hadzihasanovic and Kubura is a stark reminder that military commanders bear a responsibility not only for the strategic aspects of warfare but also for safeguarding the rights and well-being of the children.

4.4 The Dominic Ongwen case

A profound examination of justice and accountability concerning protecting children in armed conflicts is exemplified through the Dominic Ongwen case (International Criminal Court, 2015), a landmark proceeding before the ICC. Dominic Ongwen, a former commander of the Lord's Resistance Army (LRA) in Uganda, faced 61 counts of crimes against humanity and war crimes allegedly committed between 1 July 2002 and 31 December 2005. Trial Chamber IX, in a historic judgment on 6 May 2021, sentenced Ongwen to 25 years of imprisonment. The background of this case presents a complex life story that intertwines the experiences of victimisation and perpetration, shedding light on the profound impact of early trauma on individuals. Ongwen, as a child, himself endured the harrowing experience of abduction by the (LRA), an armed group notorious for recruiting child soldiers. Subsequently, as an adult, Ongwen rose to a leadership position within the LRA and became implicated in crimes against humanity and war crimes, including the recruitment and use of child soldiers. The correlation between Ongwen's traumatic past and his later actions underscores the intricate interplay between victimhood and perpetration. As a young boy, Ongwen suffered the trauma of abduction, separation from his family, and exposure to violence. These experiences left an indelible mark on his psyche, shaping the trajectory of his life. It is crucial to recognize that individuals who undergo severe trauma during their formative years may grapple with a range of psychological and emotional challenges, potentially influencing their behaviour in adulthood. Ongwen's transformation from a victim of child abduction to a perpetrator within the LRA is a tragic manifestation of the cycle of violence perpetuated by armed groups. The deep scars of his own victimisation may have played a role in shaping his worldview, impacting his capacity for empathy, and contributing to the perpetration of similar atrocities against others. This does not absolve him of responsibility for his actions, but it underscores the complexities of the psychological and emotional consequences of being a child

soldier. Understanding Ongwen's dual role as both victim and perpetrator raises important questions about the cycles of violence, the long-term consequences of child soldier recruitment, and the urgent need for comprehensive efforts in the aftermath of armed conflicts. It underscores the importance of addressing the root causes of recruitment, providing psychological support and rehabilitation for former child soldiers, and breaking the cycle of violence that perpetuates itself across generations.

The ICC judging Dominic Ongwen was a testament to its dedication to prosecuting crimes against children in armed conflicts, establishing a robust framework for accountability. The legal proceedings against Ongwen contribute significantly to deterring future acts of recruiting and using child soldiers. Similarly, the convictions in the case of Khieu Samphan and Nuon Chea demonstrate the global resolve to hold high-ranking officials accountable for heinous crimes. These cases collectively shape international norms and standards, fostering a commitment to protecting children from the ravages of war and ensuring accountability for those who perpetrate such crimes.

4.5 The Omar Khadr case

Omar Ahmed Said Khadr, born in 1986 in Toronto, Ontario, Canada, became a prominent figure in the discussion surrounding the protection of children during warfare. At age 15, he was taken to Afghanistan by his father and found himself entangled in a conflict between U.S. soldiers and Taliban fighters in Ayub Kheyl. Severely injured, Khadr was accused of throwing a grenade, resulting in the death of U.S. Army Sergeant 1st Class Christopher Speer. Captured and transferred to Guantanamo Bay, he underwent interrogations by both Canadian and U.S. intelligence officers.

Charged under the Military Commissions Act of 2006, particularly with "murder in violation of the laws of war," signed by President George W. Bush on October 17, 2006, the Omar Ahmed Said Khadr case raised significant concerns among media outlets and Human Rights associations, prompting scholars and authors to criticise the act's infringement of Human Rights (Ralph, 2010; Shephard, 2013; CBC, 2013; Heller, 2008; Macklin, 2008; Rona, 2008; Beard, 2007; Dorf, 2007). Additionally, (Bradley, 2007), in his article 'Military Commissions Act, Habeas Corpus, and the

Geneva Conventions', provides a comprehensive analysis of the legal implications of infringing basic human rights.

International Humanitarian Law, on the other side (IHL), as reflected in the Protocol Additional to the Geneva Conventions (Protocol I), article 77(1), explicitly states, "Children shall be the object of special protection and shall be afforded special care and aid." The CRC, article 37(c), further emphasises that "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment" and that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age. Moreover, the Rome Statute of the ICC, article 26, titled "Exclusion of jurisdiction over persons under eighteen," declares that the Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of the crime.

These regulations collectively advocate for the better care, assistance, and protection of children during warfare. They not only prohibit the recruitment and use of children as soldiers but also emphasise the rehabilitation and reintegration of children into society. The Paris Principles, addressing the protection of children during warfare, go beyond encouraging the release of children from armed forces or armed groups and providing support for their reintegration into society.

Even the United States, through the Child Soldiers Prevention Act (CSPA) (U.S. Department of State, 2009), has taken legislative steps to criminalise leading a military force that recruits child soldiers, aligning with international regulations that define child soldiers as individuals under 18 years of age participating directly in hostilities. The U.S. implemented the Paris Principles by passing the CSPA in 2008, prohibiting the recruitment and use of child soldiers by U.S. military forces and contractors and taking preventive measures against foreign governments and armed groups.

Despite Canada being a signatory to the Paris Principles, the Omar Ahmed Said Khadr case exposes room for improvement. Children, whether at the national or international level, must not be subjected to inhumane treatment and should be granted the due process protections to which they are entitled. The case underscores the importance of ensuring that children are shielded from the devastating impacts

of war and highlights the necessity for ongoing efforts to strengthen protective measures for children involved in armed conflicts.

5 Conclusion

Children are often victims of warfare, necessitating comprehensive and robust national and international legal frameworks to ensure their protection during armed conflicts (Rasakandan & Tehrani, 2022, p. 230). As elucidated through various legal regulations, including the CRC, the Optional Protocols (OPAC and OPSC), the UN Security Council Resolutions, The Hague Conventions of 1899 and 1907, the Cape Town and Paris Principles and Commitments, and notable case studies such as The Omar Khadr case, The Dominic Ongwen case, and AFRC: The Prosecutor vs. Alex Tamba Brima, Ibrahim Bazzy Kamara, and Santigie Borbor Kanu, it is evident that there is a wealth of legal tools aimed at safeguarding children caught in the midst of armed conflicts.

The UNSC plays a pivotal role through its Resolutions by establishing a crucial mechanism for monitoring and reporting on violations against children in armed conflicts, providing a platform for accountability and intervention. Meanwhile, The Hague Conventions and Geneva Conventions, complemented by subsequent protocols, delineate rules governing the conduct of hostilities and the treatment of civilians, including children, during armed conflicts.

Some authors have suggested the potential for children to voluntarily enlist in the military following armed conflicts (Ndongo & Derivois, 2022, p. 145). However, it is crucial to emphasize that compelling children to serve as combatants overwhelmingly constitutes a clear breach of both national and international legal norms. This is underscored by various conventions and statutes, notably article 38 of the CRC, which explicitly emphasizes the imperative to ensure the protection and well-being of children during armed conflicts. Further reinforcing this commitment, the OPAC raises the minimum age for direct participation in hostilities to 18 and emphasizes the importance of preventing the recruitment and use of children in armed conflicts. This protocol complements the CRC, fortifying the global stance against the exploitation of children in times of war.

In the context of the Rome Statute, which established the ICC, the engagement of children in armed conflicts is categorized as a war crime. Article 8(2)(b)(xxvi) of the Rome Statute explicitly defines the conscription, enlistment, or use of children under the age of 15 in hostilities as a grave breach of the Geneva Conventions and their Additional Protocols. This legal framework thus not only prohibits the recruitment of children but also underscores the gravity of such actions as criminal offences that warrant international accountability and prosecution. In essence, these conventions and articles collectively form a robust legal foundation, unequivocally condemning the enlistment of children into armed forces and demanding global adherence to these protective measures.

The Paris Principles and Commitments underscore the imperative of preventing the recruitment and use of children in armed forces and groups, emphasizing their release and rehabilitation. Case studies, such as The Omar Khadr case, bring to light the complexities and challenges in implementing these legal safeguards, showcasing the necessity for ongoing vigilance and improvement.

While the legal framework is extensive, there is room for enhancement and more effective implementation. It is essential to bolster international cooperation and coordination among states, international organizations, and non-governmental entities to ensure the consistent application of these legal instruments. Strengthening national legislation and enforcement mechanisms is paramount, with a focus on addressing impunity and holding perpetrators accountable for crimes against children.

Education and awareness campaigns play a pivotal role in preventing the recruitment of children by armed groups, while rehabilitation and reintegration programs are instrumental in facilitating the recovery of those already affected. The international community should foster dialogue and knowledge exchange to share best practices and lessons learned in the realm of child protection during armed conflicts.

Overall, the legal protection of children in armed conflicts has reached a commendable level of development, but persistent challenges demand continued efforts. The world possesses the legal texts necessary to shield children from the horrors of war; now, the global community must unite in its commitment to

implement better and reinforce these protections, ensuring a safer and more secure future for children affected by armed conflicts worldwide.

List of Abbreviations

ACRWC- African Charter on the Rights and Welfare of the Child
AFRC- Armed Forces Revolutionary Council
CRC- United Nations Convention on the Rights of the Child
DDR - Disarmament, Demobilisation and Reintegration
DRC - Democratic Republic of Congo
ECCC - Extraordinary Chambers in the Courts of Cambodia
ECOSOC - The United Nations Economic and Social Council
ICC- International Criminal Court
ICTY - International Criminal Tribunal for the Former Yugoslavia
IHL - International Humanitarian Law
LRA - Lord's Resistance Army
MRM - Monitoring and Reporting Mechanism
OPAC- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OPSC- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography
SCC - The Special Court for Cambodia
SCSL - The Special Court for Sierra Leone
UN- United Nations
UNICEF- United Nations Children's Fund
UNSC - The United Nations Security Council
UNSCR - The United Nations Security Council Resolution

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Some Aspects of the Legal Position of Children in Roman Law

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The authority of the family father was a fundamental factor defining the position of free children under paternal power in Rome. The paternal power lasted until the death of *pater familias* who could waive it emancipating the child. At certain age a child-in-power obtained the capacity to act. However, his legal capacity was limited so he could not own property. The family father could leave certain assets to his son's free administration but could take them away at any time. This property was called *peculium*. Gradually, the son-in-power became the owner of the property he had acquired as a soldier or official, and the property he had acquired from his mother. The family father was held liable for wrongs committed by a son-in-power. Instead of paying the full damages, a *pater familias* had the option of surrendering the culprit to the injured party (noxal surrender). Gradually, the possibility of noxal surrender was limited to slaves who committed a delict. Children became criminally liable when they reached the age of maturity. Some Roman jurists were of the opinion that also children close to that age and capable of understanding the reprehensibility of their actions were criminally liable.

Keywords:
son-in-power, family father (head of the household), *pater familias*, *vitae necisque potestas*, noxal surrender

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Ključne besede:
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družinski oče (glava družine),
pater familias,
vitae necisque potestas,
noksalna izročitev

NEKATERI VIDIKI PRAVNEGA POLOŽAJA OTROK V RIMSKEM PRAVU

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Avtoriteta očeta družine je bila v rimu temeljni dejavnik, ki je določal položaj svobodnih otrok pod očetovsko oblastjo. Očetovska oblast oblast je trajala do smrti *pater familias*, ki se ji je lahko odpovedal in otroka osamosvojil/osvobodil Pri določeni starosti je otrok pod očetovo oblastjo pridobil sposobnost delovanja. Toda njegova pravna sposobnost je bila omejena, tako da ni mogel imeti premoženja. *Pater familias* je lahko svojemu sinu prepustil določeno premoženje v prosto upravljanje, a mu ga je lahko kadar koli odvzel. To premoženje se je imenovalo *peculium*. Postopoma je sin pod očetovsko oblastjo postal lastnik premoženja, ki ga je pridobil kot vojak ali uradnik, ter premoženja, ki ga je pridobil od svoje matere. *Pater familias* je bil odgovoren za škodo, ki jo je povzročil sin, ki je prevzel oblast. Namesto plačila celotne škode je imel *pater familias* možnost, da krivca preda oškodovancu (noxal surrender). Postopoma se je možnost noksalna izročitev omejila na sužnje, ki so storili delikt. Otroci so postali kazensko odgovorni, ko so dosegli polnoletnost. Nekateri rimski pravniki so menili, da so bili tudi kazensko odgovorni tudi otroci, ki so bili blizu te starosti in sposobni razumeti spornost svojih dejanj.

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1 Introduction

The category of a child has different meanings in Roman law. It is usually associated with the status, or with the question of a child's capacity to act or to own property. It also plays an important role in the area of the law of succession. Children had a special position in the law of succession because of the closeness of kinship. This applied not only to intestacy but also to testamentary succession. The testator could not pass them over in his will. In the archaic period the children under the testator's paternal power were the first to inherit the estate on intestacy as *sui heredes* of the deceased. After the praetor recognized the claims of the cognatic, i. e., of blood-relationship, all children, i.e., those under the paternal power of the testator, as well as those who were *sui iuris* were entitled to inherit in the first class of persons.[1]

2 The paternal power of the head of the household (*pater familias*) and his power of life and death

The position of a child in Roman law was largely conditioned by the power of the family father,[2] which as Gaius notes was an institution peculiar to Romans.[3] Paternal power was the power that a family father had over his children, his adopted children, his more remote descendants through males and his wife. He acquired power over his wife (*manus*) by a *conventio in manum*, i.e., by *confarreatio* or *coemptio* and also by prescription.[4] In such a case the wife entered into the family of her husband and acquired the legal position of a daughter (*filiae loco*).[5] No person under paternal power could marry without the consent of the head of the household. If a son-in-power (*alieni iuris*) married a wife, it was the family father who obtained the power over the wife who passed into his family.[6]

[1] More on this Jolowicz & Nicholas, 1972, p. 242.
[2] General on paternal power Kaser, 1938, pp. 62–87; Sachers, 1953, p. 1046; Lamberti, 2023, p. 859; Kaser, 1971, p. 60 and 341. See also Watson, 1975, p. 40; Arjava, 1998, pp. 147–165; Dixon, 1992, p. 98; Lamberti, 2019, p. 25.
[3] Gai. D. 1, 6, 3: Also in our *potestas* are our children (*liberi nostri*) whom we have begotten in lawful wedlock. The right over our children is peculiar to Roman citizens. English translation De Zulueta, 1946.
[4] Gai. 1, 110: Of old, women passed into *manus* in three ways, by *usus, confarreatio*, and *coemptio*. See also Gai. 1, 111: A woman used to pass into *manus* by *usus* if she cohabited with her husband for a year without interruption, being as it were acquired by a *usucapion* of one year and so passing into her husband's family and ranking as a daughter. Hence it was provided by the Twelve Tables that any woman wishing not to come under her husband's *manus* in this way should stay away from him for three nights in each year and thus interrupt the *usus* of each year. But the whole of this institution has been in part abolished by statutes and in part obliterated by simple disuse.
[5] Gai. 1, 114. More on *manus* power of the husband Perelló, 2007.
[6] Gai. 1, 111. More on this Jolowicz & Nicholas, 1972, p. 114, esp. p. 119.

The power of the family father lasted during the entire lifetime of the *pater familias*, and was not terminated on a child's arrival to the age of maturity. It could also end by a voluntary decision of the *pater familias*. If he transferred a child into adoption, or a daughter into the power of her husband (*manus*) his paternal power ended. The father could renounce his paternal power by emancipating the child who became himself a *pater familias*. The power of the family father also ceased if his son became a priest of Jupiter (*flamen Dialis*) or if the daughter became a Vestal virgin.[7]

The loss of paternal authority could also result from a conviction in a criminal trial but it did not depend on the father's capacity to act. Therefore, a Roman who became mentally ill retained his paternal power over his children.[8]

Although the son was under paternal power he could hold public office and was independent in this respect.[9]

The father's authority over the children was, at least initially, absolute and included the power of life and death (*vitae necisque potestas*),[10] the right to expose a child at infancy, sale, chastisement, noxal surrender, and the right to force his married child to divorce. It also included full ownership of all the family property, the right to alienate it or to dispose of it by will.[11]

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[7] See Gai. 1, 145: From this statement, however, we except Vestal virgins, whom even the early lawyers out of respect for their priestly office desired to be free from *tutela*; and so it was provided by the law of the Twelve Tables. Other women *sui iuris*, i. e. those who were not subject to paternal or marital power had to have a guardian (*tutor mulieris*) who had to authorise more important transactions or acts performed by the woman.

[8] Ulp. D. 1, 6, 8 pr.: *Patre furioso liberi nihilominus in patris sui potestate sunt…* (Though a man be insane, his children are nevertheless in his power …). English translation of Digest fragments Watson, 1998.

[9] Pomp. D. 1, 6, 9: *Filius familias in publicis causis loco patris familias habetur, veluti ut magistratum gerat, ut tutor detur.* (A *filius familias* is held to have the same position as a *pater familias* in public matters, so he can, for example, hold magisterial office or be appointed as tutor.).

[10] *This power of the family father was explicitly mentioned in the formula of arrogatio quoted by Gellius (N. A. 5, 19, 9: "Velitis, iubeatis, uti L. Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est. Haec ita, uti dixi, ita vos, Quirites, rogo." (Express your desire and ordain that Lucius Valerius be the son of Lucius Titius as justly and lawfully as if he had been born of that father and the mother of his family, and that Titius have the power of life and death over Valerius which a father has over a son. This, just as I have stated it, I thus ask of you, fellow Romans.) – English translation: Noctes Atticae (Attic Nights), Gellius, 1927 (revised 1946). This text is in the public domain. See also Paul. D. 28, 2, 11: … quod et occidere licebat (… because it was also permissible to kill them). More on this topic Sachers, 1953, p. 1084; Shaw, 2001, pp. 31–77; Yaron, 1962, pp. 243–251; Westbrook, 1999, pp. 203–223.*

[11] See Crook, 1967, p. 113.

The family father formally welcomed the child into the family by taking it in his arms and lifting it up (*tollere liberum*). If he failed to do so, the child was probably exposed.[12] Given that the strength of the family depended on the number of its members, it is conceivable that the father only rejected a child who was not able to live independently or, because of his disability, would not be able to work. This is, *inter alia*, what the XII Tables are supposed to have allowed.[13] The *pater familias* could also have rejected the child for a lack of means of support.

At first glance, this looks cruel and inhumane. But we must remember that hunger was a constant threat, hanging like a sword of Damocles over the poorer sections of Roman population. Just one bad harvest could threaten the family's existence. This is why Seneca concludes that the decision to murder a crippled or weak child was the result of a rational decision and not of anger.[14] According to the law, which is said to have originated from Romulus, the family father could only do so after he had shown the mutilated child to five neighbors and received their confirmation that his decision was reasonable.

According to Dionysius of Halicarnassus, the family father was obliged to bring up all his sons and the first-born daughter. Despite his right over the life and death of his children, according to the same author, he was not allowed to kill a child who had not yet reached the age of three.[15]

Although the provisions of the alleged law of Romulus give the impression that Roman fathers killed their children *en masse*, it seems reasonable to believe that, for the reason already given, there were no abuses of this institution. Roman tradition knew a range of sacral sanctions for the abuse of paternal power. The censors could also punish the family father for acts which violated the ancestral custom (*mos maiorum*). Such acts included abuse of the right over life and death, unjustified divorce, too harsh or too lenient upbringing of children, etc. In addition to the restrictions derived from ancestral custom, there were also legal restrictions of the power of *pater familias* over the life and death of his children. This right was already

[12] More on this Sachers, 1953, p. 1089; Westrup, 1944, p. 249; Israelowich, 2017, pp. 213–229.
[13] Cic. De leg. 3, 19: … *quom esset cito necatus tamquam ex XII tabulis insignis ad deformitatem puer* … See also Liv. 27, 37. More on this Pugliese, 1985, p. 629; Harris, 1994, pp. 1–22; Lovato, 2015, pp. 239 – 254; Mommsen, 1955, p. 619.
[14] Sen. De ira 1, 15, 2: ... *portentosos fetus extinguimus, liberos quoque, si debiles monstrosique editi sunt, mergimus; nec ira sed ratio est a sanis inutilia secernere«* (unnatural progeny we destroy ; we drown even children who at birth are weakly and abnormal. Yet it is not anger, but reason that separates the harmful from the sound …).
[15] Dion. 2, 15, 2.

limited by the XII Tables. As we learn from the fragments of Gaius' Institutes found in Autun, the XII Tables forbade the father to kill a child without just cause.[16]

In the course of time this right was further restricted. It was mainly reduced to the right of a family father to kill his adulterous daughter and her lover or a son having an affair with his step-mother. As the Papinian's text shows, this kind of right of the family father still existed in his time.[17]

The right of the family father over the life and death of his children was finally abolished by the Emperor Constantine in 318.[18]

It is not entirely clear when the right of the family father to expose his child was also abolished. It was certainly weakened by the view that the exposure of a child is the same as his killing. So, the classical jurist Paul writes that a father who denies his child food or exposes him in a public place kills him:

> Paul. D. 25, 3, 4: It is not just a person who smothers a child who is held to kill it but also the person who abandons it, denies it food, or puts it on show in public places to excite pity which he himself does not have.[19]

Also Lactantius writes that exposing a child is tantamount to murder, with the perpetrators using the excuse that they do not have the means of subsistence for bringing him up.[20]

It is worth noting that the nature of the right of the family father to expose his child is not entirely clear. There is every indication that it was a right of the family father, which originated in Roman tradition and customary law and, unlike infanticide, was not legally regulated.[21] It was limited only indirectly by the introduction of the mutual

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[16] GA 85 s: … *cum patris potestas talis est ut habeat uitae et necis potestatem. 86. De filio hoc tractari crudele est, sed … non est post … r … occidere sine iusta cusa, ut constituit lex XII tabularum.*

[17] Coll. 4, 8, 1. Papinianus speaks of a royal law (*lex regia*) that gave the family father the right to kill his adulterous daughter together with her lover.

[18] Const. C.Th. 9, 15, 1 (= C. 9, 17, 1). See also Inst. 4, 18, 6. Killing a child was equated with the murder of one of the parents.

[19] Paul. D. 25, 3, 4: *Necare videtur non tantum is qui partum praefocat, sed et is qui abicit et qui alimonia denegat et is qui publicis locis misericordiae causa exponit, quam ipse non habet.*

[20] Lact., Divinarum Institutionum 6, 20: *Tam igitur nefarium est exponere, quam necare … nec se pluribus liberis educandis sufficere posse praetendunt.* (It is therefore as wicked to expose as it is to kill ... and allege that they have not enough for bringing up more children).

[21] Mommsen, 1899, p. 619: … die Aussetzung des Kindes erscheint durchaus als anerkanntes Recht des Vaters. Das Verhältnis des Aussetzungsrechts zu dem allgemeinen Tödtungsrecht wird dahin zu bestimmen sein, dass die Sitte

duty of parents to support their children or of children to support their parents.[22] Formally, the family father's right to expose his child was abolished by the law of the emperors Valentinian, Valens and Gratian in 374:

> Everyone should nourish his own offspring. If anyone meditates exposing them, he will be liable to the penalty laid down to this.[23]

The question that arises in relation to a father's right over the life and death of his children is in the first place why a father would expose or kill his child. Although the extent of the father's right over his children gives the impression of arbitrariness and despotism of the Roman family father exercising his right over his children, there can be no doubt that this was not the case. The father exposed the child because of scarcity when the family had not enough means of subsistence.

Killing a child during an uncontrolled outburst of anger would be unacceptable and contrary to Roman *mos maiorum*. Behind the right of the family father to kill the child was not an arbitrary power but exercising a sort of judicial authority.

It should not be forgotten that the right over the life and death of children was not vested in the natural father but in the family father (*pater familias*), who was not necessarily the same person. The *pater familias* could also be the child's grandfather or great-grandfather or adoptive father. If a member of a particular family killed or wounded someone or caused some other wrongdoing, (blood) vengeance followed on the part of the victim or his family. To prevent this, the family father, under whose power the perpetrator was, punished him. The family father did this with the cooperation of the family council and according to certain procedure.[24] Before killing a child the family father had to convene such a *consilium* and was bound by its

dem Vater die Aussetzung des Kindes in zartem Alter freigab, die Tödtung dagegen nur bei zureichender Begründung, also nur in vorgeschrittenem Alter Billigung fand (… the exposing of a child appears to have been a recognized right of the father. The relationship between the right of exposing a child and the general right to kill him seems to have been determined in such a way that the custom allowed the father to expose a child at a tender age, whereas the killing of a child was only allowed if there was sufficient justification, i.e. only at an advanced age.).

[22] Ulp. D. 25, 3, 1, 14: Julian also writes that if a woman notifies her husband that she is pregnant and he does not deny it, this will not make the child his, although he can be compelled to support it. Ulp. D. 25, 3, 5, 3: The same is true in the maintenance of children by their parents. Gl. tudi Ulp. D. 25, 3, 5, 4-6.

[23] Val. Val. Grat. C. 8, 51, 2 pr.: *Unusquisque subolem suam nutriat. quod si exponendam putaverit, animadversioni quae constituta est subiacebit*. English translation Blume et al, 2016.

[24] More on this Kaser, 1971, p. 62.

verdict.[25] Therefore, the killing of a child was not an act of the father's own free will but the execution of some kind of judicial decision.

Lucius Gellius, a man who had held all public offices up through that of censor, possessed near certainty that his son was guilty of very serious offenses, namely committing adultery with his stepmother and plotting the murder of his father. Still, he did not rush at once to vengeance but (instead) summoned almost the entire Senate to his *consilium,* set forth his suspicions, and offered the young man the chance to defend himself. And when he had very carefully examined the case, he acquitted him not only by the verdict of the *consilium* but also by his own. Now if, carried away by the force of anger, he had hastened to vent his cruelty, he would more have committed a wrong than avenged one.[26]

The accounts in Roman sources of cases where fathers executed their children show that these were punishments for specific crimes. So, according to the Roman tradition, in 508 B. C. Lucius Junius Brutus put his two sons to death for having joined the plot aimed at restoring the rule of Tarquins, which was a crime as they admitted; Marcus Fabius, in 222 B. C., executed his son for theft; Fulvius Nobilior in 64 B. C. inflicted the death penalty on his son for taking part in the Catilinian conspiracy; Pontius Aufidianus and Alilius Philiscus inflicted death penalties upon their daughters because of their immorality, etc.[27]

However, the jurisdiction of the family father was not limited to the punishment of crimes. He also adjudicated disputes between members of his household. Remnants of family justice can also be found in later periods. In a rescript to certain Galla the emperors Valerian and Gallienus stressed that the lawsuits between family members should be settled within the household. The two emperors advise Galla to resort to law and approach the provincial governor only if her sons insult her and behave inappropriately towards her. Then, the provincial governor will punish this injury to dutifulness (*pietas*).[28]

[25] Jolowicz & Nicholas, 1972, p. 119.
[26] Val. Max. 5, 9, 1. English translation Valerius Maximus: English translation (attalus.org).
[27] More on this Sachers, 1953, p. 1086. Breij, 2006, p. 58, lists 11 cases known in which fathers actually made use of this right; see also p. 64: Killing Sons in Roman Declamations.
[28] Valer./ Gallien. C. 8, 46, 4 pr.: *Congruentius quidem videtur intra domum, inter te ac filios tuos si quae controversiae oriuntur, terminari.* (If any lawsuits arise between you and your sons, it seems more fitting that this be settled within your household).

In imperial law the family father's power over the life and death of his children was largely abolished. A father who killed his child without due process was punished. If he thought he had reason to demand his son's death, he was, as Ulpian states, obliged to initiate ordinary proceedings:

> A father cannot kill his son without giving him a hearing but must accuse him before the prefect or the provincial governor.[29]

Emperor Hadrian had a father who killed his son without giving him a hearing exiled to an island:

> It is said that when a certain man had killed in the course of a hunt his son, who had been committing adultery with his stepmother, the deified Hadrian deported him to an island [because he acted] more [like] a brigand in killing him than as [one] with a father's right; for paternal power ought to depend on compassion, not cruelty.[30]

3 Sale of a child

The family father was also allowed to sell a child in his paternal power.[31] There were probably various reasons for this. The family may have been in hardship, or may not have had the means to nourish one more person, or may have wanted to keep the child out of poverty, etc. The child could be sold to another gens or another family.

Normally, the child who had been sold did not become a slave but entered into a special semi-free relationship called *in mancipio esse*. Although he remained free his actual situation was similar to that of a slave. If a son who had been sold was manumitted by the acquirer he returned to his father's authority.[32] It can be assumed that the buyer manumitted him, especially when his labor had worked off the purchase price. The father could sell his son again. In order to prevent the abuse of

[29] Ulp. D. 48, 8, 2.
[30] Marc. D. 48, 9, 5.
[31] Dion. 2, 27, 1; Sachers, 1953, p. 1096.
[32] Gai. 1, 138: Persons in mancipio, since they rank as slaves, become sui iuris if manumitted by uindicta, census, or will. (*Hi qui in causa mancipii sunt, quia servorum loco habentur, vindicta, censu, testamento manumissi sui iuris fiunt*). See also Gai, 1, 140: Gai. 1, 140: More than this, it is possible for them to obtain liberty by the census even against the will of their holder in mancipio, with the exception of one whom his father has mancipated with a proviso for remancipation to himself … (*Quin etiam invito quoque eo cuius in mancipio sunt, censu libertatem consequi possunt, excepto eo quem pater ea lege mancipio dedit, ut sibi remancipetur…*) See also Gai. 2, 141: Further, a son who is manumitted from his first or second mancipation by returning into *patria potestas* … (*Filius quoque, qui ex prima secundave mancipatione manumittitur, quia revertitur in potestatem patriam* …). English translation Zulueta, 1946.

this possibility, the XII Tables stipulated that a father who sold his son three times freed him from his paternal power.[33] A son, as Gaius states, "passes out of parental *potestas* by three mancipations, but all other children, male or female, leave it by a single mancipation".[34]

This provision of XII Tables was originally intended as a punishment for a hard-hearted or frivolous father who repeatedly sold his son. Later it was used as a formality for the emancipation which terminated paternal power. The father thus emancipated his son by selling him fictitiously three times, or another child in his power by selling him once.

Particularly during the economic crisis of the 4th century, there were frequent sales of newborn children whose parents did not have means to support them. Imperial law tolerated this practice because it wanted to prevent their exposure. Despite such a sale the family father retained the right to get his child back if he paid the buyer who reared the child his estimated money value[35] or gave him a slave of the same value in exchange for the child.[36]

4 Capacity of children-in-power to own property

In the agrarian society of ancient Rome, the family farm was the basic economic unit that supported the Roman family.[37] The head of the household had the power over persons and things. For this reason, the word familia also refers to the property held by the family father.[38] Persons under his power could not have property of their own. What they acquired, they acquired for the family father. Gaius thus notes:

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[33] Tab. 4, 2: If a father sell his son three times, the son shall be free from his father. (*Si pater filium ter venum duit, filius a patre liber esto.*)

[34] Gai. 1, 132: … *filius quidem tribus mancipationibus, ceteri vero liberi sive masculini sexus sive feminini una mancipatione exeunt de parentium potestate.*

[35] This was contrary to the general principle of Roman law that "the body of a free person is not susceptible of valuation (*cum liberum corpus aestimationem non recipiat*" – Gai. D. 9, 1, 3). See also Gai. D. 9, 3, 7.

[36] See Const. C.Th. 5, 10, 1 (the text of the law in Justinian's Code is slightly changed - C. 4, 43, 2) and Const. Vat. 34. The interpretation to Const. C.Th. 5, 10, 1 reads: If any person should purchase a newborn child and rear it, he shall have the right to keep and possess it. Certainly, if an owner or father should wish to recover a child that has been so reared, he shall either give to the person who reared it a slave of the same value, or the person who reared the child shall obtain the price which the child that he reared is worth (*aut eiusdem meriti mancipium nutritori dabit, aut pretium nutritor, quantum valuerit, qui nutritus est, consequatur*). English translation: Pharr et al., 1952.

[37] More on this Burck, 1942, p. 91.

[38] See Ulp. D. 50, 16, 195, 1: Let us consider how the designation of "household" is understood. And indeed it is understood in various ways; for it relates both to things and to persons: to things, as, for instance, in the Law of the Twelve Tables in the words "let the nearest agnate have the household." The designation of household, however, refers to persons when the law speaks of patron and freedman: "from that household" or "to that household"; and

> Whatever children in our *potestas* or our slaves receive by mancipation or obtain by delivery, and whatever rights they acquire by their stipulations or any other title, are acquired for us, because a person in *potestas* can have nothing of his own. Thus such a person, if instituted heir, cannot accept the inheritance except with our sanction, and if he accepts it with that sanction, it is acquired for us exactly as if we had been instituted heirs ourselves; and of course any legacy left to them goes to us on the same principle.[39]

The persons in power therefore lacked the capacity to own property. In this respect, at least initially, there was *de iure* no distinction between slaves and children in paternal power. The only difference was in their status, since children under paternal power of the family father were free and Roman citizens having other aspects of legal capacity.

The Romans, however, were aware that it would be wrong to deprive children in power, who may have been adults and at the height of their productive abilities, of everything they had acquired. Therefore, a family father could leave to a son under his power – similarly to a slave – a *peculium*, i.e., certain assets to manage and enjoy them freely. *Peculium* could be a sum of money, a commercial business, or a small property. *De iure peculium* belonged to the family father (or the slave's master), and *de facto* it was son's or slave's.

> 3. A *peculium* is so-called because of the picayune nature of the money or property in it. 4. According to Celsus in the sixth book of his Digest, Tubero defines a peculium as the property which the slave, with his master's permission, keeps in a separate account of his own, less anything owed to the master.[40]

The extent of a *peculium* in concrete case of course depended on the family's financial situation and the earning capacity of the child or slave. The *peculium* was an important economic incentive. Yet at the same time it created the civil liability of the *pater*

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here it is agreed that the law is talking of individual persons. (*"Familiae" appellatio qualiter accipiatur, videamus. et quidem varie accepta est: nam et in res et in personas deducitur. in res, ut puta in lege duodecim tabularum his verbis "adgnatus proximus familiam habeto". ad personas autem refertur familiae significatio ita, cum de patrono et liberto loquitur lex: "ex ea familia", inquit, "in eam familiam": et hic de singularibus personis legem loqui constat. "*). More on this: Dixon, 1992, p. 1; Saller, 1984, pp. 337; Saller, 1994, p. 71; Crook, 1967, pp. 113–122 and Capogrossi Colognesi, 2019, p. 37.

[39] Gai. 2, 87: *igitur liberi nostri, quos in potestate habemus, item quod servi nostri mancipio accipiunt vel ex traditione nanciscuntur, sive quid stipulentur vel ex alia qualibet causa adquirunt, id nobis adquiritur: ipse enim, qui in potestate nostra est, nihil suum habere potest. et ideo si heres institutus sit, nisi nostro iussu hereditatem adire non potest; et si iubentibus nobis adierit, hereditas nobis adquiritur, proinde atque si nos ipsi heredes instituti essemus; et convenienter scilicet legatum per eos nobis adquiritur.*

[40] D. 15, 1, 5, 3: *Peculium dictum est quasi pusilla pecunia sive patrimonium pusillum.* 4. *Peculium autem Tubero quidem sic definit, ut Celsus libro sexto digestorum refert, quod servus domini permissu separatum a rationibus dominicis habet, deducto inde si quid domino debetur.* More on the problem of *peculium* Thomas, 1982, pp. 527–580.

familias for debts and obligations contracted by the son or slave administering *peculium*. This liability was limited to the value of the *peculium* (*dumtaxat de peculio*) after a deduction of what the son or slave owed to his father or master.

> The person who deals with a son-in-power acquires two debtors, the son being liable in full and the father up to the amount of the *peculium*.[41]

The principle that the son always acquired for the head of the household was gradually relaxed in the light of the changed economic situation, which also affected the Roman family. Thus, the father was not considered to become the owner of property acquired by the son as a soldier (*peculium castrense*) or civil servant (*peculium quasi castrense*), or of anything that a *filius familias* acquired from his mother through a testament or by intestacy (*bona materna*):

> The *peculium castrense* is that which is given by parents or blood relations to a man engaged in military service, or that which a son-in-power has himself acquired in the army, and which he would not have acquired had he not served. For what was acquired outside military service is not a man's *peculium castrense*.[42]

The sons in power could dispose of this kind of *peculium* as if they were the family fathers themselves:

> the military *peculium*, which sons-in-power control just as if they were heads of a household.[43]

Without the permission of the family father a son-in-power could give away as a gift things pertaining to such a *peculium*, dispose of it in a will, etc.:

> Those, on the other hand, who have a *castrense peculium* or a *quasi-castrense peculium* are in a position to make gifts both *mortis causa* and otherwise, since they have the right to make a will.[44]

Although the free administration of a *peculium* gradually built up the economic and financial capacity of sons under paternal power, children *alieni iuris* never became fully financially capable under Roman law.

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[41] Ulp. D. 15, 1, 44: *Si quis cum filio familias contraxerit, duos habet debitores, filium in solidum et patrem dumtaxat de peculio.*
[42] Macer D. 49, 17, 11.
[43] Ulp. D. 14, 6, 2: … *cum filii familias in castrensi peculio vice patrum familiarum fungantur.*
[44] Ulp. D. 39, 5, 7, 6: … *ceterum qui habent castrense peculium vel quasi castrense, in ea condicione sunt, ut donare et mortis causa et non mortis causa possint, cum testamenti factionem habeant.*

5 Children's capacity to act

Roman law dealt with capacity to act in business transactions and in connection with torts according to similar principles. Both required the ability to understand the nature of one's actions. The legal capacity was generally linked to age, although it was recognized that reaching certain age did not necessarily imply the ability to understand the legal dimensions of one's actions.

As we learn from Justinian's Institutes, old jurists used to propose a concrete test of physical maturity as a condition for a capacity to act. Instead, finally a general rule was established that the capacity to act was acquired at a certain age:

> Guardianship ends for both girls and boys when they reach puberty. In the case of boys the old jurists chose to make puberty not merely a matter of age but also of physical development. We ourselves have thought it better suited to the propriety of our imperial reign to extend to boys the ancient ruling as to girls, which condemned bodily inspection as immoral. By solemn pronouncement we have laid down: that for boys puberty shall be considered as beginning from the completion of the fourteenth year; that for girls the well considered ancient standard shall be retained, deeming them sexually mature on completion of their twelfth year.[45]

Age-related capacity to act is, by its nature a legal presumption. It can be challenged if it can be demonstrated that a person is not of sound mind. Praetor also interdicted from the administration of his affairs a spendthrift who was unable to manage his assets.[46] Although such a person had reached the age of maturity he was given a guardian (*curator*). As we learn from the rescript of Antoninus Pius it was necessary to place him under care and control because of his incapacity for rational perception and judgement we:

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[45] Inst. 1, 22 pr.: *Pupilli pupillaeque cum puberes esse coeperint, tutela liberantur. pubertatem autem veteres quidem non solum ex annis, sed etiam ex habitu corporis in masculis aestimari volebant. nostra autem maiestas dignum esse castitate temporum nostrorum bene putavit, quod in feminis et antiquis impudicum esse visum est, id est inspectionem habitudinis corporis, hoc etiam in masculos extendere: et ideo sancta constitutione promulgata pubertatem in masculis post quartum decimum annum completum ilico initium accipere disposuimus, antiquitatis normam in femininis personis bene positam suo ordine relinquentes, ut post duodecimum annum completum viripotentes esse credantur.* English translation Justinian's Institutes, Birks, McLeod & Krueger, 1987.

[46] Paul (PS 3, 4a, 7) quotes the following praetor's formula depriving a spendthrift of legal capacity and placing him under the care of a guardian: *Quando tibi bona paterna avitaque nequitia tua disperdis liberosque tuos ad egestatem perducis, ob eam rem tibi ea re commercioque interdico.* (Since by your wickedness you are squandering the property which you have inherited from your father and grandfathers, and are thereby impoverishing your children, I hereby forbid you the commercial intercourse of it).

> The deified Pius also allowed a mother's complaint about her spendthrift sons, that they should accept a curator in these words: "It is nothing new that some persons, though they seem from their speech to be in full possession of their senses, nevertheless, handle the property belonging to them in such a way that unless help is given to them, they are reduced to poverty. Therefore, someone must be chosen to guide them by his advice; for it is right that we should take forethought also for those who, insofar as concerns their own property, bring things to a ruinous conclusion."[47]

The absence of the capacity for rational judgement was even more evident in the case of a person who was mentally ill:

> A lunatic is not to be regarded as one absent because he lacks the intellect to ratify anything done.[48]

In other cases, the presumption of maturity and capacity to act was age-related. As we have seen, boys reached it at the age of 14 and girls at the age of 12. Interestingly, however, the residue of the concrete test of maturity was retained to some extent in relation to the criminal capacity. This is clearly evident from Ulpian and Gaius' text:

> A child under the age of puberty can commit a theft if he is capable of crime, as Julianus states in the Twenty-second Book of the Digest.[49]

> *Finally, does a child commit theft if he removes something belonging to another? The majority view accepts that since theft depends on intent, a child only incurs the liability if he is near puberty. He can then understand that he is doing wrong.*[50]

From both fragments we can clearly see that Roman jurists were aware of the difficulties of sharp delimitation. That is why they allowed exceptions in cases where someone was close to the age limit:

> What we have said of a child is only true of one who has attained some understanding. A baby and a child barely past infancy (*infans et qui infanti proximus*) hardly differ from the insane, in that they are too young to understand anything. With those just past infancy (*proximis infanti*),

[47] Ulp. D. 26, 5, 12, 2: *Divus Pius matris querellam de filiis prodigis admisit, ut curatorem accipiant, in haec verba: "non est novum quosdam, etsi mentis suae videbuntur ex sermonibus compotes esse, tamen sic tractare bona ad se pertinentia, ut, nisi subveniatur is, deducantur in egestatem. eligendus itaque erit, qui eos consilio regat: nam aequum est prospicere nos etiam eis, qui quod ad bona ipsorum pertinet, furiosum faciunt exitum."*

[48] Paul. D. 3, 3, 2, 1: *Furiosus non est habendus absentis loco, quia in eo animus deest, ut ratum habere non possit.*

[49] Ulp. D. 47, 2, 23.

[50] Gai. 3, 208. See also Gai. D. 50, 17, 111 pr.: *A minor who is near the age of puberty is capable of theft and the commission of injury.*

> convenience has encouraged a generous interpretation of the law, so that they are treated as having the same capacity as those near puberty (*pubertati proximi*). A young child still within his family incurs no obligation even with the endorsement of the head of the family.[51]

Children under the age of seven who were said to be unable to speak legally relevant words (*qui fari non possunt*)[52] were considered to be incapable of reason and could perform no legal act at all.[53] They were considered incapable of entering into valid legal transactions even with the guardian's authorization, or being criminally liable. In terms of their capacity to act they were therefore compared to the insane:

> An infant or a madman who kills a man is not liable under the *lex Cornelia*, the one being protected by the innocence of his intent, the other excused by the misfortune of his condition.[54]

6 Liability for crimes and delicts of children-in-power

As we have already seen the criminal capacity arose at the same time as the contractual capacity. Nevertheless, we find two cases in the XII Tables where a minor was punished for a wrongdoing, albeit more leniently than the adult. We can assume with certainty that this was the case of a minor close to puberty while children under the age of seven (*infantes*) were completely lacking legal capacity.

The first case concerned the grazing of crops. As Pliny states "the Twelve Tables made shepherding animals by stealth at night on crops grown under the plough, or cutting them, a capital offence for an adult and enacted that a person found guilty of it should be executed by hanging in reparation to Ceres, a heavier punishment than in a conviction for homicide; while a minor was to be flogged at the discretion of the praetor or sentenced to pay the amount of the damage or twice that

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[51] Inst. 3, 19, 10.
[52] Gai. D. 46, 6, 6, Ulp. D. 26, 7, 1, 2, Paul. D. 29, 2, 9. More on this Lamberti, 2014, p. 51.
[53] Ulp. D. 26, 7, 1, 2: … *ita tamen, ut pro his, qui fari non possunt vel absint, ipsi tutores iudicium suscipiant, pro his autem, qui supra septimum annum aetatis sunt et praesto fuerint, auctoritatem praestent.* (… However, just as tutors may themselves undertake the case on behalf of those who cannot speak or are absent, they may offer their authorization on behalf of those who are over seven years of age and are present.). See also Arc. Hon. Theod. CTh. 8, 18, 8 (of 407 AD). Constantius (CTh. 8, 18, 4), however, speaks about the completion of the sixth year (*post emensum vero sextum aetatis suae annum* - but after the completion of the sixth year of his age).
[54] Mod. D. 48, 8, 12: *Infans vel furiosus si hominem occiderint, lege Cornelia non tenentur, cum alterum innocentia consilii tuetur, alterum fati infelicitas excusat.*

amount."[55]

The second case is about manifest theft. According to Gellius, the decemviri "decided that boys under age should be flogged at the discretion of the praetor and the damage which they had done made good."[56] In neither case, however, does it seem to have been a punishment in the sense of criminal law but rather an educational measure (albeit perhaps a very severe one). This is easily deduced, among other things, from the fact that the decision about this was at the discretion of a praetor.

The Proculeian and Sabinian schools seem to have differing views on the question of the beginning of legal capacity of children. The Proculians advocated tying it to a particular age while the Sabinians advocated case-by-case consideration.[57]

In general, it can be said that the earlier classic jurists defended the criminal capacity of minors over 7 years of age, provided that they were capable of understanding what was right and what was wrong:

> Labeo says that if the child were over seven years of age, he could be liable under the *lex Aquilia* in just the same way as he could be liable for theft. I think this is correct, provided the child were able to distinguish between right and wrong (*si sit iam iniuriae capax*).[58]

We can find a similar distinction with Julian, quoted by Ulpian:

> Julian wrote in the twenty-second book of his Digest that an *impubes* can commit theft, if he be already capable of guilty intent; similarly, it is possible to proceed against such a person for damage wrongfully inflicted since theft can be committed by him. But, he says, there is a limit on this; for it does not apply to infants. Our view is that one can proceed with the Aquilian action against an *impubes* capable of fault. What Labeo says is also true, that is to say, that an *impubes* is not liable as an accomplice in respect of a theft.

[55] Nat. hist. 18, 3, 12: *frugem quidem aratro quaesitam furtim noctu pavisse ac secuisse puberi xii tabulis capital erat, suspensumque Cereri necari iubebant gravius quam in homicidio convictum, inpubem praetoris arbitratu verberari noxiamve duplionemve decerni.* English translation: Backham, 1961.
[56] Gell. N. A. 11, 18, 8: *sed pueros inpuberes praetoris arbitratu verberari voluerunt noxiamque ab his factam sarciri.* English translation: Gellius, 1927. The text is in public domain.
[57] Kaser, 1971, p. 275.
[58] Lab.-Ulp. D. 9, 2, 5, 2.

Later classic jurists probably tended to be more age-oriented. Therefore, they used the expression "if he is verging on puberty" (*proximus pubertati*)[59] or "if he is approaching puberty and so understands that he is doing wrong" (*si proximus pubertati sit et ob id intellegat se delinquere*).[60] It can be assumed that in classical as well as in imperial law the following principle prevailed:

> A pupil who is very near to puberty is capable both of theft and of causing injury.[61]

7 Liability of *pater familias* for the obligations of a child-in-power

In principle, the father was not responsible for the obligations of a child in his power.[62] The exception was where a son-in-power had assumed an obligation authorized by the family father.[63] The authorization rendered the family father (or the slave's master) liable for the full amount because "in a sense the person who authorizes a contract becomes a party to it".[64] The family father was also liable if he benefited from the transaction. Evan if he didn't authorize it, "the person with power over them has materially benefited from the performance rendered, that person is liable, much as if he himself had been party to the transaction".[65] In such a case the *pater familias* was liable to the value of the benefit taken.

If there was no authorization or benefit taken from the transaction of the son-in-power the father's liability was limited to son's *peculium*.[66]

It follows that the *de facto* son-in-power was liable for his obligations with his property, which *de iure* belonged to his family father. But, as Ulpian points out, "If the peculium of those in the power of another is empty or insufficient to pay the debt in full"[67] it was possible to claim the payment from the family father. This is

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[59] Ulp. D. 4, 3, 13, 1.
[60] Gai. 3, 208. See also Ulp. D. 47, 2, 23, Maec. D. 29, 5, 14, and Alex. C. 9, 47, 7.
[61] Gai. D. 50, 17, 111 pr.: *Pupillum, qui proximus pubertati sit, capacem esse et furandi et iniuriae faciendae.* See Kaser, 1975, p. 116.
[62] More on this Longo, 2003.
[63] See D. 15, 4: *Quod iussu* and C. 4, 26 *quod cum eo qui in aliena est potestate negotium gestum esse dicitur, vel de peculio seu quod iussu aut de in rem verso.*
[64] Ulp. D. 15, 4, 1 pr.: … *nam quodammodo cum eo contrahitur qui iubet.*
[65] Ulp. D. 15, 3, 1 pr.: … *tenentur qui eos habent in potestate, si in rem eorum quod acceptum est conversum sit, quasi cum ipsis potius contractum videatur.* See: D. 15, 3 *De in rem verso.*
[66] D. 15, 1 *De peculio.* Ulp. D. 15, 1, 1, 1: *Est autem triplex hoc edictum: aut enim de peculio aut de in rem verso aut quod iussu hinc oritur actio.* (This section of the edict is in three parts: the action on the peculium, the action for benefit taken, and the action on an authorized transaction all stem from it.)
[67] Ulp. D. 15, 3, 1 pr.: *Si hi qui in potestate aliena sunt nihil in peculio habent, vel habeant, non in solidum tamen* …

logical, especially considering that the power of pater familias lasted until his death, which means the son could have been under authority at a ripe old age. If the son-in-power did not pay, the creditor could demand payment from his family father, who had to repay the obligation (*de iure*) out of his own pocket up to the value of *peculium*. Nevertheless, we can believe that this occurred only exceptionally when the son-in-power failed to meet his obligation and had to be sued.

In the case of obligations resulting form a wrongdoing the situation was somewhat different. The family father was liable for the delicts of persons under his paternal power. However, he could avoid payment of the damages if he handed over the perpetrator, i.e., his son-in-power (or his slave), to the injured party:

> Wrongdoing by sons or slaves, as where they have been guilty of theft or outrage, has given rise to noxal actions, the nature of which is that the father or master is allowed either to bear the damages awarded or to surrender the offender. For it would be inequitable that their misconduct should involve their parents or masters in loss beyond that of their persons.[68]

Gradually, this option of the family father was limited exclusively to slaves while allowing an action to be brought directly against the son-in-power who committed the delict:

> The old jurists applied these rules to dependants in family authority as well, both males and females. As attitudes changed it was rightly thought that such harshness could not be tolerated. Hence the practice of treating children in the same way as slaves has been abandoned. What father allows his son to be given in noxal surrender, much less his daughter? It would hurt the father almost more than the son. With daughters, sexual propriety provides another good reason for the change. A final reason for confining noxal actions to slaves is that in the old legal commentaries, we quite often find it said that sons who commit delicts can themselves be sued.[69]

8 Conclusion

This brief overview of some of the particularities regarding the legal position of Roman children can be concluded by arguing that the fundamental difference between Roman and modern law concerning the status of children was primarily the paternal power and, consequently, the absence of the child's capacity to own

[68] Gai. 4, 75; de Visscher, 1930, pp. 411–471.
[69] Inst. 4, 8, 7.

property. The authority of the family father was deeply rooted in Roman tradition. Remnants of this are still to be found today in some environments in the Mediterranean area. Much more than legal norms the authority of the family father was based on ancestral customs (*mos maiorum*). In particular, in the earlier periods of Roman history, the father's authority was a fundamental feature of the Roman tradition. This is perhaps best illustrated by the case of the tribune Gaius Flaminius:

> With C. Flaminius too parental authority was equally potent. As Tribune of the Plebs he had (in 232 B.C.) promulgated a law to distribute the Gallic territory individually against the will and resistance of the senate, vehemently opposing its entreaties and threats and undeterred even by the levying of an army against him should he persist in the same purpose. But when his father placed a hand on him as he was already on the rostra putting the law to vote, overborne by private authority he came down from the platform. Nor did the assembly which he left in the embarrassing position censure him by even the slightest murmurs.[70]

The reaction of the assembled people shows that the father's behavior was neither unusual nor shocking. Although probably not all Roman fathers were like the father of Gaius Flaminius, it was clearly a matter of course in Rome at that time that a son had to submit to his father's authority.

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[70] Val. Max. 5, 4, 5.

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Kinderrechte und die Rolle der Großeltern bei der Weitergabe von Werten (in sich verändernden sozialen, wirtschaftlichen, Arbeits- und Lebenswelten)

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Dieser Beitrag konzentriert sich auf interdisziplinäre Ansätze zum Verständnis des Prozesses Wertevermittlung von Großeltern an Enkelkinder, der Struktur und der Funktion ihrer Kommunikation in Unterstützungs- und Hilfsbeziehungen. Die Forschende Ergebnisse präsentieren unterschiedliche Perspektiven und zeigen, wie Beziehung zwischen Großeltern und Enkelkinder kokonstruiert wird. Einzigartig in seinem Ansatz, die an der Weitergabe der Werte beteiligt sind, und bieten sowohl dem wissenschaftlichen als auch dem angewandten Publikum ein Verständnis von sozialer Unterstützung als einem Kommunikationsprozess, der auf kontinuierlichen Beziehungen der Großeltern und Enkelkinder basiert. Wir haben die Werte untersucht, die wir aus der Musek-Werteskala zusammengefasst haben, die durch den Generationenübergreifend weitergegeben werden oder für Großeltern wichtig sind, um sie an ihre Enkelkinder weiterzugeben. So entdeckten wir in der slowenischen Gesellschaft einen eher unerforschten Bereich des Wertetransfers. Die Studie wurde an einer Population von 405 Großeltern im Alter zwischen 65 und einschließlich 75 Jahren durchgeführt, die bereits Erfahrungen mit der Weitergabe von Werten an ihre Enkelkinder gemacht hatten.

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Children's Rights and Grandparents in the Transmission of Values (in Changing Social, Economic, Labour, and Living Environments)

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Keywords:
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This article focuses on interdisciplinary approaches to understanding the process of value transmission from grandparents to grandchildren and the structure and function of their communication in support and assistance relationships. The research findings present different perspectives and demonstrate how the relationship between grandparents and grandchildren is co-constructed. Unique in its approach, it explores those involved in the transmission of values and provides both the scientific and applied audience with an understanding of social support as a communication process based on continuous relationships between grandparents and grandchildren. We examined the values summarized from the Musek Value Scale that are passed down through generations or are essential for grandparents to transmit to their grandchildren. Thus, we discovered a relatively unexplored area of value transfer in Slovenian society. The study was conducted on a population of 405 grandparents aged between 65 and 75 years who had already experienced transmitting values to their grandchildren.

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PRAVICE OTROK IN STARI STARŠI PRI PRENOSU VREDNOST (V SPREMENJENIH SOCIALNIH, EKONOMSKIH, DELOVNIH IN ŽIVLJENJSKIH OKOLILJIH)

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Prispevek se osredotoča na interdisciplinarne pristope k razumevanju procesa prenašanja vrednot s starih staršev na vnuke ter na strukture in funkcije njihove komunikacije v odnosih podpore in pomoči. Izsledki raziskave predstavljajo različne perspektive in kažejo, kako so odnosi med starimi starši in vnuki sooblikovani. Edinstven pristop, vključenih v prenos vrednot, ter akademskemu in uporabnemu občinstvu zagotavlja razumevanje socialne podpore kot komunikacijskega procesa, ki temelji na stalnih odnosih med starimi starši in vnuki. Preučili smo vrednote, ki smo jih povzeli po Musekovi lestvici vrednot, ki se prenašajo v medgeneracijskem procesu oziroma so pomembne, da jih stari starši prenesejo na vnuke. Na ta način smo odkrili dokaj neraziskano področje prenosa vrednot v slovenski družbi. Raziskava je bila izvedena na populaciji 405 starih staršev, starih od 65 do vključno 75 let, ki so že doživeli prenos vrednot na svoje vnuke.

Ključne besede:
družinsko pravo,
sociologija družine,
prenos,
vrednote,
pravo družinskih razmerij

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Wenn ich mein Leben nochmals leben könnte.
Ich würde wagen, nächstes Mal mehr Fehler zu machen.
Ich würde alles lockerer und entspannter anpacken.
Ich würde törichter sein, als ich es auf dieser Reise war.
Ich würde weniger Dinge ernst nehmen.
Ich würde mehr Gelegenheiten ergreifen.
Ich würde mehr Berge besteigen.
Und mehr Flüsse durchschwimmen.
Ich würde mehr Eiscreme essen.
Und weniger Bohnen.
Ich hätte wahrscheinlich mehr wirkliche Probleme,
aber ich würde mir weniger Probleme einbilden.
Du siehst, ich bin einer jener Menschen,
die vernünftig und gesund leben,
Stunde um Stunde, Tag für Tag.
Oh, ich hatte meine Momente,
und wenn ich es nochmals tun könnte,
ich hätte noch viel mehr davon.
Eigentlich würde ich nichts anders tun.
Nur Momente leben, einen nach dem anderen,
anstatt so viele Jahre die Tage im Voraus zu leben.
Wenn ich mein Leben nochmals leben könnte,
würde ich früher im Frühling barfuß gehen
und später im Herbst damit aufhören.
Ich würde mehr zum Tanzen gehen.
Ich würde mehr Karussell fahren.
Ich würde mehr Gänseblümchen pflücken.
Ich würde LEBEN!

1 Einleitung

Die Alterung der Bevölkerung ist auf der ganzen Welt zu beobachten, auch in den weniger entwickelten Ländern, da der Anteil älterer Menschen aufgrund eines raschen Rückgangs der Sterblichkeit zunimmt, und in den entwickelten Teilen der Welt ist neben den niedrigeren Sterblichkeitsraten auch die Geburtenrate gesunken. Es wird erwartet, dass sich die Weltbevölkerung älterer Menschen im Alter von über

65 Jahren bis 2050 auf 1,5 Milliarden verdreifachen wird. Das Land mit der ältesten Bevölkerung der Welt ist Japan, wo 28,2% der Bevölkerung aus Menschen über 65 Jahren besteht. Es folgen Italien mit 22,8% und Finnland mit 21,9% der Bevölkerung über 65 Jahre. Das globale Durchschnittsalter der Bevölkerung liegt 2020 bei 29,6 Jahren und wird bis 2050 auf 36,1 Jahre ansteigen (Ritchie & Roser, 2019).

Slowenien befindet sich, wie die meisten europäischen Länder, in der 4. Entwicklungsstufe, die durch eine niedrige Fruchtbarkeit und eine längere Lebenserwartung gekennzeichnet ist, was sich stark auf den Anteil der älteren Bevölkerung auswirkt. Die Alterspyramide hat eine charakteristische bauchige Vasenform. Auch die Prognosen für 2050 deuten darauf hin, dass der Anteil der älteren Bevölkerung stark zunehmen wird (der obere Teil der Pyramide ist breiter als 2020), während die Geburtenrate niedrig bleibt (der untere Teil der Pyramide ist noch schmaler als 2020). In der Weltrangliste der 50 Länder mit dem höchsten Anteil älterer Menschen belegt Sno- Platz 17. Ältere Menschen über 65 Jahre machen in Slowenien 20,6% der Bevölkerung aus.12 Das Durchschnittsalter der Menschen in Slowenien lag im Jahr 2020 bei 43,6 Jahren13 im Vergleich zu 1991, als Slowenien ein unabhängiges Land wurde und das Durchschnittsalter der Bevölkerung 36,4 Jahre betrug.

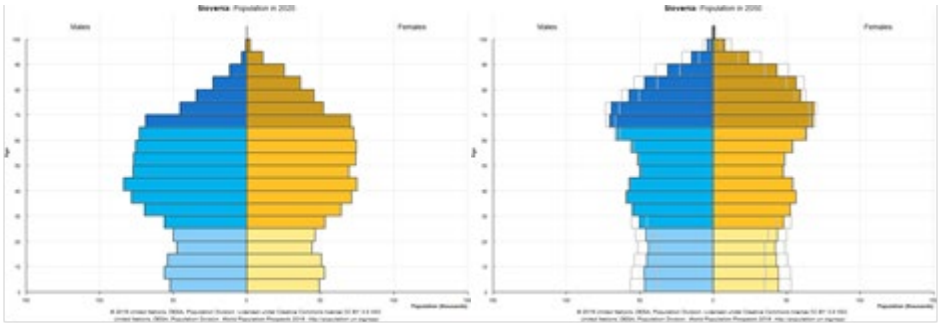

Bild 1: Die Alterspyramide Sloweniens
Quelle: United Nations, 2023.

Die Daten für 2020 sind auf der linken Seite und die Daten für 2050 auf der rechten Seite geschätzt. Die wachsende Zahl älterer Menschen wird weitreichende wirtschaftliche, soziale und politische Folgen haben. Insbesondere werden Veränderungen auf Familienebene aufgezeigt; in Großeltern-Enkel-Beziehungen,

wie wir bereits erleben. Viele Großeltern spielen eine einflussreichere Rolle im Leben ihrer Enkelkinder als je zuvor. Dies ist wahrscheinlich eine Folge der wirtschaftlichen Situation und damit des Aufstiegs von Mehrgenerationenzusammenlebens, in denen Großeltern mit ihren Kindern und Enkelkindern zusammenleben.

2 Großeltern

Die Großeltern-Enkel-Beziehung ist also wechselseitig und sicherlich für beide Generationen wichtig. Natürlich arbeiten nicht alle Großeltern in Bezug auf Enkelkinder auf die gleiche Weise. In Beziehungen findet jedoch eine Zyklizität statt, die, wie Musek (2014, S. 30) argumentiert, Generationentrends korrigiert, die sonst die Stabilität der Gesellschaft und der Menschheit in einer linearen Fortsetzung bedrohen würden. Also, im groben, können wir Großeltern unterteilen in:

a) *Formale Großeltern* – die sich freuen und sich für ihre Enkelkinder interessieren, aber es vermeiden, sich in ihre Erziehung einzumischen. Alte Elternschaft, wo es als eine Art Unterhaltung gedacht ist. Sie haben spielerische und informelle Beziehungen zu ihren Enkelkindern, tatsächlich gelten sie bereits als Spielzeug.
b) *Ersatz Großeltern* - die die regelmäßige Betreuung der Enkelkinder übernehmen, und dies ist eine Verpflichtung für sie. Sie fangen an, für die Enkelkinder zu leben und steigen oft in ihre Erziehung ein. Sie können in Kritik geraten und versuchen, ihre eigenen Fehler zu korrigieren, die sie selbst als Eltern gemacht haben. Sie können übermäßig hilfreich sein und ihre eigenen Bedürfnisse und Wünsche vergessen.
c) *Entfernte Großeltern* sind diejenigen, die bei formellen Feierlichkeiten anwesend sind, aber wenig Kontakt zu ihren Enkelkindern haben. Sie können als Fremde für ihre Enkelkinder charakterisiert werden.
d) *Toxische Großeltern* – die entweder mit ihrem Kind oder ihrem Partner (Enkelelternteil) im Konflikt stehen, die erziehen, fordern, ihr Recht beweisen, mit ihren eigenen Kindern vor Enkelkindern streiten, anderer Meinung sind oder sogar Enkelkinder ermutigen, sich ihren Eltern zu widersetzen.
e) *Manipulative-, Egoistische Großeltern* – die, weil sie oft eine wichtige Rolle in einer jungen Familie übernehmen, sei es durch Fürsorge, finanzielle Unterstützung, hilfreiche Ratschläge und andere Unterstützungsmittel, ihre Rolle (Großmütter/Großväter) bei der gemeinsamen Erziehung von Enkelkindern

missbrauchen; um familiäre Beziehungen zu zerstreuen, bewusst oder unbewusst die Entscheidungen, Bemühungen, verbalen und erzieherischen Ansätze der Eltern zu untergraben, sich wichtigen elterlichen Entscheidungen zu widersetzen.

f) *Betreuende Großeltern* – die denken, dass ihre Kinder (die bereits eine eigene Familie haben) noch klein sind und glauben, dass sie alles "am besten" wissen und das Recht haben, das letzte Wort bei den Entscheidungen der Eltern zu haben – für Großeltern ist die Grenze zwischen Großeltern und Eltern in diesem Fall sehr vage.

g) *Großeltern, die eines der Enkelkinder bevorzugen*. Es ist üblich, dass sie sich leichter mit einigen Enkelkindern verbinden und sich vielleicht mehr sehen (z. B. wenn eines der Kinder länger lebt als das andere). Günstlingswirtschaft wird jedoch zum Problem, wenn sich die Enkelkinder miteinander vergleichen oder sogar deutlich zeigen, dass einer bei ihnen beliebter ist als die anderen.

h) *Unglückliche Großeltern* – für die nichts jemals gut genug ist, und obwohl es nur einer der Indikatoren für Liebe und Schutz für ihre Enkelkinder zu sein scheint, kann dies sehr lähmend sein, weil es einfach unmöglich ist, mit ihren unrealistischen Erwartungen Schritt zu halten. Oft wird ihren erwachsenen Kindern vorgeworfen, dass sie in einem unangemessenen Zuhause oder einer unangemessenen Umgebung leben, dass die Ernährung schlecht ist, dass der Kindergarten unangemessen ist, dass die Kleidung von schlechter Qualität ist usw.

i) *Großeltern, die als Opfer auftreten*, versuchen immer, die Schuld zu geben – wenn nicht ihre eigenen Kinder, so doch ihre Enkelkinder. zum Beispiel. "Opa wird traurig sein und weinen, wenn du ihn nicht liebst"...) spielende Emotionen, die für Familienmitglieder sehr belastend und aufdringlich sein können.

j) *Ständig Beaufsichtigende Großeltern* - ständig das Leben ihrer Kinder und Enkelkinder mit "gut gemeinten" Ratschlägen, Regeln, Einschränkungen kontrollieren, Kinder können nichts alleine tun, überprüfen, versuchen. Infolgedessen werden sie nicht einmal in der Lage sein, ihre eigenen Schlussfolgerungen zu ziehen.

k) *Ignorante Großeltern* – die das Vertrauen und die Regeln der Eltern ausspielen, handeln ohne vorherige Rücksprache mit den Eltern.

l) *Großeltern als Quelle des Wissens und der Weisheit,* die eigentlich sehr autoritär sind, neigen dazu, eher ein Großeltern zu sein, der über besondere Kenntnisse und

Fähigkeiten verfügt; Somit sind sowohl die Enkel als auch ihre Eltern den Großeltern untergeordnet.

3 Die soziale Rolle der Großeltern

Großeltern sind ein wichtiges Bindeglied im Familiensystem, da sie ein Bindeglied zwischen Vergangenheit und Zukunft darstellen (Newman & Newman, 2012, S. 540). Obwohl sie in der Vergangenheit die Bedeutung der Großeltern nicht so sehr betonten wie heute, haben sich heute viele Forscher diesem Bereich gewidmet. So betont Knudsen (2016, S. 248–250) die Bedeutung der Häufigkeit der Beteiligung der Großeltern, da sie feststellt, dass das Ausmaß der Beteiligung der Großeltern, ihre Prioritäten, die lokale Distanz zwischen ihnen ist, da sie die Beziehung zwischen ihnen aufbauen oder beeinflussen.

Großeltern als soziale Unterstützung ist ein mehrdimensionales Konzept. Historisch gesehen betonten frühere Definitionen von sozialer Unterstützung ihre emotionale Dimension (z. B. Weiss, 1974; Cobb, 1976; Thoits, 1982), d.h. als ein Gefühl der Zugehörigkeit und des Angenommen-Werdens und der Fürsorge für wichtige Andere. Neuere Definitionen (vgl. Burleson, Albrecht & Sarason, 1994) betonen, dass soziale Unterstützung auch ein Interaktions- und Kommunikationsprozess ist. Wie Kinder soziale Unterstützung verstehen, lässt sich aus Interviewausschnitten ablesen.

4 Großeltern, Enkelkinder und Transmission der Werte

Werte prägen sich durch unser Leben und spielen eine äußerst wichtige Rolle in unserem Leben. Sie verbinden sich mit allen Bereichen unseres Lebens, in denen es am wichtigsten ist, nämlich bei der Entscheidungsfindung im Leben (Musek, 2014, S. 42–44). Es gibt auch keine Gesellschaft, kein Gesellschaftssystem und keine Kultur ohne ein ausgeprägtes Wertesystem. Dieses System lenkt und gibt der Bewahrung, Reproduktion und dem Fortschritt der Gesellschaft oder Kultur einen Sinn. Einerseits lenkt dieses System soziale und kulturelle Faktoren und Institutionen (Eltern, Schule,...) dazu, ein kohärentes individuelles Wertesystem für das Individuum zu bilden. Andererseits lenkt das Wertesystem Individuen in ihrem Verhalten und ihren zwischenmenschlichen Beziehungen so, dass es Grundwerten

entspricht und die Reproduktion von Gesellschaft und Kultur von einer Generation zur nächsten ermöglicht.

Die Weitergabe von Werten von Großeltern an Enkel wird von verschiedenen Faktoren beeinflusst, wie zum Beispiel:

a) äußere Bedingungen, zu denen der soziale Fortschritt, die persönlichen Finanzen, die Zeit und die Gesundheit der Großeltern gehören, von denen die persönlichen Finanzen und die Zeit entsprechend den Verpflichtungen und Verantwortlichkeiten in der Familie gebildet werden;
b) innere Wünsche der Großeltern und Enkelkinder, zu denen gehört, sich besser zu fühlen, Routinen zu entfliehen, Kontakte zu knüpfen, nach Wissen zu suchen, Stolz und Patriotismus, persönliche Belohnung und Nostalgie;
c) Qualitäten der Beziehungen zwischen Großeltern, Eltern und Enkelkindern;
d) die Art und Weise, wie Großeltern und Enkelkinder leben oder die Familie ihrer Kinder;
e) Familienhaushalt mit einer spezifischen sozialen Struktur mit zwei Arten von Rollen: dem (in der Regel weiblichen) Haushaltsakteur und seinen abhängigen Mitgliedern;
f) Art und Umfang der Arbeit, die Familienmitglieder zu leisten haben, hängen vom Geschlecht und Familienstand ab. Die (unbezahlte) Hausarbeit wird überwiegend von Frauen verrichtet. Darüber hinaus müssen Frauen auch sexuelle, reproduktive und emotionale Arbeit leisten;
g) In der Regel enthalten die wirtschaftlichen Beziehungen zwischen Großeltern und Enkelkindern keinen formellen Vertrag, so daß beide Familienmitglieder eher zu informellen Verhandlungen neigen.

Die Kontinuität im Austausch von Lebenswerten ist durch Diskontinuität ersetzt worden. Ule & Kuhar (2003, S. 19; nach Hagestad, 1988) heben Arten von Diskontinuitäten in der Wertübertragung hervor:

a) *Kulturelle Diskontinuität*: die aufgrund kultureller Veränderungen von Normen und Regeln auftritt, Rollen der Interaktion, auf die Großeltern nicht immer vorbereitet sind; z.B. veränderte sexuelle Rollen von Männern

und Frauen in der Familie und im familiären Umfeld, auf die sie während der Sozialisation nicht vorbereitet waren, da sich die Regeln im Laufe des Lebens beider Generationen änderten;

b) *Biographische Diskontinuität*: wenn strukturelle oder kulturelle Barrieren für die Koordination der Familienrollen entstehen, die zu einer inkohärenten und unkoordinierten Wertevermittlung führen;

c) *Autobiografische Diskontinuität*: Sie äußert sich in Schwierigkeiten, die eigene Lebenskontinuität der Großeltern subjektiv zu erleben, und wird durch bahnbrechende Veränderungen wie Scheidung, Verlust des Arbeitsplatzes, Krankheit usw. gebildet.

Die Vielfalt des Wertesystems der Großeltern, ihres Lebensverlaufs und Lebensstils eröffnet vielfältige Möglichkeiten für die individuelle Wahl von Werten, die sie an ihre Enkel weitergeben möchten. Als Individuen planen Großeltern ihr eigenes Leben, formulieren ihre eigene Ideologie und ihre eigenen Werte, treffen persönliche Entscheidungen, setzen sich langfristige Ziele und formulieren ihre eigenen Strategien, um diese zu erreichen. Die Individualisierung der Lebensstile, die auch die Großeltern getroffen hat, ist auch eng mit der Konsumkultur verbunden.

Die veränderten Mechanismen der Übertragung von Werten von Großeltern auf Großeltern bieten (oder zwingen sie sogar auf) neue Werte, neue Identitäten und neue Bedürfnisse und Wünsche. Sie geben Anleitungen, wie sich Großeltern verhalten und denken sollen. Soziale Kontrolle wird immer unpersönlicher und funktionaler und führt damit zum historischen Ende der pädagogisch geschützten Kindheit und Jugend. Die Pluralisierung der Möglichkeiten der Übertragung von Werten bezieht sich nicht nur auf das Wertesystem, den Lebensverlauf und die Lebensweise der Großeltern, denn die Bedeutung des Lokalen wird allmählich durch die Interaktion, Interdependenz und Integration von Gesellschaften aus allen Teilen der Welt ersetzt. Es liegt auch daran, dass die Entwicklung der (elektronischen) Massenmedien (insbesondere des Internets) einen wichtigen Beitrag zur Formulierung von Werten innerhalb des Wertes der transnationalen Integration leistet, was zu außergewöhnlichen Veränderungen in der Übertragung und Zugänglichkeit von Informationen geführt hat, die sich unminös auf die Wahl der Werte auswirken, die Großeltern an ihre Enkel weitergeben wollen. Die Massenmedien haben nämlich zur Schaffung einer Massenkultur geführt. Interpretative Divergenzen finden in der theoretischen Thematisierung des

Wertewandels statt. Sie manifestiert sich als hin- und hergerissen zwischen Argumenten, die den Wertewandel bestätigen, und denen, die ihn leugnen. In theoretischen Ansätzen, die familiäre Veränderungen erklären, gibt es also Dualität: auf der einen Seite das Denken, dass sich Werte signifikant ändern, und auf der anderen Seite das Denken, dass es überhaupt keine Veränderung gibt.

Betrachtet man die Entwicklung der Übertragung von Werten der Großeltern auf die Enkelkinder in der postmodernen Gesellschaft, wird die Transformation der Werte samt ihrer Übertragung deutlicher, indem man definiert, wie sich die Werteübertragung konstituiert:

a) In der ersten Periode konstituiert sie sich um das rationale Urteil der Großeltern über ihre Bedürfnisse und die Fähigkeit, diese Werte mit bestehenden Werten und Dienstleistungen zu befriedigen (die Logik der Übertragung der Werte, die für sie am wichtigsten sind, überwiegt (auch auf Kosten der langfristigen und weniger wichtigen);
b) In der zweiten Periode konstituiert es sich um einen scheinbar unaufhaltsamen Kreis von Werten der Großeltern als Mangel, als Wunsch nach momentaner Befriedigung von ihnen; und
c) In der dritten Periode konstituiert sie sich um die Bildung von Werten als Identität und Lebensstil der Großeltern oder um das sogenannte stilistische Summen.

Die Wertemuster, die Großeltern ihren Enkeln vermitteln wollen, bewegen sich von Werten zur Befriedigung materieller und existenzieller Bedürfnisse, durch das Streben nach Vergnügen, zu den Werten des Konsums, um den Lebensstil und die Identität der Enkel zu prägen. Diese Veränderungen lassen sich mit Ingleharts Konzept der Werte in postmodernen Drehung in Verbindung bringen. Eine der offensichtlichsten Veränderungen im Wertesystem der postmodernen Gesellschaft ist die Verschiebung von materialistischen zu postmaterialistischen Werten. Erstere betonen die wirtschaftliche und physische Sicherheit, während letztere die Lebensqualität und die individuelle Selbstentfaltung betonen. Es handelt sich also um eine Vermittlung von den Werten des Überlebens, die den Großeltern wichtig sind, hin zu den Werten des Wohlbefindens, die von den Enkeln gelebt werden, was sich auch in der Wertekultur im Allgemeinen widerspiegelt.

5 Das stellt logischerweise die Frage auf: "Wie viele Rechte haben Großeltern in Slowenien überhaupt«?

Das slowenische Familiengesetzbuch[1], das unter anderem das Eltern-Kind-Verhältnis regelt, sieht vor, dass der Staat Kinder jederzeit schützt, wenn ihre gesunde Entwicklung bedroht ist und das Wohl anderer Kinder dies erfordert. Es ist gesetzlich nicht vorgesehen, dass Eltern in der Lage sein sollten, im Voraus rechtsgültig und verbindlich gegenüber der Behörde zu erklären, wer in Fällen außergewöhnlicher Umstände (z. B. Tod) weiterhin für ihr Kind sorgen soll. Dies bedeutet nicht, dass die Eltern sonst nicht in der Lage wären, ihren Wunsch zu äußern (sie können ihn in einem Testament oder in einem anderen Dokument vor einem Notar zum Ausdruck bringen); jedoch unter dem Gesichtspunkt der Optimierung des Kindeswohls beurteilt werden.

Artikel 214 des Familiengesetzbuch sieht vor, dass die Adoption eines Verwandten in gerader aufsteigender Linie und weder ein Bruder noch eine Schwester adoptiert werden dürfen. Im Rahmen der Verwandtschaft kann die Betreuung des Kindes durch andere Formen (z. B. Pflege) erfolgen. Eine Adoption in gerader Linie würde jedoch die Verwandtschaftsraten vermischen (z. B. würde die Mutter des Kindes seine Schwester werden). Die Staaten regeln diese Inhalte unterschiedlich und nutzen meist die Institution der Pflege, die Vormundschaft, obwohl auch die Adoption durch Verwandte zulässig ist.

Artikel 142 des Familiengesetzbuch sieht auch vor, dass ein Kind das Recht hat, mit anderen Personen in Kontakt zu treten, zu denen es eine familiäre Bindung und persönliche Bindung zu ihnen hat, es sei denn, dies steht dem Wohl des Kindes entgegen. Als solche Personen gelten in erster Linie die Großeltern, Geschwister, Halbgeschwister, ehemaligen Pflegeeltern, früheren oder gegenwärtigen Ehegatten oder unverheirateten Partner des einen oder anderen Elternteils.

[1] Familiengesetzbuch (*Družinski zakonik)*: Uradni list RS, n. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23.

6 Forschungsteil

Im empirischen Teil wünschten wir:

a) identifizieren, welche Werte Großeltern als die wichtigsten für sich selbst erkennen; und
b) welche Werte Großeltern als die wichtigsten für die Weitergabe an die Enkelkinder erkennen.

Es wurden der Abflachungskoeffizient und der Asymmetrie Koeffizient sowie der Chi-Quadrat-Test der Eignung der Stichprobe im Vergleich zur Grundgesamtheit verwendet. Als nächstes wurde Cronbach Alpha verwendet, um die Zuverlässigkeit der Messung zu überprüfen. Zur Analyse der Ergebnisse wurden die Faktorenanalyse, der Wilcoxon-Signed-Rank-Test, der Spearman-Korrelationskoeffizient und der Kruskal-Wallis-Test verwendet.

Bei der Erforschung von Werten, die den Großeltern persönlich wichtig sind, sowie durch die Weitergabe an ihre Enkel und durch die Möglichkeit, Werte im Rahmen des generationenübergreifenden an ihre Enkel weiterzugeben, haben wir 405 ältere Menschen im Alter von 65 bis einschließlich 75 Jahren einbezogen, die diese Erfahrung bereits gemacht haben.

Wir fanden heraus, dass Gesundheit (4,89), Ehrlichkeit (4,84) und Familienglück (4,83) die wichtigsten Werte der Übertragung waren. Der unwichtigste Wert der Übertragung ist der politische Erfolg (2:16). Die Familie bleibt daher einer der höchsten Werte. Gesundheit ist jedoch ein sehr wichtiger Wert für ältere Menschen, da mehrere Studien bewiesen haben, dass Gesundheit auch ein wichtiger Motivator ist, der Großeltern dazu ermutigt, am Leben ihrer Enkelkinder teilzunehmen. Aber den Großeltern war auch wichtig die Vermittlung von Werten in den Bereichen:

a) der Sinnlichkeit, Gesundheit und Sicherheit (Freude, Spaß, aufregendes Leben, Komfort, Genuss, Gesundheit und Sicherheit);
b) des Status und Patriotismus (Macht, Prestige, Ruhm, Geld, politischer Erfolg, Liebe zum Vaterland, Nationalstolz);

c) der Soziale, soziologische und traditionelle Werte (Liebe, Familienglück, Verständnis mit dem Partner, Frieden, Stil, Gleichheit, Ehrlichkeit und Fleiß); und
d) der Kognitive, ästhetische, kulturelle, verwirklichte und religiöse (Wahrheit, Weisheit, Schönheit, Natur, Kunst, Kultur, Selbstverwirklichung, Religion und Hoffnung).

Wir fanden auch heraus, dass es einen statistisch signifikanten Unterschied zwischen der Einschätzung der Bedeutung der Werte der Großeltern für sich selbst und der Bewertung der Werte gibt, die sie an ihre Enkelkinder weitergeben möchten und dass die Werte, die Großeltern an ihre Enkelkinder weitergeben wollen, die Wahl der Aktivitäten zwischen ihnen und ihrer Enkelkinder bestimmen.

7 Schlussfolgerung

Während wir herausfanden, dass im Bereich der wirtschaftlichen Faktoren die Höhe des monatlichen Einkommens der Großeltern keinen bemerkbaren Einfluss auf die Möglichkeit der Übertragung von Werten durch generationenübergreifende Sozialisierung hat, stellten wir fest, dass die gemeinsame Zeit für die Qualität der Veranstaltungen sehr wichtig ist. Aber die Möglichkeit der Werteübertragung hängt auch von anderen sozio-demografischen Faktoren ab. In Bezug auf das Alter haben wir festgestellt, dass „junge Großeltern" eher auf Neues und angenehme Geselligkeit mit ihren Enkelkindern bedacht sind, während „Sicherheit" und „Verbesserung des Wissens" die Hauptziele von Großeltern sind, die regelmäßig Zeit mit ihren Enkelkindern verbringen. Die Werte der Großeltern sind stabil und für jede Generation spezifisch.

Apollo-Werte (Gesundheit, Glück, Ehrlichkeit) nehmen mit zunehmendem Alter zu., die dionysische aber sind im Rückgang (z. B. politischer Erfolg). Auch Rupnik (2020, S. 22) stellte fest, dass bei den Großeltern familiäre und gesundheitliche Werte überwiegen.

Da wir im Beitrag nur einen Teil der Forschungsdaten vorgestellt haben, finden wir, dass es durchaus notwendig ist, zu erforschen, welche Werte in die entgegengesetzte Richtung, von den Enkelkinder an die Großeltern, weitergegeben werden, und den

Forschungsumfang geografisch zu erweitern, da sich unsere Forschung nur auf Slowenien beschränkte.

So wie es heutzutage unterschiedliche Definitionen von Familie gibt, so gibt es auch die Familie selbst, und diese Veränderungen vollziehen sich im Einklang mit allgemeinen gesellschaftlichen Veränderungen; sowohl in der Größe, in der Form als auch im Stil, abhängig von den wirtschaftlichen und demographischen Faktoren der Zeit. Unterschiedliche Familienmitglieder haben unterschiedliche Rollen, aber eine der wichtigsten, so Goriup und Lahe (2018, S. 105–106), ist genau die Rolle der Großeltern. Denn durch ihre Kinder stellen sie mit ihren Enkeln eine Verbindung zwischen Vergangenheit und Zukunft her und realisieren so nicht nur das Zusammenleben zwischen den Generationen, sondern auch die Weitergabe von Werten (ebd.). Die Rolle der Großeltern ist wichtig in Bezug auf Nützlichkeit und Sinn. Es gibt den Großeltern eine „posthume" Mission, während die Enkelkinder es ihnen ermöglichen, Vitalität, geistige und emotionale Frische und eine aktive Beziehung zur Gegenwart zu bewahren (Newman & Newman 2012, 540). Gleichzeitig kann die Unterstützung der Großeltern bei der Kindererziehung die Erweiterung der Familie beeinflussen (Kaptijn et al. 2010, S. 400–404). Großeltern haben eine wichtige erzieherische Funktion, insbesondere wenn sie Traditionen und Erwartungen aus ihrem früheren Leben vermitteln (Brazelton, 1999, S. 438–441). Goriup und Lahe (2018, S. 106) argumentieren, dass auch der emotionale Aspekt der Rolle der Großeltern sehr wichtig ist und sie zu einem unverzichtbaren Bindeglied im Familienleben werden.

Großeltern spielen auch eine große Rolle bei der Bildung und kulturellen Bereicherung ihrer Enkelkinder (Beaumont & Sterry 2005, S. 175), während heutige Großeltern ein höheres Bildungs- und Einkommensniveau aufweisen als frühere Generationen von Großeltern (Shavanddasht, 2018, S. 153), was sich auch in der intergenerationalen Sozialisation in der Weitergabe von Werten widerspiegelt.

„Niemand kann etwas für Enkelkinder tun, was Großväter und Großmütter tun. Großeltern streuen magischen Staub auf das Leben der Enkelkinder." (Alex Haley)

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Das Recht der Kinder auf Spiel - neue Herausforderungen im digitalen Zeitalter

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Das Recht auf Spiel wird ausdrücklich in Artikel 31 KRK geregelt. Es handelt sich um das Recht, das häufig vergessen, übersehen oder Kindern verweigert wird. Insbesondere werden Kinder aus marginalisierten Gruppen (z. B. Invalide, Mädchen, ethnische Minderheiten) dieses Rechts beraubt. Das Kind kann sein Recht auf Spiel im nichtdigitalen und digitalen Umfeld geltend machen. Insbesondere Letzteres griff wesentlich auch ins Leben der Kinder ein. Ausgehend von Artikel 31 KRK haben die Staaten einerseits die Verpflichtung, den Kindern die Möglichkeit zum Spielen zu gewährleisten, während sie andererseits die Verpflichtung haben, ein sicheres Umfeld für das Kinderspiel auch im digitalen Umfeld zu schaffen.

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THE RIGHT OF CHILDREN TO PLAY - NEW CHALLENGES IN THE DIGITAL AGE

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The right to play is expressly regulated in Article 31 of the Convention on the Rights of the Child (CRC). It is a right that is often forgotten, overlooked, or denied to children. In particular, children from marginalized groups (such as those with disabilities, girls, and ethnic minorities) are deprived of this right. The child can assert their right to play in both non-digital and digital environments. Especially the latter significantly impacts children's lives. Based on Article 31 of the CRC, states have, on the one hand, the obligation to ensure children have the opportunity to play. On the other hand, they have the obligation to create a safe environment for children's play, including in the digital environment.

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PRAVİCA OTROKA DO İGRE – NOVİ İZZİVİ V DİGİTALNEM OKOLJU

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Pravica do igre je izrecno urejena v 31. členu KOP. To je pravica, ki je pogosto pozabljena, spregledana ali odvzeta otrokom. Zlasti otroci iz marginaliziranih skupin (npr. invalidi, deklice, etnične manjšine) so mnogokrat prikrajšani za to pravico. Otroci lahko uveljavljajo svojo pravico do igre v nedigitalnih in digitalnih okoljih. Zlasti slednje ima tudi pomemben vpliv na življenje otrok. Na podlagi 31. člena KOP so države po eni strani dolžne otrokom zagotoviti možnost igre, po drugi strani pa so dolžne ustvariti varno okolje za igro otrok, tudi v digitalnem okolju.

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Erziehe die Kinder nicht mit Gewalt und Strenge zum Lernen, sondern leite sie durch das, was ihren Geist amüsiert.
Not by force shall the children learn, but through play.
(Plato)

1 Einleitung[1]

Mit der Verabschiedung des Übereinkommens über die Rechte des Kindes[2] oder kurz Kinderrechtskonvention (im Folgenden als KRK) haben die Vereinten Nationen (im Folgenden als UNO) 1989 einen wichtigen Schritt in Richtung der Anerkennung der Kinderrechte im Völkerrecht gemacht. Die KRK hat heute 196 Mitgliedstaaten und stellt die fundamentale völkerrechtliche Verpflichtung zur Berücksichtigung der Grundrechte von Kindern dar. Die Vereinigten Staaten von Amerika (im Folgenden als USA – United States of America) sind der einzige Staat, der nicht KRK-Mitgliedstaat ist. Die USA haben zwar 1995 die KRK unterzeichnet, haben sie aber niemals ratifiziert. Das bedeutet, dass die USA die in der KRK beinhalteten Rechte unterstützen, aber nicht rechtlich an ihre Respektierung gebunden sind (Rico & Janot, 2021, S. 280).

Die KRK besteht aus 54 Artikeln, die voneinander abhängig, verbunden und unteilbar sind, und wird durch drei Fakultativprotokolle ergänzt und konkretisiert:

a) Fakultativprotokoll betreffend die Beteiligung von Kindern an bewaffneten Konflikten (2000);
b) Fakultativprotokoll betreffend den Verkauf von Kindern, die Kinderprostitution und die Kinderpornografie (2000);
c) Fakultativprotokoll betreffend eines Mitteilungsverfahren (2011).

Heute stellt die KRK ein wichtiges internationales Abkommen dar, der sich vollkommendem Schutz von Kindern und ihren Rechten widmet, die in verschiedenen Lebensbereichen des Kindes (z. B. Bildung, Gesundheit, Justiz usw.)

[1] Ins Deutsche übersetzt von Mladen Kraljić, email: druzina.kraljic@gmail.com
[2] Die Kinderrechtskonvention wurde von der Generalversammlung der Vereinten Nationen am 20 November 1989 mit der Resolution Nr. 44/25 verabschiedet; Uradni list (Gesetzblatt) SFRJ – Mednarodne pogodbe (Internationale Abkommen) Nr. 15/90, Akt über die Notifizierung der Nachfolge von Übereinkommen der Vereinten Nationen und Übereinkommen der Internationalen Atomenergiebehörde, bekanntgemacht in Uradni list RS – Mednarodne pogodbe Nr. 9/92.

erkennbar, sichtbar und auch an der Umsetzung beteiligt sind). Damit Kinderrechte sinnvoll sind, reicht es nicht aus, dass der Staat die KRK annimmt oder gar ratifiziert, sondern er muss sie auch in der Praxis umsetzen (Rico & Janot, 2021, S. 280). Daher können wir die Tatsache nicht ignorieren, dass viele Kinder auf der ganzen Welt (sowie in unserem Land) zahlreiche Verletzungen der ihnen durch die Kinderrechtskonvention garantierten Rechte erleiden.

Die Bedeutung des Spiels für Kinder wurde bereits 30 Jahre vor der Verabschiedung des KRK anerkannt, wie in der Erklärung über die Rechte der Kinder von 1959 in Absatz 3 dargelegt. Artikel 7 legt fest, dass das Kind alle Möglichkeiten zum Spielen und zur Unterhaltung haben muss, die auf dieselben Ziele wie Bildung abzielen müssen. Gesellschaft und Behörden müssen sich dafür einsetzen, die Wahrnehmung dieses Kinderrechts zu fördern. Mit dem Ziel, das Recht von Kindern auf Spiel zu schützen, zu bewahren und zu fördern, wurde 1961 die internationale Nichtregierungsorganisation International Play Association (im Folgenden als IPA) gegründet. Im Jahr 1989 hat die KRK dieses in Artikel 31 explizit niedergeschriebene Recht des Kindes weiter gestärkt und damit wesentlich zu seiner raschen Entwicklung, Etablierung und Anerkennung beigetragen. Im Jahr 2014 verabschiedete die IPA die Erklärung zur Bedeutung des Spiels (englisch *Declaration on the Importance of Play*) und betonte zusätzlich die Bedeutung des Spielens in der modernen Zeit für alle Kinder.

2 Das Kind und das Recht auf Spiel

Schon im antiken Griechenland war das Spiel (griech. *„paidia"*) untrennbar mit Kindern (griech. *„paides"*) verbunden. Sowohl Kinder als auch Spiel erlangten in der klassischen Zeit zwischen 500 und 300 v. Chr. eine größere kulturelle Bedeutung als die Alphabetisierung und damit die Bildung (griech. „*Paideia*"). Als antiker Denker erkannte Platon, dass das Spielen die Entwicklung von Kindern als Erwachsene beeinflusst. Er schlug vor, das Spiel für soziale Zwecke zu regeln (D'Angour, 2013, S. 293).

Das Spiel und seine Hauptvertreter (Kinder) wurden viele Jahre lang mit Sorge betrachtet. Spielen wird als Zeitverschwendung beschrieben und betrachtet, als etwas, das man tut, wenn man nicht arbeitet, und als leichtfertiges und marginales Verhalten. Infolgedessen (und das ist leider vielerorts auch heute noch der Fall)

wurde das Spielen in Schulen, Wohngebieten und am Arbeitsplatz weniger gut gewährleistet, da es als Geld-, Platz- und Personalverschwendung angesehen wurde (Hughes, 1990, S. 59).

Eine in Thailand durchgeführte Umfrage ergab, dass sich die meisten thailändischen Eltern der Bedeutung des Spielens für Kinder nicht bewusst sind. Weil Eltern möchten, dass ihre Kinder Unterricht haben und mit Gleichaltrigen um einen Platz an renommierten Universitäten konkurrieren, um einen gut bezahlten Job zu bekommen. Ihrer Meinung nach ist das Spiel Zeitverschwendung und nicht der richtige Weg zur Zeitoptimierung. Sie glauben, dass Lernen der richtige Weg, Zeit zu verwalten, weil es das Wissen verbessert. Von Kindern wird auch erwartet, dass sie ihrer Familie helfen. Daher ist es wichtig, dass sie eine gute Ausbildung erhalten, was beispielsweise als Schlüssel zu einem gut bezahlten Job erachtet wird (IPA, 2010, S. 15).

Auch eine japanische Umfrage ergab eine negative Einstellung gegenüber dem Spiel. Dies hat jedoch einen anderen Grund. In Japan wird das Spielen von Kindern im öffentlichen Raum der Gemeinschaft oft als unerwünscht und unwillkommen angesehen. Deshalb möchten Eltern nicht, dass ihre Kinder von ihren Nachbarn als Unruhestifter abgestempelt werden und lassen ihre Kinder lieber in geschlossenen Räumen (IPA, 2010, S. 28).

Auch die British Psychological Society berichtete in den Ergebnissen ihrer Forschung, dass die Spielmenge im Vergleich zur Vergangenheit zurückgegangen sei und dass Spielen als Belohnung oder der Verlust eines Spiels als Strafe angesehen werde (Waters-Davies, 2022, S. 17). In manchen Gemeinschaften kann das Spielen negativ gesehen werden und Erwachsene schränken es sogar ein (z. B. in einer Umgebung oder Gesellschaft, in der Kinder viele familiäre, häusliche oder berufliche Verpflichtungen haben) (Cowan, 2020, S. 17).

Trotz der erwähnten negativen Ansichten über das Spiel können wir die Tatsache nicht ignorieren, dass das Spiel heute als der wahrscheinlich effektivste, umfassendste und angemessenste Lernprozess gilt, den Kinder erhalten können. Das Spiel kann nicht mit Zeitverschwendung gleichgesetzt werden. Deshalb ist Spielen für uns alle sehr wichtig, insbesondere aber für Kinder, die aufgrund von Armut, Überfüllung, Umweltverschmutzung oder familiären oder kulturellen

Zwängen kaum oder gar keinen Zugang zu geeigneten Spielumgebungen haben (Hughes, 1990, S. 59).

2.1 Das Spiel als Grundrecht des Kindes

Fronczek schrieb (2009, S. 28), dass Spielen ein Schlüsselfaktor für das Wohlbefinden von Kindern sei. Daher können und dürfen wir das Spiel nicht als Luxus betrachten oder es von der Verwirklichung anderer Rechte abhängig machen. Hughes (1990, S. 58) warnte bereits 1990, dass das Recht der Kinder auf Spiel als „vergessenes Recht" von Kindern gelte. Kindern fehlt oft die Zeit, der Raum und die Ressourcen, um so zu spielen, wie sie es wollen oder brauchen. Oftmals sind sie auch „Opfer" unerreichter Kindheitsziele und Wünsche ihrer Eltern, die sie nun durch ihre Kinder auf Kosten ihrer Kinder erreichen wollen. Letzteres äußert sich insbesondere in der Missachtung und dem Verzicht auf das Spielrecht, um ein höheres Ziel der Eltern zu erreichen (mehr dazu s. Kraljić, 2014).

Das Spielrecht hat auch einen wirtschaftlichen, sozialen und kulturellen Charakter. Durch das Spiel lernen Kinder, sich an der Gemeinschaft zu beteiligen und die Regeln und Wertesysteme der Gesellschaft, in der sie leben und lernen, zu akzeptieren (Mrnjaus, 2014, S. 218). Das Recht auf Spielen sollte nicht als Luxusrecht angesehen werden, sondern als Grundrecht eines Kindes wahrgenommen werden, das es bereits in der Kindheit (Lott, 2022, S. 757) von großer Bedeutung ist, aber auch später, wo das Kind zu einem erwachsenen Menschen wird. Kinder beginnen ihr Leben als völlig abhängige Wesen, die auf Erwachsene, die sie erziehen und anleiten müssen, um unabhängig zu werden, angewiesen sind. Dennoch sind Kinder nicht Eigentum ihrer Eltern oder des Staates, sondern haben den gleichen Status als Mitglieder der Menschheitsfamilie (UNICEF, o. D.). Spielen spielt eine wichtige Rolle in ihrer Entwicklung. Was ein Kind spielerisch lernt, kann ihm auch im späteren Familienalltag (z. B. beim Spielen mit Babys), privat (z. B. Spiele mit geografischem oder Kochinhalt) oder im Berufsleben (z. B. beim Spielen mit der Kinderkasse) von Nutzen sein.

Die KRK bildet keine Rechtehierarchie. Alle darin dargelegten Rechte müssen stets im Interesse des Kindeswohls ausgeübt werden und kein Recht darf durch eine negative Auslegung des Kindeswohls gefährdet werden (Committe on the Rights of the Children, 2013a, S. 3). Das in Artikel 31 KRK definierte Recht des Kindes auf

Spiel muss daher als eigenständiges Recht verstanden und behandelt werden. Es ist ein Recht, das für die weitere Entwicklung des Kindes von entscheidender Bedeutung ist.

Artikel 31 KRK erkennt das Recht jedes Kindes auf Spiel, Ruhe, Freizeit, Erholungsaktivitäten und freie und uneingeschränkte Teilnahme am kulturellen und künstlerischen Leben an[3]:

»(1) Die Vertragsstaaten erkennen das Recht des Kindes auf Ruhe und Freizeit an, auf Spiel und altersgemäße aktive Erholung sowie auf freie Teilnahme am kulturellen und künstlerischen Leben.

(2) Die Vertragsstaaten achten und fördern das Recht des Kindes auf volle Beteiligung am kulturellen und künstlerischen Leben und fördern die Bereitstellung geeigneter und gleicher Möglichkeiten für die kulturelle und künstlerische Betätigung sowie für aktive Erholung und Freizeitbeschäftigung.«

Auch das Spiel der Kinder ist die primäre Form der Teilnahme. Durch das Spiel lernen Kinder die Regeln des sozialen Lebens und soziale Normen kennen und werden sich ihrer Verbindung zu Erwachsenen in ihrer Gemeinschaft bewusst (Mrnjaus, 2014, S. 220). Das Spielen von Kindern hat seine eigene Kultur, die sich von der der Erwachsenen unterscheidet und auf die Erwachsene möglicherweise nur schwer zugreifen oder sie verstehen können (Cowan, 2020, S. 15). Ein Spiel einer Generation unterscheidet sich normalerweise von einem Spiel einer anderen Generation. Die vorherige Generation versteht das Spiel der nächsten Generation oft nicht. Sie betrachten es mit ihren eigenen Augen, ihrer eigenen Wahrnehmung und ihrem eigenen Verständnis und haben oft kein Verständnis für das Spiel der nächsten Generation. Erwachsene definierten viele Spiele sogar als gefährlich, unangemessen und sogar tabu (z. B. Spiele im Zusammenhang mit Spielzeug in Form von Waffen, Spiele im Zusammenhang mit Tod und Sterben ...). Allerdings darf nicht außer Acht gelassen werden, dass Kinderspiele (Kinder im Alter von 4 bis 6 Jahren) häufig mit Ereignissen (z. B. Naturkatastrophen, Kriege, COVID-19, Tod in der Familie) verbunden sind, die sich entweder direkt oder indirekt auf ihr Alltagsleben auswirken (Cowan, 2020, S. 16). So reflektierten Kinder nach Katastrophen wie den Bombenanschlägen vom 11. September 2001 in den USA und die Erdbeben in Neuseeland auch über die Themen der Spiele, die mit ihren

[3] Für den Bedarf dieses Beitrags wird nur das Recht auf Spiel behandelt und analysiert, während das Recht auf Ruhe und Freizeit, das zwar eng mit dem Spiel verbunden ist, sowie das Recht auf Teilhabe am kulturellen und künstlerischen Leben nicht Teil des vorliegenden Beitrags sein werden.

Erfahrungen mit diesen Ereignissen in Zusammenhang standen (Cowan, 2020, S. 16 und 25).[4] Während des Spiels erleben oder wiedererleben Kinder auch verschiedene Emotionen, darunter Frustration, Entschlossenheit, Leistung, Enttäuschung und Selbstvertrauen, und durch das Spielen können sie lernen, diese Emotionen zu kontrollieren (The British Psychological Society, o. D., S. 2). Durch das Spiel erwerben Kinder auch den sog. emotionalen Kompetenzen (englisch *emotional literacy*) (Lott, 2022, S. 770).

2.2 Verpflichtungen der Staaten

Aus Artikel 31 KRK ergibt sich daher, dass die Vertragsstaaten verpflichtet sind, das Spielrecht des Kindes anzuerkennen. Die Staaten haben die Pflicht, sicherzustellen, dass Kinder die Möglichkeit haben, an verschiedenen kulturellen, Freizeit- und künstlerischen Aktivitäten zu spielen und teilzunehmen. Es wird jedoch nicht festgelegt, wie die Länder dies tun sollen. So wird das Kinderrecht auf Spiel im slowenischen Familiengesetz[5] (im Folgenden als FG) nirgends ausdrücklich erwähnt.

Trotz der Tatsache, dass jedes Kind das Recht auf Spiel besitzt, gibt es Gruppen, in denen die Gefahr besteht, dass Kinder in diesen Gruppen dieses Recht nicht erlangen oder nicht verwirklichen können. Zu diesen gefährdeten Gruppen zählen z.B. Mädchen, in Armut lebende Kinder, Kinder mit besonderen Bedürfnissen und Kinder aus autochthonen oder indigenen oder Minderheitengemeinschaften (Committee on the Rights of the Child, 2013b, S. 15-16).

Durch Artikel 31 beauftragt die KRK die Vertragsstaaten, die relevanten Schlüsseldienste und -agenturen zu identifizieren, die für das Spiel der Kinder verantwortlich sind. Diese Dienste sollen Pläne entwickeln, die Spielmöglichkeiten für Kinder jeden Alters und jeder Fähigkeit umfassen. Letzteres ist besonders wichtig, um die Möglichkeit zu gewährleisten, unter schwierigen Bedingungen zu spielen, aufgrund derer Kinder in Bezug auf das Spielen oder den Zugang zum Spiel eingeschränkt sein können (z. B. Krieg, Naturkatastrophen) (Bernard von Leer Foundation, 2009, S. 26).

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[4] Auch Sigmund Freud sah die Bedeutung des Spiels, insbesondere wenn Kinder negative Erlebnisse im wahren Leben erlebt haben: *»Wir sehen, dass Kinder in ihrem Spiel alles wiederholen, was auf sie einen großen Eindruck im wahren Leben macht, sodass sie dadurch die Kraft des Einflusses mindern und sozusagen selbst Herren der Situation werden.«*

[5] Družinski zakonik (Familiengesetz) (FG): Uradni list RS, Nr. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – Entsch. VerfG, 94/22 – Entsch. VerfG, 5/23.

2.3 Mehrwert durch den General Comment No. 17 (Allgemeiner Kommentar)

Trotz der Tatsache, dass Artikel 31 der KRK im Jahr 1989 das Recht eines Kindes auf Spielen anerkannte, erhielt (und tut?) dieses Recht einen eher stiefmütterlichen Ansatz. In diesem Jahr jährt sich der wichtige Schritt des UN-Ausschusses für die Rechte des Kindes (im Folgenden als UNCRC[6]) im Februar 2013 zum 10. Mal. Damals wurde der Allgemeine Kommentar zu Artikel 31 KRK verabschiedet. Die allgemeinen Kommentare, die das UNCRC zu den Artikeln der KRK akzeptiert, sollen ein besseres Verständnis der KRK unterstützen. Die allgemeinen Kommentare sollen den Menschen helfen zu verstehen, wie das UNCRC in der Praxis funktioniert und wie politische Änderungen dazu beitragen können, dass mehr Kinder ihre Rechte wahrnehmen. Hierbei handelt es sich um offizielle Stellungnahmen, die die Bedeutung eines ausgewählten Aspekts der Kinderrechte, der näher erläutert oder hervorgehoben werden muss, näher erläutern (Play for Wales, 2022, S. 6).

Vor elf Jahren, im Februar 2013, verabschiedete die UNCHR den Allgemeinen Kommentar Nr. 17 zu den Rechten aus Artikel 31 KRK, in dem betont wird, dass die in Artikel 31 KRK zum Ausdruck gebrachten Rechte zusammenhängen und, obwohl sie sich häufig überschneiden und bereichern, unterschiedliche Merkmale aufweisen (Committe on the Rights of the Children, 2013b, S. 4).

Allgemeiner Kommentar Nr. 17 erklärt damit Regierungen und anderen auf der ganzen Welt die Bedeutung und Wichtigkeit der in Artikel 31 KRK hervorgehobenen Rechte und betont, dass jedes Kind die Rechte aus Artikel 31 KRK genießen können muss, unabhängig davon, wo es lebt, aus welchem kulturellen Umfeld sie stammen oder welchen Elternstatus es hat (Play for Wales, 2022, S. 6).

[6] UN-Ausschuss für die Rechte des Kindes = United Nations Committee on the Rights of the Child = UNCRC.

2.3.1 Warum ist das Spiel für Kinder wichtig?

Obwohl Artikel 31 KRK das Spielrecht ausdrücklich verankert, ergibt sich aus Artikel 31 KRK nicht, was ein „Spiel" überhaupt ist. Es besteht kein Zweifel, dass das Spiel vor allem mit Kindern in Verbindung gebracht wird. Aber das Spiel hat sich im Laufe der Geschichte verändert. Heutzutage gibt es unzählige verschiedene Spiele (z. B. mit einem Ball, Karten, Deduktionsspiele), daher ist es nicht verwunderlich, dass wir keine universelle Definition des Spielens haben. Deshalb ist der Allgemeine Kommentar Nr. 17 KRK[7], der das Spiel definiert, umso willkommener.

Kinderspiel ist somit jedes Verhalten, jede Aktivität oder jeder Prozess, der von Kindern selbst initiiert, kontrolliert und strukturiert wird. Das Spiel findet statt, wann und wo immer sich die Gelegenheit bietet. Eltern und andere Erwachsene (z. B. Erziehungsberechtigte) können dabei helfen, die Umgebung zu schaffen, in der das Spiel stattfindet, das Spiel selbst ist jedoch nicht erforderlich. Es basiert auf intrinsischer Motivation und erfolgt um seiner selbst willen, nicht als Mittel zum Zweck. Spielen beinhaltet die Ausübung von Unabhängigkeit, körperlicher, geistiger oder emotionaler Aktivität und kann unendliche körperliche und intellektuelle Auswirkungen haben und in Gruppen oder einzeln durchgeführt werden (IPA, 2014, S. 3). Spielformen verändern und passen sich im Laufe der Kindheit an. Die Schlüsselmerkmale des Spiels sind Spaß, Unsicherheit, Herausforderung, Flexibilität und Unproduktivität. Zusammen tragen diese Faktoren zum Spaß am Spiel und damit auch zum Anreiz bei, das Spiel weiterzuspielen. Obwohl das Spiel oft als unwichtig angesehen wird, bekräftigt die UNCRC, dass das Spiel eine grundlegende und wesentliche Dimension der Kindheitsfreude und ein wesentlicher Bestandteil der körperlichen, sozialen, kognitiven, emotionalen und spirituellen Entwicklung ist (Committee on the Rights of the Child, 2013b, S. 5-6).

Der Allgemeine Kommentar Nr. 17 definiert das Spiel als vom Kind initiiertes, kontrolliertes und strukturiertes Verhalten, das optional ist, von internen Motivationen angetrieben wird und kein Mittel zum Zweck ist und die Schlüsselmerkmale Spaß, Unsicherheit, Herausforderung, Flexibilität und Nichtproduktivität aufweist (Committee on the Rights of the Child, 2013b, S. 5–6).

[7] Englisch *General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31).* CRC/C/GC/17.

Laut Richard-Elsner fördern Spiel und Unterhaltung Kreativität, Vorstellungskraft, Selbstvertrauen, Selbstwirksamkeit sowie kognitive und emotionale Stärke. Im Spiel verhandeln Kinder, lösen Konflikte, treffen Entscheidungen, lernen ihre soziale Stellung in der Welt zu gestalten und schließen Freundschaften (Richard-Elsner, 2013, S. 4).

Wie bereits erwähnt, ist Spielen für die Entwicklung eines Kindes von entscheidender Bedeutung, da es zu seinem kognitiven, körperlichen, sozialen und emotionalen Wohlbefinden beiträgt. Mit Hilfe und durch das Spiel entwickelt das Kind seine sozialen Kompetenzen, indem es Verständnis, Austausch, Kommunikation, Verhandlung usw. lernt und erlernt. Das Spiel ermöglicht es dem Kind, bewusste und unbewusste Erfahrungen über seine eigenen Gefühle gegenüber seinem Leben und den Dingen, die um es herum geschehen, auszudrücken. Eltern können ihre Beziehungen zu ihren Kindern erheblich verbessern, indem sie lernen, mit ihnen zu spielen (Bibaleze.si, 2022).

Die Verwirklichung des Rechts eines Kindes auf Spiel verschafft dem Einzelnen auch Zugang zu künftigem Wohlstand, indem es ihm die Fähigkeiten vermittelt, die er für den Erfolg in der Arbeitswelt benötigt. Durch die Entwicklung divergenten und konvergenten Denkens erhalten Kinder Zugang zu den Ressourcen, die sie für die Schaffung zukünftiger Güter und Dienstleistungen benötigen. Das Spiel ermöglicht Kindern eine eigenständige und würdevolle Teilhabe an der Wirtschaft. Der wirtschaftliche Charakter des Rechts auf Spiel ist daher klar, da das Recht auf Spiel für die Entwicklung von Fähigkeiten und Ressourcen notwendig ist, die für den Zugang zu Wohlstand erforderlich sind, und für die Entwicklung von Wissen und Fähigkeiten, die für eine aktive Tätigkeit auf dem Arbeitsmarkt erforderlich sind (Lott, 2022, S. 767).

Das Spiel kann die Aufmerksamkeit, Hemmung und Impulskontrolle eines Kindes verbessern. Das Spiel fördert außerdem Unabhängigkeit und Selbstvertrauen. Das freie Spiel ist besonders wichtig, da es den Kindern ermöglicht, beim Spielen allein ein Gefühl der Unabhängigkeit zu entwickeln und ihre Identität, Fähigkeiten und Persönlichkeit zu entdecken (Lott, 2022, S. 771). Durch das Spielen entwickeln Kinder auch Mechanismen, die es ihnen ermöglichen, sich vollständig zu entwickeln und zu überleben (Mrnjaus, 2014, S. 220).

Auch wenn der positive Nutzen des Spielens für das Kind sowohl aus kurz- als auch aus mittelfristiger und langfristiger Sicht hervorgehoben wird, darf nicht übersehen werden, dass bestimmte Spielweisen auch negative Auswirkungen auf das Kind haben können Konsequenzen, die sich in den drei genannten zeitlichen Aspekten auch negativ auswirken können. Wir haben bereits mehrfach erwähnt, dass das Spiel spontan stattfindet, dass die Methode und die Regeln vom Kind erstellt werden, aus Sicht des Kindes kann eine bestimmte Aktion jedoch ein Spiel darstellen, aus allgemeiner sozialer Sicht jedoch z Handlungen können als schädlich, manche sogar als kriminell eingestuft werden.

2.3.2 Das freie Spiel

Es ist zu unterscheiden zwischen dem sogenannten „freien Spiel" (English *free play*), was häufig zur Abgrenzung zu organisierten Freizeit- und Lernaktivitäten verwendet wird, die natürlich eine ebenso wichtige Rolle in der kindlichen Entwicklung spielen. Die Merkmale des freien Spiels sind Kontrolle, Unsicherheit, Flexibilität, Neuheit und Unproduktivität und damit diejenigen, die ein hohes Maß an Freude und gleichzeitig einen Anreiz zum Weiterspielen schaffen (Bernard von Leer Foundation, 2009, S. 25). Sluss (2005) definiert freies oder unstrukturiertes Spiel als jede freiwillige Aktivität eines Kindes, die ihm Zufriedenheit bringt und von dem Kind unabhängig von der Anleitung eines Erwachsenen ausgeführt wird. Freispiel zeichnet sich auch dadurch aus, dass das Kind sich nicht auf das Ergebnis der Aktivität, sondern auf die Aktivität selbst konzentriert.

Das freie Spiel ist daher für Kinder sehr wichtig, da es die kognitive, soziale, emotionale und körperliche Entwicklung des Kindes beeinflusst (Loudoun, Boyle & Larsson-Lund, 2022, S. 1). Es ist auch wichtig, weil es Kreativität, Vorstellungskraft und Fähigkeiten zur Problemlösung fördert, für Bildung und Lernen sowie für die Förderung von Gesundheit und Wohlbefinden (Cowan, 2020, S. 6). Besonders deutlich wird die Bedeutung des Spiels für das Lernen. Spielerisches Lernen stellt eine der effektivsten Methoden dar, Wissen zu erwerben und zu festigen. Dies kann jedoch nicht mit freiem Spiel gleichgesetzt werden, da das Kind in diesem Fall unter kontrollierten Umständen, nach bestimmten Regeln und mit dem Ziel spielt, die von Erwachsenen gesetzten Ziele zu erreichen. Der Schlüssel zum freien Spiel ist die Freiheit des Kindes (Varuška Živa, o. D.). Erwachsene können dazu beitragen, eine Umgebung zu schaffen, in der freies Spiel stattfindet, das Spiel selbst sollte jedoch

nicht verpflichtend sein, sondern sich an der inneren Motivation des Kindes orientieren. Das Kind sollte das Spiel aus eigener Initiative und autonom spielen und nicht als Mittel zum Zweck (IPA, 2014, S. 3).

Auch wenn das freie Spielen von Kindern gefördert wird, darf nicht außer Acht gelassen werden, dass viele kostenlose Spiele für Kinder auch Regeln haben und dass das Spielen nach den Regeln ein wichtiger Aspekt des Spiels ist (IPA, 2010, S. 10). Der Schlüssel hier ist, dass die Schöpfer der Regeln die Kinder selbst sind. Kinder ändern und ergänzen sie oft spontan (z. B. Alterszusammensetzung der Gruppe). Dadurch werden die Anpassungs- und Gestaltungsfähigkeit des Kindes sowie die Wahrnehmung und Akzeptanz sozialer Unterschiede weiterentwickelt (z. B. Einbeziehung eines behinderten Kindes in das Spiel).

Heute hat sich die Sicht auf das Kinderspiel stark verändert. Eltern glauben zwar, dass Kinder das Recht haben zu spielen, aber sie sind in der Regel diejenigen, die beurteilen, was für das Kind angemessen und vor allem ungefährlich ist. Vor allem aus Sicherheitsgründen schränken Eltern das freie Spiel ihrer Kinder ein, konditionieren es und passen es so an, wie sie es für sicher und vorteilhaft für Kinder halten. Sie bewerten dies aus ihrer eigenen Perspektive und nicht aus der des Kindes. So war und ist z.B. das Klettern auf Bäume für Kinder sehr reizvoll. Aber, heute haben die Eltern die Wahl und Kontrolle über das Spiel übernommen. So kommt es häufig vor, dass Eltern einerseits der Meinung sind, dass das vom Kind gewählte Spiel nicht sicher, pädagogisch und nützlich genug ist und dass es sich andererseits schmutzig macht, wenn es ein ungeeignetes Kind als Partner wählt... Eltern betrachten dies alles aus ihrer eigenen Perspektive und geben dem Kind somit nicht einmal die Möglichkeit, die Spielregeln zu wählen, zu kontrollieren und zu bestimmen.

Andererseits werden die Freizeit und das Spiel der Kinder zunehmend mit Lernen und nicht mehr mit der Freude am Spiel selbst in Verbindung gebracht. Das Spielen von Kindern ist nämlich institutionalisiert und findet zunehmend in spezialisierten Zentren statt (Mrnjaus, 2004, S. 227), die ansonsten speziell eingerichtet sind und enorme Möglichkeiten für Kinder bieten. Allerdings verlagert sich dieses Spiel häufig von der Natur in „geschlossene (kommerzielle) Räume", wo es wiederum den von Erwachsenen festgelegten Regeln unterliegt (z. B. bestimmte Spiele sind altersbeschränkt; kein „Austoben", kein lautes Reden …). Damit ist das Spiel der

Kinder nicht mehr frei, sondern wird zumindest teilweise wieder von Erwachsenen organisiert, geleitet und kontrolliert.

2.4 Wales und Schottland – Beispiel guter Praxis

Das UNCRC ermutigt Länder, den Grundsatz der Spielsuffizienz (englisch *principle of play sufficiency*) zu übernehmen. Die Verwirklichung dieses Grundsatzes hängt von der Fähigkeit der Kommunen ab, die zeitlichen, räumlichen und psychologischen Voraussetzungen für das Spielen von Kindern zu schaffen. Um dies sicherzustellen, sind jedoch Änderungen in der nationalen und lokalen Regierung, in den örtlichen Gemeinschaftspraktiken und in von Erwachsenen geführten Institutionen sowie in unseren eigenen Häusern erforderlich, um Umgebungen zu schaffen, die das angeborene Spielverhalten von Kindern stärker unterstützen und berücksichtigen (Waters-Davies, 2022, S. 21; Ludicology, 2019).

Der Grundsatz der Suffizienz des Spiels sollte die lokalen Behörden auf einem Weg leiten, auf dem sie sich zunehmend auf Möglichkeiten konzentrieren, wie Erwachsene (sowohl in ihrer beruflichen Rolle als auch im täglichen Kontakt mit Kindern) eine fürsorglichere Rolle übernehmen können, welche die Bedeutung dessen, dass Kinder finden in ihrer unmittelbaren Umgebung Zeit und Raum zum Spielen finden, anerkennt. Dieses Prinzip verlangt von Erwachsenen, mehr Aufmerksamkeit auf die vielfältigen Möglichkeiten zu richten, auf denen Erwachsene und Kinder bei der gemeinsamen Gestaltung der Spielbedingungen direkt und aus der Ferne miteinander verbunden sind (Ludicology, 2019).

Im Jahr 2002 veröffentlichte die walisische Regierung die weltweit erste nationale Spielrichtlinie. Die Richtlinie basierte auf dem Grundsatz, dass alle Kinder das Recht haben, zu spielen. Es spiegelt das Engagement der Regierung wider, sicherzustellen, dass Kinder und ihre Bedürfnisse im Mittelpunkt der politischen Entscheidungsfindung stehen. Wales war damit das erste Land der Welt, das Gesetze zum Spielrecht von Kindern einführte. Der Gesetzgeber verpflichtet die lokalen Behörden, angemessene Spielmöglichkeiten für Kinder in Wales zu prüfen und sicherzustellen. Dies hat Wales mit der Children and Families (Wales) Measure 2010 getan, in der in Kapitel 2 (Spiel und Partizipation) Artikel 11 „Spielmöglichkeiten“

definiert.[8] Der oben genannte Artikel verpflichtet die örtlichen Behörden zu prüfen, ob in ihrem Gebiet ausreichende Spielmöglichkeiten für Kinder vorhanden sind. Die Verordnung, die dies festlegt, kann Folgendes umfassen: i) eine Beschreibung der Aspekte, die bei der Beurteilung der Angemessenheit zu berücksichtigen sind; ii) das Datum, bis zu dem die erste Beurteilung erfolgen muss; iii) Häufigkeit der Beurteilung; iv) Methode zur Überprüfung der Noten; v) Veröffentlichung der Noten (Absatz 2 von Artikel 11). Die Kommune muss daher in ihrem Bereich ausreichend Spielmöglichkeiten für Kinder bereitstellen, soweit dies unter Berücksichtigung der Beurteilung (Absatz 3 von Artikel 11) vernünftigerweise möglich ist. Die Kommunalbehörde muss außerdem Informationen über Spielmöglichkeiten für Kinder in ihrem Gebiet veröffentlichen und die veröffentlichten Informationen auch aktualisieren (Artikel 11 Absatz 4). Bei der Wahrnehmung ihrer Aufgaben muss die Kommune auch die Bedürfnisse behinderter Kinder und die Bedürfnisse von Kindern unterschiedlichen Alters berücksichtigen. Dabei ist es notwendig, sowohl qualitative als auch quantitative Möglichkeiten des Spiels sicherzustellen (Absatz 5 von Artikel 11).

Schottland hat 2013 die „Scotland's National Play Strategy" (Folgenden als Strategy) verabschiedet, die einen wichtigen politischen Rahmen für die Förderung des Rechts von Kindern auf Spielen bietet. Die Strategy bietet lokalen Behörden und Gemeinden Leitlinien zur Schaffung, Sicherung und Aufrechterhaltung des Zugangs von Kindern zu Spielräumen und Spielmöglichkeiten. Die Strategie verlangt von den lokalen Behörden, den Spielangebotsbedarf in ihren Gebieten regelmäßig zu bewerten und entsprechende Spielpläne zu erstellen. Stellen Sie ausreichend Spielgeräte für Kinder in ihren Gemeinden sowie sichere und zugängliche Orte zum Spielen bereit.

[8] So: *»11 .Local authority duties in respect of play opportunities for children (1) A local authority must assess the sufficiency of play opportunities in its area for children in accordance with regulations. (2) Regulations may include provision about— (a) the matters to be taken into account in assessing sufficiency; (b) the date by which a first assessment is to be carried out; (c) frequency of assessments; (d) review of assessments; (e) publication of assessments. (3) A local authority must secure sufficient play opportunities in its area for children, so far as reasonably practicable, having regard to its assessment under subsection (1). (4) A local authority must— (a) publish information about play opportunities in the authority's area for children, and (b) keep the information published up to date. (5) In performing its duties under this section, a local authority must have regard (among other things)— (a) to the needs of children who are disabled persons (within the meaning of section 1 of the Disability Discrimination Act 1995 (c. 50); (b) to the needs of children of different ages. (6) In this section— "play" includes any recreational activity; "sufficient", in relation to play opportunities, means sufficient having regard to quantity and quality.«*

Wenn Schottland und Wales ein Beispiel für gute Praxis sein können, was lokale Behörden tun können, um die Verwirklichung und Achtung des Rechts eines Kindes auf Spielen sicherzustellen, können wir daraus schließen, dass wir in Slowenien (zumindest in einigen Gemeinden) noch weit davon entfernt sind. Das Problem der Verwirklichung dieses Kinderrechts zeigt sich vor allem im städtischen Umfeld, wo es vielerorts an geeigneten Spielplätzen für Kinder, geeigneten Spielen für verschiedene Altersgruppen usw. mangelt. Maribor kann sicherlich zu solchen Städten gezählt werden, wo in den letzten Jahren spürbare Fortschritte gemacht wurden, ist aber immer noch weit davon entfernt, als zweitgrößte Stadt des Landes als Stadt definiert zu werden, die genügend Möglichkeiten und angemessene Spielflächen und Spielplätze für Kinder jeden Alters bietet, insbesondere für solche mit besonderen Bedürfnissen.

3 Recht auf Spiel und das digitale Umfeld

Heutzutage verbringen Kinder aus verschiedenen Gründen viel Zeit online. Zu dieser Zeit gehört auch das Spiele spielen, mit Freunden und Verwandten kommunizieren, moderne Musik und andere Trends verfolgen, digitales Marketing verfolgen und sich verschiedene Formen von Daten beschaffen. Hier kann die digitale Umgebung eine schnelle Quelle für bestimmte Informationen sein, die für die Schule benötigt werden. Andererseits ist die digitale Umgebung fast ein Raum, der nur schwer vollständig kontrolliert werden kann, insbesondere im Hinblick auf die Gefahren, die für Kinder lauern können (z. B. unangemessene Inhalte, Anonymität, Pornografie, Gewalt unter Gleichaltrigen, finanzielle Fallen ...).

Die Digitalisierung hat alle Bereiche unseres Privat- und Geschäftslebens durchdrungen. Daher ist es nicht verwunderlich, dass auch der Bereich Spiele, Gaming und Spielzeug unter den Einfluss der Digitalisierung geraten ist. Spiele, beispielsweise Videospiele, die digital auf Konsolen, Computern oder mobilen Geräten, einschließlich mobiler Telefone, gespielt werden, sind zur neuen dominanten Kulturform des 21. Jahrhunderts geworden (Sefton-Green, o. D.).

Der Zugang zur digitalen Umgebung und ihre Nutzung sind wichtig für die Verwirklichung der Rechte und Grundfreiheiten von Kindern, für ihre Inklusion, Bildung und Zusammenarbeit sowie für die Aufrechterhaltung familiärer und sozialer Beziehungen. Wenn Kinder keinen Zugang zur digitalen Umgebung haben

oder dieser Zugang aufgrund schlechter Konnektivität eingeschränkt ist, kann dies ihre Fähigkeit beeinträchtigen, ihre Menschenrechte vollständig auszuüben (Council of Europe, 2018, S. 13).

Das Recht auf Spiel erstreckt sich heute auch auf das digitale Umfeld (Livingstone & Pothong, 2021a, S. 16). 2021 wurde der Allgemeine Kommentar Nr. 25 über das digitale Umfeld,[9] der auch das Recht auf Spiel im digitalen Umfeld adressierte und dabei sechs Arten der Förderung des Spiels von Kindern im digitalen Umfeld hervorhob, verfasst:

a) das Schätzen der Merkmale des freien Spiels und die Meinung der Kinder über ihr Spiel (Absatz 106);
b) das Erkennen der Vorteile des freien Spiels im digitalen Umfeld (Absatz 107);
c) die Vertragsstaaten sollten Fachkräfte, Eltern und Erziehungsberechtigte regulieren, entwickeln und Leitlinien bereitstellen und gegebenenfalls mit Anbietern digitaler Dienste zusammenarbeiten, um sicherzustellen, dass digitale Technologien und Dienste, die für Kinder gedacht sind, von ihnen genutzt werden oder Kinder in ihrer Freizeit betreffen, konzipiert und erweitert werden und so genutzt werden, dass die Möglichkeiten der Kinder für Kultur, Erholung und Spiel verbessert werden. Dazu kann die Förderung von Innovationen beim digitalen Spielen und damit verbundenen Aktivitäten gehören, die die Unabhängigkeit, persönliche Entwicklung und den Spaß der Kinder unterstützen (Allgemeiner Kommentar Nr. 25, Absatz 108);
d) die Sorge für ein Gleichgewicht zwischen digitalem und nicht-digitalem Spiel (Absatz 109);
e) die Förderung der "Verspieltheit bereits im Ansatz" und die Verringerung des "Risikos bereits im Ansatz" (Absatz 110);
f) das Stellen des digitalen Spiels in den Rahmen der Kinderrechte (Absatz 111).

[9] Committee on the Rights of the Child (2021). *General comment No. 25 (2021) on children's rights in relation to the digital environment.* CRC/C/GC/25. Retrieved from: www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation (21. Juli 2023).

Mit dem Begriff digitales Umfeld ist nicht nur das Internet gemeint. Das digitale Umfeld umfasst das Zusammenspiel des sich entwickelnden Spektrums vernetzter digitaler Dienste (Inhalte, Software und Anwendungen) kommerzieller, öffentlicher und anderer Anbieter. Dazu gehören alle Computer- und digital vernetzten Technologien und Dienste, die oft als IKT bezeichnet werden, das Internet, das World Wide Web, mobile Geräte und Netzwerke, das Web, Anwendungen, Social-Media-Plattformen, elektronische Datenbanken, Big Data, das Internet der Dinge, Dienste der Informationsgesellschaft, das Medienumfeld, Online-Spiele und alle Entwicklungen, die den Zugang zum digitalen Umfeld ermöglichen (Stiftung Digitale Chancen, 2023). Eine ähnliche Definition des digitalen Umfelds wird auch für die eigenen Bedürfnisse durch die vom Europarat im Jahr 2018 verabschiedeten Leitlinien gegeben, die die Kinderrechte im digitalen Umfeld beachten, schützen und erfüllen müssen:

»das *"digitale Umfeld" umfasst die Informations- und Kommunikationstechnologien (IKT), einschließlich dem Internet, den mobilen und verbundenen Technologien und Geräten sowie digitalen Netzwerken, Datensammlungen, Inhalten und Diensten.«* (Council of Europe, 2018, S. 12).

Darüber hinaus bieten digitale Technologien durch das freie Spiel viele Möglichkeiten für die kindliche Entwicklung, Identitätsbildung, Fantasie und Geselligkeit. Livingstone & Pothong (2022, S. 485) stellen fest, dass das freie Spiel von Kindern heute sowohl in digitalen als auch nicht-digitalen Umgebungen bedroht ist. Drei Schlüsselfaktoren beeinflussen das Spiel in jedem Kontext:

a) die Menschen (entweder die Eltern, Unbekannte, Lehrer, andere Spieler, auch die Schöpfer von Politiken, Vermarkter, Dienstanbieter);
b) die Produkte (wie Spielzeug, Gegenstände, Anwendungen, kulturelle Artefakte sowie auch Plattformen und Netzwerkinfrastrukturen im digitalen Umfeld);
c) und Orte (wo das Spiel stattfindet, einschließlich der physischen und virtuellen Räume, daheim, in der Schule, im Einkaufszentrum, im Spiel Minecraft, auf Zoom) (Livingston & Pothong, 2022, S. 487).

Die digitale Umgebung fördert das Recht der Kinder auf Spiel, das für ihr Wohlbefinden und ihre Entwicklung von wesentlicher Bedeutung ist. Kinder jeden Alters berichteten, dass sie Freude, Interesse und Entspannung durch die Nutzung

einer breiten Palette digitaler Produkte und Dienstleistungen ihrer Wahl verspüren, befürchten jedoch, dass Erwachsene die Bedeutung des digitalen Spielens und die Art und Weise, wie es mit Freunden geteilt werden kann, möglicherweise nicht verstehen (Allgemeiner Kommentar Nr. 25, Absatz 106; siehe auch Livingstone & Pothong, 2021b). Allerdings können Kinder durch die Freizeit, die sie im digitalen Umfeld verbringen, Risiken und dem Entstehen von Schäden ausgesetzt sein, die sich z. mit versteckter Werbung oder mit sehr überzeugenden oder sogar glücksspielähnlichen Designelementen (Allgemeiner Kommentar Nr. 25, Absatz 119; Doek, 2021, S. 351).

Digitale Kultur-, Freizeit- und Spielformen sollen Kinder unterstützen und fördern sowie die vielfältigen Identitäten der Kinder, insbesondere ihre kulturellen Identitäten, Sprachen und ihr Erbe, widerspiegeln und fördern. Sie können die sozialen Fähigkeiten, das Lernen, den Ausdruck von Kindern, kreative Aktivitäten wie Musik und Kunst sowie ein Zugehörigkeitsgefühl und eine gemeinsame Kultur fördern (Allgemeiner Kommentar Nr. 25, Abs. 116). Die Teilnahme am kulturellen Leben im Internet trägt zu Kreativität, Identität, sozialem Zusammenhalt und kultureller Vielfalt bei. Die Vertragsstaaten sollten daher sicherstellen, dass Kinder die Möglichkeit haben, ihre Freizeit zu nutzen, um mit Informations- und Kommunikationstechnologien zu experimentieren, sich online auszudrücken und am kulturellen Leben teilzunehmen (Allgemeiner Kommentar Nr. 25, Abs. 107).

Interessante Ergebnisse wurden in einer britischen Umfrage gefunden, bei der jugendliche Befragte dachten, sie seien zu alt, um offline zu spielen. Dabei identifizierten sie sich mit dem digitalen Spielen, schlossen aber auch Aktivitäten ein, die ihnen offline, also in einer nicht-digitalen Umgebung, möglicherweise kindisch vorkommen. So dachten sie beispielsweise, dass Verstecken zu spielen oder so zu tun wäre kindisch, aber sie spielten in einer digitalen Spielumgebung, in der es beim Inhalt des Spiels um Verstecken ging (Livingston & Pothong, 2022, S. 490). Sie fanden daher heraus, dass die Freuden des Versteckspiels oder des Rollenspiels in neuen Formen fortbestehen und immer noch das Bedürfnis nach Unterhaltung, Experimentieren, Identitätsbildung und Entscheidungsfreiheit befriedigen, wenn auch auf eine Weise, die den Normen von Gleichaltrigen und den verfügbaren Ressourcen entspricht (Bird & Edwards, 2015). Letztere wechselten daher in die digitale Umgebung und passten sich den digitalen Herausforderungen an, die Kinder annahmen.

Wie bereits erwähnt, hat die Digitalisierung alle Bereiche unseres Lebens durchdrungen. Digitale Inhalte sind heute aus dem Privat- und Geschäftsleben nicht mehr wegzudenken. Wenn wir uns auf die positiven Aspekte der Digitalisierung konzentrieren, können wir sie auch im Spielbereich finden. Digitale Technologien sind für die Entwicklung von Kindern wichtig geworden, da ihre Präsenz im Privat- und Geschäftsleben erst in Zukunft zu erwarten ist. Die Kinder von heute werden bereits im Zeitalter digitaler Technologien geboren. Sie sind sog. Digital Natives. Es darf nicht außer Acht gelassen werden, dass sich die Schwelle zum Eintritt in die „digitale Welt" fast schon in die sehr frühe Kindheit verschoben hat. Digitale Spiele begleiten Kinder schon bevor sie z.B. Sie gehen oder sprechen selbstständig. Digitale Technologien spielen bei ihrer Entwicklung bereits heute eine äußerst wichtige Rolle. Sie treffen sie zu Hause, in der Schule, im Verkehr, im Gesundheitswesen ... Die Kinder von heute, zumindest in unserem sozialen Umfeld, wachsen und entwickeln sich gemeinsam mit der Digitalisierung.

Vorteile von Spielen, die im digitalen Umfeld stattfinden, können sein:

a) Spiele im digitalen Umfeld können sehr schnell neuen Trends folgen und sich an verschiedene (z. B. gesellschaftliche) Veränderungen anpassen (z. B. folgt das digitale Fußballspiel FIFA jedes Jahr neuen Konstellationen in Fußballvereinen mit einer neuen Version);
b) Spiele im digitalen Umfeld ermöglichen das Spielen oder die Kommunikation trotz der geografischen Entfernung der Spieler;
c) das Spielen von Spielen im digitalen Umfeld ermöglicht die Pflege oder den Aufbau neuer Freundschaften (Loudoun, Boyle & Larsson-Lund, 2022, S. 11), was sich, während der COVID-19-Pandemie als besonders wichtig erwiesen hat;
d) durch digitale Spiele ist es möglich, Kinder aus anderen Ländern oder Städten kennenzulernen, was im wirklichen Leben ziemlich schwierig oder sogar unmöglich wäre;
e) digitale Spiele (z. B. Sandbox-Spiele (z. B. Sim-City, Roblox, Fortnite, Minecraft) ermöglichen viel Kreativität und Fantasie, da Spieler ihre eigene virtuelle Welt, ihren eigenen Avatar, ihr eigenes Haus und ihre eigenen Autos erschaffen können. Auch klassische Spiele können in der digitalen Welt gespielt werden (z. B. Verstecken);

f) auch für Bildungszwecke und als Form der Wissensvermittlung haben sich digitale Spiele als willkommen erwiesen, da Kinder sie mit weniger Widerstand akzeptieren als klassische Lernformen, z.B. aus Büchern (Loudoun, Boyle & Larsson-Lund, 2022, S. 10).

Jedenfalls werden mit Spielen im digitalen Umfeld auch bestimmte negative Gesichtspunkte in Verbindung gebracht:

a) sie werden mit Sucht in Verbindung gebracht;
b) sie verursachen Probleme im Bereich der geistigen Gesundheit (z. B. die *Facebook-Depression*);
c) die körperlichen Aktivitäten der Kinder lassen nach (z. B. Sitzen, Fettleibigkeit) (Loudoun, Boyle & Larsson-Lund, 2022, S. 10; Richard-Elsner, 2013, S. 5);
d) auch finanzielle Gefahren lauern auf die Kinder – das Weiterkommen im Spiel kann mit der Bezahlung von 'Spielgeld' bedingt werden (z. B. Juwelen, Münzen, …), dass man nur durch die Bezahlung mit richtigem Geld erwerben kann;
e) durch bestimmte Online-Spiele können Kinder auch aggressiver Werbung für bestimmte Produkte ausgesetzt sein, sei es für Kinder oder Erwachsene, wie auch das sog. '*freemium*'[10] (Doek, 2021, S. 351);
f) Auch das Spielen in einer digitalen Umgebung kann feindselig oder gefährlich sein, da das Kind unangemessenen Inhalten ausgesetzt sein kann (Livingstone & Pothong, 2022, S. 496). Darüber hinaus ermöglicht die digitale Umgebung ein höheres Maß an Anonymität oder bietet die Möglichkeit für falsche Identitäten und damit verbundene verschiedene Formen von „Cyber-Gewalt" (z. B. *grooming, sexting, happy slapping, cyberstalking, scapegoating*).

Die Freizeit von Kindern im digitalen Umfeld kann gefährdet sein, beispielsweise durch undurchsichtige oder irreführende Werbung oder sehr ansprechende oder spielerische Gestaltungsmerkmale. Die Vertragsstaaten sollten sicherstellen, dass

[10] Das Wort '*freemium*' entspringt der englischen Sprache und stellt die Kombination der Worte »*free*« (frei) und »*premium*« (Prämie) dar. Freemium stellt das Geschäftsmodell dar, das insbesondere im Internet auftaucht, wobei z. B. die grundlegenden Funktionen kostenlos sind, während für die fortgeschrittenen Funktionen bezahlt werden muss. Damit werden die Benutzer, in unserem Fall die Kinder, dazu gedrängt, virtuelle Gegenstände oder Funktionalitäten zu kaufen (Gu, Kannan & Ma, 2018, S. 10; Doek, 2021, S. 351; Van der Hof et al., 2020, S. 845).

Unternehmen Kinder nicht durch den Einsatz dieser oder anderer Techniken ins Visier nehmen, die darauf abzielen, Geschäftsinteressen gegenüber denen von Kindern zu begünstigen, indem sie Datenschutz-, Privatsphären- und Sicherheitsansätze und andere Regulierungsmaßnahmen einführen oder anwenden (Allgemeiner Kommentar Nr. 25, Punkt 110). Im digitalen Umfeld werden Kinder von frühester Kindheit an mit modernen Werbe- und Marketingtechniken vertraut gemacht. Da die Fähigkeit von Kindern, fundierte kommerzielle Entscheidungen zu treffen, geringer ist als die von Erwachsenen, sind sie daher stärker verschiedenen Marketingmanipulationen ausgesetzt (z. B. dem Ausblenden von Werbung in Spielen oder der Ermutigung von Kindern zum Spielen oder Kaufen von Produkten). Die moderne Kommerzialisierung wirkt sich auch negativ auf die Beziehung zwischen Eltern und Kindern aus und kann den ungesunden Lebensstil von Kindern verschärfen und gesundheitliche Probleme verursachen (Doek, 2021, S. 351).

Die Vertragsstaaten sollten sicherstellen, dass die Förderung von Möglichkeiten für Kultur, Freizeit und Spiel im digitalen Umfeld mit der Bereitstellung attraktiver Alternativen an den physischen Orten, an denen Kinder leben, in Einklang steht. Vor allem in der frühen Kindheit erwerben Kinder Sprache, Koordination, soziale Fähigkeiten und emotionale Intelligenz vor allem durch Spielen, zu dem auch körperliche Bewegung und der direkte Kontakt mit anderen Menschen gehören. Für ältere Kinder können Spiel und Erholung, die körperliche Aktivität, Mannschaftssportarten und andere Freizeitaktivitäten im Freien umfassen, der Gesundheit sowie den funktionellen und sozialen Fähigkeiten zugutekommen (Allgemeiner Kommentar Nr. 25, Absatz 109). Einige der aufgeführten Vorteile stellen sich sofort ein, während andere sich im Laufe der Zeit entwickeln. Die Vorteile des Spielens hängen ebenfalls miteinander zusammen, nämlich dass Spiele sowohl mit ihrem intrinsischen Wert (Spaß, Freude und Freiheit) als auch mit ihrem instrumentellen Wert (Lernen und Entwicklung) zusammenhängen (The British Psychological Society, o. D., S. 2).

Die Vertragsstaaten oder Unternehmen können Richtlinien, Alterseinstufungen, Kennzeichnungen oder Zertifizierungen in Bezug auf bestimmte Formen des digitalen Spielens und der Freizeitgestaltung bereitstellen, um die Sicherheit und Privatsphäre von Kindern zu gewährleisten. Die genannten Einschränkungen sollten jedoch nicht so formuliert werden, dass sie den Zugang von Kindern zur gesamten

digitalen Umgebung einschränken oder ihre Möglichkeiten zur Freizeitgestaltung oder andere Rechte beeinträchtigen (Allgemeiner Kommentar Nr. 25, Punkt 111).

Gemäß Artikel 31 der Zivilprozessordnung sind die Staaten verpflichtet, das Recht des Kindes auf Spiel anzuerkennen und die Spielmöglichkeit sicherzustellen. Selbstverständlich erstreckt sich diese Verpflichtung auch auf das digitale Umfeld. Allerdings ist es schwieriger, das Recht eines Kindes auf Spiel in einer digitalen Umgebung sicherzustellen als in einer nicht-digitalen Umgebung. Um das Recht auf Spiel im digitalen Umfeld zu verwirklichen, sollten die Länder geeignete Maßnahmen ergreifen, um sicherzustellen, dass alle Kinder angemessenen, erschwinglichen und sicheren Zugang zu Geräten, Konnektivität, Diensten und Inhalten haben, die speziell für Kinder bestimmt sind (Council of Europe, 2018, S. 14). Am besten wäre es natürlich, wenn dies im Kreise der Familie und im privaten Bereich gewährleistet werden könnte. Da dies jedoch nicht immer möglich ist, was sich auch während der COVID-19-Pandemie als problematisch erwiesen hat (sowie beispielsweise in Zeiten und Gebieten mit Krieg oder anderen bewaffneten Konflikten, Armut, ländlichen Gebieten usw.) Allerdings würden die Staaten dies zumindest im öffentlichen Raum sicherstellen – insbesondere in Bildungseinrichtungen und anderen Einrichtungen, die sich um Kinder kümmern. Die Staaten werden insbesondere aufgefordert, besondere Maßnahmen für Kinder in prekären Situationen zu ergreifen. Dies sind insbesondere: i) behinderte Kinder; ii) Kinder, die in Pflegefamilien leben; iii) Kinder, denen die Freiheit entzogen wurde oder deren Eltern ihrer Freiheit entzogen wurden; iv) Kinder im Kontext internationaler Migration; v) Kinder auf der Straße und vi) Kinder in ländlichen Gemeinden (Council of Europe, 2018, S. 14).

Die Staaten sind außerdem verpflichtet, Maßnahmen zu ergreifen, um die Entwicklung digitaler Kompetenzen zu fördern[11], einschließlich der Medien- und Informationskompetenzen, sowie der Ausbildung über die digitale Staatsangehörigkeit.[12] Mit solchen Anreizen soll versucht werden sicherzustellen, dass Kinder einerseits über bestmögliche Kompetenzen zur Integration in die

[11] Die digitalen Kompetenzen sind Schlüsselkompetenzen des lebenslangen Lernens, welche die sichere und kritische Anwendung von Technologien der Informationsgesellschaft bei der Arbeit, in der Freizeit und bei der Verständigung einschließt. Sie wird von den grundlegenden IKT-Kenntnissen unterstützt: die Verwendung von Computern für das Suchen, bewerten, Speichern, Herstellen, Darstellen und den Austausch von Informationen sowie die Verständigung und Zusammenarbeit in gemeinschaftlichen Internetnetzwerken (Portal OSV, o. D.).
[12] Die digitale Staatsangehörigkeit kann als »Recht auf Teilnahme an der Gesellschaft im Internet« bezeichnet werden (Pangrazio & Sefton-Green, 2021).

digitale Umwelt verfügen und andererseits die damit verbundenen Risiken beherrschen und bewältigen können (z. B. *Sexting, Grooming*...) . Die Vermittlung digitaler Kompetenzen sollte von den frühesten Jahren an in den Lehrplan der Grundschule integriert werden und dabei die Entwicklungsfähigkeiten der Kinder berücksichtigen (Council of Europe, 2018, S. 18). Letzteres ist in Slowenien leider immer noch unzureichend in die Lehrpläne der Schulen integriert.

4 Schlussgedanken

Ungeachtet der Tatsache, dass das Spielen Menschen und Kinder fast von Anfang an begleitet und die KRK 1989 das Recht auf Spielen ausdrücklich als ein grundlegendes Kinderrecht bezeichnet hat, können wir daraus schließen, dass es eines der Kinderrechte ist, nämlich auf der einerseits das am wenigsten bekannte und verstandene Recht und andererseits das am wenigsten anerkannte oder am häufigsten geleugnete, unterschätzte und ignorierte Recht. All dies führt zu unbeabsichtigten oder vorsätzlichen Verletzungen der Rechte dieses Kindes. Es wird von Eltern, Schulen, Ländern usw. missachtet. Wichtige Interessengruppen sind sich der Bedeutung des „freien Spiels" nicht ausreichend bewusst. Heutzutage spielen Kinder, aber ihr Spiel ist oft auf die gewünschten Ziele ausgerichtet (z. B. die Verbesserung des Schulerfolgs), ist zeitlich festgelegt (z. B. nach dem Lernen), Erwachsene passen die Spielregeln an (z. B., wenn Sie nicht so spielen möchten). das, spielen Sie auf keinen Fall). Das Spielen von Kindern ist oft voller Einschränkungen, die mit verschiedenen Ängsten und Drohungen seitens der Eltern verbunden sind (z. B. achten Sie darauf, nicht zu fallen; achten Sie darauf, sich nicht schmutzig zu machen; wenn Sie nicht fleißig sind, werden Sie nicht spielen; Ihr Freund ist nicht der beste Freund dafür). Spiel; …). Selbst Spielplätze, insbesondere in Städten, bieten wenig Raum für die Entwicklung kindlicher Spiele, insbesondere für ältere Kinder. Daher ist es nicht verwunderlich, dass Kinder heutzutage den Kontakt zum freien Spiel verlieren, was besonders in Slowenien zu beobachten ist. Dadurch wird absichtlich oder unabsichtlich in das Recht des Kindes auf Spiel eingegriffen.

Heutzutage greifen Kinder häufig auf Spiele im digitalen Umfeld zurück. Leider werden sie oft von ihren Eltern selbst in diese Welt geführt, was bereits bei kleinen Kindern sichtbar ist. Diese Spielwelt ist für Eltern zunächst einfacher zu erreichen und zu verwalten. Was sich natürlich ändern kann, wenn man erwachsen wird, wo

in der digitalen Welt das Angebot an Spielen nahezu endlos ist – jeder kann finden, was ihn interessiert (z. B. Musik, Tanz, Filme, Spiele, ...). In der digitalen Welt der Spiele können 'Zuflucht' und 'Erfolg' auch von Kindern gefunden und erreicht werden, die dazu in der realen Welt möglicherweise nicht in der Lage sind oder aufgrund gesetzlicher Beschränkungen für sie nicht zugänglich sind (z. B. ein zwölfjähriges Kind nimmt an Wettbewerben im Autofahren teil oder ist Mitglied einer Fußballmannschaft, die es liebt).

Zusammenfassend lässt sich sagen: Staaten sollten bestrebt sein, ihre ihnen durch Artikel 31 der KRK auferlegten Verpflichtungen sowohl in der digitalen als auch in der nicht-digitalen Welt zu erfüllen. In einer nicht-digitalen Welt soll die Möglichkeit des Spielens jedem Kind, auch unter Berücksichtigung seines Alters, nähergebracht und zugänglich gemacht werden. Insbesondere gilt es, die Verwirklichung des Rechts auf Spiel für Kinder aus Randgruppen (z. B. Kinder mit besonderen Bedürfnissen) sowie für Kinder sicherzustellen, deren Möglichkeiten zum Spielen, insbesondere zum Freispiel, durch verschiedene Ereignisse) eingeschränkt sind (z. B. Familientragödien, Naturkatastrophen, Kriege). Für letztere ist das Spiel besonders wichtig, um mit den Ereignissen umzugehen, die sie miterlebt haben. Insbesondere werden die Länder aufgefordert, die Sicherheit, den Schutz und die Würde von Kindern bei der Ausübung des Rechts auf Spiel im digitalen Umfeld zu gewährleisten. Letzteres ist ein hervorragender Ausgangspunkt für verschiedene Missbräuche und Verletzungen anderer Kinderrechte. Staaten sollten geeignete Maßnahmen zur Kontrolle des digitalen Umfelds vorsehen, diese sollten jedoch nicht so sein, dass Kinder vollständig unterdrückt oder unmöglich gemacht werden, am digitalen Umfeld teilzunehmen. Das digitale Umfeld ist das Umfeld, in dem Kinder gemeinsam spielen, und mit zunehmendem Erwachsenwerden nehmen die Eingriffe in dieses Umfeld zu, sei es privat oder beruflich. Die Digitalisierung hat alle Bereiche unseres Lebens durchdrungen. Eine angemessene Herangehensweise an das „digitale Spiel" kann ein hervorragender Ausgangspunkt für die Bereiche Bildung, Gesundheit, Kommunikation, usw. sein. Länder, darunter Slowenien, sollten so schnell wie möglich mit der digitalen Kompetenz beginnen, da ein professioneller, objektiver und neutraler Ansatz äußerst wichtig ist. Auf diese Weise kann das Kind sicherer ins digitale Umfeld gelangen und sein Recht, darin zu spielen, auch wahrnehmen. Sowohl in nicht-digitalen als auch in digitalen Umfeldern sollten Kinder und nicht Erwachsene die Schöpfer des freien Spiels sein. Damit wird ein

großer Schritt in die Richtung getan, dass dieses Kinderrecht nicht länger ein vergessenes Recht bleibt.

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The Best Interests of the Child and the Digitalization of Education

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This article explores the relationship between the principle of the best interests of the child on the one hand and the right to education in the digital environment on the other hand. It presents and provides a comparison of national and international legal frameworks regarding the best interests of the child and the right to education. The main objective of the article is to identify and analyse the advantages as well as the disadvantages of the digitalization of education, taking into account the conditions of the best interests of the child, for a more efficient implementation of the rights of the child in the digital environment. In addition, the article attempts to explain the impacts and consequences of the digitisation of education. The aim of the article is to analyse and present the contribution of the digital environment to the child's long-term best interests.

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NAJVEČJA OTROKOVA KORIST IN DIGITALIZACIJA IZOBRAŽEVANJA

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Članek raziskuje razmerje med načelom največje koristi otroka na eni strani ter pravico do izobraževanja v digitalnem okolju na drugi strani. Predstavlja in primerja nacionalne in mednarodne pravne okvire glede načela največje koristi otroka in pravice do izobraževanja. Glavni cilj članka je identificirati in analizirati prednosti ter slabosti digitalizacije izobraževanja, ob upoštevanju pogojev največje koristi otroka, za učinkovitejšo izvajanje pravic otroka v digitalnem okolju. Poleg tega članek poskuša pojasniti vplive in posledice digitalizacije izobraževanja. Namen članka je analizirati in predstaviti prispevek digitalnega okolja k dolgoročni koristi otroka.

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1 Introduction

Nowadays, the right to education is considered a common public good, one of the most important human rights, and a highly important right for children. Education presents a crucial part of a child's life and has a major impact on the individual's future. The importance of children's rights, the freedom to play and explore, and the challenges of adult authority have shaped our understanding of children's use of the digital environment today, including the context of education. This has sometimes led to an overly solemn tone but has also mobilised social resources to support children's educational and participatory opportunities, even in the digital age (Livingstone, 2012, p. 34). The provision and implementation of children's rights must always aim at the best interests of the child. The best interest of the child is a dynamic concept that requires judgement appropriate to the specific context (Howe & Covell, 2013, p. 37).

In the following, the principle of the best interests of the child will be analysed and presented at both international and national levels in the Republic of Slovenia, followed by an explanation of the right to education at both international and national levels. Furthermore, the paper will address the aspects of the digitalization of education, the advantages and disadvantages, and the different factors that influence the realization of the right to education in the digital environment and conclude with the results of the research.

2 The principle of the best interests of the child

Children's rights began to be protected when children were no longer seen as mere objects of their parents' protection but were recognised as human beings with dignity. In the process, they became the holders of various rights, both at the familial and societal level (Lorubbio, 2022, p. 13). At the same time, the principle of the best interests of the child has been developed for the purposes of the realisation of children's rights.

2.1 Convention on the rights of the child

The principle of the best interests of the child is particularly strongly promoted and protected in the Convention on the Rights of the Child (1989). The latter is considered to be a specific legal document in comparison to other international documents, as it is explicitly based on and aimed at the protection and promotion of children's rights and not the general population.

The Convention on the Rights of the Child was adopted by the United Nations on 20 November 1989 and is considered to be the first internationally binding document to explicitly recognise the rights of the child. It has been adopted by the largest number of countries of any internationally recognised legal document in history. In fact, it has been adopted by virtually every country in the world except the USA. It has entered into force in international law on 2 September 1990 (Akhtar & Nyamutata, 2020, p. 86). It has also been adopted by the Socialist Federal Republic of Yugoslavia and, in accordance with the Notification of succession in respect of United Nations Conventions and conventions adopted by IAEA (1992), also by the Republic of Slovenia.

2.1.1 The guiding principle

The Convention on the Rights of the Child covers all aspects of the child's life, recognising the political, social, economic, and cultural rights to which children are entitled. These rights are defined, including in terms of adults respecting them in their interactions with children. The rights of the child must always be the guiding principle in all contacts and relationships between children and adults. The Convention on the Rights of the Child also explains how adults and law enforcement authorities must work together to ensure that children's rights are realised. All the rights of the child represent a complex unity that is interdependent, interrelated, and equivalent to each other. It provides children with a legal basis according to which they can exercise their rights throughout their childhood, including, inter alia, throughout their education (Kraljić, 2020, p. 28).

The principle of the best interests of the child is defined in article 3(1) of the Convention on the Rights of the Child, according to which the best interests of the child must be the primary consideration in all activities relating to children, whether

they are carried out by public or private social welfare institutions, courts, administrative authorities or legislative bodies. To improve its implementation, the Committee on the Rights of the Child has adopted General Comment No. 14 (Committee on the Rights of the Child, 2013) on the right of the child to have their best interests as the primary consideration in all decisions relating to children. At the same time, the best interests of the child principle is one of the most important general guiding principles in the interpretation and implementation of children's rights. In this regard, General Comment No. 5, General Measures for the Implementation of the Convention on the Rights of the Child, should also be taken into account (Committee on the Rights of the Child, 2003).

The principle of the best interests of the child aims to ensure the full and effective realization of all the rights recognized in the Convention and the full development of the child (Committee on the Rights of the Child, 2013). The Committee has already stated that "an adult's judgement of the best interests of the child cannot prevail over the obligation to respect all of the child's rights under the Convention". It has also been pointed out that there is no hierarchy of rights in the Convention, all the rights set out therein are for the "best interests of the child," and no right can be compromised by a negative interpretation of the best interests of the child. The comprehensive obligation of the state is represented by the consideration of the best interests of the child, which should be guaranteed by all public and private social welfare institutions, courts, administrative and legislative bodies involving or relating to children. The latter also includes parents, even if they are not explicitly mentioned in article 3(1) of the Convention on the Rights of the Child.

The principle of the child's best interests is flexible and adaptable. It must be considered and defined on an individual basis, according to the specific situation of each individual child or group of children, taking into account their personal context, situation and needs. In concrete (individual) decisions, the best interests of the child must be assessed and determined in light of the specific circumstances of the individual child. Legislative decisions thus need to recognize and take into account the best interests of the child, applicable to a very extensive and diverse group of children. In both cases, the assessment and determination must be made in full respect of the rights set out in the Convention on the Rights of the Child and its optional protocols (Convention on the Rights of the Child, article 3(1)).

In relation to implementation measures, it is necessary to ensure that the best interests of the child are a primary consideration in the development and implementation of legislation and policies at all levels of government, which requires an ongoing process of child rights impact assessment to anticipate the impact on children and the realisation of their rights of any proposed law, policy or related to budget, as well as child rights impact on the assessment to assess the actual impact of implementation (Committee on the Rights of the Child, 2013).

2.2 Charter of fundamental rights of the European Union

Children's rights are also regulated at the level of European Union (EU) law, which, in accordance with article 3.a of the Constitution of the Republic of Slovenia (1991) and the principle of primacy, prevails over the national law of the Republic of Slovenia. In concrete terms, the rights of the child are explicitly addressed in the Charter of Fundamental Rights of the European Union (2000), which defines the rights of the child in article 24, according to which children have the right to the necessary protection and care to ensure their well-being.

2.2.1 Primary consideration

The principle of the best interests of the child is explicitly recognised in article 24(2) of the Charter of Fundamental Rights of the European Union, which states that the best interests of the child must be a primary consideration in all actions by public authorities or private bodies affecting children. At the same time, every child has the right to regular personal relations and direct contact with both parents, in so far as this is not contrary to his or her best interests, as provided for in article 24(3) of the Charter of Fundamental Rights of the European Union. The best interests of the child must be assessed in a broad sense, encompassing everything from basic material needs, affection and security needs, to physical, educational and emotional needs. In this context, the principle of the best interests of the child applies equally to all children, i.e., without discrimination on any grounds whatsoever (European Commission, 2013).

It should be pointed out that the principle of the best interests of the child, as set out in the Charter of Fundamental Rights of the European Union, is derived from a provision of the Convention on the Rights of the Child. The Charter of

Fundamental Rights of the European Union is, however, more concise because, for example, it does not explicitly regulate judicial proceedings in the context of the best interests of the child principle, as the Convention on the Rights of the Child does, but these are already contained in the provision on "public authorities". In addition, the Charter of Fundamental Rights of the European Union provides two further rights for children concerning the right to protection, such as the right to have their welfare taken into account, together with a provision on their views, and the right to maintain a personal relationship and direct contact with both parents on a regular basis (Klaassen & Rodrigues, 2017, p. 195).

2.3 Family code of the Republic of Slovenia

In the Republic of Slovenia, the principle of the best interests of the child is also explicitly regulated by the Family Code (Family Code, 2017), (Novak, 2019, p. 64). The foundation of the latter can be traced back to the provision of Article 56 of the Constitution of the Republic of Slovenia, which stipulates that the child is an independent bearer of rights and obligations, according to his/her age and maturity. The application of the principle of the best interests of the child comes into consideration, in particular, when weighing two human rights.

Article 7(1) of the Family Code clarifies that parents shall in all their actions concerning children, consider the best interests of the child. They shall raise children in respect of their person, individuality and dignity. Simultaneously, parents shall have priority over any other person concerning the responsibility and actions in the best interests of the child, as defined by article 7(2) of the Family Code. The priority given to the best interests of the child is particularly important when taking into account the child's personality, age, developmental stage and aspirations. The child's material, emotional and psychosocial needs must be adequately met by conduct that demonstrates parental care and responsibility towards the child. Parents must also provide appropriate educational guidance and proper encouragement for the child's development, as set out in article 7(3) of the Family Code.

Parents are under a so-called “positive obligation” to ensure that children's rights are guaranteed (Novak, 2019, p. 65). Article 7(4) of the Family Code lays down the rule, that in their activities and proceedings, national authorities and public authority holders, local authorities and other natural and legal persons shall act in the best

interests of the child. Therefore, the best interests of the child are the primary consideration of all entities in any relation to the child. At the same time, the state shall provide the conditions for the operation of non-governmental organisations and professional institutions for developing positive parenthood in accordance with article 7(5) of the Family Code defines.

In addition, article 8 of the Family Code provides for the special protection of children, according to which children enjoy special protection by the state whenever their healthy development is endangered and other interests of the child require it. This is a derivation or continuation of the principle of the best interests of the child. The healthy development of the child, including his or her mental and physical state and well-being, constitutes a public interest that must be protected to the fullest extent, which is why special protection for children has been provided (Novak, 2019, p. 77).

The state has, in the first place, a positive obligation to intervene or protect the best interests of children when the healthy development of the child is at risk. This involves assessing whether the child's healthy development is at risk, whether the child has suffered or is likely to suffer harm, and whether that harm or the likelihood of harm is the result of an omission or commission by the parents, or the result of psychosocial problems manifested in the child's behavioural, emotional, learning or other problems in his or her upbringing, as provided for in article 157 of the Family Code. At the same time, the state also has a positive obligation to intervene when the best interests of the child require it. In this context, the damage shall include damage to the child's physical and mental health and development, and to the child's property, in accordance with article 157(3) of the Family Code (Novak, 2019, p. 77).

Determining the child's best interests is a dynamic process and is considered on a particular child's individual merits. The latter depends on different criteria or influences on the child at a specific moment in time, in a specific life situation and can constantly be changing. The social, economic, and cultural environment of the child play a major influence. It must be recognised that the mental and physical health, well-being, healthy development, and welfare of the child constitute a public good, which, as such is protected at the highest level. At the same time, the child's opinion and will must be considered in the assessment of the best interests of the child, so that children have the opportunity to participate or be involved in the

matters that concern them. The best interests of the child are, therefore a set of balanced criteria (Novak, 2019, p. 73).

3 The right to education

National education systems are very different around the world. Of paramount importance for the realisation and protection of the child's right to education is the fact that it is enshrined in a number of international instruments in force at the global level, which guarantee that the child's right to education is free and accessible to all.

3.1 Right to education in international legal acts

The Republic of Slovenia is legally bound by a number of such international legal acts regulating the child's right to education, including the Convention on the Rights of the Child (CRC, 1990), the Convention against Discrimination in Education (CADE, 1964), the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights, 2000), and Protocol No.1 to the European Convention for the Protection of Human Rights (ECHR 1, 1952).

The UN Committee on the Rights of the Child, in its General Comment No. 1: The aims of education (Committee on the Rights of the Child, 2001) to the Convention on the Rights of the Child, states that children's right to education is the direct realisation of their dignity and human rights. It underlines the coherent nature of the provisions of the Convention on the Rights of the Child, promoting the efficient exercise of the right to education. The pursuit of an appropriate approach to the provision of education is essentially the promotion and realisation of all other human rights, while understanding their individuality (Akhtar & Nyamutata, 2020, p. 205).
The child's legal representatives also play a major role in the child's right to education, as article 18 of the Convention on the Rights of the Child gives them responsibility for the child's development, which must be in the best interests of the child, including education. This must be respected by the parents, and by the state and its authorities or institutions in contact with the child (Novak, 2004, p. 116).
The most protected level of education is the basic or primary level, which is protected as such in various international documents and national legal acts. It represents the minimum standards of education offered by the state to all people, especially children (Lundy, 2017, p. 364). Primary education is, so to speak, a

passport to the opportunities in life where children are given a chance to realise their ambitions, to be involved in different activities, to be respected, to be involved and to fulfil their ambitions. Because of its purpose, primary education must be accessible to all and thus offered as free to everyone (Kraljić, 2020, p. 28). Education law is regulated at both the national and international level, in constitutional provisions, laws and regulations, as well as in the various regulations of each school individually (Blokhuis, 2021, p. 1).

The state is under a positive obligation to ensure that the right to education is respected, fulfilled and protected or safeguarded. The exercise of the latter, however, obliges the state not to take measures that prevent or impair the exercise of the right to education. It must take measures to promote education and to ensure access for every member of society. The state must thus act as a guarantor of the right to education (Kraljić, 2020, p. 32).

The most common problems are the question of the resources needed to provide education, such as the lack of facilities and buildings for the proper delivery of education, staff shortages and the lack of books and other teaching aids for education (Kraljić, 2020, p. 32). Important efforts are also needed to guarantee the right to education during wartime and to reorganise the education system after the war, where countries face many challenges and problems (Sommers, 2004, p. 14). Further limitations on this right are caused by poverty in each individual's home, such as lack of decent clothing, the need for domestic help and care for younger siblings or sick relatives, problems with transport, etc. There is an urgent need to ensure that children who have already lived in an educationally deprived environment prior to primary education are included in education at an early age in order to eliminate or remedy the effects and prevent any further consequences of educational deprivation. The state must try to make education accessible, available, acceptable and flexible (Kraljić, 2020, p. 28). It is also important that parents or legal guardians support the child's education, both materially, financially and emotionally. (Oliphant & Ver Steegh, 2016, p. 288).

Teachers and other staff in each school carry out activities within the legal system to promote the rights of the child and prevent any violation. Laws are used to establish, design and build schools, employ school staff, acquire school supplies, prescribe the curriculum and adopt regulations for pupils. The law limits the rights and obligations

relating to the right to education, guarantees procedural protections in cases of school disciplinary offences, and prohibits policies that discriminate on the basis of race, national origin, sex, special needs or religion (Blokhuis, 2021, p. 1).

Education is also based on the total elimination of discrimination at all levels to ensure a minimum of equality and is one of the starting points for the exercise of other civil, political, economic, or social rights (United Nations Educational, Scientific and Cultural Organization, 2007, p. 7). The need to ensure that the right of the child to education is established as a fundamental human right is based on the idea that we live and exist in a moral relation to one another that is independent from any community but is a universal and essential right that must be primary and universal (Lee, 2013, p. 4).

However, the state, through legislation and ultimately the schools that deliver education, must also keep up with the trend towards modernisation and novelties of the digital age. This raises enormous challenges in terms of how to provide the potentially essential supplies needed by both teachers and pupils to ensure an effective education system. The impact of today's digital age can be seen in just a few years, rather than the decades it used to take before (Shapiro, 2002, p. 90). The expansion of democracy through knowledge is on the rise, both through formal education in schools and through education through digital technologies, which encourages a demand for change in the way school systems are governed locally and globally, and thus for greater accountability, openness, fairness and equality (UNESCO, 2015, p. 72).

3.2 National regulation of the right to education

In Slovenia, education and schooling are first defined at the constitutional level. article 57 of the Constitution of the Republic of Slovenia (hereinafter referred to as CRS) stipulates that freedom of education shall be guaranteed. Furthermore, primary education is compulsory and financed from public funds. In this context, the state creates opportunities for citizens to obtain a proper education.

Education is also regulated in other provisions of the CRS, namely under the rights of persons with disabilities in Article 52 of the CRS, the rights and duties of parents in article 54 of the CRS and the special rights of the indigenous Italian and Hungarian

ethnic communities in Slovenia in article 64 of the CRS. The rights of children are addressed in Article 56 of the CRS, according to which children are entitled to special protection and care. Children enjoy human rights and fundamental freedoms in accordance with their age and maturity. They shall be granted special protection against economic, social, physical, mental or other exploitation and abuse and such protection shall be regulated by law.

The law also regulates the situation of children and adolescents who are not being cared for by their parents, who have no parents or who are without adequate family care, and who, therefore, benefit from special protection by the state. The best interests of the child are explicitly mentioned in article 54 of the CRS, which provides that parents have the right and duty to maintain, educate, and bring up their children. However, this right and duty may only be deprived or limited for reasons provided by law in order to protect the best interests of the child.

Primary education is therefore the only compulsory level of education, and is for this reason the most important. It is regulated by the Basic School Act (Basic School Act, 2006), for primary education provided by public and private primary schools or as home education, as defined in article 1 of the Basic School Act. Parents have the right to choose the form of education, pursuant to article 5 of the Basic School Act. Hybrid forms of education, such as physical attendance at school and home education, are not provided by law.

The digitalization matter is mainly expressed in the Basic School Act through the non-mandatory optional subject of computer science, which is defined indirectly through article 17 of the Basic School Act. The latter does not explicitly list elective subjects at the exclusive level. The subject of computer science is defined in article 20a of the Basic School Act as a non-compulsory optional subject to be taught by the school to pupils in grades 4, 5 and 6, but the school does not teach non-compulsory optional subjects to pupils in a specialised programme with a lower educational standard.

The explanation above may mean that children who do not take a computer science subject at the end of primary school gain practically no knowledge of digital literacy, which in the digital age seems to be of utmost importance for an individual's future success in society (Webb, 2017, p. 446). The latter importance of digital literacy is

also referred to in the definition of the subject of computer science in the Primary School Curriculum (Zavod RS za šolstvo, 2013). This can have even greater implications for individuals who do not continue their education after primary school. A similar result can occur when the secondary school of one's choice also does not offer a computer science subject in the curriculum.

Upgrading Slovenian curricula with digital content is foreseen in the Digital Education Action Plan 2021-2027 (MIZŽ, 2022). Digital transformation of education is also envisaged in Digital Slovenia 2030 - the framework strategy for the development of the digital society by 2030 (Vlada RS, 2023), based on the European Commission document Europe's Digital Decade: digital targets for 2030 (European Commission, 2022).

4 The principle of the best interests of the child and the digitalization of education

There is no doubt that we live in a digital age, where a certain level of digital literacy is required for everyday tasks. Digitalization is practically inevitable or has already been introduced in a wide range of areas of our daily lives. Children are also confronted with digitalization, its challenges, advantages and disadvantages. However, with the rapid development of digitalization, the question arises about the need to digitise education, taking into account the principle of the best interests of the child.

The best interests of the child must be the primary consideration in ensuring and exercising children's rights. The best interest of the child is a dynamic concept that requires judgements appropriate to the specific context, which is also the case in education and digitalization (Howe & Covell, 2013, p. 37). The principle of the best interests of the child must be considered, in particular when the right to education comes into conflict with another right. The importance of the right to education in relation to the exercise of other rights, to which the digital environment or education through the digital environment could also contribute, should be recognised (UNESCO, 2007, p. 64).

In order to ensure the effective implementation of children's rights in relation to the digital environment, the United Nations Committee on the Rights of the Child adopted General Comment No. 25 on the Rights of the Child in Relation to the Digital Environment on 2 March 2021 (Committee on the Rights of the Child, 2021), which provides guidance on how states parties of the Convention on the Rights of the Child should adapt legislation to enable children to exercise their rights in the digital environment.

It points out that States parties of the Convention on the Rights of the Child should ensure that the best interests of the individual child are a primary consideration in all measures relating to the provision, regulation, design, management and use of the digital environment. In considering the best interests of the child, they should take into account all children's rights, including their rights to seek, receive and impart information, to be protected from harm and to have their views duly taken into account, and ensure transparency in the assessment of the best interests of the child and the criteria used (Committee on the Rights of the Child, 2021).

In *Campbell and Cosans v. the United Kingdom*, 1982, the European Court of Human Rights recognised that while the state must guarantee the exercise of the right to education, its regulation must never prejudice or impede other rights guaranteed by the European Court of Human Rights or its protocols (Ovey, Robin & White, 2006, p. 376). It is important to recognise the importance of the right to education in relation to the exercise of other rights, to which the digital environment, or education through the digital environment, could also contribute (UNESCO, 2007, p. 64).

Access to digital technology can help children learn about the full range of their civil, political, cultural, economic and social rights, and the lack of access to digital technologies in certain countries can increase inequalities around the world and also create new ones. Technology is practically present throughout a person's life, increasingly from childhood to adulthood (Committee on the Rights of the Child, 2021).

However, the state, through legislation, and ultimately the schools that deliver education, must also keep up with the trend towards modernisation and the digital age. This raises a number of challenges in terms of how to provide the potentially essential supplies needed by teachers and pupils to ensure an effective education

system in relation to digitalization. Today's effects of the digital age can be seen within a few years, rather than the decades it used to take, and it would be necessary to adapt the regulation of education in this area (Shapiro, 2002, p. 90).

It is also a positive obligation for the state to strive for a quality education system. This means that the education curriculum must include and respect the rights of the child, in the implementation of which the principle of the best interests of the child is always the guiding principle. In doing so, a non-discriminatory educational environment shall be provided which enables children to participate and develop to the best of their ability, to which the digitisation of education can also contribute (Shapiro, 2002, p. 90). Acting in the best interests of the child means that educational institutions should also focus on other aspects besides intellectual development, academic performance, and test results, meaning the entire child's development (Shapiro, 2002, p. 37). It is the development, progress and effective transition from a child to a functional adult in a society that requires the adaptation of education to the innovations offered by the digital environment.

Technology and the digital environment are found virtually everywhere around us, and almost everyone is exposed to a certain level of digitalization. It seems essential that individuals know how to use it accordingly and avoid the potentially harmful consequences of ignorance or the dangers that lurk in the digital environment. In fact, even young children, before they enter primary school, are already in contact with digitalization. Some of them have access to telephones, computers and so on. Consequently, education about it is also necessary, but in the Slovenian curriculum, we have a single subject on the digital environment, computer science, as an optional subject in three grades of primary school, when pupils can already have some experience of the digital environment, potentially as part of their everyday life. However, given the scale of the digital environment, it seems that, given the benefits or advantages and the dangers (Livingstone, 2016, p. 2) that digitalization brings, the state should go a step further and adapt the curriculum.

4.1 Advantages and disadvantages

It is undeniable that the use of the digital environment for educational purposes has both advantages and disadvantages (Mineev, Viktoruk & Artemyeva 2023, p. 76), as well as risks and certain exceptions and deviations on a case-by-case basis. The most

obvious benefits of using the digital environment for the purpose of realising the right to education are the following examples: easier access to the latest, relevant information, information from different sources (Griffin & Roy 2022, p. 7) and greater criticality in making comparisons between them; improved adaptation of education activities to individuals with learning difficulties, for example through different apps designed to enable such adaptations (Hooft & Graafland, 2018).

With the help of the digital environment, there is also the possibility of a wider range of exploration, more freedom of expression; exercising of the right to development; easier and expanded exploration of the fields of study that children are actually interested in, making it easier and potentially more successful for them to decide later on, through the education system, how and where to continue their education at higher levels of study (Young, 2017, p. 285). Creating educational programmes through the digital environment could also potentially improve education or homeschooling. There is also an advantage in creating a digitally literate population, which could prevent the consequences of incorrect or incautious use of the digital environment.

The latter, however, also entails certain disadvantages (Vintar Spreitzer, 2011, p. 22), such as various possibilities to abuse personal data, the development of addiction to the digital environment (Young, 2017, p. 155), health problems that can occur with excessive use, increased financial costs (UNESCO, 2015, p. 450; Kalenze, 2014, p. 171), increasing responsibilities for teachers and parents (Webb, 2017, p. 450) and similar issues. Peer violence is also an issue – it used to occur in schools, during break time, lunchtime, extended stay, etc. Nowadays, however, with the help of digital technology, peer violence is being taken out of the classroom and brought into homes, so that it does not stop at school, but can follow the child through the digital environment also at home (Young, 2017, p. 287).

Consideration must also be given, in particular, to the consequences of children's frequent use of screens and the threat of online abuse, which is why distance education should never completely replace education with physical presence in schools (United Nations, 2020), against all the benefits of digital education, or even education about the digital environment itself. On the basis of the above, it would be necessary to investigate thoroughly what actually constitutes a greater share of advantages or disadvantages and subsequently find out what is in the best interest of

the child. Children's use of the digital environment is reflected in their mental as well as physical health, their relationships with each other and their academic performance (Young, 2017, p. 288).

There are also concerns that digitisation is increasing the gap between the rich and the poor (Dhawan, 2020, p. 17), but on the other hand, the digital environment can also make certain information and knowledge available to the poor that has previously not been available to them, for example if they have publicly accessible computers or are helped to acquire them through the welfare programs of the state. In the Republic of Slovenia, the Promotion of Digital Inclusion Act provided for digital vouchers, as a financial incentive in the form of a credit, for the purchase of computer equipment or participation in educational programmes to acquire digital competencies (Promotion of Digital Inclusion Act, 2022, article 18).

4.2 Factors affecting the exercise of children's rights in the digital environment

The possibility and actual use of the digital environment for educational purposes is influenced by various factors such as the environment, parents, friends, age of the child, culture, gender, socio-economic status, psychological factor, emotional problems of each individual child, self-sufficiency, challenge-seeking, danger-seeking, etc. (Livingstone, 2012, p. 58). In particular, the age of the child is generally a key criterion in terms of what kind and to what extent of supervision would be necessary when children are using a digital environment for educational purposes. It would be expected that the level of supervision would decrease with the age of the child, precisely because of digital literacy and knowledge of the dangers that lurk online; on the other hand, as children grow older, they inherently want to discover and know a wider range of information that interests them, which in some cases introduces new dangers (Odink, 2019, p. 5).

When considering the best interests of the child, all children's rights should be taken into account, including their rights to seek, receive and impart information, to be protected from harm and to have their views duly taken into account, as well as ensuring transparency in the assessment of the best interests of the child and the criteria used, considering exercising their rights in the digital environment (Committee on the Rights of the Child, 2021). At the same time, it is also important

to consider which rights conflict with the right to education, and which rights can be exercised through the right to education (UNESCO, 2007, p. 64). The digital environment was not originally designed for children, but it plays an important role in children's lives (Livingstone, 2014, p. 2), as recognised in many recent international commentaries.

5 Conclusion

The digitisation of education brings with it numerous challenges and opportunities, enabling a more effective implementation of the right to education for all. In any case, the digitalization of education is, to a certain extent, necessary and inevitable for the realisation of the principle of the best interests of the child. Determining to what extent the digitalization of education should be implemented will require careful assessment and thorough analysis, as well as a great deal of research, in order to meet the conditions of the principle of the best interests of the child.

The digital environment offers many advantages in terms of making a wide range of information available to students, which is updated and topical, given the constant updating of information on the web. The use of smart computers, iPads, smart boards, etc., during education could offer many advantages to students and thus contribute to effective learning or education. Teacher supervision and guidance could help to ensure that students obtain information from verified websites so that they get authentic information rather than false or incorrect information, as can often happen when browsing the web.

Similarly, learning or education in a digital environment, with a wide range of applications and digital tools, could also provide effective and accessible education for individuals with learning difficulties, for whom the applications could be customised and the level of knowledge could potentially be increased. The latter could also prove to be an effective approach for children with disabilities, both those attending regular primary schools and those attending special primary schools (Bøttcher & Dammeyer 2016, p. 104). We must work to create opportunities where no child is left behind and equal opportunities are provided for everyone (Garber, 2010, p. 9).

It is precisely by educating people about the digital environment and helping them to use it, which could increase the level of digital literacy of the population and thus prevent potential risks for individuals in the digital environment. The use of the digital environment is practically inevitable for a functional society nowadays and even more so in the future. Education about the dangers of the digital environment can help to prevent risks and consequences before they arise or have the potential to arise.

Some level of digital transformation of education is inevitable, as digitalization is present in almost every aspect of our private and business lives. It is precisely for this reason that education about and through a digital environment is essential for the successful functioning of the individual in a digital society, making it an essential investment in a child's education.

Ensuring that a child receives a quality education means realising the child's long-term best interest, which is the time after the child reaches adulthood. Independent adult life and careers are often already dependent on knowledge of certain digital skills. It is therefore essential to strike a balance between the impact of digitisation on the education system and to adapt it so that the child can benefit not only in the short term, but also in the long term.

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Elimination of Child Marriage as One of the Measures to Achieve the Sustainable Development Goals by 2030

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Children are one of the most vulnerable groups of people due to their young age and immaturity, and as such they receive special protection in all areas. This is reflected in the extensive legal protection provided in several international instruments and national laws. One of the indicators that countries and international organizations are taking steps to protect them is also the 2030 Agenda for Sustainable Development, which was launched in 2015 by the Member States of the United Nations out of the multiannual »*let's change the world*« vision. It sets out 17 goals and actions to improve the world, with children as an important target group. A key action in the light of child protection is the elimination of harmful practices, covered by the Gender Equality Goal, which, among other things, aims to eradicate all harmful practices by 2030, such as child marriage, which have a strong impact on children, (mostly) girls, as they affect several aspects of the lives of »child brides« and could help achieve several Sustainable Development Goals.

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ODPRAVA OTROŠKIH POROK KOT EDEN OD UKREPOV ZA DOSEGO CILJEV TRAJNOSTNEGA RAZVOJA DO LETA 2030

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Ključne besede:
Agenda 2030,
otroci,
prenehanje škodljivih praks,
prenehanje otroških porok,
nasilje na podlagi spola

Zaradi svoje mladosti in nezrelosti so otroci ena najbolj ranljivih skupin ljudi ter kot taki prejemajo posebno zaščito na vseh področjih. To se odraža v obsežni pravni zaščiti, zagotovljeni v večih mednarodnih instrumentih in nacionalnih zakonih. Eden od kazalnikov, da države in mednarodne organizacije sprejemajo ukrepe za zaščito otrok, je tudi Agenda 2030 za trajnostni razvoj, ki so jo leta 2015 začele izvajati članice Združenih narodov. Agenda 2030 določa 17 ciljev in ukrepov za izboljšanje sveta, pri čemer so otroci pomembna ciljna skupina. Ključno dejanje v luči zaščite otrok je odprava škodljivih praks, ki jo pokriva cilj enakosti spolov, ki med drugim cilja na izkoreninjenje vseh škodljivih praks do leta 2030, kot so na primer otroške poroke, ki močno vplivajo na otroke, (večinoma) dekleta, saj vplivajo na več vidikov življenja "otroških nevest" in bi lahko pomagale pri doseganju več trajnostnih ciljev razvoja.

Univerzitetna založba Univerze v Mariboru

1 Introduction

Child. It represents the beginning of life and the possibility of the continuation of humanity. Because of its importance and vulnerability, it receives special protection in national and international regimes. One of the first instruments to protect children was the Geneva Declaration on the Rights of the Child of 1924, followed by the Declaration on the Rights of the Child of 1959 and then the Convention on the Rights of the Child (CRC), which constitutes the founding instruments and the first internationally legally binding document for the protection of children.[1] The preamble to the CRC is based on the belief that the family, as a fundamental social group and the natural environment for the development and well-being of all its members, especially children, must be given the necessary protection and assistance to enable it to fully assume its responsibilities in society. It triggers all States Parties to take measures to protect children, with the best interests of the child as the guiding principle. One of the indicators that States are following this is, among others, the Agenda 2030 for Sustainable Development, which sets out Sustainable Development Goals (SDGs) for countries to improve the world by 2030 and puts children at the heart of these goals.

2 Children at the center of the SDGs in Agenda 2030

2.1 Child

Article 1 of the CRC provides that a child is any human being under the age of 18 unless the law applicable to the child provides that the age of majority is reached earlier. The general age limit of 18 years for the majority has been adopted in most countries of the world, with the exception of a few countries which set a lower or higher age of majority, but these are in the minority.[2]

In Slovenian legal system, the Constitution of the Republic of Slovenia itself already provides for special protection and care for children in article 54, and the definition of a child is specifically defined in article 5 of the Family Code, which follows the general age limit set out in the CRC and provides that a child is a person who has

[1] Some of the international instruments that protect the best interests of children are also: *the International Covenant on Civil and Political Rights*, 1966; *Charter of Fundamental Rights of the European Union*, 2010.
[2] For example, Iran and North Korea have lower age of majority. Some provinces in Canada, South Korea, Thailand have a higher age majority.

not yet attained the age of 18 years, unless he has previously acquired full legal capacity. The acquisition of full legal capacity before the age of 18 occurs upon the marriage of a child over the age of 15 and when the minor becomes a parent and is granted full legal capacity by the court. When a child acquires full legal capacity before reaching the age of majority, or passes into adulthood, he loses the status of a child and thus the special protection that they enjoy, which is not necessarily in their best interests. Children are a special category of persons and thus a vulnerable group of people due to their age, immaturity and (in)ability to understand their actions and consequences (Kraljić, 2019, pp. 61, 63, 723). As such, they are afforded special protection in all areas, as demonstrated by the rich legal protection in the international legal instruments already listed in the introduction, individual national legislation, organizations dedicated to the protection of the best interests of children[3] and the measures they take to protect them. The fact that children are at the heart of the SDGs, as will be explained below, is also an indication of their importance for society as a whole and of the awareness of organizations of their importance.

2.2 Agenda for Sustainable Development by 2030

The 2030 Agenda for Sustainable Development (Agenda 2030) is an outline for peace and prosperity for people and the planet, now and in the future, conceived in 2015 by all the Member States of the United Nations (UN) out of a multi-year »*let's change the world*« vision that dates back to 1992 with the adoption of Agenda 21, the first comprehensive action plan to build a global partnership for sustainable development.[4] The desire to move forward together has only grown stronger over the years, and in 2002 countries set out eight development goals to reduce poverty by 2015 through the Millennium Declaration (2000), followed up in 2012 with the adoption of »*The Future We Want*« (2012) and in 2015 they began the process of preparing for the post-2015 era, culminating in the adoption of the 2030 Agenda. The Agenda sets out sustainable development goals for countries to make the world a better place by 2030. It has been adopted by all 193 UN Member States, including Slovenia, but it is not only intended for the signatory countries, as it is also anchored in human rights and explicitly based on the Universal Declaration of Human Rights (UDHR), international human rights treaties and other instruments (UN, Human

[3] United Nations International Children's Emergency Found- UNICEF, Child Rights International Network-CRIN, Defence for Childre International- DFI, Save the Children, Girls not Brides.
[4] United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992, AGENDA 21.

rights Council, 2016). Sustainable development is also a fundamental principle of the Treaty on European Union (EU), as both, the EU and the UN, work towards a better and safer world for all. To this purpose the EU has developed its own roadmap, the European Green Deal (2019), which is an action plan for a circular economy towards a sustainable EU economy, focusing not so much on people and the Earth as in the 2030 Agenda, but more on the economy (Evropski zeleni dogovor (The European Green Deal), 2019). The Agenda 2030 seeks to realize the human rights of all, and is universally applicable to all people in all countries, including developed and developing countries. It consists of a preamble, a declaration, and 17 general SDGs, within which specific actions or means to achieve them are identified. Central to all the Goals are people and in this context, ending poverty, hunger, ensuring education and a decent, equal life for all; eliminating gender inequality; protecting our planet Earth; ensuring people live a life worth living in prosperity; promoting peaceful and just societies; and providing the means to implement the Agenda through a renewed Global Partnership for Sustainable Development, in a spirit of strengthened solidarity worldwide (Justinek et al., 2015, pp. 19–20). It is therefore about five key elements that are interlinked through the goals- people, land, prosperity, peace and partnership.

2.3 The position of children in Agenda 2030

A key feature of Agenda 2030 is its universality, as it applies to all groups of people and addresses a range of challenges facing both rich and poor countries around the world. The key aspiration of countries is to transform the world by eradicating poverty and reducing inequalities and keeping the planet within its carrying capacity, with actions based on the rule of law, human rights and the Agenda's 2030 core principle of »*leaving no one behind,*« which means that »*no one should be left behind*« and that »*those most in need must be reached first,*« therefore the most at-risk, vulnerable and marginalized groups of people, including children, as a very important target group of the 2030 Agenda (Kešeljević, 2022, pp. 171–174). However, children are not included in the SDGs or its actions only because of their vulnerability. In general, the starting point for adopting sustainable development measures is to improve lives in a sustainable way. The sustainable future of all of us or the future of people, society and the planet as a whole, depends on children and, consequently, on the measures we take to protect them and their development, because they are our future and therefore one of the key groups to be reached first if we are to achieve the

SDGs. The SDGs address all aspects of children's lives and within them there are actions, focused on realizing their rights and benefits for a better life. The Agenda's universality and fundamental guiding principles place an additional emphasis on those children who are most in need - those living in the most precarious situations and therefore the most vulnerable. In this context, these are particularly children from poorer areas and children living in migration situations and also in war zones. These children suffer even more from the consequences of inequality, poverty, hunger, violence and poor living conditions because of the circumstances in which they live.

The Agenda 2030 therefore emphasizes non-discrimination to ensure a better future for all the world's children, namely that no one should be treated differently, regardless of where they come from, their race, gender, religion, age or any other personal circumstance, based on the principles of »*leaving no one behind*« and »*reaching those most in need first*,« as mentioned above. Despite years of efforts by organizations around the world and the universal ratification of the CRC, some societies still do not prioritize investing in children and do not see it as a foundation for broader social improvement, and millions of children around the world are still neglected and their rights are still denied. Even in rich countries, many children go hungry or live in absolute poverty, especially those belonging to marginalized social groups - including indigenous peoples and ethnic minorities. In addition, millions of children grow up scarred by war or insecurity, deprived of the most basic health, education and development services (Clark et al., 2020, pp. 605–658). Such examples make taking into account that the goals of Agenda 2030 with its focus on children as the driving force of society and the world, have great importance for all of us. The SDGs in the light of children are not just to reduce preventable child deaths or extreme poverty, but to eliminate them altogether, and not just to expand access to vaccines or basic sanitation, but to ensure that this access is universal so that no one is left behind. These goals put the world's most vulnerable and marginalized people, including children, at the top of the Agenda. The SDGs derive general guidelines specifically for children, namely that every child should survive and thrive; every child should learn; every child should be protected from violence, exploitation and harmful practices; every child should live in a safe and clean environment; and all children should have equal opportunities in life. Within these guidelines, there are specific SDGs that relate to children and are designed to protect them. The importance of children and their rights for our future can already been seen from

the fact that of the 17 overarching SDGs many of the specific targets or 44 indicators within the Goals, relate specifically to improving the lives of children, namely this Goals are Eradication of Poverty (»SDG 1«), Eradication of hunger (»SDG 2«), Good Health and well-being (»SDG 3«), Quality Education (»SDG 4«), Gender equality (»SDG 5«), Decent work (»SDG 8«), Reduce inequality (»SDG 10«), Peace and justice (»SDG 16«) and Partnership for achieving the Goals (»SDG 17«) (UNICEF, 2018). The objectives are interlinked and interdependent, which means, among other things, that one action can achieve several objectives at the same time.

For example, in the case of children, if we make progress in poverty eradication, this could indirectly lead to improvements in child good health and well-being, quality of education and the elimination of inequalities, and conversely, if we achieve the elimination of inequalities and better quality of education for girls, this could also have an impact on poverty eradication and improved health. The goals and actions set out in the Agenda 2030 are only the first step and the beginning or continuation of a multi-year commitment by UN Member States to improve the world, but achieving them, actually taking action and making progress, this is the second and more difficult step.

3 Geneder equality (»SDG 5«) – elimination of harmful practices

One of the essential or key actions in the protection of children through the SDGs is the elimination of harmful practices, which include various measures that are carried out against children, especially girls, and constitute a violation of human rights, as they pose a serious threat to the sexual and reproductive health and rights of women and adolescents (United Nations, 2020). Harmful practices, for example, include female genital mutilation (female circumcision), child, early and forced marriage, early motherhood, dietary restrictions or practices (for example, force-feeding), measures taken to make girls beautiful (such as breast ironing), virginity testing and related practices and others. There are many examples of harmful practices around the world, concentrated in Africa and the Middle East, but they are also spreading through migration to other parts of the world (Editorial, 2014). In the Agenda 2030, because of the profound violations of children's rights through harmful practices, their elimination is included in the »SDG 5« (Gender Equality), which aims to achieve gender equality and empower all women and girls. In point 5.3 of this goal, the aim is to eradicate all controversial customs (harmful practices)

by 2030, highlighting early and forced marriage and female circumcision. Both practices have immediate and long-term consequences for the health of children, especially girls. In the case of child or early marriage, these include early and frequent pregnancies, which brings along a lot different problems for the girls, children, infections, complications in childbirth and health and genital mutilation problems (Efevbera & Bhabha, 2020).

3.1 Female genital mutilation

Circumcision is usually performed on adolescent girls as part of various cultural traditions, without therapeutic reasons (also on boys, but justified on hygiene grounds). A common feature of all these practices is the social conditioning of women to accept female genital mutilation within the framework of social definitions of femininity and identity (Jones et al., 2004). These are very painful procedures, involving partial or total removal of the external female genitalia or other damage to the female genital organs, and endangering the health of girls (they are not carried out by medically trained persons, and some of them can even lead to death). It constitutes a violation of the rights of the child, as it is usually always carried out on children, a violation of the right of the person to health, safety and psychological integrity, the right to be free from torture protected by international legal instruments,[5] cruel, inhuman and degrading treatment and the right to life (Kraljić, 2010). Despite human rights violations and strong international condemnation, many countries still persist in these harmful practices. According to data, as many as around 44 million girls aged 14 and under are circumcised, with the highest prevalence at this age in African countries (Gambia, Mauritania, Somalia, Guinea), Middle East (Iraq, Yemen) and Asia (Indonesia) and also elsewhere in the world (Muteshi et al., 2016). That is why the UN therefore calls for the urgent elimination of this »violent practice« in Agenda 2030, because these practices scars girls for life, threatens their health, denies them their rights and prevents them from reaching their full potential. But over the last 30 years, the prevalence of female genital mutilation among girls has declined. Since 2008, more than 15,000 communities and sub-districts in 20 countries have publicly declared that they are abandoning female genital mutilation, and some of countries that have carried out these practices have even adopted national legislation criminalizing the practice.

[5] *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 1994, and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984.

However, the data also show a general disapproval of the practice, with the majority of people in countries where these harmful practices exist believing that the practice should end (United Nations, 2016).

4 Elimination of child marriage

4.1 The term »child marriage« and its prevalence worldwide

In addition to female circumcision, one of the most important measures to achieve several of the 2030 Agenda's goals, is the elimination of child marriage, which refers to formal or informal marriages contracted before the age of 18, which means before the age of majority as defined in the CRC (Islam, 2022). It can be said without reservation that child marriage constitutes a form of violence against children because, as will be explained below, it interferes with their fundamental human rights, deprives them of their right to a (carefree) childhood, negatively affects several aspects of their lives and often results in other forms of violence- physical, psychological, economic. Since child marriage is a marriage where at least one of the future spouses is a child who, because of their age, cannot give free or full consent to the marriage or is not yet aware of and does not understand the consequences of the marriage itself, child marriages are often also forced marriages (but this is not a generally accepted rule). Forced marriages are marriages entered into without the free and full consent of both parties, where age plays no role (Efevbera & Bhabha, 2020, pp. 2, 8). Taking into account that UDHR itself stipulates that marriage may only be contracted with the free and full consent of both future spouses, from the very definition of forced marriages, it follows that this is a violation of a fundamental human right.[6] In addition to female mutilation, forced marriages and child marriage constitutes also a form of gender-based violence, as their victims are mostly girls (Hüseyin, 2021).

[6] So child marriage and forced marriage means a violation of article 16 of the UDHR; a violation of article 16 of the Convention on the Elimination of All Forms of Discrimination against Women which says that States Parties shall ensure to women, on the basis of equality of men and women, the equal right to marry; the equal right to choose a spouse freely and to marry of her own free will and full consent); and also the violation of several articles of the Covenant (the right to survival, the right to full development, the right to protection from harmful practices, etc.).

Around us, there are more child marriages than one might think at first sight. Data suggest that globally, more than 650 million girls were married as children and at least 12 million girls are married before the age of 18 every year, which translates into 28 girls per minute. One in every 5 girls is thus married or in a relationship before the age of 18 (Data from UNICEF, 2023). Although child marriage occurs among both, boys and girls, the prevalence is much higher among girls, which is a consequence of social values that hold girls in low esteem and deny them the opportunity to determine their own path in life (»girl child marriage«). In countries where child marriage is most common, child marriage remains high, with approximately 32 percent of girls in sub-Saharan Africa married by the age of 18, 76 percent of girls in Niger married before the age of 18 and approximately 28 percent married before the age of 15, according to statistics from May 2023 (Koski et al., 2017, pp. 7–29 and Ahonsi et al., 2019). In South Asia 26 percent of girls marry before the age of 18, 51 percent of girls in Bangladesh marry before the age of 18 (Faroque, 2016, pp. 156–161), and 21 percent of girls in Latin America marry before the age of 18 (UNICEF, 2023).

4.2 The drivers of child marriages

The coercion for child (forced) marriage often comes from the family or society encouraging the girl, for social beliefs or economic reasons, to marry early in the (mistaken) belief that such a union will protect her. A girl is encouraged by her family to marry early (before the age of majority), mainly because of poverty and the economic needs and the related lack of opportunities for quality education and further work for the child. In such cases, families, if they find a suitable suitor, see the girl's marriage as her »*way out to a better life*.« Furthermore, the fear of becoming pregnant and losing their virginity before marriage is often a reason for child marriage, as in some societies, it represents a »*disgrace to the family*.« Families also encourage child marriage because of possible religious beliefs or social norms in general (Mangeli et al., 2017).

4.3 The (negative) consequences of child marriage and the impact of its elimination on the achievement of the SDGs

By being forced into marriage (most of the time) as children and subjected to various forms of deprivation, girls are in a sense deprived of their childhood. It is a gross violation of human rights, as it exposes girls in a physical sense by endangering their health and well-being and in a psychological, social sense by denying them, making it difficult for them to get a quality education and consequently (quality) employment, causing poverty and distress due to frequent violence and the impasse caused by dependence on a husband. Girls who marry before the age of majority are often the first to be subjected to early pregnancies, which result in health problems; child marriages, due to child and household care, lead to the interruption or cessation of girls' education; and last but not least, due to their vulnerability, youth, and subordination to an (older) partner, they are often also subjected to violence. These (negative) consequences can be seen in a number of factors relating to the SDGs (poverty, education, health and well-being, inequality, etc.). Although the goal of (complete) elimination of harmful practices, and thus child marriage, is identified under SDG 5.3, it is precisely because of the aforementioned impact of child marriage on several aspects of the lives of »child brides« that many other SDGs will not be achieved without its complete elimination, including those relating to poverty, hunger, health, education, economic growth, reducing inequalities, and promoting peace and justice.

4.3.1 Gender equality and empowering all women and girls (»SDG 5«)

The goal of (completely) eliminating harmful practices, and thus child marriage, is identified under Objective 5.3 of »SDG 5« (Achieve gender equality and empower all women and girls), which means that eliminating child marriage would undoubtedly contribute to achieving this goal. Gender equality is not only a fundamental human right, but also a necessary foundation for a peaceful, prosperous and sustainable world, which is why it is one of the most important SDGs under which all forms of discrimination against women and girls everywhere must be eliminated (Justinek et al., 2015). The link between child marriage and gender inequality stems from the fact that, although it occurs among both, boys and girls, the prevalence is much higher among girls, as a result of the (discriminatory) social values still present in some places, which make girls less valued and »unheard,« and

in fact deprive them of the opportunity to determine their own life path, as their marriage is most often decided by others (parents). However, when they marry an older man as minors, this inequality or powerlessness is exacerbated by their young age, their vulnerability in general and their financial dependence on their husbands in most cases. This results in the subordination and domination of the husband, which (often) leads to all forms of domestic violence (physical, psychological, sexual, economic). For these reasons, the abolition of child marriage, which as such is also conditional on changing or abolishing societal beliefs and traditions regarding child marriage, especially for girls, would ensure that girls everywhere will be free to choose when and with whom they marry, thus preserving their childhood and their influence on their future, and thus ensuring that they have the same opportunities as boys.

4.3.2 Good health and well-being (»SDG 3«)

Elimination of child marriage also has long-term consequences for the health of children, especially girls. Getting married young is often associated with early pregnancies, infections, and exposure to complications during childbirth (Editorial, 2014, p. 1722). The high incidence of pregnancies in child marriage is due, among other things, to the fact that girls themselves, because of their young age and their subordination to (most often) an older husband, do not have a decisive say in when they have sex and whether or not they use contraception and are usually not even educated about it. Health problems arise because their age makes them neither physically (physically) nor mentally mature for pregnancy or childbirth and thus puts them at a higher risk of experiencing problems during both. This is also supported by studies, which have shown that being underage increases the risk of adverse birth outcomes, poor fetal growth, and infant and maternal health and mortality (Rah et al., 2008, pp. 1505–1511). This is also shown by the fact that pregnancy and childbirth are one of the leading causes of death for girls aged from 15 to 19 (70.000 adolescent girls die each year in developing countries from pregnancy and childbirth-related causes), making them much more likely to die in childbirth than girls in their early twenties. However, if child brides survive childbirth, they are still at risk of health complications (they are very vulnerable to obstetric fistula). It is not only »child brides« who are exposed to risks and health risks, but also the babies that adolescent girls give birth to. With stillbirths and neonatal deaths among mothers under 20 years of age being 50 per cent higher than among women who give birth

later, they are more likely to be stillborn or die in the first week of life than children of women who give birth later (after the age of majority). »Child brides« are also more likely to have low birth weight children, with serious long-term consequences for their health (Girls not Brides, 2016, pp. 1–2). Studies have also shown that girls who marry early are at higher risk of HIV infection due to more frequent sexual intercourse and the fact that the husbands of these girls tend to be significantly older, more experienced and thus more likely to be HIV-positive. Child marriage can also be associated with poor mental health for the child, including feelings of isolation, depression and suicidal thoughts and behavior (Editorial, 2013, pp. 513–514). Given all these negative consequences for the health and well-being of girls (and their newborns), it is therefore clear that abolishing child marriage, and thus delaying pregnancy, would undoubtedly contribute to improving the health of adolescent girls and their children, and thus to the achievement of Goal 3.

4.3.3 Quality education (»SDGs 4, 8, 1, 2«)

As mentioned above, most often the reason for an under-age girl's marriage stems from poverty, the economic needs of her family and the less developed environment from which she comes, all of which result in a lack of opportunities for (quality) education, the acquisition of work skills and, consequently, fewer opportunities for employment and decent work. The above shows that poor quality education, lack of job opportunities and consequent poverty are, on the one hand, the drivers of child marriage, as it is precisely the lack of (quality) education, few job opportunities and consequent poverty that drives parents to »*marry girl well*« as soon as possible, in the hope and desire for a better life for their child. Early marriage in such a situation thus represents for the girl as the »*only way out*« of her current situation. On the other hand, it is precisely the elimination of child marriage that would contribute to, or have an impact on girl's better education, because it would enable them to have equal work opportunities and thus be their way out of poverty and poor conditions. This is because, by marrying before the age of 18, girls take over the care of the family and home, and consequently abandon or interrupt the process of education, to which they are unlikely to return. As a result, they are more likely to be limited in literacy, with no formal education and few employable skills, and most »child brides« are thus (financially) dependent on their husbands, leading to a relationship of subordination (Tenkorang, 2019, pp. 48- 49). Given all of the above, eliminating child marriage would thus also contribute to better quality education (Goal 4), as

child marriage is a barrier to continuing schooling, and eliminating it would help more girls to continue their education and thus acquire the skills needed for further work or employment. As education is also one of the factors that influence the increase in employment opportunities, the elimination of child marriage would consequently improve economic growth (Goal 8), as more girls would be employed, and this would undoubtedly result in the elimination of poverty (Goal 1) and hunger (Goal 2).

4.3.4 Peace, justice and strong institutions (»SDG 16«)

In addition to all the (negative) consequences, girls who are victims of child marriage are also often subjected to violence or devaluation and eliminating child marriage would thus achieve the goal of promoting peace and justice (Goal 16) (Muazzam et al., 2014). Given the findings above that the main cause of a girl's early marriage is mostly the family's poverty, it can be inferred that the family intends that the girl is no longer a financial burden on her father and mother, but that her husband takes care of her. Thus, when a girl marries, she becomes financially dependent on her husband, which often leads to their subordination and, in addition to their vulnerability due to their minority, makes them even more helpless and exposed to the possible domination of their partner. Such girls are much more likely or at risk of being controlled, abused, exploited and sexually, psychologically and physically assaulted by their husbands. It is therefore not surprising that child marriage is not only a violation of human rights, but even a form of violence (Hüseyin, 2021, pp. 548–552). Since girls who marry underage are thus more vulnerable to domestic violence - physical, psychological, sexual and economic - the abolition of child marriage would, in this sense, also have an impact on, or contribute to the achievement of Goal 16 (Promote peace and justice).

4.4 Measures to eliminate child marriage

The goals of the 2030 Agenda and what needs to be achieved to reach them are clear, also without hesitation we can say that ending child marriage is important for achieving several of the SDGs, but the key issue is how to effectively achieve the end of child marriage? Despite the work of international organizations and

international legal instruments,[7] individual countries still have the most important role to play. The most widespread, common and, in almost all countries of the world, already accepted measure to eliminate or reduce child marriage is a change in legislation. In general, the legal regimes of countries around the world vary with regard to the minimum age of marriage, with some having already adopted several measures and (good) changes in the interests of sustainable development and some not yet, as will be explained below. It should be borne in mind that certain countries have an age of majority or transition to adulthood below or above 18 years, which does not necessarily coincide with the age of marriage.[8] In all European countries (with the exception of Scotland, where the age of marriage is still 16),[9] the age of marriage is 18. This does not mean that these countries have completely abolished child marriage, as most European countries allow marriage before the age of majority, with the consent of the parents or the competent authority, and thus still allow child marriage in exceptional cases. Only Denmark, Germany,[10] the Netherlands, Sweden, England and Wales (Raab, 2023) have taken a step towards to a complete abolition, and under no circumstances allow marriage before the age of 18. Slovenia has made progress in this area over time, but child marriage has not yet been completely abolished. The Marriage and Family Relations Act,[11] which was in force before the current Family Code, set the minimum age for marriage at 18 years (article 18 of Marriage and Family Relations Act), but the Social Work Centre could, if there were justified reasons, allow a person under 18 to marry (article 23 of Marriage and Family Relations Act). This means that the minimum age for marriage was not set by the Marriage and Family Relations Act when the Social Work Centre gave its permission. A novelty and, at the same time an improvement and a step towards abolishing the possibility of child marriages in Slovenia was the adoption of the Family Code in 2017 (entry into force in 2019). The minimum age for marriage remains 18 (article 5 of the Family Code in conjunction with article 24 of the Family Code) but there is a change in the possibility of marrying a child under the age of 18

[7] For example, article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that men and women of marriageable age have the right to marry. Protection against forced and (too) early marriage is also provided by the Convention on Consent to Marriage, Minimum Age and Registration of Marriages, adopted by the United Nations, New York, December 1962.

[8] For example, Iran sets the age of majority at 8 years and 8 months for girls and 14 years and 7 months for boys, and the age of marriage at 13 years for girls and 15 years for boys, which may be lowered with the permission of the competent authority *(*Azimi, 2020, pp. 96–98).

[9] *Marriage (Scotland) Act*, 1977, Chapter 15, Act 1.

[10] Although, the Act to Prevent Child Marriages was proclaimed that it is incompatible with the Basic Law due to the failure to address the legal consequences of the invalidation of child marriages concluded abroad (Federal Constitutional Court Decision, NO. 1 BvL 7/18, on 1 February 2023).

[11] *Zakon o zakonski zvezi in družinskih razmerjih (Marriage and Family Relations Act*), 1976.

(underage age waiver). The Family Code now provides that a minor may be granted permission to marry by a court (no longer by the Social Work Centre, as was the case under the Marriage and Family Relations Act) if four conditions are met: there are valid reasons (for example, pregnancy), the minimum age is 15 (a person under 15 cannot marry),[12] the minor is physically and mentally mature (maturity is presumed to begin at the age of 18, but in the case of a child between 15 and 18 years of age, the attainment of maturity must be verified by a court), and the minor who wishes to enter into the marriage understands the meaning and consequences of the rights or obligations arising from the conclusion of the marriage (Kraljić, 2019, pp. 131–132). In light of the above, we can see that Slovenia has already taken measures to protect the best interests of children by setting a minimum age (15 years) and to some extent protecting girls' right to education and protecting them from early pregnancies, which often lead to health complications during pregnancy and childbirth, but has not yet exhausted all possibilities (as has been done, for example, in Denmark, the Netherlands and Sweden), leaving room for progress and improvement towards the complete abolition of child marriage in terms of legislative change by 2030. In other countries around the world, while most already have a minimum age of marriage of 18, some countries still derogate from this, and more allow the age to be lowered with the permission of the parents, the competent authority or other conditions. In the United States, for example the minimum age for marriage is set at 18 years or older (Reiss, 2021, p. S8–S10); in Latin America, despite the above-average number of child marriages in the past (and a low minimum age set in countries), precisely because of the elimination of child marriages, most countries have already raised the age limit to 16 years (Argentina, Brazil) or 18 years (Peru), which is a (much) higher age limit than it was in the past (Wiedemann, 2021). Regardless to the fact that some countries still allow marriage before the minimum age, for example Brazil allows marriage with 16 years with parental consent (Urquia et al., 2022), the changes go in the right direction with the goal to eliminate child marriages. In African countries, many countries have also changed legislation to abolish child marriage, for example Ethiopia has raised the minimum age from 15 to 18 also for girls (McGavock, 2021), Mauritania and Benin from 14 and 15 to 18, Sudan from 13 and 15 to 18 and in Asian countries for example Nepal raised the minimum marriage age from 16 to 18, Tajikistan from 17 to 18 and Kazakhstan from 17 to 18 (Batyra & Pesando, 2021). However, some countries still have a lower age

[12] Compared to article 24 of Marriage and Family Relations Act, this means that the minimum age for marriage with the authorisation of the competent authority has been limited to 15 years by the Family Code.

limit, for example Iran sets the age limit for girls at 13 and for boys at 15, which can be lowered further with the permission of the competent authority (Azimi, 2020, pp. 96–98). As only the mere enactment of a law is by itself not enough, countries are also adopting a variety of additional legal approaches to enforce them successfully, some criminalizing child marriage, some prohibiting or annulling marriages below the legal minimum age, some not even recognizing child marriages contracted in another country where it may be allowed, and others merely prescribing a minimum age for marriage without explicitly criminalizing or prohibiting it (UNICEF, 2020). Indeed, the measure of amending the law and enforcing it in the manner described above is at the forefront of measures to eliminate child marriages and is, to some extent, effective.[13] However, the monitoring of data and the analyses carried out have shown that changing the law in order to raise the age of consent itself is not enough, since it remains problematic that countries (including Slovenia and most EU countries) still allow marriages below the generally established minimum age of consent with the agreement of the parents, the competent authorities, or possibly only justify and allow it because of entrenched social or religious customs. However, as already explained in Chapter 4.2, parents and social or religious customs are most often also the main drivers or promoters of child marriages, so arrangements that allow marriage with their consent and approval lose their purpose and effectiveness. Parents are encouraged and incentivized to marry off their girls at an early age because of factors such as poverty, social beliefs (tradition) and social norms, and therefore, when they find a suitable husband for the girl, they consent and give the necessary permission for the marriage to take place, regardless of the age of the girl. Furthermore, the implementation and enforcement of these (amended) laws also remain problematic, as in many places, social or societal norms allow and accept marriage below a certain age, and thus, such ingrained beliefs in society only justify and override any potential legal regulation. It is precisely because of the causes that lead to child marriage (therefore parental wishes and social beliefs), and because of the failure to enforce or respect the rules adopted by law, or because of the large numbers of informal marriages, or because of the exceptions that still allow marriage before the age of majority (the minimum age laid down by law), that studies call for a different approach to measures to eliminate them. In particular, key (successful) interventions have been shown to be, for example, providing financial support for girls' schooling, empowering and educating girls, especially in the areas of life skills,

[13] Child marriage numbers have increased since the change in legislation (McGavock, 2021).

vocational (career) skills training, raising awareness about sexuality, reproductive health, contraceptive options and gender rights education (Chae et al., 2017), introducing sexuality education in schools, providing education on the protection of human rights and others.

5 Conclusion

The preamble of the Agenda 2030 and its goals already make it clear that the key aspiration of UN Member States is to transform the world by ending poverty and reducing inequalities, with actions based on the rule of law, human rights and the 2030 Agenda's core principle of »*leaving no one behind,*« which means that »*no one should be left behind*« and »*reaching those most in need first,*« therefore the most deprived, vulnerable and marginalized groups of people. As explained, children are one of these important groups, with vulnerability stemming from their young age, dependence on parents or, in the case of child marriages, spouses, subordination and inexperience, and relevance stemming from the fact that the sustainable future of all of us, or the future of human beings, of society and of the planet as a whole, depends first and foremost on how the needs of the next generation are met today. The fact that children are indeed relevant to the SDGs is evident from the above findings, that they are directly involved in at least 8 of the SDGs, and indirectly targeted by some of the other SDGs. It showed how the action of ending child marriage, which is directly related to children and is only directly included in Goal 5 of the Agenda 2030, would itself have an impact on several goals and thus contribute to sustainable development. From the effects of child marriage on girls who marry as children, it can be safely concluded that without achieving, or at least making significant progress towards, the goal of the (complete) elimination of harmful practices, and thus child marriage, a good half of the other SDGs will also not be achieved, including those related to poverty, health, education, nutrition, economic growth and the reduction of inequalities. As has been pointed out, first of all, girls with child marriage are exposed to health problems as they tend to have early pregnancies and, because of their age, are more likely to suffer complications during the pregnancy itself to and at the time of childbirth, and it is not only the health of the under-age mother that is at stake, but also the child that the young mother gives birth to is more vulnerable to health problems. This demonstrates that eliminating child marriage would improve the health and well-being of girls, contributing to the achievement of SDG 3. Furthermore, girls married before the age of 18 take over

the care of the family and home at a very early age, which prevents them from starting or continuing their education and thus from being able to be independent and work, and as a result, with no formal education and few employable skills and opportunities for further work, most »*child brides*« are thus (financially) dependent on their husbands. It follows that ending child marriage could also contribute to better quality education (Goal 4), economic growth (Goal 8), and the eradication of poverty (Goal 1) and hunger (Goal 2). Finally, these girls are often subjected to violence and belittling, and so ending child marriage would help to achieve the goal of promoting peace and justice (Goal 16). The inclusion of child marriage elimination and its focus on the SDGs shows that organizations in the first place, followed by individual countries around the world, are aware of the difficulties in this area and are working in the right direction, both by raising awareness and by taking action and planning for the future. Regardless of their efforts, it is an inescapable fact that there are still factors that are slowing down progress toward the goal of ending child marriage. One of these factors is the COVID-19 epidemic, which has had an impact on child marriage mainly because it has interrupted the education of girls who may never return to school, while on the other hand, the economic crisis has also increased the number of children living in poverty, for whom the only way out of poverty, or hope of a »better« life, will be to marry early. In addition to the impact of the epidemic, it is also assumed that conflict and instability in particular countries are important drivers of child marriage, as it is in such areas that girls also leave education and live in the worst conditions, increasing their vulnerability and exposure to early marriage.

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TARGETED ADVERTISING AND THE (CHILDREN'S) RIGHT TO PRIVACY - REMEDIES OF EX-ANTE AND EX-POST REGULATION

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This paper analyses how instruments of economic regulation can be used to protect the right to the protection of personal data, especially in relation to vulnerable societal groups, such as children. In this regard, it analyses the Bundeskartellamt's Facebook decision that established an unprecedented connection between competition law and data protection law, as well as the Digital Markets Act, which imposes several positive and negative obligations on companies branded as "gatekeepers," which could also increase the level of personal data protection. It is concluded that instruments of economic regulation can have a profound impact on data protection issues, although addressing them is not their primary goal.

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CILJNO USMERJENO OGLAŠEVANJE IN (OTROKOVA) PRAVICA DO ZASEBNOSTI – *EX-ANTE* IN *EX-POST* SREDSTVA PREDHODNEGA IN POPREJŠNJEGA UREJANJA

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Ključne besede:
zloraba tržnega položaja,
pravica do varstva osebnih podatkov,
Facebook,
Bundeskartellamt,
Digital Markets Act

V prispevku je analizirano, kako lahko instrumenti ekonomske regulacije prispevajo k zaščiti pravice do varstva osebnih podatkov, še posebej glede na ranljive družbene skupine, kot so otroci. V tem kontekstu je analizirana odločitev Bundeskartellamta v zvezi s Facebookom, ki je vzpostavila brezprimerno povezavo med konkurenčnim pravom in pravom varstva podatkov, ter 'Digital Markets Act', ki podjetjem, označenim kot »varuhi vrat«, nalaga več pozitivnih in negativnih obveznosti, ki bi lahko tudi povečale raven varstva osebnih podatkov. Ugotavljamo, da lahko instrumenti ekonomske regulacije močno vplivajo na vprašanja varstva podatkov, čeprav to ni njihov primarni cilj.

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1 Introduction

In today's digital society, the right to privacy is a particularly important fundamental right, all the more so when vulnerable segments of the population, such as children, are affected. The rapid developments in companies' business models and the opening up of completely new markets pose an as-yet unprecedented threat to the right to privacy.

This paper attempts to analyse how the right to privacy (of children) can be protected with instruments of *ex ante* economic regulation in the context of targeted advertising.

The first chapter thus defines several concepts necessary for understanding the paper, namely targeted advertising, the right to privacy and the protection of personal information, and economic regulation. The second chapter looks at some examples where instruments of economic *ex ante* and *ex post* regulation have been used in innovative ways to protect the right to privacy and analyses their scope and importance. Finally, the last chapter provides an overview of the main findings of the study.

2 Setting the scene

2.1 Targeted advertising

Targeted advertising is a particularly efficient form of advertising that is directed only at people who have shown some affinity for a particular product or service in the past. It is most often associated with multi-sided web platforms, i.e., intermediary services that operate on two different markets (sides). In one market, they offer a product for free, but in exchange, they collect the user's personal data. They then use this information to create accurate profiles of each user's preferences (e.g., through information about the websites they visit, search queries, connections with other users of the platform, etc.). These profiles are ultimately used as a key input for operating in the secondary market, where they offer targeted advertising services

to companies on a "pay-per-click" basis.[1] One of the best-known examples of targeted advertising are the ads displayed to users of the social network Facebook. In the controversial decision B6-22/16, the German competition authority ruled that the Facebook company had abused its dominant position in the social networking market in Germany by forcing its users to comply with abusive general terms of service that allowed the company to collect a disproportionate amount of personal data (Lypalo, 2021, pp. 169–198).

2.2 The right to privacy and the right to the protection of personal information

Although it is a relatively new fundamental right, the right to privacy has become one of the most important cornerstones of the European Union's legal system. There are several different definitions of privacy, with Warren and Brandeis viewing it as the "right to be let alone" (Warren & Brandeis, 1890, p. 195). Westin, on the other hand, defined the right to privacy as the right of individuals, groups, or institutions to freely decide when, how, and to what extent their personal information is disclosed to third parties (Westin, 1967, p. 7), while Miller claims that the right to privacy is the ability of an individual to control the dissemination of information about them (Miller, 1973, p. 25). The above theories all indicate that a violation of the right to privacy does not occur as long as the individual to whom the data relates consents to disseminating their personal information. However, particularly in the context of the digital economy, situations can arise where an individual has consented to disseminating their personal data for a specific purpose, but the data ends up being used for an entirely different purpose. This usually happens when the data is combined with other (personal) data, with the new contexts revealing information that the individual does not want to share with the public. Such positions are addressed by various contextual privacy theories, all of which suggest that the collection and/or processing of personal data does not violate the right to privacy as long as it remains within the context in which the data subject has given consent. Closely related to the right to privacy is the right to the protection of personal data. The European Court of Human Rights first established the latter as the informational dimension of the right to privacy and was later incorporated

[1] The company using the services of targeted advertising pays the intermediary platform a certain remuneration for each click of the user on the displayed advertisement, regardless of whether the user buys (or does not buy) the product in question.

into the Charter of Fundamental Rights of the European Union[2] as an independent fundamental right (article 8). In general, it can be stated that a violation of the right to the protection of personal data is almost always also a violation of the right to privacy, but not vice versa.

2.3 Economic regulation

Regulation theory attempts to define the meaning of the term regulation, its different types, its effects, the role of each actor in the regulatory process, and so on. This paper, however, is limited to the distinction between *ex ante* and *ex post* and economic and social regulation.

Ex ante regulation refers to regulatory acts that address abstract and general positions that have not yet occurred, in other words, the attempt to influence the behavior of regulated parties before the relevant acts have occurred. *Ex post* regulation, on the other hand, addresses actions that have already occurred. A typical example of *ex post* regulation is the prohibition of abuse of a dominant market position.

In terms of its primary goals, regulation can be classified as either economic or social regulation, although the line between the two types of regulation is often blurred and unclear (Graef, Husovec & Purtova, 2018, p. 1359). In general, however, it can be stated that economic regulation consists of rules that are intended to regulate the behavior of companies concerning various aspects of market competition and are especially justified in cases of market failure(s).[3]

On the other hand, social regulation consists primarily of rules aimed at protecting values that are per se outside the bounds of pure market competition. Thus, social regulation serves primarily to ensure, among other things, the right to a clean

[2] Charter of Fundamental Rights of the European Union, OJ C 326, 26. October 2012.

[3] Market failure is a fundamental consideration in the analysis of economic and regulatory issues. This failure, characterized by situations in which the unregulated market does not allocate resources efficiently, has significant legal implications. Legal frameworks and regulations often play a central role in addressing problems such as externalities, monopolies, asymmetric information, and the provision of public goods. Law serves as a tool to correct these market inefficiencies and protect the interests of consumers and society as a whole. Whether through antitrust and competition laws to prevent monopolistic behavior, environmental regulations to address negative externalities, or consumer protection laws to mitigate information asymmetries, the legal system plays an important role in shaping the rules and boundaries of market activity to ensure fairness, equity, and the general welfare of society.

environment, the right to the protection of personal data, standards for occupational safety and working hours, etc. However, the fact that social regulation primarily targets values that are not in themselves directly related to market competition does not mean that it has no impact on market competition. On the contrary, it can have a significant impact on competition. However, this impact is always a byproduct of the protection of a socially important value. Thus, because economic goals play only a secondary role in social regulation, the letter may even have a negative impact on market competition.[4]

3 Examples of economic regulation protecting the (children's) right to privacy

The following part of this paper examines in more detail two instruments of economic regulation that have been used, among other things, to counter threats to the individual's right to privacy.

3.1 The Bundeskartellamt's Facebook decision

In 2019, the Bundeskartellamt, Germany's competition protection authority,[5] published its controversial decision B6-22/16 (hereinafter: Facebook decision).[6] The Bundeskartellamt concluded that Facebook (now Meta) was abusing its dominant position in the German social networking market.[7]

[4] For example, a high level of protection of personal data may have a negative impact on market competition by creating new regulatory and compliance hurdles that companies must overcome in order to operate in a given market. In particular, smaller companies may not be able to make the necessary changes to their business models and will therefore be forced out of the market, affecting competition in the market.

[5] The Bundeskartellamt is responsible for enforcing competition and antitrust law in Germany. It plays a crucial role in regulating and monitoring markets to ensure fair competition, prevent monopolies and protect consumers from anti-competitive behaviour. The Bundeskartellamt investigates mergers, monopolistic practices and violations of antitrust law and imposes fines and sanctions where appropriate. It also promotes competition and provides advice to companies and policymakers to maintain a competitive market in Germany.

[6] Bundeskartellamt, decision B6-22/16, Facebook, 7 February 2019.

[7] Abuse of a dominant position in EU law refers to anticompetitive conduct by a dominant company that holds a substantial share of a given market, which is expressly prohibited by article 102 of the Treaty on the Functioning of the European Union. Such conduct may take various forms, such as unfair pricing, exclusionary practices or the transfer of dominance from one market to another. These actions hinder competition, stifle innovation and harm consumers, which is contrary to the fundamental principles of EU competition law. The competition authorities of the EU Member States and the European Commission actively monitor and intervene to prevent or eliminate such abuses in order to ensure a level playing field for companies and the preservation of an open and competitive market.

It should be noted that abuse of a dominant position is traditionally "measured" in monetary terms – in both exclusionary and exploitative abuse of a dominant position cases, the end result is an unjustified price increase of the product.[8] The existence of a dominant position does not in itself constitute an infringement of article 102 of the Treaty on the Functioning of the European Union,[9] but is merely a precondition for the abuse of a dominant position. For there to be an infringement of article 102, the dominant company must abuse its pre-existing dominant position in some way.

The conduct which, in the view of the Bundeskartellamt, constituted an abuse of a dominant position was as follows: The company Facebook required new users of the Facebook social network to agree to its general terms and conditions if they wanted to use the said social network. In other words, using the Facebook social network was impossible if the new users disagreed with the general terms and conditions. By agreeing to the terms and conditions, the users also agreed that the company Facebook would collect the personal data they generated by using websites that were not connected to the Facebook social network, as well as by using other platforms and applications controlled by the company Facebook (such as WhatsApp and Instagram) and the Facebook social network itself. This allowed the company Facebook to create very accurate profiles of individual users, which it then used to offer services of targeted advertisement on the market for targeted advertisement. According to the Bundeskartellamt, this behavior violated users' right to the protection of personal data and the right to informational self-determination.[10] This was the case as the actions of the company were not based on any of the legal basis

[8] Exclusionary abuses of dominance include anticompetitive practices aimed at excluding or hindering competitors from the market, such as predatory pricing, exclusive dealing, tying, and refusal to supply. Exploitative abuses, on the other hand, refer to excessive or unfair pricing strategies, including excessive pricing, discriminatory pricing, and price suppression, in which the dominant firm exploits its market power to the detriment of consumers. Both types of abuse are central to competition law because they undermine fair competition, harm consumer welfare, and impede innovation in the marketplace. Moreover, it should be noted that the distinction between exclusionary and exploitative abuses of dominance is not necessarily clear-cut, as ultimately all forms of abuse of dominance result in some form of loss of consumer welfare. Moreover, the same actions by a dominant company may constitute both exclusionary and exploitative abuses of market dominance (Grilc, 2009, p. 259).

[9] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

[10] The German "right to informational self-determination" is a legal concept that emphasizes the right of individuals to control their personal data and information. It grants individuals the power to decide how their data is collected, processed, and used, and aims to protect privacy and data autonomy. This right is a fundamental aspect of data protection and privacy laws in Germany and has influenced broader European data protection legislation, including the GDPR.

for legal data processing as put forth by the General Data Protection Regulation (henceforth: GDPR)[11].[12]

The above violations were only possible because Facebook had (has) an extremely dominant position in the market for social networks in Germany. Therefore, if German users wanted to use social networks, they had to use Facebook's social network because there were no actual or potential substitutes. In addition, Facebook also concealed the actual amount of personal data it collected from its users.

In its Facebook decision, the Bundeskartellamt made an unprecedented connection between competition law and the right to protection of personal data, a fundamental right in the European Union. Accordingly, a violation of the right to protection of personal data may constitute an abuse of a dominant position (a violation of competition law rules) if it was made possible by the dominant position of the company. This somewhat contradicts the principle established in the *Asnef-Equifax*[13] judgement of the Court of Justice, according to which competition law and data protection law are generally two separate areas. However, the aforementioned judgement still leaves the door open for data protection aspects to be taken into account in competition law proceedings if a company's actions simultaneously constitute a breach of data protection law and competition law. The company Facebook had filed an appeal against the decision of the Bundeskartellamt with the Duesseldorf Higher Regional Court, which overturned it due to significant concerns about its legality.[14] However, following an appeal against the decision of the Higher Court to the Federal Court of Justice, the latter referred the case back to the Higher Court, which made a reference for a preliminary ruling to the European Court of

[11] 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), OJ L 119, 4.5.2016.

[12] Accordingly, the processing of personal data is lawful if:) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

[13] C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc), 23 November 2006.

[14] Düsseldorf Higher Regional Court, FCO, VI-Kart 1/19 (V), *Facebook*, 24 March 2021.

Justice. The latter passed a judgement on July 6th 2023[15] in which it ruled that violations of other legal fields (such as data protection law) may be considered when deciding on whether a company abused its dominant market position. Moreover, the dominant market position of a company is also to be considered when deciding on the validity of the data subjects' agreement to the processing of their personal data. It can thus be concluded that the Court of Justice mitigated its strict position on the separation of competition law and data protection law as put forth in the *Asnef-Equifax* judgement.

Some authors, in particular, Schneider (Schneider, 2018, p. 221), have strongly criticized the Facebook decision of the German Federal Cartel Office, arguing that abuse of market dominance does not automatically constitute a violation of rules of other areas of law, such as data protection law. This does not mean, of course, that Facebook's actions should go unpunished, but that the instruments of data protection law must be used for this purpose – the Duesseldorf Higher Regional Court took the same position in its ruling overturning the Federal Cartel Office's decision.

Incidentally, the German competition authorities were not the only national institution to initiate proceedings against Facebook for its data hoarding practices.[16] The Italian competition authority, the Autorita' Garante della Concorrenza e del Mercato,[17] did likewise. However, the latter has the authority to issue rulings in cases of both competition law violations and consumer protection law violations. Consequently, it found Facebook guilty not of abuse of market dominance but of violating the Italian consumer protection law, the Codice del consume, which transposes the Unfair Commercial Practices Directive[18] into the Italian legal order.

[15] C-252/21, Meta Platforms and others, 6 July 2023.

[16] Data hoarding is the accumulation and retention of large amounts of digital information, often without a clear or immediate purpose. This behaviour can strain storage resources, complicate data management, and pose privacy and security risks. Data hoarding is often driven by the belief that the data may be valuable in the future, but without effective organization or curation, it can become a liability rather than an asset, hindering efficient data use and decision making.

[17] The Italian Competition Authority, Autorità Garante della Concorrenza e del Mercato, is the Italian regulatory body responsible for promoting and enforcing fair competition and consumer protection in the country. It plays an important role in ensuring competitive markets, preventing antitrust practices, and protecting the rights and interests of consumers. It investigates mergers, enforces antitrust laws, and takes action against unfair business practices. The Authority's mission is to create a level playing field for businesses and protect the welfare of Italian consumers through its regulatory and enforcement activities.

[18] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC,

Facebook violated consumer protection rules by advertising its services (the use of the Facebook social network) as free, while the real price was the users' personal data. In my opinion, the Autorita' Garante della Concorrenza e del Mercato has chosen to prosecute violations of consumer protection law rather than competition law because in this way it has avoided having to define a relevant market in which the Facebook social network operates. Relevant markets are usually defined using the SSNIP test,[19] which requires that the product in question has a monetary price. If this is not the case, as in the case of the Facebook social network, the SSNIP test cannot be applied and defining the relevant market can be difficult, if not impossible.

3.2 The Digital Markets Act

A particularly important instrument of *ex ante* economic regulation that also addresses (albeit indirectly) privacy concerns is the Digital Markets Act, whose main objective is to ensure competitive and fair markets. For example, the Digital Markets Act primarily aims to limit the power of so-called "big tech" companies (e.g., Alphabet, Meta, Amazon, and Netflix) that operate in several important data and big data-driven markets (such as the social networking market and the targeted advertising market). These latter markets are very different from traditional markets (the so-called "brick-and-mortar" markets), as they are characterized by, *inter alia*, extreme direct and indirect network effects (also called network externalities),[20] extreme economies of scale,[21] the snowball effect[22] and the "winner takes it all"

Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005.

[19] The SSNIP (Small but Significant Non-transitory Increase in Price) test is an important tool in antitrust and competition law used to assess the competitive effects of a hypothetical price increase by a dominant company in a given market. The purpose is to determine whether such a price increase would be sustainable and profitable, and if so, whether it would substantially lessen competition or create a monopoly. The test examines whether a small price increase would cause a hypothetical monopolist to lose a significant number of customers who would switch to other products or suppliers. If the test indicates that the price increase is not profitable or would not result in significant customer churn, this indicates that the market is competitive, whereas a profitable price increase indicates potentially anticompetitive behavior and may trigger regulatory action or antitrust litigation.

[20] Direct network effects occur when the value of a product or service increases as more people use it, such as social media platforms that become more valuable as the number of users increases. Indirect network effects, on the other hand, involve multiple user groups, where the growth of one group increases the value of the product for another group, such as the availability of apps on a smartphone, which benefits both users and developers and creates a positive feedback loop.

[21] Economies of scale refer to the cost benefits a firm experiences when it increases its output or production. When a firm produces more units of a product, it can spread its fixed costs (e.g., equipment and facilities) over a larger quantity, thereby reducing its average unit cost. This efficiency leads to cost savings, so it is more cost-effective to produce on a larger scale, which translates into lower prices for consumers or higher profits for the company.

[22] The snowball effect in economics refers to a self-reinforcing cycle in which a small initial change or event triggers a series of larger and larger interrelated changes. This process can lead to exponential growth or decline. In a positive context, it can describe how initial investment, consumer demand, or innovation can lead to significant economic

principle of functioning.[23] Because of these peculiarities, traditional ex post economic regulation instruments are rather unsuitable for application in these markets, as they were designed for traditional brick-and-mortar markets. This, by its very nature, requires the creation of innovative (*ex ante*) regulatory structures, such as the Digital Markets Act. The Digital Markets Act is an instrument of asymmetric regulation, meaning that its obligations (positive and negative) do not apply to all companies in a given sector or market, but only to those that meet strict criteria – the so-called "gatekeepers." The European Commission classifies companies as "gatekeepers" must meet strict positive and negative obligations that severely limit their economic freedom. Among the most important obligations are the data access obligation and the prohibition of self-referencing and data hoarding.[24] These obligations are rigid in nature, meaning that once a company is designated as a "gatekeeper" with respect to one or more of its key platform services, it is obliged to comply with them, with no room for negotiation with the European Commission. Moreover, the penalties for violations of the Digital Markets Act are severe compared to the penalties for violations of data protection law and even competition law, as the violating gatekeeper company can be fined up to 10 percent of its annual income for individual violations and up to 20 percent of its annual income of systemic breaches. In addition to the high maximum fines, the European Commission may also impose structural remedies (such as unbundling) if it deems this necessary and the measure is proportionate to the infringement in question.

Although the main goal of the Digital Markets Act is to ensure a competitive and fair market and to allow smaller companies to access it, it also has a strong, albeit indirect, impact on the right to personal data protection. First, because it limits the economic power of "big tech" companies and thus their ability to engage in business practices that could constitute a violation of the right to the protection of personal data, and second, because some of its provisions directly prohibit economic practices

expansion. Conversely, in a negative context, it can illustrate how economic downturns or crises can escalate when they affect different sectors of the economy and trigger a cascade of negative consequences.

[23] The "winner takes it all" principle in economics describes a situation in which the most successful or dominant player in a given market or industry collects most of the profits, while competitors receive relatively little. This may be due to network effects, economies of scale, or other factors that give the market leader a self-reinforcing advantage. As a result, the dominant company accumulates a disproportionately large market share, profits and influence, often leaving smaller competitors with limited opportunities to succeed or survive.

[24] For a more detailed list of positive and negative obligations set forth by the Digital Markets Act see: Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, article 5-6.

that in most cases have a negative impact on the right to the protection of personal data – a prime example being the prohibition of data hoarding.

4 Conclusion

New and innovative business models (such as multi-sided platforms) pose as yet unprecedented threats to the right to personal data protection. This is especially true for vulnerable social groups, such as children. These dangers can be addressed with instruments of social or economic regulation. In the latter case, the protection of the right to the protection of personal data is not the primary goal of regulation, but only a "by-product." Be that as it may, economic regulation can be particularly effective in protecting the right to the protection of personal data, as it imposes sanctions that are traditionally much stricter than those imposed by instruments of social regulation.

This paper analyzes two instruments of economic regulation that also consider data protection concerns: the decision of the Bundeskartellamt in the Facebook case and the Digital Markets Act. In the Facebook case, the Bundeskartellamt concluded that Facebook's practices, which collected a huge and disproportionate amount of users' personal data, constituted an abuse of market dominance because they were enabled by Facebook's ultra dominant market position – if users wanted to use social networks in Germany, they had to use the Facebook social network because there were no actual or even potential substitutes for it. The Facebook decision is noteworthy in that it makes an innovative and unprecedented connection between competition law and fundamental rights – according to it, abuse of a dominant position can also constitute a violation of a fundamental right (in this case, the right to protection of personal data) if that violation was made possible by the dominant position of the violating company. The decision has been appealed and is currently being considered by the Court of Justice of the European Union for a preliminary ruling. The Italian Competition Authority also sanctioned the same action by Facebook. However, the latter imposed a fine on Facebook because it violated consumer protection law, not competition law.

In addition, *ex ante* economic regulation tools can also be used to address privacy concerns; an important example is the recently adopted Digital Markets Act. This regulation imposes strict and non-negotiable positive and negative obligations that

companies designated as gatekeepers (with respect to the core platform services they control) must comply with. Although these obligations are primarily economic in nature, they also contribute to increased protection of personal data by limiting the economic power of gatekeepers and thus their ability to violate the right to the protection of personal data, and by prohibiting certain economic practices that traditionally lead to interference with the right to the protection of personal data.

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Detention of Children in Turkey: Sounds Good Doesn't Work

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This paper will examine the juvenile justice system in Turkey. First criminal capacity of children and courts exclusively established for children will be explored. Then types of detention before conviction, special provisions for children and institutions that children deprieved of their liberty will be send to will be explained. Since the physical conditions of these institutons differ greatly, their affects on children can also vary. Convicted children are normally being held in institutions that offer a certain amount of liberty, but since remand needs to prevent jailbreaks, children who were not convicted cannot be reasonable held in this kind of institutons. This creates an unfair treatment between children who were convicted and those whose trial is still continuing, putting the children on trial at a disadvantage. This paper will offer some solutions to balance the rights of the child and the aim of criminal procedure to reach the material truth.

Keywords:
rights of the child,
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PRISILNO PRIDRŽANJE OTROK V TURČIJI: ZVENI DOBRO, A NE DELUJE

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V prispevku avtorica preučuje mladoletniški pravosodni sistem v Turčiji. Najprej razišče kazensko sposobnost otrok in sodišča, ki so izključno vzpostavljena za otroke. Nato so pojasnjeni tipi pripora pred obsodbo, posebne določbe za otroke in institucije, v katere so otroci, ki jim je odvzeta prostost, poslani. Ker se fizični pogoji teh ustanov zelo razlikujejo, se lahko njihov vpliv na otroke prav tako razlikuje. Obsojeni otroci so običajno nastanjeni v ustanovah, ki ponujajo določeno mero svobode, vendar pa ker pripor mora preprečiti ubežnike, otroci, ki niso bili obsojeni, ne morejo biti razumno nastanjeni v takšnih ustanovah. To ustvarja nepravično obravnavo med otroki, ki so bili obsojeni, in tistimi, katerih sojenje še poteka, kar slednje otroke postavlja v neugoden položaj. Prispevek ponuja nekaj rešitev za uravnoteženje pravic otroka in dosego cilja kazenskega postopka, da se doseže materialna resnica.

1 Introduction

United Nations Convention on the Rights of the Child[1] is undoubtedly among the most widely accepted and influential documents regarding children's rights. Actually, The Convention is the most widely ratified human rights treaty in history. (Congressional Research Service, 2015, p. 2). The Convention provides us guidelines to evaluate our legal systems, helps us to compare them with various countries and, enables improvements that were tested and proved successful.

The Convention provides guidelines regarding children who "alleged as, accused of, or recognized as having infringed the penal law" in article 40 and who are deprived of their liberty in article 37. Since this paper aims to evaluate the situation of children mentioned in article 40 who are deprived of their liberty in Turkey, first the requirements of The Convention regarding this issue should be emphasized.

- There should be a minimum age for criminal liability.
- Child's deprivation of liberty should be a measure of last resort.
- Child's deprivation of liberty should be for the shortest period of time possible.
- Child should be separated from adults during the deprivation of liberty.
- There should be laws, procedures, authorities and institutions specifically applicable to children.
- Child should be treated in a manner that is consistent with his/her age and the fact that his/her reintegration into society is desirable.

Turkish criminal law system is in compliance with these guidelines on paper. But there are some issues that must be addressed and they constitute the main focus of this paper. To correctly determine these problems, first we need to answer some questions regarding the Turkish criminal justice system and its institutions.

We will first answer the "Who can be the subject of adjudication?" question and explore criminal capacity in Turkish law. Then we will answer the "By whom the adjudication process will proceeded?" question and briefly explain the court system for children. Afterwards we will answer the "Under which circumstances children

[1] Will be cited as "The Convention" hereinafter.

can be deprived of their liberty without a conviction?" question and briefly explain the detention types in Turkish criminal justice system. Our last question will be "Where the detention would be enforced?" and we will explore the penitentiary institutions for children.

After answering these questions and providing an outline of the juvenile justice system in Turkey, we can address the issues in application and hopefully offer some viable solutions.

2 Criminal Capacity of Children

Turkish Criminal Code divides children into three groups; under the age of 12, between ages 12 to 14, age 15 and above. (*Turkish Criminal Code,* 2004, article 31) These age groups are important not only for criminal liability, but also for rules of detention and enforcement of prison sentences.

Children who are 11 years of age or younger do not have criminal capacity. Which means even when they commit an act that is regulated as a crime, they cannot be put on trial. Even if an 11-year-old child is highly intelligent and is able to understand everything as well as an adult, the outcome would not change (Dönmez, 2020, p. 73). Only security measures (which are the same as protective and supportive measures for children who are in need of protection) can be applied to these children. Which inevitably means they cannot be deprived of their liberty under any circumstances and are outside the scope of this paper. In fact, a public prosecutor expressed that they do not even question these children, lest it might be harmful for the children (Kaya, 2021, p. 137).

Criminal capacity of children who are between the ages of 12 to 14 must be assessed in each individual case. Criminal capacity consists of two abilities: to understand the legal significance and consequences of the act, to choose the course of action. For criminal capacity a child must possess both these abilities; if even one is beyond the child's capabilities then he/she does not have criminal capacity. It is important to note that evaluation should be made in regards to the specific crime committed. (Dönmez, 2020, p. 79) For example, whereas a child might have criminal capacity for murder, the same child might not have criminal capacity for defamation (Kaya, 2021, p. 179).

Children between ages 12-14 can be put on trial and the court will declare a verdict about them even when they lack criminal capacity. If the court decides the child on trial committed the crime but lacks criminal capacity, the verdict must be "no grounds for punishment for lack of culpability" and an appropriate security measure must be decided about the child (Akbulut, 2013, p. 553). This means until the final decision regarding criminal capacity is reached, these children can be subjected to all forms of detention described below.

Children between ages 12-14 that have criminal capacity can be imprisoned if they are found guilty, but their sentence will be mitigated. This regulation is criticized for not being in par with the Convention's regulation that states that any kind of deprivation of liberty must be seen as a last resort. (*Convention on the Rights of the Child*, 1989, article 37/b) It is stated that courts should be able to choose between punishment and security measures. But the word of law explicitly states these children will be punished with imprisonment if the act they committed requires it (Akbulut, 2013, p. 554).

According to "Bylaw About Procedures and Principles Regarding the Application of Child Protection Act"[2] the right to decide whether these children have criminal capacity or not exclusively belongs to the court. (*Bylaw About Procedures and Principles Regarding the Application of Child Protection Act*, 2006, article 20/3) But both a social investigation report and an opinion from a forensic medicine expert, a psychiatrist or if necessary a specialist physician must be obtained before the assessment is made. (*Bylaw About Procedures and Principles Regarding the Application of Child Protection Act*, 2006, article 20/3-4) All these must be taken into consideration during the assessment of criminal capacity. If the child is under suspicion of various crimes, courts should obtain separate reports and opinions for each of these crimes. Likewise, courts should ask for evaluations regarding aggravating circumstances separately (Kaya, 2021, p. 179). This is especially important because as will be explained below; children of certain age can only be remanded for crimes that require heavier prison sentences. It is possible for the punishment of a crime to be under this limit, making remand impossible; whereas aggravating circumstances might raise the prison sentence thus enabling remand.

[2] Will be cited as "The Bylaw" hereinafter. For full text in Turkish: https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=10885&MevzuatTur=7&MevzuatTertip=5 (20 February 2024).

Children who are 15 or above have criminal capacity. Their prison sentences will also be mitigated, but to a lesser extent than younger children.

Which age group child belongs to will be determined by his/her age when the crime was committed. Child's age during trial will not be taken into consideration while criminal capacity is being assessed (Akbulut, 2013, p. 549).

3 Courts for Children

In accordance with The Convention, children who "alleged as, accused of, or recognized as having infringed the penal law" will stand trial in specialized courts. (*Convention on the Rights of the Child*, 1989, article 40/3) There are two types of courts in Turkish criminal justice system for children; Juvenile (Criminal) Courts (JCC) and Juvenile Criminal Courts for Serious Offences (CSO).

According to The Child Protection Act[3] crimes under the jurisdiction of CSOs are explicitly stated in the relative code and JCCs have jurisdiction over all other criminal cases, along with all civil cases.

The Act states that, CSOs will have jurisdiction over cases regarding crimes that fall under the jurisdiction of Criminal Courts for Serious Offences. (*The Child Protection Act*, 2005, article 26/2) Jurisdiction of these courts are regulated in "The Code About the Establishment, Duties and Authorities of the First Degree Courts and Regional Courts". According to this code, crimes of robbery, extortion, counterfeiting official documents, qualified theft by deception, bankruptcy by deception; with the exemption of some articles offences against state security, offences against the constitutional order and its functioning, offences against national defense, offences against state confidentiality and espionage; crimes regulated in the Anti-Terrorism Law no. 3713; crimes whose punishment can be imprisonment for more than 10 years, life and aggravated life sentences fall in the jurisdiction of these courts (*The Code About the Establishment, Duties and Authorities of the First Degree Courts and Regional Courts*, 2004, art. 12).

[3] Will be cited as "The Act" hereinafter. For full text in Turkish: https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=5395&MevzuatTur=1&MevzuatTertip=5 (20 February 2024).

All criminal cases not stated above will be under the jurisdiction of JCCs.

4 Detention of Children

There are three types of detention in Turkish Criminal Procedure Code[4]: Arrest by police, detention by the order of public prosecutor and remand, which is the pre-trial detention by court order. The applicability of these measures is different for children of varying age groups. The Bylaw contains regulations about these measures. It should be noted that, in criminal procedure mostly the age when the procedural process takes place is important; not the age when the act was committed (Akbulut, 2013, p. 560). But there are some regulations that are applicable on the basis of age when act was committed.

4.1 Arrest by Police

Arrest by police (or anyone) happens when someone is caught red-handed while committing a crime. (*Turkish Criminal Procedure Code*, 2004, article 90) The Bylaw cites relevant articles of "Bylaw of Arrest, Detention and Taking the Statement"[5] regarding children. (*Bylaw About Procedures and Principles Regarding the Application of Child Protection Act*, 2006, article 5/9).

Bylaw of Detention has an article that holds the title "Special provision regarding children" and in this article, children are divided into two age groups; under 12 and between 12-17. Children who were under the age of 12 (sc. 11 and younger) while the act was committed cannot be detained. Even if they are caught red-handed, they must be set free right after their identification. (*Bylaw of Arrest, Detention and Taking the Statement*, 2005, article 19/a) This is a proper regulation; since children of this age group does not have criminal capacity and cannot be punished, they should also not be in contact with criminal procedure officials (Akbulut, 2013, p. 574). It is impossible for these children to face any punishment that limits their freedom, therefore they should not be subjected to any measure that does so.

[4] Will be cited as "The Code" hereinafter. For full text in Turkish: https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=5271&MevzuatTur=1&MevzuatTertip=5 (20 February 2024).
[5] Will be cited as "Bylaw of Detention" hereinafter. For full text in Turkish: https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=8197&MevzuatTur=7&MevzuatTertip=5 (20 February 2024).

In paragraph (b) of the aforementioned article, it is explicitly stated that But children that are or above 12 years of age can be arrested in accordance with article 90 of the Code (*Bylaw of Arrest, Detention and Taking the Statement*, 2005, article 19/b). These children will be sent to the public prosecutor's office immediately and their relatives and lawyer will be notified.

4.2 Detention by the Order of Public Prosecutor

People who are arrested as described above will be sent to the public prosecutor. Public prosecutor can either set the said person free, or issue an order of detention. (*Turkish Criminal Procedure Code*, 2004, article 91) Children below 12 cannot be subjected to detention, because detention is a form of measure that must follow arrest (Akbulut, 2013, p. 578).

Children that are or older than 12 years old can be detained, but in accordance with The Convention (*Convention on the Rights of the Child*, 1989, article 37/c) they must be held separate from adults. These children will be held in the Child Unit of Law Enforcement, and if this unit does not exist where the child was detained, they will still be separated from adults that are under detention (*The Child Protection Act*, 2005, article 16; *Bylaw About Procedures and Principles Regarding the Application of Child Protection Act*, 2006, article 6).

Detention cannot exceed 24 hours, and the additional time absolutely necessary to send the person to the judge or court closest to the place where arrest took place. The 24-hour clock starts with the arrest made by the police, and the necessary duration cannot exceed 12 hours. All in all, the time period someone can be subjected to detention cannot exceed 36 hours after arrest (*Turkish Criminal Procedure Code*, 2004, article 91). This period is the same for children.

4.3 Remand

Remand is the measure that causes the main issue this paper will be addressing. Remand is the deprivation of liberty with a court order, but without a conviction and is strictly regulated with The Code.

Remand has two main material conditions; evidence that amounts to probable cause and existence of cause for remand. Two causes for remand are flight risk and risk of evidence and/or witness tampering. (*Turkish Criminal Procedure Code*, 2004, article 100) In addition to these, remand must be proportionate to the expected punishment of the verdict and restricted liberty must be insufficient (Ünver & Hakeri, 2023, p. 373). If the punishment of the crime is only judicial fine or imprisonment not more than two years, then suspect cannot be remanded.

Remand durations differ in accordance with the severity of the crime. If the crime falls in the jurisdiction of the criminal court that oversees serious offences, the remand duration is up to two years plus an additional up to three years under inevitable circumstances. In all other cases remand duration is up to one year, plus an additional up to six months under inevitable circumstances.

Children under twelve years of age cannot be subjected to remand, as they cannot be subjected to detention in any form. Older children are divided into two age groups regarding remand; under the age of 15 and between 15-17 years of age.

Children younger than 15 (sc. between 12-14 years of age) can only be remanded if the crime they are suspected of requires a prison sentence of over five years (*The Child Protection Act*, 2005, article 21; *Bylaw About Procedures and Principles Regarding the Application of Child Protection Act*, 2006, article 11). The Code also limits the regular duration of remand for these children. If the child was under 15 when he/she committed the crime, remand cannot exceed half of the regular duration (*Turkish Criminal Procedure Code*, 2004, article 102/5). Which is one year plus 1.5 years for crimes under the jurisdiction of the severe courts and; 6 months plus 3 months in other cases.

There are no special regulations regarding conditions of remand for children who are 15 or older, but the duration is shorter. If the child was or over 15, remand duration is ¾ of the adults'. Which is 1.5 years plus 2.25 years for crimes under the jurisdiction of the severe courts and; 9 months plus 4.5 months in other cases.

The main problem remand causes is the fact that these children are kept in closed penitentiary institutions. And as can be seen, the duration of these deprivations of liberty can be too long to ignore the issue. The issue can be discussed better after explaining the penal institutions for children.

5 Penal Institutions for Children

Children are always kept separate from adults. There are two types of institutions exclusively for children; child education homes (CEH) and closed prisons for children (CPC). Unfortunately, these institutions are not established countrywide.

5.1 Closed Penitentiary Institutions

CPCs are regulated in article 11 of "The Code About the Enforcement of Punishments or Security Measures".[6] CPCs are institutions that have safeguards against jailbreak, along with internal and external guards. Children who are remanded or sent from CEHs for disciplinary or other reasons are held in these institutions. If there is no CPC where the child will be held, he/she is kept in a separate section of the closed prisons. Unfortunately, half of the children in penal institutions are located as such. Especially sending girls to a section of the women's closed prisons ceased being an exemption and became the regular process (Duman, 2022, p. 377).

In Turkey there are only 9 CPCs located in; Ankara (Sincan), İstanbul (Maltepe), Samsun (Kavak), Tekirdağ (Çorlu), Mersin (Tarsus), İzmir, Kayseri, Diyarbakır, Hatay.

Closed penitentiary institutions' separate sections for children differ. In some, children have to share common places with adults, which hinders with their development. In others, they have relatively specialized schedules which is better but still not sufficient because the places are not designed for children (Gündüz, 2022, p. 513).

Children in CPCs are already ripped off from their normal lives and isolated. The fact that institutions are only established in certain cities enhances this isolation by making visitations more difficult. It is stated that during COVID-19 pandemic, with the travel and activity restrictions, isolation of these children became even more severe (Duman, 2022, p. 371).

[6] Will be cited as "Code of Enforcement" hereinafter. For full text in Turkish: https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=5275&MevzuatTur=1&MevzuatTertip=5 (20 February 2024).

5.2 Child Education Homes

CEHs are the main institutions prison sentences of convicted children will be carried out (Doğan, 2018, p. 198). Convicted children should be sent to one of the four CEHs after the verdict is finalized. The verdict becomes final, by either being approved in or not being taken to a higher court.

Convicted children serve their finalized prison sentences in CEHs. These institutions' main aims are to enable children's education, vocation and re-integration. There are no safeguards against prison break or external guards. The security of the institution is the responsibility of the internal guards. If a child turns 18 while continuing an education program inside or outside of the institution, they might be let to remain in the CEH until they turn 21 for the completion of education. As mentioned above, only children who are remanded are kept in closed institutions. Children can also be sent to closed institutions for disciplinary (or other) reasons (*The Code About the Enforcement of Punishments or Security Measures*, 2004, article 15).

Children in CEHs will go to school like other children and return to CEH after school. There are no guards to make sure they don't escape during their time outside.

Unfortunately, there are only 4 CEHs in Turkey and the number of child convicts exceeds their capacity. These CEHs are located in Ankara, İstanbul, İzmir and Elazığ. Ankara CEH has single rooms and having 144 rooms, has the capacity to accommodate 144 children. Elazığ CEH has 6 wards and can accommodate 108 children. İstanbul CEH's website does not contain information regarding capacity and living quarters. But when contacted, they stated that children have single rooms and the capacity is 144 children like Ankara. If the capacity is exceeded, they accommodate young people over 18, three in a room. İzmir CEH also has no information on its website regarding physical conditions.[7] But when contacted the CEH in Urla, they said they have three units designed like dorm rooms that can accommodate a maximum of 30 children. But this 30 spots were never filled and they accommodated 27-28 children at most.

[7] These institutions have websites that give information about physical facilities or contact numbers. But for privacy concerns, they don't contain an address. For further information, the websites of Ankara, Elazığ, İstanbul and İzmir CEHs are as follows: https://ankarace.adalet.gov.tr/hakkimizda (10 December 2023); https://elazigce.adalet.gov.tr/kurumumuz-hakkinda (10 December 2023); https://istanbulce.adalet.gov.tr/kurum-hakkinda (10 December 2023); https://urlace.adalet.gov.tr/ (10 December 2023).

Since the main aim of these institutions are education and re-integration into society, physical conditions are important. Penitentiary institutions' architectural design also bears a significance; for example, ward system is an obstacle in rehabilitation. (Gündüz, 2022, p. 506) In this regard, Ankara and İstanbul CEHs can be said to have the best conditions with single rooms, followed by İzmir with 10 person "dorm rooms" and at last Elazığ with a ward system.

All in all, the total capacity of the 4 CEHs in Turkey is 426, which is not enough to accommodate all the convicted children. The number of convicted children got into penitentiary institutions and their age when admitted in the institution according to official statistics is as follows:

	2016	2017	2018	2019	2020	2021	2022
12-14 year old	42	80	53	44	36	38	79
15-17 year old	1016	1661	1518	1121	913	961	1294

According to the same statistics, as of 31st of December 2022 there are 200 children between the ages of 12-14 and 2306 children between the ages of 15-17 in penitentiary institutions as convicts and remanded combined. Even though remanded children are kept in closed penitentiary institutions, the capacity of CEHs are not nearly enough to accommodate 1373 children who were convicted and admitted to penitentiary institutions in 2022 alone (T.C. Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, 2023, p. 5 and 9).

Children in CEHs can be sent to a closed penitentiary institution for disciplinary or other reasons (*The Code About the Enforcement of Punishments or Security Measures*, 2004, article 11). While disciplinary reasons are made concrete by the Code of Enforcement, the wording "other reasons" leave an undesirable flexibility, whose use by the officials will be discussed below.

5.3 Disciplinary Reasons to Send Child to Closed Penitentiary Institution

Disciplinary reasons are regulated in article 46 paragraph 8 of the Code of Enforcement. A child can only be sent to a closed institution if he/she committed the acts in this paragraph. After the first act, child will be sent to the closed institution

for 6 months. After this, if an act in the same paragraph is committed again he/she will be sent for 1 year. Child can be sent to the closed institution because of consecutive acts only once. So, the maximum duration a child in CEH can be sent to a closed penitentiary institution is 1 year and 6 months.

Aforementioned acts are:

Causing aggravated bodily harm; causing or attempting to bodily injury with any kind of deadly tool, weapon or explosive; confining someone against their will; hindering duties of the officers in the institution via threats or coercion; completed or attempted prison break; intentional arson or attempted arson of the institution and/or its properties or causing them heavy damage; inciting detainees against administration, causing or attempting riot; murder or attempted murder; committing, attempting to or incite to sexual assault, abuse and harassment; torture officers or other children or make others commit this torture.

As can be seen, acts that will cause a child be send to closed institutions are quite severe. Even if a child commits murder, he/she can be sent to a closed institution for a maximum duration of 6 months. If the child commits a second murder, he/she can be sent back for a maximum duration of 1 year. After this period, the child cannot be sent back to the closed institution even if he/she commits murder for a third time. But if the child is remanded for one of these murders, then he/she will be send to a closed institution and can be kept there until the maximum duration for remand passes.

5.4 Remand for Another Crime

Children in CEHs might commit crimes inside or outside the institution. Unlike closed institutions, CEHs are not designed to keep children away from the outside world. Therefore, if they commit another crime while serving their prison sentence in a CEH; and the causes of remand are met for this crime; they might be remanded and send to a closed institution.

At first glance, it might seem unreasonable to remand someone who was already convicted and is serving a prison sentence. But the structure of CEHs might make this unavoidable. If the child is suspected to carry a risk of evidence and/or witness

tampering, restricting his/her liberty might be necessary to protect witnesses and to ensure criminal procedure to function properly. This will be discussed in length below.

6 Issues Caused by the System and Application

Convicted children are serving their sentences in CEHs. These children are living in a relatively comfortable environment without any safeguards against prison break, which is important for their psychological well-being. As stated above, most of these children have separate, single rooms. Even ones that do not have single rooms share living quarters with a lesser number of people who are close to their own age. The facilities they are in are designed exclusively for children, enabling them to access both academic and vocational education, along with various recreational activities. For example, Ankara CEH has one indoor sports facility; one football, two basketball, two volleyball courts; one library; eight hobby rooms and; additional educational and recreational spaces.

But children who are merely under suspicion stay in institutions that profoundly limits their liberties. According to official statistics, as of 31.03.2022 the total number of child convicts (between ages 12-18) that are in penitentiary institutions is 670, whereas the same number for remanded children is 1406. (Ceza ve Tevkifevleri Genel Müdürlüğü, 2022, p. 2) This means number of children in closed institutions would be more than double of the ones in CEHs, even if all the convicted children were serving their sentences in CEHs, which is unfortunately far from the truth as will be discussed below.

Regarding remanded children; restricting liberties to a greater extent as a measure and giving some of it back after conviction may seem utterly unreasonable at first glance. But it has a logic behind.

As stated above there are two causes for remand; risk of flight and risk of evidence/witness tampering. While the former of those two should never be the reason for remanding children, the latter can be.

A child should never be remanded because of flight risk; because after the finalized conviction he/she will be held in an institution that has no safeguards to prevent prison break. Remand after the verdict of the first degree court poses an even greater absurdity in these cases.

Criminal courts sometimes remand the accused along with the prison sentence, lest they will commit a flight after the verdict (Özbek, Doğan & Bacaksız, 2023, p. 272). Even more alarmingly, The Constitutional Court wrongfully decided that the maximum duration for remand does not apply after this verdict, because the accused is no longer under mere suspicion, but there is a court order stating that he/she is guilty (Ünver & Hakeri, 2023, p. 389).

Considering the already long durations of remand, along with this decision and the situation of children whose verdict was not yet finalized; the need for a special provision regarding remand of children becomes obvious.

If the cause for remand is witness/evidence tempering, it becomes understandable to detain the child in an institution that aims to prevent jailbreak. For, if the child is continued to stay in a CEH, it is possible for him/her to temper evidence and return to the institution as if nothing happened. But regarding flight risk and remand after the not-finalized verdict, an amendment is necessary. The proposed content of these amendments will be discussed in detail in the conclusion.

Unfortunately, the inequalities do not only effect remanded children. Although the codes explicitly states that children will serve their prison sentence in CEHs, most of the convicted children cannot access them. The aforementioned "other reasons" regulation in article 11 of Code of Enforcement is used in a way to deny children transfer to CEHs.

On paper, when a child's verdict is finalized he/she should be send to the closest CEH. Unfortunately, contacted enforcement official stated that practice proceeds differently. Since transfer is the right of the child and there are no regulations for convicted children to stay in the closed institutions, the transfer documents are written. But right after them, the Ministry of Justice issues a document stating that the child should remain in the closed institution for "security reasons" and the transfer is stopped. Since "security reasons" are conceived as indisputable, the child stays in the closed institution he/she was in. So children who were in cities where CEHs are established can benefit from them, but children from other cities, especially the ones that are far away, are rarely transferred to CEHs.

Although there are several practical issues, there are no data on violations. Among the reasons of this shortage are; the unawareness of children, their inability to contact outside world and lack of independent monitoring (Civil Society in the Penal System Association, 2022, p.11).

7 Conclusion

Children in closed institutions face challenges other than being detained. They are isolated and more than half of them have to survive in institutions that were designed for adults. Some even have to mingle with them, which makes rehabilitation and education extremely difficult and inefficient.

It is obvious that more CEHs should be established since the existing ones' capacities are not sufficient to accommodate the number of convicted children. But other than physical insufficiencies, there are some amendments that can secure the children's rights.

First, the relative codes should explicitly state that a child can only be remanded if he/she carries the risk of evidence and/or witness tampering; but can never be remanded because of flight risk.

Second, it can be codified that the child should be released immediately if all evidence was obtained and all witnesses were heard.

Third, it should be codified that if a child is to be remanded after the verdict, he/she will be held in a CEH and not in a closed institution. As explained above, The Constitutional Court said that the base cause of remand changes after the not-finalized verdict. Therefore, limiting the cause for remand to evidence/witness tampering might not be sufficient to protect children's rights; they might still be remanded after the verdict of the court. If it cannot be ensured that they will not be remanded; enabling these children to go to CEHs will offer a better protection. Since a verdict means all relevant evidence and witnesses were already assessed by the court; and since the children will be sent to institutions that have no safeguards against prison break after the verdict is finalized; keeping them in closed institutions can have no logical basis under these circumstances.

Last, the "other reasons" mentioned in article 11 of the Code of Enforcement should be repealed or concretized. The differences between CEHs and CPCs (or even worse, other closed penitentiary institutions) are too great. Therefore, deciding where children will serve their sentences cannot be left to the discretion of the administration. On one hand, regardless of their shortcomings, we have institutions that secure most of children's rights protected by international treaties; that enable children to better themselves both academically and psychologically, in an environment that was designed specifically with that aim in mind. On the other hand, we simply have prisons.

CEHs are solid steps towards treating convicted children with dignity and should be made available to as much children as possible. The propositions of this paper might provide a larger number of children to access these facilities' benefits and have a better chance at rehabilitation.

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Crimes in Which Children are Primary Object of Criminal Law Protection in the Criminal Code of the Republic of Slovenia

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The author discusses criminal offences in which children are the primary object of criminal law protection in the Criminal Code of the Republic of Slovenia. Children enjoy special state protection and care. This also includes the criminal law protection of the interests and benefits of children and minors. As for all other areas, criminal law is considered to be the last and the least appropriate means for protecting legally protected goods. Criminal law protection only becomes relevant when legally protected goods are damaged or highly endangered. Nevertheless, in the case of serious violation of the benefits of children and minors, it is not possible to renounce criminal law intervention, as it is a good of such importance that it also deserves criminal law protection.

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KAZNIVA DEJANJA, V KATERIH SO OTROCI GLAVNI PREDMET ZAŠČITE KAZENSKEGA PRAVA V KAZENSKEM ZAKONIKU REPUBLIKE SLOVENIJE

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Ključne besede:
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Avtor v prispevku obravnava kazniva dejanja, v katerih so otroci glavni subjekt zaščite kazenskega prava po pravni ureditvi Kazenskega zakonika Republike Slovenije. Otroci uživajo posebno državno zaščito in skrb. To vključuje tudi kazenskopravno zaščito interesov in koristi otrok in mladoletnikov. Kot pri vseh drugih področjih, se kazensko pravo šteje za zadnje in najmanj primerno sredstvo za zaščito pravnih dobrin. Zaščita kazenskega prava postane pomembna le, ko so pravne dobrine poškodovane ali močno ogrožene. Kljub temu pa v primeru resnih kršitev koristi otrok in mladoletnikov ni mogoče zanikati kazenskopravnega posredovanja, saj gre za dobrino takšnega pomena, da si zasluži tudi zaščito kazenskega prava.

Univerzitetna založba Univerze v Mariboru

1 Introduction

Children enjoy special protection and care. According to article 56 of the Constitution of the Republic of Slovenia[1], children enjoy special protection and care.[2] Several provisions of the Criminal Code-1[3] of the Republic of Slovenia explicitly refer to children and minors. Let me name just a few of these provisions. Article 15a of the Criminal Code-1 determines the method of prosecuting perpetrators of crimes committed to the detriment of minors.[4] The term 'minors' certainly also covers children, as minors are persons up to the age of 18, while children are persons up to the age of 14 under Slovenian law.

Article 21 of the Criminal Code-1 expressly excludes children (persons up to the age of 14) as potential perpetrators of crime.[5]

Paragraph two of article 84 of the Criminal Code-1 regulates providing data from criminal records in the case of conviction for certain criminal acts committed against minors.[6]

[1] Constitution of the Republic of Slovenia (Ustava Republike Slovenije): Uradni list Republike Slovenije [Official Gazette of the Republic of Slovenia], Nos. 33/91-I; 42/97 – UZS68; 66/00 – UZ80; 24/03 – UZ3a, 47, 68; 69/04 – UZ14; 69/04 – UZ43; 69/04 – UZ50, 68/06 – UZ121,140,143; 47/13 – UZ148; 47/13 – UZ90,97,99; 75/16 – UZ70a; 92/21 – UZ62a.

[2] Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity. Children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse. Such protection shall be regulated by law. Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. Such protection shall be regulated by law.

[3] The Criminal Code (Kazenski zakonik): Uradni list Republike Slovenije [Official Gazette of the Republic of Slovenia], Nos. 55/08; 66/08; 39/09 (KZ-1A); 91/11 (KZ-1B); 54/15 (KZ-1C); 38/16 (KZ-1D); 27/17 (KZ-1E); 23/20 (KZ-1F); 91/20 (KZ-1G); 95/21 (KZ-1H); 186/21(KZ-1I) and 16/23 (KZ-1 J).

[4] In cases concerning a criminal offence referred to in the chapters relating to criminal offence committed against life and limb, against human rights and freedoms, or against sexual integrity or other criminal offences referred to in this Code with elements of violence committed against minors, the provisions of this Code relating to the filing of a motion or bringing a private action shall not apply to the method of criminal prosecution and the perpetrator shall be prosecuted *ex officio*.

[5] Anyone who commits an unlawful act when he or she is under the age of 14 years (a child) cannot be a perpetrator of a criminal offence.

[6] Upon a reasonable request from institutions or associations entrusted with the education, guidance, protection or care of children or minors, information from the criminal record shall also be provided regarding the expunged convictions for criminal offences under article 170, article 171, article 172, article 173, article 173a, paragraph two of article 174, and paragraph two of article 175, committed against a minor, and under article 176 of this Code.

Paragraph three of article 90 of the Criminal Code-1 regulates the limitation of criminal prosecution for some crimes committed against minors.[7]

In the following, I will limit myself to reviewing criminal acts in which children or minors are defined as the primary object of criminal law protection. It is understood that children and minors are also protected in other cases where the object of criminal law protection is humans.

2 Crimes in which children or minors are explicitly involved as objects of criminal law protection:

a) genocide (article 100 of the Criminal Code-1) - one of the forms of committing this type of crime is forcible transfer of children of one group to another group;[8]
b) crimes against humanity (article 101 of the Criminal Code-1) - one of the forms of committing this type of crime is enslavement, which means performing of a particular or all justifications arising from the property right over a person and also includes carrying out such justification in trafficking in human beings, especially women and children;[9]
c) war crimes (point 2 of article 102 of the Criminal Code-1) - one of the forms of committing this type of crime is conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;[10]
d) enabling the escape of prisoners (article 293 of the Criminal Code-1) - defines the enabling of the escape of minors from a correctional facility for juveniles.[11]

[7] Notwithstanding paragraph one of this article, the time limit for the statute of limitations in criminal offences against sexual inviolability and criminal offences against marriage, family or youth, committed against a minor, shall begin when the injured person reaches adulthood.
[8] Whoever with the intention of destroying in whole or in part a national, ethnic, racial or religious group or gives an order: - to forcibly transfer children of the group to another group shall be sentenced to imprisonment for at least fifteen years.
[9] Whoever orders or carries out the following acts as part of a larger systematic attack against the civilian population and which the perpetrator is aware of: enslavement, which means the exercise of any or all of the powers attached to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; shall be sentenced to imprisonment for at least fifteen years.
[10] - conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities; shall be sentenced to imprisonment for at least fifteen years.
[11] Whoever by force, threat, deception, or otherwise enables the escape of a person serving a sentence in a prison, or a detained person or a person subject to compulsory psychiatric treatment and confinement in a mental health institution, or a minor in a correctional institution, shall be punished by imprisonment of up to three years.

3 Crimes in which the fact that an act is committed against a child or a minor constitutes a qualifying circumstance:

3.1 Enslavement (article 112(3)of the Criminal Code-1)[12]

3.2 Trafficking in human beings (article 113 of the Criminal Code-1)[13]

3.3 Solicitation to and assistance in suicide (article 120 of the Criminal Code-1)[14]

3.4 Abduction (article 134 of the Criminal Code-1)[15]

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[12] (1) Whoever, in violation of international law, brings another person into slavery or a similar condition, or keeps another person in such a condition, or buys, sells or delivers another person to a third party, or brokers the buying, selling or delivery of another person, or urges another person to sell his freedom or the freedom of the person he supports or looks after, shall be sentenced to imprisonment between one and ten years. (2) Whoever transports persons held in slavery conditions or in a similar condition from one country to another shall be sentenced to imprisonment for between six months and five years. (3) Whoever commits a criminal offence referred to in paragraph one or two of this article against a minor shall be sentenced to imprisonment for between three and fifteen years.

[13] (1) Whoever purchases, takes possession of, accommodates, transports, sells, delivers or uses another person in any other way, or recruits, exchanges or transfers control over another person or acts as a broker in such operations, for the purpose of exploiting prostitution or other forms of sexual exploitation, forced labour, slavery, servitude, or committing the criminal offences of trafficking in organs, human tissue or blood, shall, notwithstanding the possible consent of such person, be sentenced to imprisonment for between one and ten years and imposed a fine. (2) If an act referred to in the preceding paragraph is committed against a minor or with force, threats, deception, abduction or the exploitation of a subordinate or dependent position or by giving or taking payment or benefits in order to obtain the consent of a person who exercises control over another person, or in order to force a victim to become pregnant or be artificially inseminated, shall be punished by imprisonment for between three and fifteen years and by a fine. (3) Whoever, with a view to committing an act referred to in paragraph one or two of this article, keeps, seizes, hides, damages or destroys an official document proving the identity of victims of trafficking in human beings, shall be sentenced to imprisonment for up to three years and imposed a fine. (4) Whoever knows that a person is a victim of human trafficking and uses such services as a result of the exploitation of this person described in paragraphs one and two of this article shall be sentenced to imprisonment for up to three years and imposed a fine. (5) Whoever carries out an act referred to in paragraph one, two or three of this article as a member of a criminal organisation, or if large proceeds are gained through the commission of the act, the perpetrator shall be sentenced to imprisonment for between three and fifteen years and imposed a fine.

[14] (1) Whoever intentionally solicits another person to kill him- or herself or assists him or her in doing so and that person indeed commits suicide shall be sentenced to imprisonment for between six months and five years. (2) Whoever commits an act referred to in the preceding paragraph against a minor above fourteen years of age or against a person whose capacity to understand the meaning of his or her act or to control his or her conduct is substantially diminished shall be sentenced to imprisonment for between one and ten years. (3) In the event of an act referred to in paragraph one of this article being committed against a minor under fourteen years of age or against a person who was not capable of understanding the meaning of his or her act or of controlling his or her conduct shall be punished in the same manner as for manslaughter or murder. (4) Whoever treats his or her subordinate or a person who is his or her dependant in a cruel or inhuman manner, resulting in this person's suicide, shall be sentenced to imprisonment for between six months and five years. (5) Whoever, under particularly mitigating circumstances, assists another person in the commission of suicide and that person indeed commits suicide, shall be sentenced to imprisonment for up to three years. (6) If in relation to an act referred to in the preceding paragraphs the suicide has only been attempted, the Court may reduce the punishment of the perpetrator.

[15] (1) Whoever abducts another in order to compel him or her or any other person to perform an act or to omit to perform an act or to suffer any harm shall be sentenced to imprisonment for between six months and five years. (2) Whoever commits an act referred to in the preceding paragraph against a minor or threatens the abducted person with murder or serious bodily harm shall be sentenced to imprisonment for between one and ten years. (3) A perpetrator of an act referred to in paragraph one or two of this Article who releases the abducted person before the demand that was the motive for abducting the person is satisfied may be sentenced more leniently or his or her sentence may be remitted.

3.5 Exploitation through prostitution (article 175 of the Criminal Code-1)[16]

3.6 Illicit manufacture and trade in narcotic drugs, illicit substances in sport and illicit drug precursors (first and second paragraph of article 186 of the Criminal Code-1)[17]

3.7 Facilitating the consumption of narcotic drugs or illicit substances in sport (first and second paragraph of article 187 of the Criminal Code-1)[18]

4 Criminal acts that are entirely intended to protect children and minors

I will pay some more attention to criminal acts that are entirely intended to protect children and minors.

[16] (1) Whoever participates for exploitative purposes in the prostitution of another or instructs, obtains or encourages another to engage in prostitution by force, threats or deception shall be sentenced to imprisonment for between three months and five years. (2) Whoever participates for exploitative purposes in the prostitution of a minor, or exploits the prostitution of a minor, or whoever instructs, obtains or encourages the prostitution of a minor by force, threat, deception, recruitment or solicitation, shall be sentenced to imprisonment for between one and ten years. (3) If an act referred to in paragraph one or two of this article is committed against several persons or within a criminal organisation, the perpetrator shall be sentenced to imprisonment for between one and twelve years.

[17] (1) Whoever illicitly produces, processes, sells or offers for sale or, for the purpose of sale or placing on the market, buys, stores or transfers or acts as an agent in the sale or purchase of or otherwise unlawfully places on the market plants or substances that are classified as narcotic drugs or illicit substances in sport, or the precursors used to manufacture narcotic drugs, shall be sentenced to imprisonment for between one and ten years. (2) Whoever sells, offers for sale or distributes free of charge narcotic drugs or precursors used to manufacture narcotic drugs, or illicit substances in sport to a minor, mentally disabled person, a person with a temporary mental disturbance or severe mental retardation or a person undergoing treatment for addiction or rehabilitation, or, if the act is committed in educational institutions or in the immediate vicinity thereof, in prisons, military units, public bars and restaurants or at public events, or if an act referred to in paragraph one is committed by a public employee, priest, physician, social worker, teacher or educator who thereby exploits his or her position, or whoever in order to commit the aforementioned act uses minors, shall be sentenced to imprisonment for between three and fifteen years.

[18] (1) Whoever solicits another person to use narcotic drugs or illegal substances in sport or provides a person with drugs for their personal consumption or to be consumed by a third person, or whoever provides a person with a place or other facility to use narcotic drugs or illicit substances in sport or otherwise facilitates others to use such substances shall be sentenced to imprisonment for between six months and eight years Whoever solicits another person to use narcotic drugs or illegal substances in sport or provides a person with drugs to be used by him or her or by a third person, or whoever provides a person with a place or other facility to use narcotic drugs or illicit substances in sport shall be sentenced to imprisonment for not less than six months and not more than eight years. (2) Whoever commits an act referred to in paragraph one against several persons, a minor, a mentally disabled person, a person with a temporary mental disturbance or severe mental retardation or a person undergoing treatment for addiction or rehabilitation, or if the act is committed in educational institutions or in the immediate vicinity thereof, in prisons, military units, public bars and restaurants or at public events, or if an act referred to in paragraph one is committed by a public employee, priest, physician, social worker, teacher or educator who thereby exploits his or her position, shall be sentenced to imprisonment for between one and twelve years.

4.1 Infanticide (article 119 of the Criminal Code-1)[19]

This crime is a privileged form of manslaughter. This is a special form of crime that can only be committed by the mother of the child victim of the crime, during or immediately after childbirth. The woman must be under the influence of childbirth, which affects her entire psychophysical condition as the perpetrator. The perpetrator can only be a mother, and other participants in the crime would be held accountable as participants in the crime of manslaughter. This crime can only be committed with intent (either direct or eventual). This act may be accomplished by commission or omission.

If the death of a child occurs at birth or after birth through negligence, the act should be defined as negligent homicide, which is quite illogical, as causing death by negligence is punishable more severely than infanticide (Deisinger, 2017, pp. 137–138).

In recent literature, there are many concerns against treating infanticide as a privileged form of homicide (Korošec & Škrubej, 2017, pp. 77–117).

4.2 Sexual assault on a person below fifteen years of age (article 173 of the Criminal Code-1)[20]

This crime is based on the Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse and Directive of the European Parliament and the Council on combating the sexual abuse and sexual exploitation of children and child pornography.

[19] A mother who takes her child's life during or immediately after giving birth by reason of mental disturbance provoked by giving birth shall be sentenced to imprisonment for up to three years.

[20] (1) Whoever has sexual intercourse or performs any other sexual act with a person of the same or opposite sex under the age of fifteen years shall be sentenced to imprisonment for between three and eight years. (2) Whoever commits an act referred to in the preceding paragraph against a vulnerable person under the age of fifteen or by threatening him or her with a direct attack on life or body, or, by acting in such manner, commits the aforementioned act against another person, shall be sentenced to imprisonment for between five and fifteen years. (3) A teacher, educator, guardian, adoptive parent, parent, clergyman, doctor or any other person who through the abuse of his or her position has sexual intercourse or performs any other sexual act with a person under the age of fifteen that has been entrusted to him or her for teaching, education, medical treatment, protection or care shall be sentenced to imprisonment for between three and ten years. (4) Whoever in the circumstances referred to in paragraphs one, two or three of this article violates the sexual integrity of a person under the age of fifteen years shall be sentenced to imprisonment for up to five years. (5) The act referred to in paragraph one of this article shall not be unlawful if it is committed with a person of comparable age and if it is appropriate to that person's mental and physical maturity.

The perpetrator of this criminal offence may be anyone, either a male or female person. In the case of a criminal act according to paragraph three, the perpetrator must have special personal characteristics. Specific intent is required for the commission of all forms of this crime. The perpetrator must be aware that the victim is under fifteen years of age. Paragraph one covers cases of sexual intercourse and all cases of sexual acts between perpetrators of both sexes and victims of both sexes who are less than fifteen years old. All sexual intercourses, according to paragraph one of this article, must be voluntary, or at least without resistance, by a person under the age of fifteen.

Paragraph three of this article defines an aggravated form of offence. These are cases of rape of a person under the age of fifteen, cases of other sexual acts and cases of (sexual) abuse committed against weak persons of both sexes under the age of fifteen, but without the use of force or threats.

Paragraph three of this article defines an aggravated form of crime, considering the perpetrator's special personal characteristics. Under this paragraph, a perpetrator of the crime may be a teacher, educator, guardian, adoptive parent, parent, clergyman, doctor or any other person who, through the abuse of their position, has sexual intercourse or performs any other sexual act with a person under the age of fifteen who has been entrusted to him or her for teaching, education, medical treatment, protection or care. All of these perpetrators abuse their position to achieve sexual intercourse or other sexual acts. Cumulatively, two conditions must be met: that the perpetrator abused his position and that a person under the age of fifteen was entrusted with his custody for learning, education, treatment, protection or care. Of course, it suffices that a person under the age of fifteen has been entrusted to the perpetrator for one of the aforementioned purposes.

Paragraph four defines a privileged crime. These are cases where, under the circumstances referred to in paragraphs one, two or three, the perpetrator otherwise affects the sexual integrity of a person under the age of fifteen. In accordance with paragraph five of this article, the act is not illegal if it is committed with a person of comparable age and corresponds to the mental and physical maturity of this person (Deisinger, 2017, pp. 295–298).

4.3 Solicitation of persons under fifteen years of age for sexual purposes (article 173a of the Criminal Code-1)[21]

This crime is defined by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. This is a preparatory act for a crime referred to in paragraph one of article 173 of the Criminal code-1.

The perpetrator of this crime may be anyone. Such a crime is committed with intent. Crime is committed by soliciting persons under the age of fifteen for an encounter. The perpetrator carries out the solicitation by using information or communication technologies.

The perpetrator's intent is to commit a crime referred to in article 173 of the Criminal code-1. The criminal act is completed when the perpetrator succeeds in soliciting an encounter with the victim (Deisinger, 2017, p. 301).

4.4 Presentation, manufacture, possession and distribution of pornographic material (article 176 of the Criminal Code-1)[22]

This crime is defined by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Anyone may commit such a crime. Such a crime can only be committed with intent.

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[21] (1) Whoever proposes, by means of information and communication technology, to meet with a person under fifteen years of age for the purpose of committing a criminal offence referred to in paragraph one of article 173 or for the purpose of producing photographs or audiovisual or other items with pornographic or other sexual content, and where this proposal is followed by material acts in order to realise such a meeting, shall be sentenced to imprisonment for up to one year. (2) The act referred to in the preceding paragraph shall not be unlawful if it is committed for the purposes of carrying out the act referred to in paragraph one of article 173 provided that the conditions referred to in paragraph five of article 173 of this Code are met.

[22](1) Whoever sells, presents or publicly exhibits documents, pictures or audiovisual or other items of a pornographic nature to persons under fifteen years of age, enables them to gain access to these in any other manner, or presents to them a pornographic or other sexual performance, shall be punished by a fine or imprisonment for up to two years. (2) Whoever by force, threat, deception, excessive or abusive powers, recruitment or solicitation, or for exploitative purpose instructs, obtains or encourages a minor to produce photographs, audiovisual or other items of a pornographic or other sexual nature, or uses them in a pornographic or other sexual performance, or is knowingly present at such performances, shall be sentenced to imprisonment for between six months and eight years.

A criminal act referred to in paragraph one of this article can only be committed against a minor who is under the age of fifteen. Pornography must be of such intensity that negative consequences for the child's development can be identified. Establishing this fact often requires obtaining the opinion of a court-appointed expert psychologist during criminal proceedings.

Paragraph two of this Article defines an aggravated form of crime. This provision protects not only children, but also all minors – all persons under the age of eighteen. An aggravated form of crime is committed by whoever, by force, threat, deception, exceeding or abusing powers, recruitment or solicitation, or for exploitative purpose instructs, obtains or encourages a minor to produce photographs, audio-visual or other items of a pornographic or other sexual nature, or uses them in a pornographic or other sexual performance or is knowingly present at such performances. An aggravated form of crime is also committed when the perpetrator consciously attends a pornographic performance involving the participation of minors.

The case in paragraph three of this article is a *delictum sui generis* that is committed by whoever, for themselves or any third person, develops, produces, distributes, sells, imports, exports or otherwise provides pornographic or other sexual materials depicting minors or their realistic images, or supplies them in any other way, or possesses such materials, or obtains access to such materials by means of information and communication technologies, or discloses the identity of a minor in such materials (Deisinger, 2017, pp. 309–310).

4.5 Alteration of family status (article 189 of the Criminal Code-1)[23]

This criminal offence is also the so-called offence of status. This offence is completed only when it results in an unlawful situation. Further existence of an unlawful situation is not relevant for this criminal offence.

(3) The same punishment as referred to in the preceding paragraph shall be imposed on whoever, for himself or herself or any third person, produces, distributes, sells, imports, or exports pornographic or other sexual materials depicting minors or their realistic images, or supplies them in any other way, or possesses such materials, or obtains access to such materials by means of information and communication technology, or discloses the identity of a minor in such materials. (4) If an act referred to in paragraph two or three of this article is committed within a criminal organisation for the commission of such criminal offences, the perpetrator shall be sentenced to imprisonment for between one and eight years. (5) The pornographic or other sexual materials referred to in paragraphs two, three and four of this article shall be confiscated or their use shall be appropriately prevented.

[23] Whoever substitutes a child for another or otherwise alters its family status shall be sentenced to imprisonment for not more than three years.

This criminal offence can only be committed with intent. If the alteration of family status arises out of negligence, there cannot be a question of a criminal offence.

A child's family status applies to his affiliation to a given family, personal name and citizenship. Interestingly, in this criminal offence, a child is not deemed to be a minor attaining the age of 14 years, but only a baby or a child up to the age when he is not yet aware of his affiliation to a given family. It is different with mentally disabled children, who can be the object of this criminal offence until they reach the age of 14 (Deisinger, 2017, pp. 317–318).

4.6 Abduction of minors (article 190 of the Criminal Code-1)[24]

This criminal offence can be committed by any person, including by one of the parents. A perpetrator of this crime cannot be only one of the parents or the person to whom a child has been entrusted for education and care by an enforceable judgment.

In this criminal offence, unlawfulness is not just an element of the general notion of crime, but also its constitutive statutory element. Therefore, a perpetrator of this crime must be aware that they are acting unlawfully. If a perpetrator is convinced that they act according to the law, while there are no legal grounds for their act, a perpetrator is mistaken. Since unlawfulness is an indispensable statutory element of a criminal offence, a mistake which is originally a mistake of law (mistake as to unlawfulness), turns into a mistake of fact in the narrow sense of the word (mistake regarding statutory elements of a criminal offence) and therefore also has a respective effect – the exclusion of the perpetrator's criminal intent. Since it is a question of a criminal offence, which, following the definition set out in the Act, can only be committed with direct intent, the mistake about the act's unlawfulness (mistake of law) excludes a perpetrator's culpability.

[24] (1) Whoever unlawfully abducts a minor from his parent, adoptive parent, guardian, institution or a person who has been entrusted with the custody of the minor, or whoever detains a minor or prevents him from living with the person he is entitled to live with, or whoever malevolently prevents the implementation of an enforceable judgement referring to a minor shall be punished by a fine or sentenced to imprisonment for not more than one year. (2) If the offence caused deterioration of mental or physical health of a minor or threatened his development, the perpetrator shall be sentenced to imprisonment between one and five years. (3) If the Court imposes a suspended sentence, it may order the perpetrator to relinquish the minor to the rightful claimant or enable the implementation of the enforceable judgement. (4) If the perpetrator referred to in paragraph one of this article has relinquished a minor to the rightful claimant by his own free will and made possible the implementation of the enforceable judgement, his punishment may be remitted.

The act of completion of crime is set out in alternative forms. That means that it is sufficient for a perpetrator of this offence to accomplish at least one of the alternatively stipulated forms of the completion of this crime (abduction, detaining, preventing the implementation of an enforceable judgement). For the commission of this offence, it is necessary to commit cumulatively the abduction or detaining of minor person as well as the prevention of his or her contacts with persons entitled to live with. In both cases, this results in the interruption of direct custody over a minor, exercised by the person he or she has been entitled to live with until then (Deisinger, 2017, pp. 319–320).

Paragraph two of this article provides for an aggravated form of this crime. An aggravated form of this crime is committed when the act causes a deterioration of the mental or physical health of a minor or presents a threat to their development.

If the Court imposes a suspended sentence, it may order the perpetrator to relinquish the minor to the rightful claimant or enable the implementation of the enforceable judgment regarding the minor.

Paragraph four of this article contains a provision which enables the remission of the punishment of a perpetrator who has relinquished a minor to the rightful claimant by their own free will or made possible the implementation of the enforceable judgement.

In connection with this criminal offence, there is a problem of how to define a perpetrator's act of »stealing« and appropriating a baby. It is obviously not a criminal offence of theft, as a baby is not another's movable property but a human being. The Criminal Code-1 of the Republic of Slovenia seems to contain no provision that would adequately address such a case. Theoretically, it would be possible to legally define such conduct as a criminal offence of alteration of family status according to article 189 of the Criminal Code-1 (as the appropriation of a baby generally also means the alteration of the baby's family status) or as the offence of the abduction of minors according to article 190 of the Criminal Code-1. Despite the dilemma regarding the definition of this offence, I think that it would be more appropriate to define this act following article 190 of the Criminal Code-1, since »stealing« and the appropriation of a child represent a form of unlawful taking of a minor from his parent or the person who is actually exercising custody of the minor. In this legal

classification, it is, however, very disturbing to see how extremely lenient is the sentence prescribed for the abduction of a minor. For the crime of theft, the prescribed sentence is imprisonment of up to three years, while the sentence provided for the abduction of a minor is imprisonment of up to one year. In this case, this means that a perpetrator stealing a motorcycle could be sentenced to imprisonment for up to three years, while a perpetrator stealing a child could be punished only by imprisonment for a maximum of one year. This is obviously an absurd situation that should be resolved. The problem could be solved by adding to article 190 of the Criminal Code-1 the aggravated form of this crime (stealing and appropriating another person's child) and prescribing an appropriate sentence per the gravity of the offence.

In this context, a question could also arise as to the relationship between the crime of alteration of family status and the crime of abduction of minors. Although Deisinger writes in his commentary that a joinder of these two offences is not possible (Deisinger, 2017, p. 318), I nevertheless believe that, in some situations, a joinder is possible and also rational. Let us take a perpetrator who steals a baby, appropriates it and then, by deceiving an administrative authority, achieves its entry in the official register as their own child. Such a perpetrator would simultaneously qualify as the perpetrator of the two aforementioned criminal offences. I think no circumstance would make us believe that the joinder is merely apparent. It would, therefore, be a question of a real joinder of the two offences.

4.7 Neglect and maltreatment of a child (article 192 of the Criminal Code-1)[25]

A criminal offence referred to in paragraph one of this article is a special offence, which can be committed only by persons with certain duties to a minor. It is an intentional offence. The act of completion is formulated in paragraph one of this article and consists of neglecting a minor with serious breaches of obligations, care and education rights**.** These acts are deemed criminal offences when they represent

[25] (1) A parent, guardian, foster parent or other person who seriously breaches his or her obligations towards a minor shall be sentenced to imprisonment for up to three years. (2) A parent, guardian, foster parent or other person who forces a minor to perform excessive work or to perform work unsuitable to his or her age or to give up his or her work, or who for self-serving motives solicits a minor to mendicancy or other conduct prejudicial to his or her proper development, or who maltreats or tortures a minor, shall be sentenced to imprisonment for up to five years.

a threat to a minor person's education, development or health. Less serious cases are considered to be minor breaches of law and order.

Child neglect has in its act of completion a form of physical and psychological abuse of a minor or rough treatment, which manifestly exceeds the limits of usual educational measures for minors, of the omission of care to provide for the basic needs of a minor in terms of nutrition, personal care, healthcare, clothing and education. Such conduct is deemed a criminal offence only when it constitutes a perpetrator's permanent activity, not in the case of individual rough measures taken against a minor. The act of completion of this crime, which has been repeated several times, constitutes a single criminal offence.

The criminal offence referred to in paragraph two of this article is a general criminal offence, as it may be committed by anyone (Deisinger, 2017, pp. 324–325).

4.8 Incest (article 195 of the Criminal Code-1)[26]

This criminal offence can be committed only by an adult person who has a sexual intercourse with an underage lineal relative or with an underage brother or sister. A perpetrator has to be aware that he or she has a sexual intercourse with an underage lineal relative or with an underage brother or sister. When a perpetrator, who is aware of the kinship relationship, nevertheless decides to have a sexual intercourse, this is uniquely the case of a crime committed with direct intent.

If a perpetrator who has sexual intercourse is not aware of the kinship relationship, he or she is in the situation of mistake of fact in a narrow sense of the word. The perpetrator's culpability is excluded, even though he or she was in a mistake by negligence.

Consensual sexual intercourse between the underage lineal relatives and with underage brothers and sisters is not punishable, nor is a sexual intercourse between adult blood relatives. An underage person, with whom a perpetrator has a sexual intercourse, is not deemed to have committed a criminal offence. The unlawfulness of this act is not excluded also in the case when an underage person himself/herself

[26] An adult who has sexual intercourse with an underage lineal relative or underage brother or sister shall be sentenced to imprisonment for up to two years.

induces a linear adult parent to have sexual intercourse (Deisinger, 2017, pp. 338–339).

5 Conclusion

Children enjoy special state protection and care. This also includes the criminal law protection of the interests and benefits of children and minors. As for all other areas, criminal law is considered to be the last and the least appropriate means for protecting legally protected goods. Criminal law protection only becomes relevant when legally protected goods are damaged or highly endangered. Nevertheless, in the case of serious violation of the benefits of children and minors, it is not possible to renounce criminal law intervention, as it is a good of such importance that it also deserves criminal law protection.

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Das Kind im materiellen Strafrecht

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Das slowenische materielle Strafrecht, insbesondere die Strafgesetzgebung, befasst sich traditionell besonders mit jungen Leuten, sowohl in der Rolle des Opfers von Straftaten als auch des Täters. Sie zeigt jedoch dabei Probleme mit der systematischen Behandlung des Kindes im Strafrecht insbesondere innerhalb des besonderen Teils des Strafgesetzbuchs (StGB SLO). Bereits die Definition des Kindes im StGB SLO ist systematisch fragwürdig. Der Einfluss des Kinderalters auf die Rolle des Täters innerhalb der Logik des allgemeinen Verbrechensbegriffs bleibt im StGB SLO völlig unklar. Die Behandlung des Kindes als Opfer im besonderen Teil des StGB SLO ist chaotisch. Der Gesetzgeber scheint weder politisch motiviert noch rechtlich-wissenschaftlich in der Lage, diese Probleme und Defizite vergleichsrechtlich und anderswie zu erkennen, anzusprechen oder gar zu lösen.

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THE CHILD IN SUBSTANTIVE CRIMINAL LAW

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The Slovenian substantive criminal law, especially the criminal legislation, traditionally deals particularly with young people, both in the role of victims of crimes and as perpetrators. However, it shows problems with the systematic treatment of the child in criminal law, especially within the special part of the Criminal Code (StGB SLO). Even the definition of a child in the StGB SLO is systematically questionable. The influence of the age of the child on the role of the perpetrator within the logic of the general concept of crime remains completely unclear in the StGB SLO. The treatment of the child as a victim in the special part of the StGB SLO is chaotic. The legislator seems neither politically motivated nor legally and scientifically capable of recognizing, addressing, or even solving these problems and deficiencies comparatively or otherwise.

Univerzitetna založba Univerze v Mariboru

OTROK V KAZENSKEM MATERIALNEM PRAVU

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Slovensko materialno kazensko pravo, še posebej kazenska zakonodaja, tradicionalno obravnava mlade, ki se pojavljajo tako v vlogi žrtve kaor tudi storilcev kaznivih dejanj. Pri tem se pojavljajo težave s sistemsko obravnavo otroka v kazenskem pravu, še posebej v okviru posebnega dela slovenskega Kazenskega zakonika. Že sama definicija otroka v Kazenskem zakoniku je sistematično vprašljiva. Vpliv otrokove starosti na vlogo storilca v logiki splošnega pojma kaznivega dejanja ostaja v Kazenskem zakoniku povsem nejasen. Obravnava otroka kot kot žrtve v posebnem delu Kazenskega zakonika je kaotična. Zdi se, da zakonodajalec ni niti politično niti pravno in znanstveno sposoben prepoznati, obravnavati ali celostno rešiti te težave in pomanjkljivosti.

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1 Einführend über die Rolle und die Definition des Kindes im slowenischen Strafrecht

Das slowenische materielle Strafrecht, insbesondere die Strafgesetzgebung[1] befasst sich traditionell besonders mit jungen Leuten, sowohl in der Rolle des Opfers von Straftaten als auch des Täters. In der gesamten Entwicklung des modernen slowenischen Strafrechts (damit meine ich die fast acht Jahrzehnte nach dem zweiten Weltkrieg) kann man in Slowenien sogar von einem nicht übersehbaren lebhaften politischen Interesse am Kind im Strafrecht sprechen, wo Politiker der rechten und der linken politischen Grundausrichtung immer wieder über die Notwendigkeit des Schutzes der Kinder sprechen. Rechts politisch gesinnte vor allem im Kontext der Argumentation der Repression gegenüber dem Täter einer Straftat gegen das Kind, insbesondere die Sexualstraftaten, links politisch gesinnte klarer in Richtung der Kontraproduktivität des Strafrechts als Werkzeug der Umerziehung der Straftäter, der prinzipiellen Schwierigkeit, zwischen Täter und Opfer bei Jugendlichen zu unterscheiden, alles typisch innerhalb einer allumfassenden Skepsis gegenüber dem Strafrecht als Institution. Auch in der Wissenschaft tummeln sich geradeaus Soziologinnen, Kriminologinnen und Sozialarbeiterinnen (diese Kategorien sind in Slowenien in der Praxis schwer zu unterscheiden) in Spezialisierungen auf das Kind im Kontakt mit strafbaren Handlungen beziehungsweise Straftaten, innerhalb des Strafrechts ganz besonders in Bezug auf sogenannte alternative Sanktionen und umerziehende Maßnahmen als Ersatz für Strafen, bis, um es etwas karikiert zu beschreiben, zu wissenschaftlichen Projekten über den besten Anteil der Karotten in der gesunden Ernährung von jungen Straftätern in staatlichen Anstalten. Die rechtliche Definition des Kindes und die Einbindung bestimmter an das Kind als Straftäter angepassten Strafrechtsinstitute und Ausnahmen von allgemeinen Regeln innerhalb des allgemeinen Verbrechensbegriffs scheint dabei kaum von Interesse. In diesem Sinne ist die wissenschaftliche Befassung mit dem Kind in Beziehung auf materielles Strafrecht in Slowenien traditionell und aktuell ausgesprochen soziologisiert und politisiert (offensichtlich in eher stark linker Richtung), sie ist, um es auf diese Art zu formulieren: sehr engagiert aber kaum strafrechtlich.

Ein dankbares Beispiel für die einführende Einschätzung ist die Definition des Kindes im geltenden Strafgesetzbuch Sloweniens[1] (StGB SLO). Im allgemeinen Teil, im sehr allgemein und einführend gefassten Artikel 21 findet man unter dem Titel „Begrenzung der strafrechtlichen Haftung in Bezug auf das Alter der Täter" (Omejitve kazenske odgovornosti glede na starost storilcev) folgenden Wortlaut: „Wer eine rechtswidrige Tat begangen hat, als er noch keine vierzehn Jahre alt war (Kind), kann nicht als Täter einer Straftat gelten" (*Kdor je storil protipravno dejanje, ko še ni bil star štirinajst let (otrok), ne more biti storilec kaznivega dejanja*). Diese Definition des Kindes (Mensch, *tempore criminis* jünger als vierzehn Jahre) gilt erstens nur dem Täter, dem „Begeher" einer Straftat. Es richtet sich nicht an andere Subjekte des Strafrechts. Es gilt nicht für das Opfer. Die Definition des Kindes als Opfer sucht man im StGB SLO vergebens, wie auch in allen anderen Teilen des slowenischen Rechts. Es scheint, dass der slowenische Strafgesetzgeber diese Personen nicht als Kind sehen will oder zumindest den strafrechtlichen Begriff des Kindes von ihnen fernhalten will. Falls ein Straftatopfer jung ist, gelten für seine Klassifizierung als Kind keine klaren strafrechtlichen Normen, sondern, falls überhaupt welche, allgemeine Regeln des Rechts über den breiten, allgemeinen Blankettbegriff des Kindes, also primär das sowohl gesetzliche als auch rechtstheoretische System des Familienrechts und des internationalen (Kinder-) Rechts. Hier gilt der Grundsatz der Minderjährigkeit als Schlüssel zum Begriff des Kindes, also im Fall Sloweniens das Alter unter achtzehn Jahren *tempore criminis*. Auch wenn es scheint, dass gerade dies der slowenische Strafgesetzgeber mit einer so exklusivistischen Regelung des strafrechtlichen Begriffs des Kindes im StGB SLO nicht wollte, kommt auf diese Weise, durch die Deutung des Rechts, sozusagen auf Umwegen, durch die Hintertür das Kind als Opferkategorie ins Strafrecht und so haben wir zwei Arten von Kindern im slowenischen materiellen Strafrecht: eines unter vierzehn Jahren (das Kind als Täter) und eines unter achtzehn Jahren – der Minderjährige bzw. die Minderjährige (das Kind als Opfer). Letzteres findet man sporadisch, ausgesprochen nicht politisch systematisch oder auf irgendeine Weise system-logisch im besonderen Teil des StGB SLO in bestimmten Formen von qualifizierten Straftatbeständen (zum Beispiel bei bestimmten Straftaten-Unterformen in den Artikeln 100 und 101 StGB SLO), wobei zum Beispiel in der Definition der Straftat der Entführung (des Kindes) im Artikel

[1] Das geltende Strafgesetzbuch in Slowenien (Kazenski zakonik, KZ-1) trat am 1. November 2008 in Kraft und wurde bis heute oft novelliert (KZ-1, KZ-1-UPB2, Ur. l. RS, Nr. 50/12 vom 29. 6. 2012, 54/15 vom 20. 7. 2015, 38/16 vom 27. 5. 2016, 27/17 vom 2. 6. 2017, 23/20 vom 14. 3. 2020, 91/20 vom 26. 6. 2020, 95/21 vom 15. 6. 2021, 186/21 vom 30. 11. 2021 und 16/23 vom 7. 2. 2023). Es gilt allgemein als ein eher typisches eurokontinentales, dem deutschen StGB nachempfundenes Strafgesetz.

134 Abs. II StGB SLO der Gesetzgeber vom minderjährigem Opfer spricht (und höchstwahrscheinlich an das Kind denkt) und dabei, nebenbei an dieser Stelle zu betonen, nicht klar bleibt, warum er gerade bei dieser Straftat wegen des jungen Alters des Opfers eine qualifizierte Form haben will und an vielen anderen Stellen im besonderen Teil des StGB SLO nicht (bei allen Delikten gegen Leib und Leben, gegen die Gesundheit, gegen die persönliche Sicherheit, gegen das Vermögen, usw.) (Korošec & Markelj Zgaga, 2023, S. 680–706).

Was der slowenische Gesetzgeber im Rahmen des allgemeinen Verbrechensbegriffs im zitierten Artikel 21 StGB SLO mit dem Wortlaut „[…] kann nicht als Täter einer Straftat gelten" genau meint, kann wohl nicht als klar gelten. Es scheint offensichtlich, dass es sich bei Kindern als Beschuldigten im Strafverfahren naturgemäß um die persönliche Zuständigkeit der Strafgerichte handeln muss, konkret um einen gesetzlichen Ausschluss so einer Zuständigkeit aus Gründen der natürlichen Schuldunfähigkeit des Täters. In diesem Sinne sind Kinder als Täter eine Problematik für strafprozessuelle gesetzliche Regeln und Normen und gehören in Strafverfahrensgesetze, in Slowenien also in die Strafprozessordnung.[2] Da sich der slowenische Gesetzgeber aber endschieden hat, Kinder als Täter im allgemeinen Teil des materiellrechtlichen Strafgesetzes zu regeln und noch dazu mit dem materiellrechtlich höchst enigmatischen Wortlaut „kann nicht als Täter gelten[!]", bleibt die Frage offen, was hier nun ausgeschlossen sei. Als Theoretiker denkt man, wie erwähnt, vorrangig an die Schuld als Element des allgemeinen Verbrechensbegriffs, konkret an die ausgeschlossene Schuldfähigkeit, aber das Gesetz bleibt in dieser Hinsicht offen und lehr.

2 Die Systematik der Behandlung des Kindes als Opfer einer Straftat im besonderen Teil des StGB SLO

Es bleibt leider völlig offen, warum sich der slowenische Gesetzgeber und besonders warum gerade in einigen Fällen entscheidet, wegen des jungen Alters des Opfers eine Straftat im besonderen Teil des StGB SLO als schwerer, also als qualifiziert zu definieren. Aus Sicht der Systematik der gesetzlichen Behandlung von schutzlosen Menschen, von Wehrlosen, besonders der Schwachen und von ähnlichen Kategorien von Opfern von Straftaten ist überhaupt nicht selbstverständlich, dass

[2] Strafprozessordnung (Zakon o kazenskem postopku): Ur. l. RS, Nr. 176/21 – amtlich konsolidierter Text, 96/22 – Entsch. VerfG, 2/23 – Entsch. VerfG, 89/23 – Entsch. VerfG.

es von solchen Straftatbeständen bei Sexualdelikten im StGB SLO nur so wimmelt, bei Körperverletzungen aller Art, Tötungen, Raubüberfällen, man sie bei der Folter und bei ähnlichen Straftatbeständen aber vergebens sucht. Beim Straftatbestand der Entführung, wie oben schon erwähnt, findet man jedoch, zumindest für Strafrechtstheoretiker sehr überraschend, eine stark qualifizierte Form der Entführung (Artikel 134 StGB SLO) nicht einmal nur von Kindern, sondern gleich ausdrücklich und unmissverständlich von allen Minderjährigen, also von Personen bis achtzehn Jahre (Abs. 2). Diese Un-Systematik, dieses System-Unding scheint ein Zeichen von vulgärer Unterentwicklung des Strafrechtssystems zu sein und wurde in Slowenien nicht einmal ansatzweise in der Theorie erklärt oder gerechtfertigt, oft jedoch kritisiert (Korošec, Filipčič & Zdolšek, 2019; Korošec, 2008).

3 Besondere Regelung der Verjährung der Strafverfolgung bei Straftaten gegen das Kind

Das StGB SLO beharrt traditionell auf einer besonderen Regelung der Verjährung der Straftaten gegen die sogenannte sexuelle Unantastbarkeit und gegen die Ehe, die Familie und die Jugend, wenn sie gegen eine minderjährige Person verübt worden sind, also implizit gegen ein Kind. Diese Regelung überstand und übersteht alle Novellen des StGB SLO und gilt schon deswegen als ein sehr stabiler Teil der politischen Kultur Sloweniens. 2004 wurde sie bloß verschärft: seitdem beginnt die (nach allgemeinen Regeln des StGB nun allgemein extrem verlängerte) Verjährungsfrist bei diesen Straftaten erst mit der Volljährigkeit des Geschädigten zu laufen (Artikel 90 Abs. 3 StGB-1).

Das geltende slowenische Strafrecht denkt in der geschilderten Spezialregelung der Verjährung offensichtlich nicht an Fälle, wo der freiwillige Rücktritt vom Versuch einer an und für sich beendeten Tat noch möglich wäre (wenn auch nur noch durch aktive Verhinderung des Eintritts der verbotenen Folgen). Hier haben wir es mit einer völlig anderen Logik zu tun. Aber mit welcher?[3]

Die Verlagerung des kritischen Zeitpunkts für den Beginn der Verjährungsfrist von der tatbestandsmäßigen Handlung auf spätere Zeitpunkte in der Entwicklung der Straftat (quasi iter criminis), konkret auf familienrechtlich oder verwaltungsrechtlich

[3] Im Folgenden dieses Abschnitts eine Kurzfassung von Korošec, 2011, S. 85–98.

bestimmte Zeitpunkte des Erreichens eines bestimmten biologischen Alters (der Volljährigkeit) des Opfers, bedeutet das Ende der Verjährungslogik, auf die wir lange vertraut haben, vielleicht auch den Anfang vom Ende des Instituts der Verjährung an sich, jedenfalls aber eine Systemanomalie des neueren slowenischen materiellen Strafrechts. Dies vor allem deshalb, weil der Gesetzgeber es nicht für nötig befunden hat, zu erklären, warum nur Sexualstraftaten und (unter diesen vor allem) Straftaten gegen die Familie (was auch immer das bedeuten mag) eine solche Sonderbehandlung erfahren sollten, andere hingegen nicht, vorsätzlich oder fahrlässig begangene Straftaten mit charakteristisch späten und schwer vorhersehbaren, nicht selten auch schweren Folgen (einschließlich der Fälle, in denen das Opfer als Nebenkläger oder Antragsteller in der Strafverfolgung vorgesehen ist, und auch der Fälle, in denen das Kind oder eine andere besonders schutzbedürftige Person ausdrücklich vorgesehen ist), jedoch nicht. Die Schwere der genannten Anomalie im neuen slowenischen Strafrecht kann nach Ansicht der Kritiker der überstürzt verabschiedeten Novelle des slowenischen Strafgesetzbuches aus dem Jahr 2004 und noch einmal der neuen Novelle des Strafgesetzbuches aus dem Jahr 2008 nicht mit ähnlichen Ansätzen im internationalen und ausländischen Strafrecht (bei Sexualdelikten an Kindern) entschuldigt werden, solange hinter diesen Ansätzen keine logische, vom allgemeinen Verbrechensbegriff her überzeugende und kohärente Begründung steht, die im Strafrecht breit geprüft wurde.

Geht man von der Strafrechtsdoktrin der Spätfolgen der Tat aus, so kann man bei der beschriebenen Regelung nicht übersehen, dass diese Spätfolgen inhaltlich diskriminiert werden, und zwar in hohem Maße aufgrund sehr unklarer, in Slowenien offensichtlich strafrechtlich nicht ausreichend erforschter Strafrechtsgüter, die sehr absolutistisch und selbstgefällig, potentiell schon dem Namen nach, im krassen Gegensatz zu modernen Lehren über die sexuelle Selbstbestimmung junger Menschen, vom Gesetzgeber als „sexuelle Unantastbarkeit„ oder noch diffuser als „Jugend“ deklariert werden. Es versteht sich von selbst, dass gerade bei den genannten Strafrechtsgütern so viele Jahre nach der angeblichen Tatbegehung die Zurechenbarkeit der Spätfolge der tatbestandsmäßigen Handlung von allen denkbaren Spätfolgen im modernen Strafrecht besonders fraglich bleiben muss (z.B. ob die Schlaflosigkeit der vierzigjährigen mehrfachen Mutter gerade wegen bestimmter sexueller Handlungen in ihrer Kindheit eingetreten ist).

(In Slowenien) überrascht das materiellrechtliche Schweigen über die Spätfolgen der Tat in den Gesetzeserläuterungen. Stattdessen finden sich Verweise des Gesetzgebers (Justizministerium der Republik Slowenien) auf die angeblich typische lange Nichtentdeckung der erfassten (Sexual-)Straftaten innerhalb der Familie und auf die Tatsache, dass die Opfer aus praktischen Gründen (Widerstand der Eltern, Angst vor den Eltern als Täter, Angst vor den Folgen des Strafverfahrens für die Eltern und für sich selbst und ähnliche Gründe) typischerweise lange nicht in der Lage sind, diese anzuzeigen. In diesem Sinne haben wir es also vor allem mit rein verfahrensrechtlichen Problemen zu tun, mit tatsächlichen Hindernissen für die Anzeige bei den repressiven Staatsorganen, die man durch die Anpassung der (übrigens sehr alten) Regeln des allgemeinen Teils des materiellen Strafrechts zu neutralisieren versucht.

Ein solcher Ansatz ist problematisch, insbesondere wenn man nur bestimmte Deliktskategorien im Auge hat. Vor allem aber sind echte Verfahrenshindernisse nicht nur ein Problem des Sexualstrafrechts oder des „Familien-, Jugend- und Ehestrafrechts", was immer man sich darunter vorstellen mag. Mögen solche Unterscheidungen aus verfahrensrechtlicher Sicht noch einigermaßen nachvollziehbar erscheinen (so ist z.B. bei Körperverletzungen am Kind, insbesondere bei schwersten, davon auszugehen, dass sie vom sozialen Umfeld des Kindes auch dann früher oder später entdeckt werden, wenn sich die gesamte Familie des Opfers und ggf. sogar das Opfer selbst gegen das Strafverfahren aussprechen, sexuelle Übergriffe auf das Kind und einige andere Formen des Kindesmissbrauchs, insbesondere im Kontext von Gewalt in der Familie, sind demgegenüber deutlich verdeckter und rufen geradezu nach besonderen Methoden der Förderung des Strafverfahrens), so liegt es auf der Hand, dass die Übertragung der tatsächlichen Verfahrensprobleme auf die materiell-rechtliche Bewertung des Unrechts der Tat und ihrer Folgen in der beschriebenen Weise, also über das Institut der Verjährung (und nicht etwa über die Erhöhung des Strafrahmens der betreffenden Delikte), nicht unproblematisch sein kann. Dabei ist es unerheblich, dass das Institut der Verjährung nach seinem Inhalt und seinen Funktionen zumindest ein materiell-prozessuales Zwitterinstitut, wenn nicht sogar ein rein prozessuales Institut ist, das aus technischen Gründen im materiellen Strafrecht geregelt wird. Wenn es sich nach der Wertung des Gesetzgebers um Taten handelt, die gerade wegen der Schwierigkeit ihrer Aufdeckung und Verfolgung eine besonders schwere Form des Kindesmissbrauchs darstellen, die gerade deshalb

durch eine Sonderregelung auch Jahrzehnte nach ihrer Begehung strafrechtlich verfolgt werden sollen, auch gegen den Widerstand des mutmaßlichen Opfers, dann handelt es sich eben um eine Wertung materiellen Unrechts, die nach den Maßstäben des materiellen Strafrechts anders und anderswo zum Ausdruck kommen muss als in Form irgendwelcher Ausnahmen von der Verjährung. Es kann nicht verwundern, dass ein solcher Ansatz in der strafrechtlichen Literatur auf kritische Ablehnung stößt.

So kommentieren etwa die österreichischen Strafrechtstheoretiker Kienapfel und Schmoller (2008, S. 218)[4] die Regelung des Art. 58 Abs. III (3) des österreichischen StGB, der sehr ähnlich wie später das slowenische bereits mit Inkrafttreten der StRÄG-Novelle 1998 (BGBl I 153) die Verjährung bei minderjährigen Opfern von Sexualdelikten (nach den §§ 201, 202, 205, 206, 207, 212 und 213, also einer sehr breiten Palette von Sexualdelikten des österreichischen Strafrechts) so regelt, dass die Verjährungsfrist erst mit der Volljährigkeit des mutmaßlichen Opfers zu laufen beginnt. Sie stellen fest, dass diese Lösung bei Personen, die als Kleinkinder Opfer von Sexualdelikten geworden sein sollen, zu außerordentlich langen Verjährungsfristen führt und in der Praxis wegen der großen zeitlichen Distanz zum angeblichen Tatgeschehen nicht wirksam ist und auch nicht wirksam sein kann. Besonders problematisch sei, dass die Verfolgung nach so langer Zeit auch gegen den Willen des mutmaßlichen Opfers wieder aufgenommen werden könne, und es sei völlig unverständlich, warum andere schwere Straftaten gegen Kinder [nicht erfasst sind z.B. schwere Körperverletzungen, auch wenn sie in echter Idealkonkurrenz zu den erfassten Sexualdelikten stehen] nicht der gleichen Logik unterworfen werden. Sie warnen davor, dass es sich bei der gefundenen Lösung um eine dogmatisch und gesetzgeberisch inkohärente und nicht harmonisierte strafrechtliche Behandlung [des Unrechts der Tat und ihrer Folgen] handelt.

Auch das schweizerische Strafgesetzbuch kennt in Artikel 97 Absatz 2 Ausnahmen von der Verjährung bei Straftaten gegen das Kind als mutmaßliches Opfer. [5] Dort heißt es: "Bei sexuellen Handlungen mit Kindern (Art. 187) und unmündigen Abhängigen (Art. 188) sowie bei Straftaten nach den Artikeln 111, 113, 122, 189-191, 195 und 196, die sich gegen ein Kind unter 16 Jahren richten, dauert die Verfolgungsverjährung in jedem Fall mindestens bis zur Vollendung des 25.

[4] Im Folgenden eine Kurzfassung von Korošec, 2011, S. 85–98.
[5] Im Folgenden eine Kurzfassung von Korošec, 2011, S. 85–98.

Lebensjahres des Opfers". Mit dieser Lösung hat der Gesetzgeber zumindest versucht, alle Straftaten gegen das Kind mit typischerweise besonders schweren Spätfolgen der Tat in den Katalog der Straftaten mit besonderer Verjährungsregelung aufzunehmen. Die schweizerische Lehre befürwortet diese Regelung vom Wert her, räumt aber ein, dass sie in der Praxis keine besondere Bedeutung hat und auch nicht haben kann. Begründet wird dies damit, dass bei höchstpersönlichen und zwischenmenschlichen Delikten, wie sexuellen Übergriffen auf Kinder, eine Aufklärung so lange Zeit nach der Tat naturgemäß nicht ernsthaft zu erwarten sei.

Das deutsche Sexualstrafrecht erkennt in ähnlicher Weise an, dass bestimmte Sexualstraftaten gegen Kinder typischerweise lange unentdeckt bleiben und die Opfer aus praktischen Gründen (hier wird vor allem die bremsende Rolle der Eltern hervorgehoben) typischerweise lange keine Anzeige erstatten können.[6] Ausgehend von diesen im Wesentlichen verfahrensrechtlichen kriminalpolitischen Ausgangspunkten sieht die Regelung des § 78b Abs. I StGB für verschiedene Sexualdelikte ein Ruhen der Verjährung bis zur Vollendung des 18. Ausgeschlossen sind damit alle Formen der Körperverletzung, auch solche, die in echter Idealkonkurrenz zu den einbezogenen Sexualdelikten stehen. Da es sich hier um eine sehr ähnliche Form der Verlagerung von tatsächlichen Verfahrensproblemen auf die materiellrechtliche Bewertung des Unrechts der Tat und ihrer Folgen über das Institut der Verjährung wie in Österreich handelt, kann auch hier nur gelten: Eine solche Lösung kann materiellrechtlich dogmatisch nicht unumstritten sein.

4 Abschließend

Der slowenische Gesetzgeber hat Probleme mit der systematischen Behandlung des Kindes im Strafrecht insbesondere innerhalb des besonderen Teils des Strafgesetzbuchs (StGB SLO). Bereits die Definition des Kindes im StGB SLO ist systematisch fragwürdig. Der Einfluss des Kinderalters auf die Rolle des Täters innerhalb der Logik des allgemeinen Verbrechensbegriffs bleibt im StGB SLO völlig unklar. Die Behandlung des Kindes als Opfer im besonderen Teil des StGB SLO ist chaotisch.

[6] Im Folgenden dieses Abschnitts eine Kurzfassung von Korošec, 2011, S. 85–98.

Der Gesetzgeber in Slowenien scheint weder politisch motiviert noch rechtlich fachlich und wissenschaftlich in der Lage, diese Probleme und Defizite vergleichsrechtlich und anderswie zu erkennen, anzusprechen oder gar zu lösen. Die Gründe dafür sind wahrscheinlich in der allgemeinen Unterentwicklung des slowenischen Strafrechts und offensichtlich nicht leicht zu ändern oder mindern. Ein zusätzlicher Grund ist wahrscheinlich die Marginalisierung und die damit verbundene generelle Impotenz der Strafrechtstheorie in Slowenien.

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The Rights of Children in Turkish Criminal Law

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Family is the most important factor in child development. In the early stages, children emulate their parents and learn from their behavior without questioning and accepting them as unquestionable truths. If a child's propensity for unlawful behavior goes unnoticed, it can have a lasting impact and potentially affect the community in the future. As this behavior pattern carries the possibility of turning into criminal activity in the future, the sanctions should be tailored accordingly. This study aims to investigate children's rights within the scope of Turkish Criminal Law in conjunction with international and national agreements in the field of law. The existing studies are insufficient, and as children are to shape our future, progressing children's rights should always be a priority.

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PRAVICE OTROK V TURŠKEM KAZENSKEM PRAVU

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Družina je najpomembnejši dejavnik otrokovega razvoja. V zgodnjih fazah otroci posnemajo svoje starše in se učijo iz njihovega vedenja, ne da bi jih spraševali, in jih sprejemajo kot nedvomne resnice. Če otrokova nagnjenost k nezakonitemu vedenju ostane neopažena, lahko ima to dolgoročne posledice in potencialno vpliva na skupnost v prihodnosti. Ker ta vzorec vedenja prinaša možnost prehoda v kriminalno dejavnost v prihodnosti, bi morale biti sankcije temu ustrezno prilagojene. Ta študija si prizadeva raziskati pravice otrok v okviru turškega kazenskega prava v povezavi z mednarodnimi in nacionalnimi sporazumi na področju prava. Obstoječe študije so nezadostne, in ker so otroci tisti, ki bodo oblikovali našo prihodnost, bi napredek otrokovih pravic vedno moral biti prednostna naloga.

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1 Introduction

In today's modern society, children are increasingly influenced by digital data, and due to their incompetence in distinguishing right from wrong, they can be more vulnerable. While the importance of the family is crucial for a child's healthy development within society, protecting a child's inherent rights and prioritizing their interests will shape the future of the society in which they live. Children with undeveloped cognitive and evaluative abilities are defenseless against the data bombardment of social media without any filters. Ensuring legal security for children who must continue to exist in this vulnerable environment is imperative.

In today's society, where digital data has such a profound impact on humanity, the effective protection of children should be controlled not only on a national level but also through international regulations (Temiz, 2023, p. 246). Children's rights encompass all legal rules that have been established to enable a child to develop in a mentally, physically, emotionally, and morally respected environment (Akyüz, 2018, p. 6). The most important regulation within this scope is the Convention on the Rights of the Child (1989). According to this convention, everyone under the age of 18 is considered a child, except for cases of early adulthood determined by laws. This convention secures the rights of children primarily as children and subsequently as human beings (Serozan, 2005, p. 8). By establishing children's rights, it has been demonstrated that individuals have distinct rights simply because they are children and that, like adults, they have inalienable rights. Referred to by some authors as the "Magna Carta" of children's rights, this convention has elevated children's rights to the forefront of society (Serozan, 2005, p. 49; Temiz, 2023, p. 246).

In cases where the best interests of a child conflict with the legal system due to actual events, different regulations should be introduced for children compared to adults (Kontacı, 2020, p. 1707). In other words, all sanctions applied to children should be proportionate to the circumstances in which they find themselves. Children who commit offenses should be protected within the framework of "juvenile justice", and the penalties for their crimes should either make them not liable or, if they are held responsible, be different from and lighter than those applied to adults. Therefore, provisions related to children differ from those for adults in many countries (Dönmezer & Yenisey, 1998, p. 420). Per international legal norms, the children's best interests should be prioritized, and penalties for a child's wrongdoing

should be proportionate to the environment and conditions in which the offense occurred (Akyüz, 2013, p. 1017).

When examining the innovations introduced by the Child Protection Law No. 5395, enacted in Turkey on 03.07.2005, it is observed that there are regulations such as the absence of a prosecutor during the trial, the prohibition of handcuffing children, the possibility of postponing the initiation of public prosecution, the non-arrest of children under the age of 15 for offenses punishable by up to five years, the establishment of child units in law enforcement and prosecutor's offices, and the appointment of social workers.

2 Fundamental principles governing Criminal law

With the developments in the field of children's rights, the juvenile justice system has transitioned from a punitive justice approach to a restorative justice approach. In 2010, the Council of Europe prepared the "Guidelines for Child-Friendly Justice", which promoted the effective implementation of alternative dispute resolution methods for children (Council of Europe, 2010, pp. 17–19).

The restorative justice approach is more focused on addressing future issues than past behavior (Uluğtekin, 2004, p. 38). According to article 5 of the Beijing Rules, the procedures to be applied to children in conflict with the law should be proportionate to both the offense and the conditions of the child offender. Article 11 of the United Nations Minimum Standard Rules for the Administration of Juvenile Justice states: "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". Various efforts should be made to facilitate the resolution of child delinquency outside the judicial mechanism, such as community programs, temporary supervision and guidance, and restitution for the damage caused to victims (Council of Europe, 1987, p. 1).

The recommendation Rec(2003)20 on "Juvenile Delinquents on Probation" highlights that the main objectives of the juvenile justice system are the prevention of reoffending by the child, the protection of the interests of the victim and society,

and the reintegration of the child into society after committing an offense (Council of Europe, 1987, p. 1).

Fail-victim mediation, community service, and group conferences are among the most commonly used restorative justice programs for children (Kontacı, 2020, p. 1727). However, article 253, Paragraph 4 of Law No. 5271 on Criminal Procedure stipulates, "If the suspect, victim, or person harmed by the crime is not of legal age, the mediation proposal shall be made to their legal representatives". The Court of Cassation has considered offering mediation to children without considering their age as a reason to invalidate the process (Yargıtay 13. CD, 03.03.2016, 2015/2032 E. 2016/3593 K.). In our opinion, not offering mediation to a child of an age who can comprehend and understand the relevant matter and even continuing the process without seeking the child's opinion does not align with the restorative justice concept. Furthermore, concerning the child's rights, determining the matter through out-of-court methods, or in other words, diversion, is at the prosecutor's discretion. However, it is expected that both parties should request this from the prosecutor (Yenisey, 2007, p. 16).

3 International conventions signed by Turkiye

The first steps in regulating children's rights were taken by Jules Le Jeune in 1894. Le Jeune proposed the establishment of the International Organization for the Protection of Children, and in 1911, a meeting was held in Paris to discuss this issue (İnan, 1995, p. 95). In 1910, the International Extradition Committee convened in Washington to discuss whether children who committed crimes should be subjected to the same judicial provisions as adults and how regulations should be made, but the meeting ended without a conclusive result (Şensoy, 1949, p. 162). In 1913, the First International Brussels Congress was initiated, leading to the establishment of the "International Bureau for the Protection of Children". In this context, Korczak elaborated thoroughly on children's rights in his book *"How to Love a Child",* published in 1919. Subsequently, in 1917, the Children's Rights Declaration was published in Russia (Gören, 2012, p. 48).

In 1920, the "International Child Welfare Organization" was established to meet the essential needs of children affected by war, and in 1924, the "Declaration of the Rights of the Child (Geneva Declaration)" was published to enable this organization

to achieve its goals (İnan, 1995, p. 96–97). Both the 1924 Geneva Declaration on the Rights of the Child and the 1948 International Union of Child Welfare, now known as the International Child and Youth Welfare Federation, laid the groundwork for future conventions related to children's rights (Ballar, 1998, p. 36).

The 1924 Geneva Declaration on the Rights of the Child protected children's rights in specific areas; however, just like with human rights, no comprehensive and binding work was conducted like the Universal Declaration of Human Rights. The declaration clearly emphasized the child's best interests with the statement: "Mankind owes the best it has to give to the child." In our view, both the Geneva Declaration and the UN Convention on the Rights of the Child lack the power of enforcement, so the progress has been limited to the intentions of the signatory states, as seen during World War II. In November 1959, the United Nations Declaration on the Rights of the Child was proclaimed. Within the framework of the declaration, it was stated that children should not be discriminated against, that children should be given the opportunity to develop themselves, that they should be granted identity and citizenship, that their social security rights should be regulated, that discrimination based on religion and race should not be allowed, that they should be protected from neglect and abuse, that their families, raised with love should support them, and that their care responsibilities should be fulfilled.

The Convention on the Rights of the Child is based on the 1924 Geneva Declaration on the Rights of the Child and the 1959 United Nations Declaration on the Rights of the Child. It is important to note that among the initial signatories of the declaration in 1928 was Mustafa Kemal Atatürk, the founder of the Republic of Turkey (Müftüoğlu, 1993, p. 344).

The European Convention on the Exercise of Children's Rights was signed in Strasbourg on January 25, 1996, and by Turkey on June 9, 1999, and came into effect on February 1, 2001. This convention focuses on the child's best interests, allowing children under the age of 18 to have both the right to be informed and the right to express their views in family disputes.

The main principle of the Convention on the Rights of the Child is the prioritization of the best interests of the child. In the second and third parts of the convention, the rules for teaching and complying with the rights expressed in the convention by

the signatory states are laid out. Article 1 of the Convention on the Rights of the Child states: "For this Convention, a child means every human being below the age of eighteen years." When examining the convention, it is seen that the framework is based on the International Human Rights Convention and the Universal Declaration of Human Rights, emphasizing the family's duty to provide assistance and protection to the child and the child's rights without discrimination. Although the convention specifies that the childhood period extends up to the age of 18, if states lower the age of majority through their regulations, this will not violate the convention. This convention ensures that children have the right to participate in decisions made about them and express their opinions on matters concerning their future. Additionally, it mandates that the child's best interests must be considered when making decisions about children. In the United Kingdom, it has been argued that this principle contradicts legislation regulating physical abuse within the family if it remains at a certain level (Alston & Gilmour, 1996, p. 45).

In addition, Turkey has reserved the right to interpret articles 17, 29, and 30 of the Convention on the Rights of the Child in accordance with the Constitution of the Republic of Turkey and the 1923 Treaty of Lausanne (Başbakanlık Sosyal Hizmetler ve Çocuk Esirgeme Kurumu, 2001, p. 60). The reservation placed on article 17, paragraph 4 of the Convention states:

"State Parties, ...encourage the mass media to have particular regard to the linguistic needs of children who belong to a minority group or are indigenous."

Moreover, the reservation in article 29(3) reads,

"In states where there is a considerable number of people of the same cultural, linguistic, religious or ethnic background as the child, the right of the child to preserve his or her cultural identity, language values, religious beliefs, and to use his or her language should be respected."

The reservation placed on article 30 states:

"In states in which there exist ethnic, religious, or linguistic minorities or persons of indigenous origin, a child who is a member of such a minority or is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her religion, or to use his or her language."

The reason for these reservations is the fact that Turkey does not officially recognize minorities other than those defined by the Treaty of Lausanne. The minorities in Turkey are considered to be non-Muslim Turkish citizens under the Treaty of Lausanne.

In conclusion, the international agreements related to the regulation of child rights in international law are as follows (Kobat, 2009, p. 11–12): "Convention on the Rights of the Child, European Convention on the Exercise of Children's Rights, Convention on the Elimination of All Forms of Discrimination against Women and Children, Convention on the Minimum Age for Admission to Employment in Seafaring, Convention on the Return of Minors, Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children, Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, European Convention on the Adoption of Children, Convention on the Establishment of Paternity, Adoption of Children of Unwed Parents, Convention on the Recognition and Enforcement of Decisions on Custody of Children, Convention on the Abolition and Immediate Action for the Worst Forms of Child Labor, ILO Convention No. 138 on Minimum Age for Admission to Employment, Memorandum of Understanding between UNICEF and the Government of Turkey."

When examining the studies conducted in Turkey, it is observed that the Turkish Declaration of the Rights of the Child was adopted in 1963. When the Turkish Declaration of the Rights of the Child dated 1963 is examined, it is regulated in articles as follows:

"1. Good care, proper upbringing, and suitable education for the child, as well as receiving attention, love, and assistance everywhere, is the right of every Turkish child. Every official and private institution and citizen is obliged to recognize this right and realize it with the means at hand. Priority is given to the rescue of the child in distress. 2. No child under the age of 16 can be deprived of formal education and made to work in private jobs. It cannot be exploited in any way. 3. Every parent is obliged to take care of his child and to educate him in the best possible way with knowledge and skill. In cases where the parents are inadequate, the responsibility falls to the first-degree close relatives of the child and the state. 4. After primary education, technical and agricultural training courses are opened for those who do not continue their education or are unable to continue. The Ministry of National Education, the Mayorship, and the mukhtars are responsible for opening these courses and for the children to benefit from these courses. 5. It is the duty of the state along with parents to heal disabled and maladjusted children, to rescue children facing difficulty in life, and to raise them to be successful and strong enough to make a living for themselves in a profession suitable for their conditions. 6. Laws regarding the protection of children should primarily be prepared and enacted and implemented without delay".

As can be seen in this declaration, it not only addresses the responsibilities of parents but also emphasizes the supervision of the child by the state. The Convention on the Rights of the Child, dated November 20, 1989, was signed by Turkey on September 14, 1990, and it came into force on January 27, 1995.

4 Principle of the best interests of the child

In Dede Korkut Stories in Turkish literature, a child is considered an individual regardless of age (Yalçın & Şengül, 2004, p. 210). It is observed that in Göktürk, Hun, and Uyghur states, children were raised by their families without gender discrimination (Akyüz, 2010, p. 48). Article 6, paragraph 1-b of the Turkish Penal Code states:

"The term 'child' means a person who has not yet reached the age of eighteen."

In addition, according to article 3, paragraph 1-a of Law No. 5395 on the Protection of Children,

"The term 'child' means a person who has not yet reached the age of eighteen, even if they are considered legally adult."

As for the age limit for criminal liability, it is 7 for Bangladesh, Ireland, Jordan, Lebanon, Syria, and Sudan; 8 for Scotland and Sri Lanka; 9 for the Philippines and Iraq; 10 for New Zealand and the UK; 12 for Korea and Canada; 13 for France, Poland, and Algeria; 14 for Germany, Italy, Japan, and Russia; 15 for Norway, Sweden, and Finland; 16 for Azerbaijan, Cuba, Spain, and Portugal; and 18 for Belgium (Tekin & Ünver, 2005, p. 488).

The principle of the best interests of the child, which focuses on the child's needs and rights to achieve their best interests, aims to prioritize the child's viewpoint in decisions made regarding the child. Although this principle is not defined in the Convention on the Rights of the Child, it has become a widely used concept in international law as a result of the Child Rights Declaration adopted by the League of Nations in 1924. While the term "best interests of the child" is used in English, the French text uses the term "*l'intérêt supérieur de l'enfant"* which translates to "the higher interests of the child." The term "child's best interests" is considered a concept that can best protect the child's interests in all legal proceedings.

In Turkish legal doctrine, the term *"çocuğun üstün yararı"* or *"çocuğun yüksek yararı"* (the best interests of the child) is generally used. The term "best interest" corresponds to the Turkish legal concept of *"üstün çıkar"* (superior interest), and when there is a conflict of interests, "law" or "just cause" should prevail. For this reason, the term *"yüksek yarar"* (high interest) has been preferred throughout this study (Kurt, 2016, p. 111). In our opinion, the principle of the child's best interests is the most important principle to be applied in any legal issue concerning the child. In other words, when there is a conflict between the child's interests and the rights of adults, a legal rule that serves the child's interest should be applied by siding with the child. In this context, article 3 of the Convention on the Rights of the Child states:

"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".

In the preamble of the Constitution of the Republic of Turkey, it is stated:

"Every Turkish citizen has, from birth, the right to live in accordance with the principles of the national culture, civilization, and the rule of law, under the guarantee of the fundamental liberties, justice, equality, and peace, as envisaged in the Constitution, and in a manner to ensure the welfare of society as a whole."

This provides the possibility for social rights to be interpreted within the framework of the principle of equality. Furthermore, in accordance with article 10 of the Constitution of the Republic of Turkey,

"State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings. Measures for children, elderly citizens, disabled, widows and orphans, veterans, and martyrs' relatives shall not be regarded as a violation of the principle of equality" (Öden, 2003, p. 157).

Article 41 of the Constitution of the Republic of Turkey states:

"Every child has the right to protection and care, to have a good upbringing, to receive education and to lead a life in comfort and security, in the family, society, and the state, in a manner to conform with national moral values. The state takes measures to ensure the protection of the child from all forms of neglect, abuse, cruelty, ill-treatment, and oppression, as well as social neglect and moral corruption. 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."

Thus, although the Constitution does not explicitly mention the best interests of the child, the indirect reference to the child's best interests obligates compliance with this principle in all actions involving children.

In conclusion, the principle of the best interests of the child is a paramount principle to be taken into account when making decisions about children. When assessing the child's welfare, it is crucial to consider both the child's immediate and long-term interests while also considering society's values and norms. In making decisions regarding children, the welfare of a child should be the primary consideration, and this principle should guide all legal actions involving children (Grassinger, 2009, p. 59).

Based on the explanations provided above, in our opinion, while considering the child's best interests, it is essential to consider the values and beliefs of society, ensuring that the child is not harmed in the future. For instance, according to article 4 of the Mexican Constitution, it is emphasized that the state must consider the best interests of the child in its actions. Similarly, in article 42/A of the Irish Constitution, it is stated that in all circumstances, the "paramount consideration" should be given to the child's best interests. In the famous "McGrath Case" the judge emphasized that the well-being of the child includes not only physical well-being but also their religious, moral, and emotional well-being. Furthermore, the importance of love and affection to be provided to the child should not be overlooked (*McGrath v. United States*, 1980).

For example, following a decision by the European Court of Human Rights regarding child victims, the local court concluded that a girl, who was a victim of abuse by her father with custody rights after a divorce, was indeed a victim. In 2016, the father was found guilty of injuring his daughter (*M. and M. v. Croatia*, 2020). In Belgium, the 1874 Insurance Act was amended in 2014 to prevent access restrictions to the courts for children on insurance-related matters. It ensured that the three-year limitation period for actions relating to insurance policies could not be enforced against children until they reached the age of majority. Furthermore, the new law required that any amount payable to a child as a result of an insurance agreement be deposited in a blocked account and kept there until the child reaches the age of majority (*Stagno v. Belgium*, 2014).

In the Czech Republic, the Code of Civil Procedure introduced special proceedings for international child abduction cases. As a result, a specialized court was designated for return proceedings, and local courts were given the authority to make temporary arrangements for the child's return conditions and for the complainant to have contact with the child, and a six-week time limit was established for the court to make a final decision. Mediation was also emphasized in parental disputes. In cases of international child abduction disputes, the International Legal Protection Unit for Children appoints an informal mediator. The appointed mediator seeks the most effective way to resolve the family crisis resulting from international child abduction (*Czechia v. Macready*, 2012).

The right of the children to express their views must always be protected (*Godelli v. Italy*, 2012). Every child should be able to express their thoughts and opinions freely. In this regard, the United Nations Committee on the Rights of the Child recommends that signatory states, in light of articles 12, 13, and 15 of the Convention, make efforts to promote the active participation of children in family, school, and social life and involve them in decisions that affect them. To enable children to exercise their right to express their views, there is a need to raise awareness and sensitivity among families and the general public, as well as among professionals working with children, and to provide training to these individuals to encourage children to express their views and to give proper weight to the views of children.

The Convention has not set any age limit for children to express their views freely, yet it is only expressed as having the "capacity to form views". Within the framework of the Convention, the necessity of children's participation in determining policies, including state policies, the effective implementation of complaint mechanisms that children can use, ensuring that children express their views within the family and that these views are taken seriously, creating media opportunities for children to convey their opinions, allowing children to freely express their views in disciplinary offenses that they may experience during their school years, etc., have been generally regulated (Efe, 2008, p. 14).

The Constitutional Court has stated that *the "best interests of the child and the child's relationship with their parents should only be prevented in extraordinary and exceptional circumstances*" (*Serpil Toros v. Turkey*, 2016), and that "the protection and development

of the child's material and moral well-being are among the child's best interests" (*B.B. v. Turkey*, 2018).

5 Right of the child to participate in decisions

In the scope of this principle, it should not be disregarded that younger children may express their views through play, art, and drawings. Accordingly, a child's expressions should be evaluated and considered according to their age (Convention on the Rights of the Child, 2009, pp. 6–7). The right of a child to participate in decisions is enshrined in article 17 of the Constitution of the Turkish Republic under the heading "Right to Life, Integrity of Material and Spiritual Entity", where it states:

"Everyone has the right to life and the right to protect and develop his material and spiritual entity",

article 20 under the heading "Privacy of Private Life", where it states: "Everyone has the right to request the respect for their private and family life. Privacy of private and family life shall not be violated", and article 8 of the ECHR under the heading "Respect for Private and Family Life", where it states: "Everyone has the right to respect for their private and family life."

The right of the child to participate in decisions can be found explicitly in the Swiss Civil Code. The Swiss Civil Code attaches importance to the "freedom proportionate to the child's development within the organization of their life" and "obtaining their opinion on sensitive matters" in cases where the child lacks legal capacity (Gören, 2012, p. 80). According to article 22 of the Belgian Constitution, every child has the right to express their views on any matter concerning themselves and have their opinions taken into account based on their age and maturity. Pursuant to Chapter 6 qrticle 2 of the Finnish Constitution, the opinions of children must be considered according to their level of development. In the Polish Constitution, it is explicitly stated that priority should be given to the child's views, reflecting the significance of children's rights in the legal field. The Polish Constitution, which places the highest importance on children's views among constitutional regulations allowing children to participate in decisions, creates a different value compared to other countries' constitutions (Algan, 2021, p. 586). In the case of *Mubilanzila Mayeka and Kaniki Mitunya v. Belgium*, the European Court of Human Rights stated that the deportation and repatriation of a child to the Republic of the Congo, without consulting the child

and without proper legal representation, violated "family life" as defined in article 8 of the Convention (*Mubilanzila Mayeka and Kaniki Mitunya v. Belgium*, 2007).

Likewise, article 308 of the Turkish Civil Code states:

"The person to be adopted must be at least eighteen years younger than the adopter. A minor with discernment cannot be adopted without their consent."

Article 339 of the same code emphasizes that parents allow the child to organize their life according to their maturity, considering the child's thoughts as much as possible in important matters. In the Child Protection Law, article 4(1)(d) specifies the "participation of the child and their family in the decision-making process" while ensuring that they are informed.

Moreover, when it comes to children from minority groups and immigrant children who are at risk within society, it is essential to ensure that their statements are taken correctly, especially if they are at risk of sexual abuse or violence by other children who have committed offenses (*M. and M. v. Croatia*, 2015). According to the European Court of Human Rights (ECtHR), children's views can be expressed independently while giving due consideration to their age and maturity. Conversely, the ECtHR has ruled that the views of a 12-year-old child regarding their treatment in a psychiatric ward cannot be taken into account (*Nielsen v. Denmark*, 1988). Children's opinions are important not only when they are suspects or defendants but also when they are victims of a crime. Turkish Penal Code article 104 states:

"A person, who engages in sexual intercourse with a child and who is at least fifteen years old with the use of force, threats, or deceit, shall be sentenced to imprisonment for a term of two to five years upon a complaint."

In cases of sexual intercourse with a minor, the preference for filing a complaint lies with the legal representative, not the child. This situation raises challenges in terms of children's direct participation rights. In our opinion, especially in cases where the child's will contradicts that of the legal representative, the child's right to express their opinion should take precedence.

6 Principle of equality

To protect vulnerable children from external influences within the scope of article 14 of the European Convention on Human Rights, attention should be paid to the principle of equality (Arnardottır, 2017, p. 157). The concept of equality is grouped as "equality before the law", "equal protection of the laws", "non-discrimination", and "equal rights" (Algan, 2021, p. 503). According to the Constitutional Court, the concept of equality does not mean being equal to everyone in every situation without any objective and rational basis. In the Aziz Turhan case, the Constitutional Court interpreted the concept of equality as "not treating individuals in the same situation differently without any objective and rational basis" (*Aziz Turhan v. Turkey*, 2012).

Regarding discrimination, it may be observed that article 10 of the Constitution and article 14 of the ECHR do not define the concept of equality. The ECtHR, through the *Rumor v. Italy* case, explicitly highlighted that children should be under the special protection of the state (*Rumor v. Italy*, 2014). Similarly, the *Tarakhel v. Switzerland* case stated that refugee children could be in a vulnerable situation (*Tarakhel v. Switzerland*, 2014). The absence of proportionality between the means used and the aim pursued with ECtHR jurisprudence is considered discrimination if there is no rational reason for the difference between the actions or sanctions, in other words, if there is an unjustifiable difference between them (*Rasmussen v. Denmark*, 1984). According to the Constitutional Court, for discrimination to be claimed, it must be proven that

"there is a difference between the treatment of the complainant and that of others in a similar situation, and that this difference is not based on a legitimate reason but is based solely on a discriminatory reason such as race, color, gender, religion, language"

supported by reasonable evidence (*Kamil Çakır v. Turkey*, 2013). In the *Hüseyin Münüklü case*, the Constitutional Court stated that to claim discrimination,

"it is necessary to prove that there is a difference between the treatment of the complainant and that of others in a similar situation, and that this difference is not based on a legitimate reason but is based solely on a discriminatory reason such as race, color, language, religion, gender, and that this fact must be supported by reasonable evidence" (*Hüseyin Münüklü v. Turkey*, 2017).

The case of *Enver Şahin v. Turkey* is an example of an ECtHR decision where a university administration's rejection of a request for continued education as a person with a disability was considered a violation of the right to education and peaceful living (*Enver Şahin v. Turkey*, 2018).

7 Conclusion

The first juvenile court was established in Chicago, USA, in 1899, and it was followed by the UK, France, Germany, and Italy (Yavuzer, 2009, p. 280). In Turkey, the Ministry of Justice conducted its initial study in 1945, followed by a draft law in 1952. In 1965, a draft law regarding the establishment, duties, and trial procedures of juvenile courts was prepared (Günal, 1965, p. 338). In this context, the Juvenile Court Law for juvenile trials came into effect in 1982 and was put into practice in 1987, aiming to create a difference in the judicial system (Acar & Çoban, 2015, p.).

We believe that the field of Juvenile Criminal Law needs to be regulated with a restorative justice approach. Therefore, it is essential to have a separate legal system for children and specific rules of procedure that only apply to juvenile cases. In cases of children who have been led into crime, the primary duty of the state is to reintegrate the child into society and prevent them from reoffending. Consequently, judges and prosecutors should pay attention to these aspects while making decisions.

The juvenile justice system should involve child-specific practices, ensuring that their best interests are protected in all circumstances, even in stages where the law is applied. In Turkey's Criminal Law system, the same crimes that apply to adults also apply to children.

Juvenile correctional facilities should not be located in remote areas, enabling as much interaction as possible with society. Conditions of confinement should be more flexible for juveniles with no history of recidivism. Furthermore, juvenile offenders should be subject to different procedures depending on the nature of the offense, and the Mediation Institution in Criminal Law should be used as effectively as possible. For instance, for first-time child offenders, reintegration into society without entering correctional facilities should be achieved through mediation. Additionally, it is clear that the principle of the child's best interests is not adequately applied within the Turkish legal system under the restorative justice approach.

Therefore, the child's best interests should take precedence, and the balance of benefits between the parties and the child should be considered with a child-centered approach, leading to the reorganization of the mediation institution.

The child's past experiences should be carefully assessed by expert pedagogues when determining suitable measures. All decisions made by the courts should be meticulously deliberated, keeping in mind that the child, from the outset of their life, may carry the stigma of being a "delinquent". The courts should not disregard the child's history and circumstances during the decision-making process.

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Children as Witnesses in Court Proceedings

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When children are confronted with the judicial system, they are particularly vulnerable to stressful and complex situations. Complying with international standards promoting child-friendly justice is crucial for preventing negative impacts on their development. The Slovenian legal system has implemented several measures to safeguard the rights and well-being of child victims and witnesses in criminal proceedings, such as excluding minors from direct confrontation with the accused, utilising videoconferencing for testimony, and establishing child-friendly spaces. The model of "Barnahus" or "Children's House" has been adopted as well, emphasising a multidisciplinary approach to addressing child victims of sexual abuse and other crimes. The Supreme Court has actively pursued child-friendly justice, producing informative booklets to guide child witnesses through legal processes. These and other initiatives underscore Slovenia's commitment to balancing the rights of the accused with the protection and support of child victims in the criminal justice system while leaving room for further development.

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Ko se otroci soočijo s pravosodnim sistemom, so še posebej ranljivi za stresne in kompleksne situacije. Spoštovanje mednarodnih standardov, ki spodbujajo prijazno pravosodje do otrok, je ključno za preprečevanje negativnih vplivov na njihov razvoj. Slovenski pravni sistem je uvedel več ukrepov za varovanje pravic in dobrega počutja otrok žrtev in prič v kazenskih postopkih, kot so izključitev mladoletnikov iz neposrednega soočenja z obtoženim, uporaba videokonferenčnih zaslišanj ter vzpostavitev otrokom prijaznih prostorov. Model "Barnahus" ali "Otroška hiša" je bil prav tako sprejet, saj poudarja multidisciplinarni pristop k obravnavi otrok žrtev spolnih zlorab in drugih kaznivih dejanj. Vrhovno sodišče aktivno sledi prijaznemu pravosodju do otrok in pripravlja informativne brošure, ki otrokom pričam pomagajo pri navigaciji skozi pravne postopke. Te in druge pobude poudarjajo zavezanost Slovenije k uravnoteženju pravic obtoženih z zaščito in podporo otrokom žrtvam v kazenskem pravosodnem sistemu, pri čemer pa puščajo prostor za nadaljnji razvoj.

1 Introduction

Children unavoidably take on different roles in judicial and other legal proceedings, regardless of their vulnerable position. Most commonly, they are involved in family proceedings concerning custody rights, access and visitation rights, as well as issues related to maintenance, administrative proceedings concerning their citizenship, or criminal proceedings, in which they may be involved as victims, witnesses, or perpetrators of criminal offences. According to data from 2017, around 2.5 million children participate in judicial proceedings across the EU every year, affected by parental divorce or as victims of, or witnesses to, crime (FRA, 2017, p. 3). Moreover, roughly 1.5 million children worldwide are deprived of liberty per year on the basis of a judicial or administrative decision, while the actual number of children deprived of liberty is estimated to be much higher, exceeding 7 million per year. This includes 410,000 children in prisons and detention centres, at least a million in police custody, and around 5.4 million children living in various institutions or homes (Nowak, 2019).

When confronted with the judicial system, children find themselves in a highly stressful and complex situation. Therefore, it is crucial to ensure that access to justice and corresponding procedures are always as child-friendly as possible. Thirty-five years have passed since the adoption of the United Nations Convention on the Rights of the Child (CRC, 1989), which applies universally and thus guarantees equal rights to children worldwide. Furthermore, significant progress has been achieved concerning the legal protection of children at both international and national levels. Regardless, children in certain parts of the world continue to live in dire conditions, their fundamental rights are being violated, and even in the most developed countries, not all children enjoy equal rights in practice. The Covid-19 pandemic has resulted in a further increase in physical, psychological and sexual violence against children and shown the vulnerability of child protection systems in times of crisis. (Council of Europe, 2022, p. 13). The treatment of children in judicial systems thus continues to raise some concerns and requires further attention.

The article will address the issue of children participating in judicial and other legal proceedings as witnesses, with a special focus on the presentation and evaluation of measures adopted by the Republic of Slovenia to guarantee the protection of their rights and best interests within the framework of child-friendly justice. The analysis

will start by presenting relevant international and national legal sources before addressing the legislative approach to hearing child witnesses in the Republic of Slovenia in more detail. Furthermore, it will compile, explain and evaluate the most relevant measures aimed at protecting child witnesses and victims, especially those introduced with the transposition of EU Directives into the Slovenian legal system and the Barnahus project as an example of good practices.

2 Legal protection of children participating in judicial proceedings

2.1 International legal instruments

Child-friendly justice originates in international law, primarily in the CRC, but also in numerous other legal acts and instruments developed by the United Nations, Council of Europe, and the European Union, including guidelines, principles, standards and case law pertaining to children.

The CRC, adopted by the General Assembly of the United Nations on November 20, 1989, played a crucial role in recognising a child as a bearer of rights. The CRC is universally recognised and is distinguished as the most widely ratified human rights treaty in history, with 196 countries being party to it in 2023, including every member of the United Nations except the United States. With fifty-four articles and three optional protocols, the CRC defines fundamental human rights that should be enjoyed by all children worldwide (e.g. the right to life, survival and development, protection from all forms of exploitation, inhumane treatment and unnecessary detention, etc.) and establishes fundamental standards for children's development across various age groups and aspects of their lives. Aiming to protect children as a distinct and vulnerable group, it introduced the best interests of the child as the primary consideration in all actions concerning children (CRC, 1989, article 3).

Another pivotal provision influencing the child's role as a subject in legal proceedings is article 12 of the CRC, which grants every child who is capable of forming their 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. This includes 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 (CRC, 1989, article 12). Furthermore, article 40 of the CRC provides special procedural guarantees and protection to children alleged as, accused of, or recognised as having infringed the penal law (CRC, 1989, article 40). Consequently, children have finally been given their voice in legal proceedings (Kraljić, 2016, pp. 11–30).

Likewise, the Charter of Fundamental Rights of the European Union emphasises the importance of the child's best interests as a primary consideration in all actions relating to children, whether taken by public authorities or private institutions, explicitly grants children the right to such protection and care as is necessary for their well-being, as well as the right to express their views freely and have such views taken into consideration on matters which concern them in accordance with their age and maturity (EU Charter, 2012, article 24).

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Directive 2012/29/EU, 2012) and Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (Directive (EU) 2016/800, 2016) also impose an obligation on the EU Member States to ensure that the child's best interests are always a primary consideration in respective judicial procedures.

The most extensive compilation of standards concerning child-friendly justice is contained within the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice of 2010. These guidelines ensure effective access to judicial protection for children, appropriate treatment in justice, and protection from secondary victimisation by the justice system (Guidelines on Child-Friendly Justice, 2010, p. 8). They serve as a crucial instrument, addressing various issues such as the minimum age of criminal responsibility, protection of private and family life or deprivation of liberty.

While the European Convention on Human Rights fails to address children as a separate group explicitly, the right to a fair trial (ECHR, 1950, article 6) also applies to children, who are to be treated differently than adults in judicial proceedings.

2.2 Protection of children in Slovenian legislation

In addition to the CRC, which is directly applicable, the Republic of Slovenia is a signatory to all major declarations, conventions, and agreements regulating the issues concerning violence against children and their protection in criminal proceedings (including those mentioned above). The most important recent legislative developments were the transpositions of the Directive 2012/29/EU and the Directive (EU) 2016/800 into the Slovenian legal system. The Directive 2012/29/EU was transposed into Slovenian law in October 2019 with a four-year delay, partially with the Act Amending the Domestic Violence Prevention Act (ZPND-A, 2016) and partially with the Act Amending the Criminal Procedure Act (ZKP-N, 2019) and the Act Amending the Social Assistance Act (ZSV-I, 2019), whereas the Directive (EU) 2016/800 was transposed with the Act Amending the Criminal Procedure Act (ZKP-O, 2020), which came into force in 2021.

The system of protection and care for children in the Republic of Slovenia is thus in line with international standards and, according to international rankings, monitoring and criteria, provides a high level of realisation of the rights and well-being of children (Ministry of Labour, Family and Social Affairs and Equal Opportunities, 2019; Janjatović, 2020, p. 37).

At a national level, the Constitution of the Republic of Slovenia stipulates that children shall enjoy special protection and care, as well as human rights and fundamental freedoms consistent with their age and maturity. It further provides them with special protection from economic, social, physical, mental, or other exploitation and abuse and special protection by the state if they are not cared for by their parents (Slovenian Constitution, 1991, article 56).

When adopted in 2008, the Slovenian Criminal Code stipulated that a special act shall determine the criminal liability of minors (KZ-1, 2008, article 5). However, even though 15 years have passed since then, no such act addressing juvenile offenders and victims has been adopted. For that reason, the provisions of the former Criminal Code (KZ, 1994) continue to apply to respective issues until the long-awaited adoption of the special law (KZ-1, 2008, article 375). In addition to the Criminal Code, two other Acts govern different aspects of criminal proceedings involving minors: the Criminal Procedure Act (ZKP, 1994) and the Enforcement of

Criminal Sanctions Act (ZIKS-1, 2000). Both contain special chapters or provisions concerning the treatment of children.

The most recent legislative achievement concerning the protection of children involved in criminal proceedings is the Protection of Children in Criminal Procedure and their Comprehensive Treatment in Children's House Act (ZZOKPOHO, 2021), which established grounds for the comprehensive treatment of minor victims and witnesses in pre-trial and criminal proceedings (see 4.7 below).

3 Children as witnesses in Slovenian judicial proceedings

3.1 The concept of a child in Criminal Code

Under the CRC, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier (CRC, 1989, article 1). The terminology in Slovenian Criminal Code is less consistent and contains multiple terms for a person who has not yet reached the age of 18, including a child, a minor and an underage person. With article 21 of KZ-1 stipulating that "anyone who commits an unlawful act when he or she is under the age of 14 years (a child) cannot be a perpetrator of a criminal offence" (KZ-1, 2008, article 21), the resulting confusion was addressed by the Supreme Court, which provided the proper interpretation of the term 'child' used in definitions of criminal offences. In its judgement, I Ips 5335/2010-96 of 7 February 2013, the Supreme Court stated the following: "When interpreting the provision of article 192 of the KZ-1, which, in the KZ-1B amendment, replaces the word 'child' used in the previous text of article 192 of the KZ-1 with the term 'underage person,' the term 'child' cannot be defined in the sense of article 21 of the KZ-1, which defines the term 'child' solely in terms of the age limit of criminal responsibility." It thus concluded that the term 'child' used in contexts other than the above-cited article 21 of KZ-1 is to be interpreted as referring to a person who has not yet reached the age of 18 instead of 14 (Supreme Court of the Republic of Slovenia, 2013; Filipčič, 2018).

3.2 Children testifying as witnesses

The position of a witness is generally less stressful than that of an accused person; however, when the witness is a child (who may also be a victim of a criminal offence), the situation becomes considerably more complicated.

For a long time, children were not considered suitable for the role of a witness because they were presumed incapable of providing credible information due to a lower capacity to memorise events and their inability to distinguish between truth, falsehood and imagination. However, different studies have largely refuted such beliefs. Even very young children have sensory abilities comparable to adults. If an event seems significant to them, they will perceive it equally well or even better than adults (Šugman Stubbs, 2000, p. 208). Researchers have also strongly disputed that children cannot distinguish between reality and imagination or between truth and falsehood. They even estimate that young children are no less truthful than older children or adults. Furthermore, children turned out to be no more susceptible to suggestions than adults, and age is not the primary factor influencing suggestibility. Arguments could even be reversed: adults are presumed to consciously lie more frequently, and because they simultaneously have more developed mechanisms for justifying their actions and can better conceal their emotions, such lies are harder to detect. Based on these insights, there is no objective reason to believe adult witnesses more than children (Šugman Stubbs, 2000, p. 209).

Slovenian Criminal Procedure Act does not contain any provisions that would explicitly exclude a specific category of persons as absolutely incapable of being a witness or determine an age limit at which a child may be questioned as a witness. Instead, any person can be generally heard as a witness as long as they are capable of providing a reasonable statement before the court and are likely to be able to provide some information about the criminal offence. This includes children, who are capable of testifying if they can comprehend the significance of testifying and credibly recount important facts. Naturally, the questioning itself must be adjusted to their developmental stage (Janjatović, 2020, p. 39–40).

However, this does not imply that the duty to testify is unlimited. The Criminal Procedure Act lays down several exceptions and privileges allowing witnesses, regardless of age, to refuse to testify or answer particular questions. Paragraph one

of article 236 thus grants legal privilege to witnesses with close family or blood ties to the accused, exempting them from the duty to testify. The reason for the privilege is to prevent the conflict between persons with the closest and (legally recognised) trusted relationship (Dežman & Erbežnik, 2003, p. 405). Among the so-called privileged witnesses are the accused person's descendants, siblings and adoptees (or, more precisely, blood relatives in the direct line, relatives in the collateral line up to the third degree and relatives by marriage up to the second degree). Furthermore, paragraph three of article 236 of the ZKP explicitly states that minors who, due to their age and mental development, are not capable of understanding the significance of the right of not having to testify (which is a question on facts determined by the court itself or with the assistance of an expert in the relevant field), may not be heard as witnesses, except if the accused person so demands or if the court deems it in the minor's best interest (ZKP, 1994, article 236; Horvat, 2004, pp. 546–547).

This provision is contentious as it prioritises the right of the accused to defence over the interests of the minor witness. The minor witness who fails to comprehend the significance of legal privilege is seemingly at a disadvantage compared to other privileged witnesses, which is especially questionable when the child is also a victim of a criminal offence. Defendants accused of violence against a child are often the parents or individuals living with or frequently interacting with the child, who may easily pressure the child to testify in their favour. In such cases, the accused may insist on the child being questioned (Janjatović, 2020, p. 40). For that reason, case law has taken the stance that the respective provision should not be interpreted to mean that the court must always question a minor witness whenever the accused person so demands. Such proposals should always be assessed in line with the criteria established by the Constitutional Court of the Republic of Slovenia for deciding on proposals for evidence, and the potentially harmful effects of such questioning on the mental state of the minor should always be weighed against the right of the accused to defence in accordance with the principle of proportionality (Supreme Court of the Republic of Slovenia, 2009).

The courts frequently refer to experts with questions concerning the child's understanding of legal instructions and, consequently, their ability to participate in legal proceedings. Generally, it is estimated that a child with intellectual abilities consistent with their chronological age and with average experiences in interpersonal relationships and verbal communication is capable of understanding legal

instructions reliably from the age of nine or ten, assuming the instructions are presented in a suitable manner. In the case of children under the age of ten, an expert is usually appointed to determine whether the child is capable of understanding legal instructions in a specific case. However, the child's chronological age should not be the sole criterion for such assessment (Žmuc Tomori, 2014, p. 13).

3.3 Children testifying as victims

Though undoubtedly traumatic, questioning the child is often unavoidable in cases where reasonable suspicion exists that the child is a victim of sexual abuse or other criminal offence. Such testimony constitutes evidence that is almost impossible to obtain in any other way and is, as such, often irreplaceable. Experts agree that children almost never fabricate claims of sexual abuse, especially when they are younger and lack the knowledge to invent such a story. The greater challenge is the fact that they often remain silent, even if the abuse has been happening over a longer period of time. Children may talk about such incidents more frequently as if they happened to a friend, testing the response of the person they wish to confide in and only revealing the truth if the reaction is appropriate or if they are explicitly asked if something similar happened to them (Horvat, Čobec & Strle, 2017, pp. 24–25).

It goes without saying that special care is needed when questioning an underage victim of a criminal offence to protect them from secondary victimisation. The victim is primarily victimised by the crime itself, which triggers a sense of hurt and destroys their feelings of safety and trust. Further trauma occurs when the child decides to speak out or when others notice their distress, even before the initiation of criminal proceedings (Filipčič, 2006, p. 80; Janjatovic, 2020, p. 32; Nikolić-Ristanović, 2003, p. 3). During this time, the child experiences severe doubts about whether to disclose the actions of a person they usually care about, betraying them in the process (in their mind). If they do report the abuse, they might not be believed by trusted adults or may face significant pressure regarding what to say and how to say it. When questioned by teachers, caregivers, social workers, doctors and others, the child may feel guilty, believing they did something wrong or are the main cause of the perpetrator's punishment (Žmuc Tomori, 2014, p. 11). Finally, the trauma of the functioning of the criminal justice system emerges. The child suddenly becomes another source of evidence, one of the cogs in a justice system accustomed to dealing with adults. The court premises and the proceedings are purposefully designed to be

intimidating and authoritative, which is even more effective when children are involved. It can be very difficult for them to understand what is happening, what is expected of them and what the consequences of their actions will be, even if they are given instructions and explanations (Šugman Stubbs, 2000, p. 207). Furthermore, the prosecutor, judge, and attorneys may ask invasive questions, which are intended to discover the truth, but for the child, they might seem like an attack. They might get the impression that the adults do not believe their testimony or that they have done something wrong. Secondary victimisation is defined as victimisation that does not occur as a direct result of the criminal act but arises due to (inappropriate) responses of institutions and individuals concerning the victim (Janjatović, 2020, p. 34; Nikolić-Ristanović, 2003, p. 3).

Secondary victimisation can cause even more trauma to the child than primary victimisation. It can be aggravated as a result of inadequate professional training of teachers, school counsellors, police officers, and doctors; inconsistent actions by individuals and services responsible; inadequate facilities for the professional treatment of abused children; repeated questioning of the child; the presence of multiple individuals during the child's interview; the lack of female investigators; the presence of parents during interviews; or repeated reliving of the criminal offence (Umek, 2001, p. 205).

Protection of victims from secondary victimisation is thus primarily achieved through educating law enforcement agencies and other participants in the criminal justice system, legislative reforms, and practical measures to support victims and minimise the adverse consequences of criminal proceedings (Janjatović, 2020, p. 34; Nikolić-Ristanović, 2003, p. 5).

A particularly important mechanism for preventing secondary victimisation are the provisions of the Criminal Procedure Act aimed at limiting any unnecessary contact between the victim and the accused. Thus, the authority conducting pre-trial and criminal proceedings must ensure that the victim does not come into unwanted contact with the accused unless such contact is indispensable for the successful implementation of pre-trial or criminal proceedings (ZKP, 1994, article 65, par. 5). Furthermore, the accused person may not be present during the hearing of a witness younger than 15 years who is the victim of a criminal offence against sexual integrity,

marriage, family and youth, enslavement, or human trafficking (ZKP, 1994, article 178, par. 4).

The Act Amending the Criminal Procedure Act (ZKP-N, 2019) introduced additional mechanisms to protect minor witnesses. For example, the testimony of a witness under the age of 15 who was a victim of the criminal offences mentioned above must always be recorded (ZKP, 1994, article 84). Direct questioning of such victims is not permitted at the main hearing; in such cases, the court reads the record of the previous questioning of such persons (ZKP, 1994, article 331). Their testimony may also be taken using modern technical devices for the transmission of image and sound, i.e., videoconference (ZKP, 1994, article 244a). The use of communication technology and audiovisual recordings of testimonies is crucial in preventing contact between the child and the accused and unnecessary repetition of questioning. In any case, if a person under the age of eighteen is heard as a witness, the panel may order that the public be excluded from the hearing. After their testimony, they are removed from the courtroom as soon as their presence is no longer required (ZKP, 1994, article 331; Horvat, 2004, p. 697).

The summarised provisions represent a departure from the principle of immediacy in presenting evidence at the main hearing. While it is crucial to organise criminal proceedings so as not to unjustifiably imperil the life, liberty or security of witnesses and victims, such measures must not deprive the accused of their fundamental right to confront an incriminating witness during the main hearing (see for example, Y. v. Slovenia, 2015). Therefore, carefully balancing the rights of the accused and the rights of the victim in criminal proceedings is particularly challenging. The proper balance can be achieved, for example, by informing the accused of the victim's testimony, allowing them to follow the questioning and pose questions to the victim, but not necessarily directly. Instead, technical means can be applied to prevent direct contact between the victim and the accused (Tratnik Zagorac, 2010, pp. 31–32; Janjatović, 2020, p. 46).

4 Child-friendly justice in the Republic of Slovenia

The ZKP contains several provisions aimed at promoting child-friendly justice in the Republic of Slovenia, some of which were already included in the first version of the act and some that were introduced into the legislation as a result of the

transposition of the Directive 2012/29/EU (2012). These provisions represent a significant step in strengthening the position of victims and establishing child-friendly justice. However, it is worth noting that the majority of protective measures (especially mandatory ones) concerning the hearing of minor witnesses and victims are limited to persons up to a certain age (15 years) who are victims of the most severe criminal offences (against sexual integrity, marriage, family and youth, enslavement, or human trafficking). Considering the definition of a child in the CRC (1989), such regulation is not entirely consistent with international standards, and protective measures should be equally guaranteed to all minor victims and witnesses, thus leaving further room for improvements in this area (Janjatović, 2020, p. 43).

4.1 Principle of treating victims with particular care and due consideration

The ZKP-N introduced the general principle requiring all authorities and participants in pre-trial and criminal proceedings to treat victims with particular care and act with due consideration where necessary because of their vulnerability, such as age, health condition, disability or other similar circumstances (ZKP, 1994, article 18a). This is even more important when hearing a minor, especially if such person has suffered harm from the criminal offence, in order to avoid possible detrimental consequences to their mental state. If necessary, the hearing of a minor is carried out with the assistance of an educational or other expert (ZKP, 1994, article 240, par. 4).

4.2 The right to information

The ZKP provisions give special emphasis to the victim's right to information by precisely defining the scope and type of the information provided, which depends on the personal characteristics and vulnerability of the victim, their specific needs for protection, the nature, gravity and circumstances of the crime and the stage of pre-trial or criminal proceedings (ZKP, 1994, article 65a).

A child summoned to court is under a significant amount of stress, which is why it is crucial to inform them properly about the proceedings they are about to face. To minimise the negative impact of legal proceedings on the child's development, the Supreme Court of the Republic of Slovenia has been engaged in the creation of special informative publications since 2010. Based on the experiences of experts and

judges working with children in criminal proceedings, these illustrated publications are tailored to children of different age groups (5 to 9 years and 10 to 14 years) who participate as witnesses in criminal proceedings before the court. In an easily understandable manner, combining visuals and text (including some activities such as connect-the-dots, connect the person with the colour of their gown, crosswords, etc.), the booklets explain who a witness is and what their role is, who the defendant is, how the court looks, and who will be present in the room alongside the child being examined. They encourage the child to understand that they have an important task ahead and instruct them to tell the truth while emphasising that they are helping the court and did nothing wrong. Children invited to court as witnesses receive this booklet along with the summons (Supreme Court of the Republic of Slovenia, 2022; Janjatović, 2020, p. 38).

4.3 Exclusion of the public

The ZKP provisions further stipulate that if a person under the age of eighteen is heard as a witness, the panel may decide to exclude the public from the hearing. After their testimony, the minor should be removed from the courtroom as soon as their presence is no longer required (ZKP, 1994, article 331).

4.4 Child-friendly premises

The environment where a child is being questioned can significantly impact the outcome of the testimony, as children are more willing to cooperate and provide more information in a child-friendly environment that gives a sense of homeliness (e.g., a room with a couch and toys) compared to the formal atmosphere of a courtroom (Janjatović, 2020, p. 41; Šugman Stubbs, 2000, p. 209). The importance of hearing a child in a child-friendly environment is also emphasised in the Guidelines on Child-Friendly Justice (2010, p. 30).

The hearing of a witness who is a victim with a special need for protection may be carried out in specially adapted premises, depending on their personal circumstances. In order to prevent secondary victimisation, such hearing is mandatory when hearing the witness who is younger than 15 years and who was the victim of the criminal offence against sexual integrity, marriage, family and youth, enslavement, or human trafficking, unless this is not necessary for justifiable reasons that must be

substantiated explicitly by the court (ZKP, 1994, article 240, par. 6). Child-friendly premises (equipped with toys, colourful furniture, cameras, separate entries) are available at all district courts in the Republic of Slovenia.

4.5 Mandatory representation

Before the ZKP-N amendment (2019), the ZKP stipulated that a minor who is a victim of certain criminal offences must have a legal representative during the criminal proceedings to ensure their rights, particularly regarding the protection of their integrity (if necessary, assigned by the court ex officio) (ZKP, 1994, article 65, par. 3). This provision was already an exception of the general rule that legal representation is a right of the victim and it is up to the victim whether they intent to exercise it or not (Horvat, 2004, p. 152). However, it did not require mandatory representation through a legal representative in the proceedings before the police when the child may already be exposed to traumas and other adverse effects (Šugman Stubbs, 2000, p. 213). Often, the offender influenced the victim even before the initiation of proceedings (judicial investigation) to prevent the victim from speaking about the incident during the questioning (Janjatović, 2020, p. 44; Nussdorfer, 2006, p. 17). With the adoption of the ZKP-N, it finally became mandatory for a minor who is a witness of certain criminal offences to have a legal representative even during the hearing in pre-trial proceedings, i.e., during the first contact with the police.

4.6 Presence of a trusted person

A child involved in pre-trial and criminal proceedings does not only need the assistance of a person with legal knowledge but also the support of someone they trust, who is capable of providing appropriate psychological assistance in overcoming traumas caused by both the criminal offence and the resulting secondary victimisation (Nussdorfer, 2006, p. 17).

Therefore, under the ZKP provisions, a minor as a victim may be accompanied by a person of their choosing in pre-trial and criminal proceedings unless this is contrary to the interests of the successful implementation of pre-trial or criminal proceedings or the benefit of the injured party (ZKP, 1994, article 65, par. 4). Such person could be the child's parent, relative or even an expert (Šugman Stubbs, 2000, p. 212).

However, the person chosen by the child is not always suitable, for example, if the same person is also a witness in the proceedings or a parent who does not believe the child and sides with the defendant. This raises the question of how the investigative or adjudicating judge should verify the suitability of the chosen person whom the child trusts (Janjatović, 2020, p. 45).

4.7 Project Barnahus

Barnahus, the leading European model for the treatment of child victims of sexual abuse, means "Children's House" in Icelandic. The idea behind the model adopting a multidisciplinary approach to addressing child victims of criminal offences originated in the United States, with the first Child Advocacy Center (CAC) established in Alabama in 1985. The Barnahus model is designed to coordinate parallel criminal justice and child welfare assessment processes in suspected cases of children's sexual abuse. It does this in a child-friendly way, in a manner that prevents the secondary victimisation of the child, by providing all necessary services to child victims under one roof (Mikec & Stankić Rupnik, 2022, p. 44).

Following the adoption of the ZZOKPOHO, the public institution Children's House was also established in Slovenia. The formal opening of the Children's House at Zaloška 59 in Ljubljana took place on 27 May 2022 (Mikec & Stankić Rupnik, 2022, p. 44).

The ZZOKPOHO regulates the manner of and conditions for the comprehensive treatment of minor victims and witnesses in pre-trial and criminal proceedings concerning specific criminal offences, which include, *inter alia*, criminal offences against humanity, against life and limb, against sexual integrity and against marriage, family and children (ZZOKPOHO, 2021, article 1–2).

The ZZOKPOHO will be implemented gradually. While it already applies to criminal offences against sexual integrity (since May 2022), it will apply to all other criminal offences specified in the second paragraph of article 2 of ZZOKPOHO (against marriage, family, and children, as well as other criminal offences) as of 1 May 2024. If the best interests of the child so require, comprehensive treatment may also be provided after 1 May 2024 to a child who is a victim of or witness to other

criminal offences or to a minor under 18 years of age against whom pre-trial or criminal proceedings are conducted (ZZOKPOHO, 2021, article 1 and 43).

The most important principles of comprehensive treatment provided by the ZZOKPOHO require ensuring the following:

- that the child receives the necessary information and explanations;
- that the protection and personal safety of the child are ensured to prevent exposure

to secondary victimisation and re-victimisation, intimidation and revenge;

- that the interviews and physical examinations of the child are only carried

out as far as this is absolutely necessary and that the number of interviews and examinations is kept to the minimum to prevent further victimisation;

- that the child is allowed to be heard;
- that the procedures are carried out without undue delay (ZZOKPOHO, 2021, article 3).

Comprehensive treatment of a minor victim or witness in pre-trial or criminal proceedings may be provided on the basis of a court order issued after the court assessed whether such treatment in the Children's House is indeed in the best interests of the child (ZZOKPOHO, 2021, article 14). Activities carried out within the framework of comprehensive treatment include interviewing the child, physical examination of a child and crisis and psychosocial support.

The interview of the child is carried out on the basis of a written order issued by a court ex officio or on the parties' proposal. The court thus retains the substantive procedural management of the questioning, while the Children's House is responsible for its organisation and implementation. Before the interview, the preparatory meeting, led by the investigating judge, is always held on the premises of the Children's House. At this meeting, the participants may give their statements on the facts and circumstances relevant to the conduct of the interview, on the questions to be posed to the child and the method of conducting the interview. The

interview itself is carried out in accordance with the protocol for forensic interviewing of a child by a professional from the Children's House, who follows the starting points determined at the preparatory meeting. The interview space consists of two separate rooms connected via audio and video systems, which ensures that there is no unwanted personal contact between the child and the suspect or the accused immediately before, during and after the interview. The child and the professional conducting the interview are confined in one room, while all other participants are present in another. During the interview, the professional and the judge leading the interview communicate using electronic communications equipment. All interviews of a child are audio and video recorded. It is crucial that the recording of the forensic interview may be used in criminal proceedings and other court proceedings (e.g. family cases) and to provide crisis and psychosocial support to the child (ZZOKPOHO, 2021, article 16–28).

Physical examination of a child is carried out in a specially equipped space at the House for Children to ensure to the greatest extent possible that the child is treated with care and consideration. The court must take particular care in assessing whether the expert examination of physical injuries should be made solely based on medical documents and other information contained in the file or whether it should also include an examination of the child. If the child opposes the physical examination, the latter can be conducted only if this is necessary for the successful implementation of pre-trial or criminal proceedings (ZZOKPOHO, 2021, article 29–32).

The Children's House also provides crisis and psychosocial support to children. Crisis support constitutes, in particular, the psychological support provided to children during interviews and physical examinations, while psychosocial support represents a more permanent form of psychological, social and practical support provided to children after interviews or physical examinations (ZZOKPOHO, 2021, article 33). Crisis and psychosocial support is carried out by the counsellor of the child, who accompanies the child throughout the treatment. The appointed counsellor receives the child immediately before the interview or physical examination, calms the child, and explains the interview or examination process and further treatment. The counsellor observes the child's interview from a separate room. Immediately after the interview or physical examination, the counsellor provides the child with professional assistance and psychosocial support. The psychosocial support is provided for six months from the start of the treatment.

After this period, the counsellor can refer the child to relevant institutions outside the Children's House if the child needs further treatment (ZZOKPOHO, 2021, article 34–37).

In the first year of its existence, the Children's House already provided support to 26 children who were victims of criminal offences against sexual integrity and it continues to intensify its various activities (Children's House, 2023).

5 Conclusions

As presented in this paper, Slovenian legislation is generally consistent with international standards promoting child-friendly justice. Following the latest legislative developments, several measures were implemented or improved to safeguard the rights and well-being of child witnesses and victims in criminal proceedings, such as preventing direct contact and confrontation with the accused, utilising videoconferencing for testimony, and establishing child-friendly spaces in all regions in the Republic of Slovenia. The model of "Barnahus" or "Children's House" has been adopted as well, emphasising a multidisciplinary approach to addressing child victims of sexual abuse and other crimes. The Supreme Court has actively pursued child-friendly justice, producing informative booklets to guide child witnesses through legal processes. These and other initiatives underscore Slovenia's commitment to balancing the rights of the accused with the protection and support of child victims in the criminal justice system and are doubtlessly a step in the right direction. However, as modern society faces new challenges (epidemics, unrest, new technologies, climate change, etc.), continuous effort and attention are necessary at both international and national level to ensure a genuinely child-friendly justice, as far as this is even possible.

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Best Child Care Arrangements After Separation of Parents

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The child's right to contact is a strictly personal, non-inheritable, and non-transferable right that is tied to the child's closest family relationship. No one can be forced to carry out contact if they do not want to. Parents have the right and responsibility to maintain, educate, and raise their children. This right may be taken away or limited from the parents only for reasons established by law to protect the child's interests. The performance of parental duties must therefore be in the child´s best interests. Where it is not in the best interests of a child to maintain unsupervised contact with one of their parents the child does not live with, the possibility of supervised personal contact or other forms of contact with this parent shall be considered. Joint parenting is possible only in cases where both parents are unencumbered by their past parental relationship and are able to agree.

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NAJBOLJŠE UREDITVE VARSTVA OTROK PO LOČITVI STARŠEV

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Pravica otroka do stikov je strogo osebna, neoporečna in nezamenljiva pravica, ki je povezana z otrokovim najtesnejšim družinskim odnosom. Nikogar ni mogoče prisiliti, da izvaja stike, če tega ne želi. Starši imajo pravico in odgovornost vzdrževati, izobraževati in vzgajati svoje otroke. Ta pravica se lahko staršem odvzame ali omeji samo iz razlogov, določenih z zakonom, in če je v korist otroka. Izvajanje starševskih skrbi mora zato biti v največjem interesu otroka. Kjer vzdrževanje nenadzorovanih stikov z enim od staršev ni v interesu otroka, se upošteva možnost nadzorovanih osebnih stikov ali drugih oblik stikov s tem staršem.

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1 Introduction

Children experience divorce deeply and personally, and the potential for negative short- and long-term different kinds of consequences is considerably higher for children whose parents divorce than for those from non-divorced families. While parental divorce poses significant risks for children that warrant concern, research shows that these outcomes are not the same for all children, nor are they inevitable (Pedro-Carroll, 2020). In this relation, the law must provide clear and compelling rules to minimize all these factors, among other means of help.

In the Convention on contact concerning children, a special article 7[1] is devoted to resolving disputes concerning contact, saying that the judicial authorities shall take all appropriate measures to ensure that both parents are informed of the importance for their child and for both of them of establishing and maintaining regular contact with their child. The primary purpose of protection is to encourage parents and other persons having family ties with the child to reach amicable agreements with respect to contact, particularly through family mediation and other processes for resolving disputes. Before making a decision, ensure that they have sufficient information at their disposal, particularly from the holders of parental responsibilities, to decide in the child's best interests and, where necessary, obtain further information from other relevant bodies or persons.

Today, the principle of the best interests of the child is a fundamental principle of children's law – an area where law is intertwined with the child's life. It is covered in article 3 of the 1989 UN Convention on the Rights of the Child[2] (hereinafter: UNCRC, 1989):

1. *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.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

[1] Convention on contact concerning children of The Council of Europe, available: https://rm.coe.int/convention-on-contact-concerning-children/1680a40f71

[2] Convention on the rights of the Child, Uradni list SFRJ – Mednarodne pogodbe, no. 15/90, Akt o notifikaciji nasledstva glede konvencij Organizacije združenih narodov in konvencij, sprejetih v mednarodni agenciji za atomsko energijo objavljen v Uradnem listu RS – Mednarodne pogodbe, no. 9/92.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

The foundation of the child`s right to contact with both parents is also stipulated in article 8 of the European Convention on Human Rights (hereinafter: ECHR)[3] , which is devoted to the right to respect for private and family life.

Parents have the right and duty to maintain, educate and raise their children. This right may be taken away or limited from the parents only for reasons established by law to protect the child's interests. The stated provision of the first paragraph of article 54 of the Constitution of the Republic of Slovenia[4] lays down the basis of parental care, which belongs to both parents, who have the same rights and obligations towards their children (Kraljić, 2019, p. 455).

In the first paragraph of article 141 of the Family Code (hereinafter: FC)[5], there is a legal presumption that contacts ensure the child's benefits since the child has the right to contact both parents, and both parents have the right to contact the child. When decisions are made about the child's contact with the parent with whom the child will not live, it is not necessary to prove that the contact is in their favour, as this is assumed (Kraljić, 2019, p. 455).

However, when the procedure for the withdrawal or restriction of contacts, for the reassignment of the child or the change of contacts due to the occurrence of changed circumstances, as follows from paragraphs 7 and 8 of article 141 of the FC, this legal presumption will have to be challenged and according to the court's decision it will have to be assured that the changed contacts of the child after following the changed circumstances are in the child's best interests (Kraljić, 2019, p. 455).

[3] The European Convention on Human Rights (ECHR; formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

[4] Constitution of the Republic of Slovenia (Slovene *Ustava Republike Slovenije*) (CRS): Uradni list RS/I, št. 33/91, Uradni list RS, št. 42/97 - UZS68, 66/00 - UZ80, 24/03 - UZ3a, 47, 68, 69/04 - UZ14, 69/04 - UZ43, 69/04 - UZ50, 68/06 - UZ121,140,143, 47/13, 47/13, 75/16 - UZ70a, 92/21 - UZ62a.

[5] Family Code (Slovene *Družinski zakonik)* (FC): Uradni list RS, no. 15/17, 21/18 - ZNOrg, 16/19 - ZNP-1, 22/19, 67/19, 200/20 - ZOOMTVI, 94/22 - odl. US, 94/22 - odl. US, 5/23.

The importance of the child with both parents who are separated is stated in article 9(3) of the CRC where it is stipulated that the State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents regularly, except if it is contrary to the child's best interests.

The child's right to contact is a strictly personal, non-inheritable, and non-transferable right that is tied to the child's closest family relationship. Waiver of the right to contact has no legal effect, and in the event of its non-execution, there is no termination. However, no one can be forced to carry out contact if they do not want to. The right to contact is also protected against interference by third parties (Kraljić, 2019, p. 456).

2 The performance of parental duties

2.1 Assessing best interests of the child in specific cases

The performance of parental duties must therefore be in the child's best interests. However, parents work for the benefit of the child if they meet his material, emotional and psychosocial needs by appropriate behaviour.

In the decision of the Higher Court in Ljubljana IV Cp 453/2016[6], the court assessed whether the mother is the one who prevents contact with the child's father. The court's decision is based on the previously valid article 106 of the Marriage and Family Relations Act[7] (hereafter: MFRA). The fact that one of the parents prevents the child from having contact with the other parent is a circumstance that, given that it is in the child's interest to have regular personal contact with the parent with whom they do not live can also influence the decision on the assignment of a child. The mother must provide more convincing evidence that the boy's contact with his father would be harmful. The parent with whom the child lives is the one who must provide convincing evidence that the child's contact with the other parent is not in the child's best interest (Novak, 2017, p. 222). Namely, the defendant failed to prove either that the contact between the child and the father would harm the child or that

[6] *VSL sklep IV Cp 453/2016*, 21 June 2016.
[7] Marriage and Family Relations Act (Slovene *Zakon o zakonski zvezi in družinskih razmerjih)* (MFRA): Uradni list RS, no. 69/04 - uradno prečiščeno besedilo, 101/07 - odl. US, 90/11 - odl. US, 84/12 - odl. US, 82/15 - odl. US, 15/17 - DZ, 94/22 - odl. US, 94/22 - odl. US.

the father would not be able to care for the child. The defendant claimed at the appeal hearing that she was ready to make contact. Now he has the last and ultimate chance to prove it. The court will monitor her conduct if it turns out that the defendant is not ready to exercise contact and the child's interests and possibly protect her; otherwise, the father will become the child's primary guardian.

Article 7 of the Slovenian FC states:

> *(1) Parents shall take care of the best interests of the child in all activities related to the child. Children are brought up with respect for their person, individuality, and dignity.*
> *(2) Parents have priority over all others in the care and responsibility for the benefit of the child.*
> *(3) Parents work for the benefit of the child if, in particular, taking into account the child's personality, age and developmental level and desires, they adequately meet his material, emotional and psychosocial needs by acting to indicate their care and responsibility towards the child, appropriate educational leadership and encourage it in its development.*
> *(4) State bodies, public service providers, holders of public authority, local community bodies and other natural and legal persons must take care of the best interests of the child in all activities and procedures related to the child.*
> *(5) The state shall provide conditions for the operation of non-governmental organizations and professional institutions for the development of positive parenting.*

The principle of the best interests of the child thus represents a fundamental starting point in all vertical relations or activities related to the child carried out by state bodies (e.g., court, social work center, police …). However, the best interests of the child must also be a fundamental guide in horizontal relations, i.e., in the relations between parents and children.

Our positive legislation does not define the notion of "child benefit, " which must be the basic guideline in all matters concerning the child (i.e., general authority). It is a legal standard, the content of which must be sought in each case separately (e.g., judiciary, education, health care). The only starting point is that parents are considered to be working for the benefit of the child if, in particular, taking into account the child's personality, age and developmental level and desires, they adequately meet their material, emotional and psychosocial needs, responsibility to the child and provide him with appropriate educational guidance and encourage him in his development.

According to article 106 of the MFRA, a parent who does not live with the child has the right to personal contact with the child unless the Social Work Center decides otherwise based on the interests of the child, the parent with whom the child lives is obliged to enable contact. In the following case of the Supreme Court of the Republic of Slovenia[8], the defendant complied with the provisions of the United Nations Declaration on the Rights of the Child[9] and the CRC, thereby taking into account the child's rights to love, affection, and happy childhood and education for the arrangements of the child whose parents are separated.

After the separation of the parents, the child has his ultimate right derived from the legislation providing him that both of his parents are entitled to realize his emotional needs, that by seeing and communicating with the child, he learns about his physical and mental state and development, and above all, that the child maintains a sense of emotional attachment, connection with him, and a sense of mutual belonging. Contacts should, therefore, build relationships between parents and children when they live together.[10]

Effective parenting encompassing warmth and discipline, developing positive parent-child relationships and managing conflict are the three most important factors in protecting children. Developing the ability to listen for children's hidden emotions and help them articulate their feelings underlie parents' ability to parent effectively and develop strong relationships (Pedro-Carroll, 2020).

It is crucial to understand that contacts with both parents are essential so that the child can develop family relationships also with the parents with whom he does not live. As for the decision of contacts, the legal standard of the child's best interests must be considered in each case.

In article 2 of the Convention on Contact concerning children, "contact" means the child staying for a limited period of time with or meeting a person with whom they are not usually living and also means any form of communication between the child and such person, as well the provision of information to such a person about the child or the child about such a person.

[8] *VSRS sodba U 984/94-10*, 6 March 1996.
[9] Adopted by the General Assembly of United Nations on 20 November 1959.
[10] *VSL sodba IV Cp 2027/2013*, 7 August 2013.

A child and their parents shall have the right to obtain and maintain regular contact with each other. Such contact may be restricted or excluded only where necessary in the child's best interests. Where it is not in the best interests of a child to maintain unsupervised contact with one of their parents, the possibility of supervised personal contact or other forms of contact with this parent shall be considered. It is stated in the article 4 of the Convention on Contact concerning children that it is important that the child has regular contact after separation of parents with both of his parents and that it is advised when necessary to supervise contact of the child with one of his parents. In all cases, parents should act in the child's best interests.

The legal standard of the child's best interests is individually adaptable and traceable to the needs of each child. To give the most optimal content to this legal standard in any case, it is necessary to take into account all the circumstances of the individual case, as it is a value concept that is subjective in nature and adapted to each user. As a rule, the Slovenian court has a wide discretion in defining the content of this legal standard, as in practice it can use a number of subjective and objective reasons that have developed over the years in case law. However, it should not be overlooked that the court must also follow the principle of proportionality, as the exercise of parental care and the obligations and rights arising from it primarily belong to the parents, who exercise them in accordance with the principle of autonomy. Parents, therefore have priority over all others in the exercise of parental care. The basic premise is that parents act in the child's best interests.

As stipulated in article 5 of the above-mentioned convention, subject to their best interests, contact may be established between the child and persons other than their parents who have family ties with the child.

Anyone who disagrees (either a natural person (e.g., a second parent) or a legal person (e.g., a public authority) must challenge this legal presumption (legal standard of the child's best interests) and prove it to the contrary with an appropriate standard of proof.

Contacts are primarily intended for the child because, in the case of parents living separately, it is precisely the contact with both parents that enable him to maintain a connection and attachment to both, even to the one with whom the child does not live. It is important, however, that the parents communicate with each other and

make appropriate arrangements regarding contact without hindering or complicating them (Kraljić, 2019, p. 456, 457).

2.1.1 Decisions about child care arrangements after separation of parents

As it is stated in the first paragraph of article 138 of the FC:

"If the parents do not live or will no longer live together, they must agree on the care and upbringing of joint children by their interests. They can decide on joint care and education of children, that all children are in care and education with one of them or that some children are with one of them, others with the other of them. If they disagree on this, the Social Work Center helps them reach an agreement, and at their request, mediators also help them."

When the parents agree on the care and education of the children, they can propose to the court the conclusion of a judicial settlement, whereby the court will check the content of the proposal for a judicial settlement ex officio. Here, the principle of officialdom is followed, as the court cannot leave such decisions to the mutual disposal of the parents because it is in the interests of the children, and the investigative maxim is enforced, which requires the court to determine whether the children are taken care of by the agreement (Kraljić, 2019, p. 442).

The main guide for the decision to establish contact is the child's best interests. The child's benefit is shown through his interest in growing up with both parents. They must take care of the child together even if they live separately. Considering the child's benefit, both parents are therefore obliged to behave mutually loyally when exercising the right to contact. The parent with whom the child is in care and education must abandon everything that makes contact difficult for the other parent, including influencing the child (consciously or unconsciously) that causes him to resist contact. He is also obliged to act actively: as part of his educational task, he must try to eliminate the child's possible psychological resistance to contact or to establish an appropriate positive attitude towards contact with the child. It should be emphasized here that the purpose of the contacts is to ensure the healthy and holistic development of the child, i.e., development into a healthy and independent adult. It is, therefore, necessary to follow the child's long-term benefit, even at the expense of sacrificing his short-term benefit.[11]

[11] *VSL sklep IV Cp 1932/2017*, 12 October 2017.

According to the opinion of the Social Work Center and the opinion of the expert, in the case under the above consideration, the children's resistance to the father is not artificially aroused by the mother, which would otherwise represent a form of abuse of children's emotions. However, the unconscious alienation of girls from their father, which results in no contact, poses a serious risk to children's normal mental and emotional development which is important for each child. This means that the resulting situation is not for both girls' benefit. However, her solution is not reducing the girls' contact with their father. Reducing the amount of contact poses a risk that the girls and her father will not be able to establish a proper relationship, which can lead to their complete alienation, which is not favourable for their development. The participant in the procedure should be aware of the resulting situation and act with the greatest benefit of the children in mind while, as the court expert found, showing readiness for professional help, which can only be successful under the condition that both parents sincerely want to reach a constructive solution. Therefore, the girls' parents will have to take responsibility for their past decisions and actions and find a solution as soon as possible to end the emotional distress in both of their children.

If the child refuses contact, the court must first determine whether this reflects his resistance or a reflection of the influence of the other parent with whom the child lives (see also Kraljić, 2019, p. 458). It also engaged an expert in the above case, who provided relevant findings for these purposes.

The Higher Court in Ljubljana also delt with the case in question where the fact that the child is sometimes bored with the father does not provide a basis for reducing contact but rather requires the plaintiff to behave in a supportive and encouraging manner towards contact with the other parent and to accept the fact that the child must learn to adapt even to periods of discomfort; and for the father, encouraging and strengthening the mutual relationship with the child through various activities adapted to the child's developmental needs.[12]

As the Higher Court in Ljubljana was judging the facts in the following case: From the factual basis of the disputed decision comes the indisputable finding that both children refuse contact with the opposing participant. The children's resistance to

[12] *VSL sklep IV Cp 256/2014*, 26 February 2014.

contact with their father results from the applicant's conduct, namely the systematic, harmful influence on the children's perception of their father.[13] The proposer is, therefore, the one who, with her behaviour, causes the children to resist contact. This comes from the opinion of the Social Work Center, the clinical psychologist experts appointed in the non-trial procedure, and the experts who gave their expert opinion in the criminal procedure.

The United Nations Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights[14] obliges the signatory countries to ensure freedom of expression for a child who is capable of forming his own opinion in all matters related to him. Still, the weight of the expressed opinions is judged per age and the maturity of the child, or that a child who has a sufficient level of reason, among other things, is recognized as having the right to express his opinion and that the expressed opinion is duly taken into account.

In the case under consideration, the court concluded with the help of experts that the expressed will of both children to refuse contact with the opposite participant was not genuine. Regarding the older child, the expert concluded that, given his age and emotional maturity, he is not yet able to make up hisnd about issues that are essential for him. Conversely, the younger girl follows her brother's feelings and verbal and non-verbal communication, as they are mutually connected. The court's conclusion of the first instance regarding disregarding the children's opinion is, therefore, correct, as their will is not genuine but is manipulated by the mother.

The aforementioned expert concluded that in the case in question, the contact involves a psychological burden on the children, which is incomparable to the hard-to-repair damage that occurs and could occur to the children, which means that it is a situation where long-term benefits must be identified and pursued of both children.

[13] *VSL sklep IV Cp 2332/2016*, 8 December 2016.
[14] European convention on the exercise of children's rights, of 25 January 1996 (ETS No. 160, entered into force on 1st July 2000), Strasbourg, Council of Europe).

One of the child's fundamental rights is also the child's right to express an opinion, which is covered by article 12 of the UNCRC, 1989. States Parties shall ensure that a child who is able to form his or her own views has the right to express them freely in all matters relating to him or her.

The weight of the opinions expressed is judged according to the child's age and maturity. In particular, the child must be able to be heard in any judicial or administrative proceedings concerning him, either directly or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

Therefore, the child's right to be heard in all judicial proceedings has its limits. In the before mentioned case, the court of the second instance could not consider the child's opinion because the court found that the child's opinion was manipulated and, therefore, not genuine.

Article 6 of the European Convention on the Exercise of Children's Rights states that in proceedings affecting a child, the judicial authority, before taking a decision, shall consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities.

3 Childrens views are taken into account

In the cases where the child is considered by internal law as having sufficient understanding: – ensure that the child has received all relevant information and consult the child in person in appropriate cases, if necessary, privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child. It will allow the child to express his or her views and give due weight to the views expressed by the child in cases where the court considers the child mature enough to express his views.

It is important that in all relations concerning children, especially after the separation of parents, children are listened to, children are supported in expressing their views, children's views are taken into account, children are involved in decision-making

processes, and children share power and responsibility for decision-making. These are so-called five stages of the participation model.[15] But the decision-making process and child`s participation have to be carefully recognized and considered, but "not at any cost".

The child has the right to contact both parents. Both parents have the right to contact the child. Contact primarily ensures the child's benefits (article 106 of the MFRA[16]). In accordance with the fifth paragraph of the same article, the court can take away or limit the right to contacts only if this is necessary to protect the child's interests, and the contacts are not in the child's best interest, if they cause mental stress for the child, or if they otherwise endanger his physical or mental development.

In the first instance in the following case, the court determined that the 9-month-old girl should have contact with her father once a week, every Sunday from 11 a.m. to 12 p.m. Such a decision was also based on the opinion of the Social Work Center, which follows that it is in the girl's interest to maintain contact with her father once a week for at least an hour. This is also as much as the court of first instance determined with a temporary order. The contact the girl has with her father once a week is not excessive, as the complaint states—rather the other way around. The court limited the contacts to a small extent. The contacts are short-lived, as they last one hour and are carried out on the terrace of the mother's home. It is controlled contact, which is acceptable considering that it is a child who is not yet one year old.[17]

In the next decision of the Higher Court in Ljubljana[18], the court of second instance stated, that the first-instance court based its decision to reject the petitioner's proposal to establish contact between him and his two daughters on the expressed will of the children regarding contact with their father, which they gave at the Social Work Center and the court during an informal interview. It assessed that the girls are old enough and capable of understanding the will expressed and the consequences, and it is in their best interest that they have no contact with their

[15]Shier based the Pathways to Participation model on his experience working on child participation in the United Kingdom in the 1990s. He developed the model to align with article 12(1) of the UNCRC, 1989 (Shier, 2001).
[16] Now article 141(1) of the FC.
[17] *VSL sklep IV Cp 2128/2013*, 10 June 2015.
[18] *VSL sklep IV Cp 2631/2016*, 23 November 2016.

father. The Court of Appeal accepts the decision and all the Court of First Instance arguments.

The first-instance court also found that both girls do not refuse contact with their father due to indoctrination by their mother or the so-called syndrome of alienation from their parents-from their mother, which the petitioner claims during all the proceedings as well as in the appeal. In the current situation, taking into account all the circumstances of the case, according to the assessment of the Court of Appeal, this is no longer important since the child's right to contact does not only include the right of the child to maintain contact with both parents but also the right to resist contact for justified reasons. In a collision between the child's entitlement and the parent's right to contact, only the child's benefit is decisive. A similar but even more rigorous position from the point of view of the child's benefits was taken by the European Court of Human Rights in the decision of 23rd September 1994 in the case of *Hokkanen v. Finland.*[19]

In deciding on matters of custody and access the competent court must consider the wishes and interests of the child in accordance with the following considerations: primary emphasis must be placed on the interests of the child and particular regard should be had to the most effective means of implementing custody and access rights in the future. The child's views and wishes must, if possible and depending on its age and maturity, be obtained if the parents are unable to agree on the matter or if the child is being cared for by a person other than its custodian or if it is otherwise deemed necessary in the latter's interests. The consultation must be carried out in a tactful manner, taking into account the child's maturity and without causing harm to its relations with the parents (*Hokkanen v. Finland,* p. 10-11).

Conciliation may not be ordered if it is evident from previous attempts that it would be unsuccessful or, in the case of a custody decision if immediate enforcement is in the child's interests and dictated by strong reasons (*Hokkanen v. Finland,* p. 12).

Although there may be plausible reasons for a parent to have custody and access rights, it does not necessarily follow that these should be enforced, especially if it would be incompatible with the interests and welfare of the child. The decision of

[19] *Hokkanen v. Finland*, app. no. 19823/92, 23 September 1994.

the European Court of Human Rights viewed a parent's custody of a child as a right first and foremost in the interest of the wellbeing and balanced development of the child and not primarily for the benefit of the parent (*Hokkanen v. Finland,* p. 15-16).

In the following decision of the Higher Court in Maribor[20] the court of appeal explained that the court of first instance has adequate reasons why it did not follow the expert report and the wishes of the children so that the contacts would be under the wishes of the children since it is a high conflict situation between the parents. Therefore, a precise determination of the implementation of the contacts was necessary. However, the parents can still agree on implementing the contacts differently, which the court of first instance repeatedly emphasized and explained to the parents that the contacts are primarily for the benefit of the children, which the participants in the procedure have not seen until now. Caring for the child must be the parents' main guide, following article 141 of the FC and article 54 of the CRS.

3.1 Deciding about the child`s care and upbringing can be devoted to experts

The courts must define which contacts are in the child's best interests in each case. Not every situation can be judged according to the views and wishes of the child because it is not always the optimal choice, as we spoke before, the child`s decision can sometimes be optimal for the time being, but not an optimal decision for long term agreements between the separated parents. In some circumstances that indicate such a high level of endangerment, the court can decide to stop any contact with the child with one of his parents.

The established factual circumstances in the following case of Higher Court in Ljubljana[21] do not indicate such a level of endangerment of the child, which would dictate such an exceptional measure as the prohibition of any personal contact of the child with him.

The opposite participant was not all the time under the influence of alcohol and, therefore all the time a threat to the child, so a supervised contact order is offered as a possible solution that would allow the child to have personal contact with the

[20] *VSM sklep III Cp 414/2023*, 6 June 2023.
[21] *VSL sklep IV Cp 702/2023*, 9 May 2023.

father, to whom he is attached and without being endangered. Or in the presence of a Social Work Center expert.

Also, the court may entrust the care and upbringing of the child to both parents as in the case which follows:

Since the expert found that both parents have very similar parental capacities, the possibility of entrusting the care and upbringing of the child to both is indicated. The expert should therefore provide an expert assessment of the complainant's proposal regarding the regime of contact or spending time with the child, as well as her proposal on how (probably gradually) the scope of contact between the child and the father should increase when would it be based on the primary attachment to the mother, which is conditioned with the age of the daughter, to her greatest benefit, that spending time with each parent is (more) balanced and what should be the long-term way of spending time with each parent.[22]

Due to the conflicting relationship between the parents, they needed help to reach an agreement on the implementation of contact at the Social Work Center. The father understands contact with his son primarily as a right but not an obligation. At the same time, the mother expects the boy's father to follow what seems right to the mother, leading to repeated conflict situations, as both parents prioritize their needs and interests rather than their son's needs.[23]

The idea of arranging contacts has a primary consideration, and that is the child's best interests; the child's care and upbringing must never be a result of the interests of the parents.

The child's best interest is the primary substantive legal guideline for the contact decision. Decision-making should be based on the principle that having good and close contact with both parents is to the child's advantage. If necessary, the court can limit the right to contact to protect the child's interests. Contacts are not in the child's best interest if they cause psychological stress or otherwise endanger their physical or mental development.[24]

[22] *VSL sklep IV Cp 387/2023*, 19 April 2023.
[23] *VSL sklep IV Cp 518/2023*, 23 March 2023.
[24] *VSL sklep IV Cp 1962/2022*, 8 December 2022.

The above is the main guideline to all the decisions on contacts as in the above conclusion of the Higher Court in Ljubljana; any contacts, except indirect ones, through written messages, are out of the question because they would not benefit the girl and could mean too much psychological stress for her and harm her mental development.

It follows from the third paragraph of article 138 of the FC that in cases where the parents disagree on the care and education of children, the court decides on this, which means that in this case, the court decides without a claim or without a mutual agreement on care and education (*ultra petitum*). The court, ex officio, in accordance with the provisions of the FC, decides on all measures for the protection of the interests of children beyond the claims of the parties (*extra petitum*), all with the aim of satisfying the principle of the child's best interests. In custody and education, the court always decides on joint child support and contact with parents (Kraljić, 2019, p. 442).

After the divorce, the parents can decide to have joint custody and upbringing of the children, that all the children will be in the custody and upbringing of one of them, the right and duty of contact will be determined for the other parent, but they can decide that they will be one child with one, the other with the other of them. This decision to separate children can have a negative impact on the mental development of the children, who, until the moment of separation, grew up together and are attached to each other, but this is not the general impact in all cases, namely in every case it is necessary to judge what is in the best interest of the children (Kraljić, 2019, p. 442).

The parents, who have agreed on which of them will be entrusted with the care and education of the child, have judged in any case what is best for their child. Still, when the parents do not reach an agreement, it is up to the court, after a careful assessment of all the facts and evidence, to decide that the common children will remain in the care and education of one of the parents, which is the decision in most cases. Still, this decision must not be based on giving priority to one of the parents since, in accordance with the provisions of article 6 of the FC, parental care belongs to both parents. Above all, the court must determine which of the parents has the best conditions for the child's further physical and mental development. The court can rely on the Social Work Center's opinion or ask for a court expert's help. In judicial

practice (earlier), the influence of the so-called doctrine of tender years can be traced, where the court's position was mostly formed that a younger child (preschool) should only be entrusted to the care of the father in exceptional cases since the mother is the one who can provide him with the strongest support in the early years, the mother can provide optimal benefits to the child during these years (Kraljić, 2019, p. 443). However, the mother is the one with whom the child is most connected and attached from birth.

4 Best interests of the child as the only criterion?

The fundamental guideline for conduct and decision-making in connection with the assignment of a child is dictated by the legal standard of the child's benefit, which the court completely bypassed with the challenged decision.[25] The court decided to assign the child to the mother simply so that the expected big problems would not be caused to him if he was now withdrawn from his familiar environment.

The court thus ruled in complete contradiction to the findings of the expert opinion, which the defendant justly points out in the appeal. The expert concluded that the mother is indecisive, independent, unenterprising, submissive, loses her attitude to reality, and is symbiotically dependent on her parents, which is why she believed that the child should not be raised by her but by her parents, who have a very bad influence on him. Such upbringing can have two pathologically negative outcomes: the child may develop into a neurotic personality disorder, or behavioural disorders may occur. The mother would only take care of the child's physical needs and care; otherwise, given her current functioning, she is incapable of raising the child independently and properly.

The expert drew exactly the opposite conclusions regarding the defendant, who, in terms of his functioning and external conditions, is able to take care of the boy's upbringing and care adequately. He is extremely devoted to and means a lot to him; he is non-aggressive, adequately organized, and has a normal functioning personality. From his side, the child would receive positive emotional affection and active engagement in activities and jobs.

[25] *VSL sklep IV Cp 419/2009*, 15 April 2009.

Already in her written opinion, the expert predicted that the mother's upbringing would lead to the child's alienation from the father, which began to be confirmed even before the court's judgment of first instance. Completely contrary to the expert opinion, the court's conclusion is that it is in the boy's favour to assign him to his mother in order not to cause problems when the environment changes. During the oral presentation of the expert opinion, the expert pointed out that assigning the child to the father would be a burden for him in the first phase, but he would get used to it later. It should be considered that the boy was very attached to his father in the past.[26]

The decision of the court about assigning the care and upbringing of the child is influenced by many factors, among others, it is important the child`s sex, age, perceptions of the family environment, and character. Namely, it is also important to consider the child`s opinion. As stated in article 12 of the UNCRC, 1989, States Parties shall assure 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.

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.

According to the Slovenian FC, the right of the child to express his views is stated in article 143, that the court also considers the child's opinion when deciding on the care, upbringing, and maintenance of the child, on contacts, the exercise of parental care, and the granting of parental care to a relative. The child expresses the opinion through a person he trusts and has chosen himself if he is capable of understanding its meaning and implications.

It is primarily the parents who are entrusted with upbringing and care after the divorce, or one of the parents or, in the case of such an agreement, both parents together. In the event that the court determines that neither parent is suitable for the child's future development, the child may also be assigned to a third party, a close

[26] Also stated in the decision of the Higher Court in Ljubljana, *VSL sklep IV Cp 419/2009*, 15 April 2009.

relative, or a person to whom the child feels a special attachment. The court may decide that the child is placed in an institution (Kraljić, 2019, p. 445).

The child's benefit is the only criterion that legitimizes the decision to raise and care for the child. The court making the choice must choose the option for which there are several reasons. These are both objective and subjective. To make such a decision, the court must know not only the circumstances on the part of the specific child, his needs and wishes but also the personality and educational abilities of both parents. It must find out what the conditions are for asserting the benefits of the children for each of the parents, what are the characteristics of their personalities, what is the ability of both parents to raise and have an intimate emotional connection with the child, which must be the basis for a guarantee for the successful implementation of care and upbringing of the children, and what are the conditions for the development possibilities of the child with each of the parents.[27]

When the parents divorce, the court always decides on the relationship between the children and the divorced parents based on the facts and circumstances known to it at the time. The relationship between the parents and the child continues, despite the changed way of life (each of the parents on their own); in the future, such a changed way of life may lead to changed circumstances that demand the issuance of a new decision on the care and upbringing of the child, which occurs if they request it changed circumstances and benefits of the child (article 138(4) of the FC).

The court settlement or the court's decision on joint custody and upbringing of the child must contain a decision on the child's permanent residence, which of the parents the child's parcels are served, and child support (article 139 of the FC).

Otherwise, joint custody is always an option. Still, because it takes a lot of coordination and understanding between the parents, it is difficult to agree on joint custody if the parents have communication issues with each other and are having problems deciding anything.

[27] *VSL sodba IV Cp 1454/2010*, 6 May 2010.

Through a court settlement, the girl was entrusted with joint parenting, which is no longer in the girl's favour due to the tension and hostile relationship between the two parents.[28]

Both experts concluded that the characteristics of both parents are such that they both have adequate parental capacities, and neither of them is unsuitable as a parent due to their personal characteristics.

However, both experts believed it would be better if the girl had her mother's domicile in the future and had precisely defined contacts with her father. According to the expert opinion, assigning the girl to her mother would have a positive effect on the girl in terms of greater psychological stability and relief, while assigning her to her father would be an emotional burden, causing even greater depression or additional emotional stabilization.

It is also important that the girl expresses her wish, and reassignment to the father would mean that the girl's wish is not considered and that her opinion is not worth it. When evaluating the evidence of the expert's opinion, the court also considered it essential that the expert concluded that the girl confided in her mother about her emotions, feelings, and hardships, but she did not dare to do so to her father. In addition, the girl does not feel accepted in his father's family and does not feel like a part of the family, but the expert expressed optimism that this could be corrected with regular contact.

5 Joint parenting

In any case, the parents must agree on joint custody because if one of the parents opposes the joint custody, they do not reach an agreement.[29]

Joint parenting is possible only in cases where both parents are unencumbered by their past parental relationship and are capable of completely unencumbered communication regarding the care and upbringing of the child.[30] It follows from the expert opinion of the clinical psychologist that she herself would have proposed

[28] *VSL sodba IV Cp 1324/2018*, 9 August 2018.
[29] Judicial practise also emphasises the importance of the agreement in the cases of joint custody.
[30] *VSL sodba IV Cp 1652/2017*, 28 September 2017.

joint parenting if there had not been such a large gap in communication between the parents and if there had not been the plaintiff's obvious opposition to joint parenting. It is, therefore, a circumstance that is essential for the decision on joint parentage. Otherwise, according to the provisions of article 105 of the MFRA, the decision that both parents retain custody and upbringing of the child can only be the result of an agreement between them and not a court decision when the parent, even with the help of the Social Work Center they fail to agree on the care and education of the child (article 105(1 and 3) of the MFRA.

The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors that vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and is again not the same as those relevant to an infant.[31]

As a general rule, a young child's environment is essentially a family environment, determined by the reference person(s) with whom the child lives by whom the child is looked after and taken care of.

That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where the infant is looked after by her mother, it is necessary to assess the mother's integration into her social and family environment.

It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence,' for the purposes of article 8 and article 10 of the Regulation[32], must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors that must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's

[31] *Barbara Mercredi v Richard Chaffe*, C-497/10, *22 December 2010*.
[32] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national Court to establish the child's habitual residence, taking account of all the circumstances of fact specific to each case.

In joint custody cases, it is important to determine the child`s permanent residence. It is crucial to define the child`s habitual residence, as the Court of the European Union was determining in the above case, to be able to determine the child`s permanent residence.

6 Instead of conclusion

Many views need to be taken into account. Still, the essential factor to be considered in the childcare arrangements after the separation of parents is the principle of a child`s best interests that has to be considered in any case and any court decision whatsoever.

It is crucial to understand that contacts with both parents are essential so that the child can develop family relationships also with the parents with whom he does not live. As for the decision of contacts, the legal standard of the child's best interests must be considered in each case.

Parents, therefore have priority over all others in the exercise of parental care. The basic premise is that parents act in the child's best interests.

Considering the child's benefit, both parents are therefore obliged to behave mutually loyally when exercising the right to contact.

The idea of arranging contacts has a primary consideration, and that is the child's best interests; the child's care and upbringing must never be a result of the interests of the parents.

The child's best interest is the main substantive legal guideline for the contact decision. Decision-making should be based on the principle that having good and close contact with both parents is to the child's advantage. If necessary, the court can limit the right to contact to protect the child's interests.

The parents, who have agreed on which of them will be entrusted with the care and education of the child, have judged in any case what is best for their child.

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EIN KURZER ÜBERBLICK ÜBER DEN BEGRIFF DER BERÜCKSICHTIGUNG DES KINDESWILLENS IM TÜRKISCHEN ZIVILRECHT

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Dieser Beitrag behandelt das Thema der Berücksichtigung des Kindeswillens, das in verschiedenen Bereichen von erheblicher Bedeutung ist. Er bietet einen kurzen Überblick über diesen Begriff im Zusammenhang mit dem Zivilrecht und präsentiert seine Rechtsgrundlagen, die sowohl aus internationalen als auch aus nationalen Vorschriften abgeleitet sind. Ausserdem erläutert er gemäß den festgelegten Vorschriften die Rechtsnatur und Bedeutung des Begriffs der Berücksichtigung des Kindeswillens. Dementsprechend identifiziert er den Rechtsinhaber und legt die Voraussetzungen fest, unter denen dieses Recht ausgeübt wird. Zudem hebt er insbesondere einige Unterschiede zwischen internationalen und nationalen Vorschriften hervor. Daraus ist es abschließend zu folgern, dass die Urteilsfähigkeit und die persönliche Relevanz der Angelegenheit als wesentliche und notwendige Voraussetzungen angesehen werden. Diese beiden Voraussetzungen allein gelten als entscheidend für die wirksame Ausübung dieses Rechts.

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A Brief Overview of the Concept of Considering the Child's Will in Turkish Civil Law

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Keywords:
child,
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consideration of the child's will,
maturity,
capacity to judge

This article addresses the topic of considering the child's will, which is of significant importance in various areas. It provides a brief overview of this concept in the context of civil law and presents its legal foundations derived from both international and national regulations. Furthermore, it explains, in accordance with the established regulations, the legal nature and significance of the concept of considering the child's will. Accordingly, it identifies the legal holder and establishes the conditions under which this right is exercised. It also particularly highlights some differences between international and national regulations. Consequently, it can be concluded that the capacity to judge and the personal relevance of the matter are considered essential and necessary prerequisites. These two conditions alone are deemed crucial for the effective exercise of this right.

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KRATEK PREGLED POJMA UPOŠTEVANJA OTROKOVE VOLJE V TURŠKEM CIVILNEM PRAVU

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Prispevek obravnava vprašanje upoštevanja otrokove volje, ki je zelo pomembno na različnih področjih. V prispevku je podan kratek pregled tega pojma v okviru civilnega prava in predstavljena je njegova pravna podlaga, ki izhaja iz mednarodnih in nacionalnih predpisov. Prav tako prispevek pojasnjuje pravno naravo in pomen pojma upoštevanja otrokove volje v skladu z uveljavljenimi pravili. V skladu s tem opredeljuje nosilca te pravice in določa pogoje, pod katerimi se ta pravica uresničuje. Posebej poudarja tudi nekatere razlike med mednarodnimi in nacionalnimi pravili. Na koncu je mogoče ugotoviti, da se sposobnost presoje in osebna pomembnost zadeve štejeta za bistvena in nujna pogoja. Samo ta dva pogoja veljata za odločilna za učinkovito uveljavljanje te pravice.

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1 Einschränkung des Themas

Was dieser Beitrag kurz erwähnt und einen relativ kurzen Überblick bietet, ist ein populäres Thema: Die Berücksichtigung des Kindeswillens im türkischen Zivilrecht. Angesichts seiner Komplexität und Breite ist es bedauerlich, dass dieses bedeutende Thema in einer einzelnen Sitzung einer Tagung nicht in allen Perspektiven behandelt werden kann. Dennoch beabsichtige ich, über fünf wesentliche Aspekte dieses Themas einen kurz gefassten Überblick zu vermitteln, um die Grundlagen dieser komplexen Rechtsfigur zu beleuchten.[1]

Die Rechtsnatur und Bedeutung des Begriffs (I) geben nicht nur Einblicke in die juristische Dimension dieses wichtigen Aspekts, sondern werfen auch grundlegende Fragen zu den ethischen und gesellschaftlichen Implikationen auf. In diesem Zusammenhang beschränke ich mich darauf, diesen Aspekt des Themas dadurch einzuschränken, dass Fragen, die außerhalb des Rechtsgebiets liegen, nicht behandelt werden. Das bedeutet, dass dieser Beitrag sich auf die verschiedenen Interpretationen dieses Begriffs in anderen Fachbereichen nicht konzentriert.

Der relevante Rechtsrahmen (II) sollte idealerweise nicht nur einen Überblick über die geltenden Gesetze und Regelungen geben, sondern sich auch mit möglichen Reformansätzen auseinandersetzen. Solche Ansätze könnten beiläufig darauf abzielen, die Berücksichtigung des Kindeswillens im türkischen Zivilrecht weiter zu stärken. Diese Betrachtungsweise könnte dazu dienen, aktuelle Entwicklungen und potenzielle zukünftige Veränderungen zu beleuchten. Wie erwähnt, handelt es sich dabei um ein äußerst umfassendes Thema, dessen Dimensionen viele zivilrechtliche Rechtsinstrumente betreffen. Allerdings wird im Rahmen dieses Beitrags dieses Thema nur Artikel 339 des türkischen Zivilgesetzbuches im Lichte der diesbezüglichen völkerrechtlichen Regelung (Artikel 13 VN-Kinderrechtkonvention (KRK)) befasst.

Ein besonderes Augenmerk wird anschließend auf die Merkmale der Person gerichtet, die über diese Rechtsmacht (das Recht, Berücksichtigung zu verlangen) verfügen darf (III). Mit anderen Worten sollte in einem dritten Schritt eine rechtliche

[1] Andererseits wäre es inkonsistent, wenn die schriftliche Fassung des Beitrags erhebliche Abweichungen aufweisen würde. Daher sollte man sicherstellen, dass das vorliegende Werk treu zur ursprünglichen, mündlichen Version bleibt.

Definition für den Begriff „des Kindes" erarbeitet werden. Denn das ist für die rechtliche Behandlung hinsichtlich der Befugnis so dem Kind betreffende Willensäußerungen entscheidend ist. Da verschiedene Länder eigene Gesetzgebungen bezüglich der begrifflichen Definitionen des Kindes erlassen haben, halte ich es für wichtig zu klären, wer im juristischen Sinne als Kind zu akzeptieren ist und welche Stellung dies in der Türkei hat.

Mit dem Umfang dieses Begriffs (IV) sollte verdeutlicht werden, auf welche Rechts- oder Tathandlungen sich dieser Begriff bezieht. Anders ausgedrückt versucht dieser Beitrag festzustellen, in welchen Fällen der Wille des Kindes zu berücksichtigen sind. Die im relevanten Teil des Beitrags hervorgehobenen Gesetzgebungen dienen dazu, festzulegen, unter welchen Umständen und zu welchem Zeitpunkt sowie auf welche Weise ein Kind das Recht hat, zu verlangen, dass sein Wille berücksichtigt wird.

Abschließend wird im letzten Schritt die rechtlichen Voraussetzungen (V) behandelt, unter denen diese rechtliche Befugnis bzw. dieses subjektive Recht ausgeübt werden darf. Ein genauerer Blick auf konkrete Fälle und mögliche Dilemmata soll dazu dienen, die Komplexität der Entscheidungsfindung zu illustrieren und mögliche Ansätze für eine verbesserte Praxis aufzuzeigen.

Schließlich wird ein problematischer Fall angesprochen, der die Herausforderungen bei der Anwendung der Berücksichtigung des Kindeswillens im türkischen Zivilrecht von großer Bedeutung macht. Beiläufig sei darauf hingewiesen, dass dieser Beitrag sich auf die zivilrechtliche Perspektive des Themas fokussiert und weitere disziplinäre oder interdisziplinäre Betrachtungen ausschließt.

2 Rechtsnatur und Bedeutung von Begriff der Berücksichtigung des Kindeswillens (I)

Die rechtliche Bedeutung der Erforderlichkeit der Berücksichtigung des Kindeswillens manifestiert sich in den Gesetzen nicht durch eindeutiges Vermerken, die eine präzise rechtliche Einordnung ermöglichen. Anders ausgedrückt wird dieses Phänomen gesetzlich nicht explizit als subjektives Recht definiert. In der türkischen Zivilrechtslehre wird es hingegen fast einstimmig als ein höchstpersönliches subjektives Recht betrachtet, über das ausschließlich das Kind verfügen darf.

Dieses Recht von höchstpersönlicher Natur ermöglicht es dem Kind wiederum, an über die ihn berührenden Entscheidungsprozessen aktiv teilzunehmen. Es erstreckt sich auf diverse Situationen, in denen die Meinung bzw. Wille des Kindes adäquat berücksichtigt wird. Daneben verleiht es dem Kind die Befugnis, die Konsequenzen von Handlungen und Prozessen, welche sein Leben, seine Gesundheit und seine Persönlichkeit betreffen, zu beeinflussen. Hierzu zählen auch Beschlüsse im familiären Kontext, bildungsbezogene Angelegenheiten und andere Belange, die das Wohl des Kindes tangieren.

In Anbetracht der höchstpersönlichen Natur dieses Rechts ist es dem Kind rechtlich nicht gestattet, auf dieses Recht zu verzichten. Diese Unverzichtbarkeit gewährleistet, dass das Kind uneingeschränkten Zugang zu seinem subjektiven Recht auf Berücksichtigung seines Willens behält. Diese rechtliche Gewährleistung trägt dazu bei, die Interessen und Belange des Kindes in allen einschlägigen rechtlichen Angelegenheiten angemessen zu wahren und zu schützen, um so die umfassende Entfaltung des Kindes gemäß seinen individuellen Bedürfnissen zu erfüllen.

3 Rechtsrahmen (II)

Im Kontext des zweiten Punkts wirft dieser Beitrag einen genaueren Blick auf den diesbezüglichen rechtlichen Rahmen. Die Thematik unterliegt sowohl internationalen als auch nationalen Gesetzgebungen. In einer anfänglichen Analyse werden zuerst die internationalen Rechtsquellen, insbesondere der maßgebliche Artikel der KRK, beleuchtet. Anschließend erfolgt eine detaillierte Betrachtung der nationalen Regelung im türkischen Zivilgesetzbuch, die als Spiegelung der internationalen Vorschrift auf nationaler Ebene fungiert.

Die Ursprünge des Begriffs der Berücksichtigung des Kindes liegen in der KRK der Vereinten Nationen. Nach Unterzeichnung und Ratifizierung dieser KRK durch die befugten Personen wurden entsprechende Bestimmungen vom türkischen Gesetzgeber in das türkische Zivilgesetzbuch aufgenommen. Während die KRK dieses Anliegen generell unter den Grundnormen regelt, betrachtet der türkische Gesetzgeber es spezifisch im Rahmen der elterlichen Sorge.

Die internationale Dimension dieses rechtlichen Rahmens manifestiert sich in der Anerkennung grundlegender Rechte und Pflichten gegenüber Kindern auf globaler Ebene. Auf nationaler Ebene reflektiert die türkische Regelung im Zivilgesetzbuch diese internationalen Standards, wobei der Schwerpunkt auf der Integration des Prinzips der Berücksichtigung des Kindeswillens in die elterliche Sorge liegt.

Der Rechtsrahmen ist wie gefolgt:

VN-KRK
Artikel 12: Berücksichtigung des Kindeswillens
(1) Die Vertragsstaaten sichern dem Kind, das fähig ist, sich eine eigene Meinung zu bilden, das Recht zu, diese Meinung in allen das Kind berührenden Angelegenheiten frei zu äußern, und berücksichtigen die Meinung des Kindes angemessen und entsprechend seinem Alter und seiner Reife.
(2) Zu diesem Zweck wird dem Kind insbesondere Gelegenheit gegeben, in allen das Kind berührenden Gerichts- oder Verwaltungsverfahren entweder unmittelbar oder durch einen Vertreter oder eine geeignete Stelle im Einklang mit den innerstaatlichen Verfahrensvorschriften gehört zu werden.

Die Vereinten Nationen haben den Begriff der Berücksichtigung des Kindeswillens mit der Verabschiedung von Artikel 12 der KRK erstmals erwähnt. Dieser Artikel legt einen Grundstein für die rechtliche Berücksichtigung der Ansichten und Wahlen von Kindern. Darüber hinaus haben die Vereinten Nationen jedem einzelnen Staat die klare und rechtliche Verpflichtung auferlegt, sicherzustellen, dass die Bestimmungen dieses Artikels effektiv umgesetzt werden. Es liegt in der Verantwortung jedes Staates, zu garantieren, dass Kinder in ihrem Hoheitsgebiet die Möglichkeit haben, von diesem Recht aktiv Gebrauch zu machen.

Die Umsetzung dieser Verpflichtung kann durch die Einführung neuer gesetzlicher Bestimmungen oder die Anpassung bestehender Gesetze an die KRK erfolgen. Auf diese Weise wird jedem Kind innerhalb eines Mitgliedsstaates die Befugnis gewährt, seine eigenen Meinungen frei zu äußern und an Entscheidungsprozessen aktiv teilzunehmen, die seine Interessen betreffen.

Der Artikel 12 regelt nicht nur die individuelle Rechtsstellung und den sozialen Status des Kindes, sondern legt auch den Grundstein für eine ausführliche Gesetzgebung für den Kinderschutz. Die darin enthaltenen Bestimmungen erstrecken sich über eine Vielzahl von Situationen, einschließlich persönlicher Präferenzen, schulischer Angelegenheiten und anderer Sachen von unmittelbarer Bedeutung für das Kind.

Es ist wichtig anzumerken, dass Artikel 12 nicht nur Handlungen oder Rechtsgeschäfte betrifft, sondern auch auf gerichtliche und administrative Verfahren anwendbar ist. Diese weitreichende Dimension unterstreicht die Bedeutung der Kinderbeteiligung in verschiedenen Kontexten und schafft die Grundlage für eine partizipierende Gesellschaft, die die Rechte und Bedürfnisse der jüngsten Mitglieder angemessen berücksichtigt. In diesem Beitrag liegt der Fokus jedoch auf den grundlegenden Aspekten von Artikel 12 im Zusammenhang mit der Berücksichtigung des Kindeswillens.

Als Vertragsstaat war der türkische Gesetzgeber verpflichtet, den Anforderungen der KRK nachzukommen (Öcal Apaydın & Hışım, 2021, S. 289). Artikel 339(3) des türkischen Zivilgesetzbuches erfüllt die durch die KRK auferlegten Verpflichtungen. Der genauen Text dieses Artikels lautet:

Das türkische Zivilgesetzbuch
B. Inhalt der elterlichen Sorge
I. Im Allgemeinen
Artikel 339
(1) Die Eltern leiten im Blick auf das Wohl des Kindes seine Pflege und Erziehung und treffen die nötigen Entscheidungen.
(2) Das Kind schuldet den Eltern Gehorsam.
(3) Die Eltern gewähren dem Kind die seiner Reife entsprechende Freiheit der Lebensgestaltung und nehmen in wichtigen Angelegenheiten, soweit tunlich, auf seine Meinung Rücksicht.
(4) Das Kind darf ohne Einwilligung der Eltern die häusliche Gemeinschaft nicht verlassen; es darf ihnen auch nicht widerrechtlich entzogen werden.
(5) Die Eltern geben dem Kind den Vornamen.

Soweit ersichtlich, betrifft die Regelung den Bereich der elterlichen Sorge. Der türkische Gesetzgeber hat in diesem Artikel die Grenzen der Berücksichtigungsanforderungen festgelegt. Die entsprechenden Voraussetzungen lassen sich aus diesem Artikel ableiten, und in einem weiteren Schritt werden diese im vierten Abschnitt dieses Beitrags behandelt. Vor dem nächsten Schritt sollten zunächst die Merkmale der Person festgestellt werden, die diese Rechtsmacht ausüben darf. Mit anderen Worten soll dieser Beitrag klären, wer die Rechtsinhaber sind.

4 Merkmale des Rechtsinhabers (III)

Es ist zweifellos ersichtlich und erfordert möglicherweise keine weitere Erläuterung, dass der Rechtsinhaber in diesem Kontext das Kind ist (Akıntürk & Ateş, 2016, S. 409). Dennoch ist es von großer Bedeutung, im Rahmen nationaler Gesetzgebung genau festzulegen, wie ein Kind juristisch definiert wird. Obwohl der erste Artikel der KRK einen Rahmen für den Begriff des Kindes vorgibt, bleibt die genaue Definition einzelnen Rechtsordnungen überlassen. Gemäß Artikel 1 der KRK wird eine Person als Kind betrachtet, wenn sie das achtzehnte Lebensjahr noch nicht vollendet hat, es sei denn, die Volljährigkeit tritt nach dem auf das Kind anwendbaren Recht früher ein. Da das Konzept der Volljährigkeit in unterschiedlichen Rechtsordnungen variiert, ist es wichtig, im Rahmen dieses Beitrags zu klären, wie das türkische Zivilgesetzbuch den Begriff des Kindes definiert.

Nach den Regelungen des türkischen Zivilgesetzbuches gilt eine Person als Kind, solange sie das 18. Lebensjahr noch nicht vollendet hat. Daher werden Minderjährige grundsätzlich als Kinder im Sinne des Gesetzes betrachtet. Es lässt sich feststellen, dass das Kriterium des Lebensalters im türkischen Zivilgesetzbuch im Prinzip mit den Vorgaben der KRK in Einklang steht (Dural & Öğüz, 2022, S. 53).

Neben diesem allgemeinen Grundsatz gibt es im türkischen Zivilgesetzbuch zwei Ausnahmen (Dural & Öğüz, 2022, S. 53 f.). Eine Minderjährige wird im juristischen Sinne nicht als Kind betrachtet, wenn sie verheiratet ist (ab 16. Lebensjahr - Artikel 124 i.V.m. Artikel 11(2)) oder durch richterlichen Beschluss nicht mehr als Kind angesehen wird (Artikel 12). Diese Ausnahmen verdeutlichen, dass das türkische Rechtssystem spezifische Situationen berücksichtigt, in denen die rechtliche Qualifikation als Kind eingeschränkt sein kann.

Wie bereits kurz erwähnt, wird im rechtlichen Sinne eine Person als Kind betrachtet, wenn sie jünger als 18 Jahre ist, nicht verheiratet ist und deren Status nicht durch einen richterlichen Beschluss geändert wurde. Die Person, die all diese Merkmale erfüllt, steht grundsätzlich unter elterlicher Sorge. Daher benötigt sie die Zustimmung ihrer gesetzlichen Vertreter, um juristisch handeln zu können. Außerdem entscheiden ihre beiden Elternteile für das Kind, da sie die elterliche

Sorge grundsätzlich gemeinsam ausüben (Oğuzman, Seliçi & Oktay-Özdemir, 2019, S. 97 f.). Das Kind hat das Recht, in Fällen, in denen es die Zustimmung seiner gesetzlichen Vertreter benötigt oder nach deren Entscheidung handeln muss, zu verlangen, dass sein Wille berücksichtigt wird.

5 Umfang des Rechts des Kindes, Berücksichtigung seines Willens zu verlangen (IV)

Der vierte Punkt, den dieser Beitrag behandelt, befasst sich mit dem Umfang des Berücksichtigungsrechts. Es ist wichtig zu betonen, dass das entscheidende Prinzip zum Gebrauch dieses Rechts leicht festzustellen. Das Berücksichtigungsrecht des Kindes sollte in allen Situationen und bei sämtlichen Handlungen oder Geschäften, die die Person des Kindes betreffen, beachtet werden (Usta, 2012, S. 98).

Dieses Prinzip ist eindeutig im Artikel 12 der KRK verankert. Es gibt keine Einschränkungen hinsichtlich der Angelegenheiten, in denen das Prinzip gilt. Stattdessen wird deutlich vorgeschrieben, dass das Kind in allen Angelegenheiten, die es betreffen, das Recht hat zu verlangen, dass sein Wille berücksichtigt wird. Daher spielt die Einzelheit der Angelegenheit keine entscheidende Rolle, soweit es das Kind berührt (Öcal Apaydın & Hışım, 2021, S. 291). In diesem Sinne wird darauf nicht geachtet, ob die Angelegenheit erheblich, ernsthaft, einfach, detailliert oder eng ist.

Der türkische Gesetzgeber hat im Artikel 339 den Umfang des Rechts fast wie in der KRK festgelegt. Demnach sind die Eltern verpflichtet, dem Kind die seiner Reife entsprechende Freiheit der Lebensgestaltung zu gewähren und in wichtigen Angelegenheiten, soweit tunlich, auf seine Meinung Rücksicht zu nehmen (Dural, Öğüz, & Gümüş, 2022, S. 368). Es gibt geringfügige Unterschiede zwischen diesen beiden Regelungen. Während die Formulierung in der KRK alle Angelegenheiten umfasst, schreibt die türkische Regelung vor, dass die Eltern lediglich in wichtigen Angelegenheiten auf die Meinung des Kindes Rücksicht nehmen sollen. In diesem Zusammenhang lässt es sich argumentieren, dass die gesetzgeberische Verfassung meiner Meinung nach kaum bedeutungsvoll ist. Diese Regelung sollte im Einklang mit dem ursprünglichen Sinn interpretiert werden (Öcal Apaydın & Hışım, 2021, S. 306).

Als Beispiel für den Umfang des Berücksichtigungsrechts des Kindes könnte man die schulischen Angelegenheiten eines Kindes anführen. Gemäß dem Prinzip des Artikel 12 der KRK sollte das Kind das Recht haben, seinen Willen in Bezug auf Bildung und schulische Entscheidungen zu äußern. Dies schließt nicht nur grundlegende Fragen wie die Wahl der Schule, sondern auch besondere Angelegenheiten wie die Teilnahme an außerschulischen Aktivitäten oder die Auswahl von Fachrichtungen ein. In diesem Zusammenhang könnte das Prinzip auch auf Entscheidungen im Gesundheitswesen angewendet werden. Ein Kind sollte das Recht haben, seinen Standpunkt zu medizinischen Behandlungen oder Präventionsmaßnahmen zu äußern. Dies könnte die Entscheidung über Impfungen, medizinische Untersuchungen oder sogar schwerwiegendere medizinische Eingriffe umfassen.

Der Ausgangspunk dieses Meinungsstand ist, dass das Berücksichtigungsrecht des Kindes in allen Lebensbereichen gilt, die seine Person und sein Wohlbefinden betreffen. Es geht darum sicherzustellen, dass der Wille des Kindes, sofern es altersgemäß möglich ist, in den Entscheidungsprozessen, die sein Leben beeinflussen, angemessen berücksichtigt wird.

6 Rechtliche Voraussetzungen für Ausübung des Rechts des Kindes, Berücksichtigung seines Willens zu verlangen (V)

Der letzte Punkt, der in diesem Beitrag behandelt wird, betrifft die Voraussetzungen dafür, dass das Kind sein Berücksichtigungsrecht ausüben darf. Laut der KRK und der türkischen Gesetzgebung ist es einem urteilsfähigen Kind erlaubt, dieses Recht selbst auszuüben. Die volle Geschäfts- oder Handlungsfähigkeit (Artikel 10) wird nicht als Voraussetzung betrachtet; stattdessen genügt die Urteilsfähigkeit.

Wie bereits oben erwähnt, ist es zweifelsfrei nach der KRK und dem türkischen Zivilgesetzbuch, dass das Kind die befugte Person ist, die dieses Berücksichtigungsrecht ausüben darf. Allerdings reicht es nicht aus, nur die Merkmale des Kindes zu erfüllen. Darüber hinaus muss das Kind nach der KRK in der Lage sein, eine eigene Meinung zu bilden. Die KRK betont die Bedeutung der Urteilsfähigkeit. Erst dann wird die Willenserklärung des Kindes juristisch als wirksam gehalten.

Auf der türkischen Seite darf das Kind an Entscheidungen über Angelegenheiten mitwirken, wenn es eine angemessene Reife erreicht hat. Diese Reife muss hier definitiv als Urteilsfähigkeit verstanden werden. Solche Argumente könnten aufgrund des Wortlauts des Artikels nicht vorgebracht werden, dass der türkische Gesetzgeber die Geschäfts- oder Handlungsfähigkeit als Voraussetzung für die Ausübung dieses Berücksichtigungsrechts gesetzt hat (Öcal Apaydın & Hışım, 2021, S. 306).

In einem hypothetischen Beispiel könnte ein 14-jähriger Schüler, der sich für Mathematik und Schach interessiert, durch seine klare Meinungsbildung und sein Verständnis für Kalkulation dazu befähigt sein, an Entscheidungen teilzunehmen, die die Auswahl seiner zukünftigen Schule betreffen. Gemäß der KRK und des türkischen Zivilgesetzbuches würde diesem urteilsfähigen Schüler gestattet sein, sein Recht auf Berücksichtigung geltend zu machen. In diesem Fall könnte er sich für das Gymnasium entscheiden, und seine Eltern wären verpflichtet, seine Entscheidung zu respektieren, da die Minderjährigkeit diese Möglichkeit nicht ausschließen würde. Dieses Beispiel verdeutlicht, wie die Urteilsfähigkeit eines Kindes in Bezug auf bestimmte Angelegenheiten im Rahmen des Berücksichtigungsrechts eine maßgebliche Rolle spielt.

7 Ein problematischer Fall

Schließlich wird eine sehr problematische Handlung als Beispiel angeführt, die am Körper des Kindes durchgeführt wird: die bekannte medizinische Maßnahme, die als Beschneidung bezeichnet wird. Hierbei ist es wichtig anzumerken, dass der Artikel 12 der KRK und die entsprechenden Bestimmungen des türkischen Zivilgesetzbuches aufgrund ihrer allgemeinen Formulierung nicht spezifisch auf bestimmte Handlungen oder medizinische Eingriffe eingehen. Dennoch kann die Thematik der Beschneidung als Beispiel dienen, um die möglichen Anwendungsbereiche des Berücksichtigungsrechts zu illustrieren. Es ist unnötig, hier auf die rechtlichen Elemente eines medizinischen Eingriffs einzugehen. Deshalb werden weitere Rechtfertigungsgründe wie medizinische Notwendigkeit etc. ignoriert, und der Fokus liegt ausschließlich auf dem Willen des urteilsfähigen Kindes.

Es ist sehr wichtig, die rechtlichen Folgen dieses medizinischen Eingriffs zu diskutieren, da er unter Kindern in der Türkei aus verschiedenen Gründen, wie etwa gesundheitlichen, medizinischen oder kulturellen, sehr verbreitet ist. Es gibt kaum Fälle, in denen ein urteilsfähiges Kind selbst den befugten Arzt aufsucht und sich diesem Eingriff unterzieht. Angenommen, ein 12-jähriges Kind (Junge) steht vor der Entscheidung zur Beschneidung aus religiösen Gründen. Gemäß der KRK und des türkischen Zivilgesetzbuches könnte der Junge, wenn er als urteilsfähig angesehen wird, das Recht haben, seine Meinung zu diesem medizinischen Eingriff zu äußern. In dieser Konstellation sind seine Eltern dazu verpflichtet, seine Meinung zu berücksichtigen, wenn es um einen solch bedeutsamen Eingriff in seinen eigenen Körper geht. Keine rechtlichen Probleme ergeben aus solchen Fällen. Hingegen bringen in der Regel die Eltern das Kind in die Arztpraxis oder laden den Arzt ins Familienhaus ein, wo der Eingriff am Körper des Kindes durchgeführt wird. In vielen Fällen greift der Arzt am Körper des Kindes ohne dessen Willen ein. In solchen Fällen, in denen der medizinische Eingriff der Beschneidung ohne Willen des Kindes durchgeführt wird, verursacht es rechtliche Probleme, wie Verpflichtung zur Leistung eines ggf. Schadensersatzes. Denn solche Eingriffe stellen unerlaubte Handlungen dar und seine Eltern und behandelnde Personen werden als Täter angesehen. Und dies bildet eine Verletzung der Persönlichkeitsrechte des Kindes. Aus verschiedenen Gründen bringen jedoch nur wenige solche rechtswidrigen Fälle vor Gericht.

Hier wird die Meinung vertreten, dass ein urteilsfähiges Kind, das diesem medizinischen Eingriff unterzogen wird, die Möglichkeit haben sollte, seinen Willen dafür oder dagegen zu erklären. Wenn die Entscheidung des Kindes gegen den Eingriff ist, dann ist die Beschneidung rechtswidrig. In einem solchen Falls haften sowohl die behandelnde Person (Beschneider), als auch grundsätzlich die beiden Elternteile.

Zuletzt sollte darauf hingewiesen werden, dass die rechtliche Behandlung immer nach den einzelnen Umständen des konkreten Falles zu ermessen (Dural & Öğüz, 2022, S. 60). Aufgrund der relativen Natur der Urteilsfähigkeit muss in der konkreten Angelegenheit festgestellt werden, ob das betroffene Kind urteilsfähig ist oder nicht (Oğuzman, Seliçi & Oktay-Özdemir, 2019, S. 61).

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Inheritance of a Commercial Enterprise to a Minor and the Minor's Title as a Merchant in Accordance With the Provisions of the Turkish Commercial Code

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In our legal system, the status of minors and interdicted persons holds significant importance, necessitating constant vigilance in both public and private law domains. Their legal status impacts themselves and extends to third parties affected by their actions. It's imperative to assess their capacity under the Turkish Civil Code and scrutinize relevant legislation in private law contexts. A comprehensive understanding of the Turkish Commercial Code and Turkish Civil Code provisions is crucial. This issue is particularly pertinent in commercial enterprises. While minors and interdicted persons can acquire the title of merchant, they are prohibited from actively engaging in commercial activities. Despite the perceived separation between public and private law, a holistic approach is necessary to accurately determine these individuals' legal status and actions under commercial law. The article first clarifies the commercial enterprise concept and its role in commercial law, drawing from scholarly opinions. Then, it delves into the conditions for minors and interdicted persons to become merchants, interpreting relevant TCC articles and analyzing Court of Cassation decisions. The final section examines the inheritance of commercial enterprises, particularly when inherited by a minor, interpreting relevant legislation to clarify pertinent issues.

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DEDOVANJE TRGOVSKEGA PODJETJA MLADOLETNIKU IN NJEGOV NAZIV TRGOVCA V SKLADU S DOLOČBAMI TURŠKEGA TRGOVINSKEGA ZAKONIKA

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V našem pravnem sistemu ima status mladoletnikov in odrasle osebe pod skrbništvom postavljenih oseb velik pomen, kar zahteva nenehno pozornost tako v javnopravnem kot zasebnopravnem področju. Njihov pravni status vpliva na njih same in se razteza na tretje osebe, ki so prizadete zaradi njihovih dejanj. Pomembno je oceniti njihovo sposobnost v skladu s Turškim civilnim zakonikom in skrbno preučiti relevantno zakonodajo na področju zasebnega prava. Celovito razumevanje določb Turškega trgovinskega zakonika in Turškega civilnega zakonika je ključno. To vprašanje je še posebej pomembno v gospodarskih družbah. Čeprav lahko mladoletniki in odrasle osebe pod skrbništvom pridobijo naziv trgovca, jim je dejavno vključevanje v poslovne dejavnosti prepovedano. Kljub zaznani ločitvi med javnim in zasebnim pravom, je potreben za natančno določitev pravnega statusa teh posameznikov in njihovih dejanj v skladu s trgovinskim pravom celosten pristop. Članek najprej pojasni koncept gospodarskih družb in njihovo vlogo v gospodarskem pravu, pri čemer se naslanja na strokovna mnenja. Nato se poglobi v pogoje za mladoletnike in odrasle osebe pod skrbništvom, da postanejo trgovci, tolmači relevantne člene TComC in analizira odločitve Vrhovnega sodišča. V zadnjem delu pa pregleda dedovanje gospodarskih družb, zlasti kadar jih podeduje mladoletnik, in tolmači relevantno zakonodajo, da se pojasnijo ustrezna vprašanja.

1 The concept of commercial enterprise and merchant title

1.1 The concept of commercial enterprise

In Turkish law, the concept of commercial enterprise is not limited to economic relations or any other social sciences. With the undeniable reality of today's developing conditions, adapting the nature of law to this process has become a necessity rather than a demand. In our opinion, it would be wrong to consider many elements such as sales made through the e-commerce market and through information systems only as an »intermediation« activity. These activities also include production and consumption in addition to their intermediary nature (Bahtiyar, 2017, p. 1).

The commercial enterprise concept is outlined in article 11 of the Turkish Commercial Code (hereafter: TComC). The article reads as follows:

»*A commercial enterprise is an enterprise, where the transactions are carried out continuously and independently, that aims to generate income which exceeds the limit that any tradesman enterprise is subject to.*«

Based on the definition, it can be said that to be able to recognize the existence of a commercial enterprise, firstly, the existence of an enterprise for commercial activities and economic affairs is sought; secondly, it must have the purpose of providing an income exceeding a certain level and the activities to be carried out for this purpose must be continuous, and finally, it must be operated independently (Bozer & Göle, 2015, p. 7).

Although the above-mentioned issues appear as the elements of a commercial enterprise based on the wording of the legislation, it is observed in the doctrine (for recriticism see Tekinalp, 2008, p. 9 ff) that when these elements are listed, the aim to provide income is replaced by the element of providing economic benefits (Bozer & Göle, 2015, p. 8). The reason for this, in our opinion, is that the term economic benefit is based on a broader scope than the concept of providing income. In addition to this, some authors in the doctrine (Ülgen et al., 2015, (N.74) ve (N.94)) argue that it is inconvenient to prepare a system based on one system in terms of the way commercial law is addressed, and that each system will intersect with other systems in certain aspects. This view is appropriate because it is very difficult to say

that such a narrow definition will overlap with other branches of science or will be accepted. As the theory develops, putting it into a narrow mold will also limit the boundaries to be drawn by the law for commercial activities, thus increasing disputes.

1.2 Merchant title

The merchant is one of the concepts that forms the center of commercial law and plays a major role. The TComC drafted the merchant's provisions between articles 12 and 14. The title of merchant is important for determining the presumption of commercial business and implementing certain provisions stipulated in the TComC. Although our law introduces rules for both natural persons and legal entities, the issue will be addressed in the context of natural persons, as this is the part that is relevant to our research.

1.2.1 Acquisition of merchant title for natural persons

The acquisition of the title of merchant for natural persons is regulated under article 12 of our TCC. According to this article: *»a person who operates a commercial enterprise, even partially, on their own behalf is called a merchant.*« Based on the law's wording, first of all, to acquire this title, it is necessary to mention the existence of a commercial enterprise. Then, this commercial enterprise must be operated on behalf of a certain person, even partially (Arkan, 2021, p. 127). Clearly, the word »partially« is used for ordinary partnerships. Because in the case of an ordinary partnership, the business is partially operated for each partner (Berzek, 2013, p. 39).

While drafting the text of the TComC, it is observed that there is no requirement of capacity or registration in the trade registry or chamber of commerce in order to acquire the title of merchant (Kayar, 2013, p. 109). Therefore, any natural person who is of legal age and has the capacity of appeal shall be entitled to the title of merchant as long as they operate the commercial enterprise on their own behalf (Reform Serisi Yayın Kurulu, 2020, p. 54). From this point of view, it is concluded that for natural persons to acquire the title of merchant, a commercial enterprise must exist and this commercial enterprise must be operated on behalf of the person who owns it, even partially.

We have mentioned above that one factor that plays an active role in the acquisition of the title of merchant is to operate the commercial enterprise on one's own behalf. Accordingly, commercial representatives who operate a commercial enterprise on behalf of someone else will not be entitled to hold this title. That is to say, in cases where a commercial enterprise is operated or carried on through a representative, the title of the merchant will not belong to the representative but to the natural person on whose behalf the commercial enterprise is represented (Arkan, 2021, p. 129).

2 Merchant title in the case of minors and interdicted persons

2.1 Acquisition of merchant title by minors and interdicted persons

The TComC does not impose any specific legal capacity requirement in order to qualify as a merchant. Since every person who is an adult, has the power of discernment and who is not interdicted has the capacity to act (Turkish Civil Code (TCivC), article 10), they may acquire the title of merchant by fulfilling the requirements stipulated in the law. Therefore, the law does not require full capacity to acquire the title of merchant, nor does it require registration in any official registry. From this point of view, it would be appropriate to say that minors or interdicted persons may also acquire the title of merchant. As mentioned above, it should be noted here that minors or interdicted persons cannot operate the commercial enterprise themselves. Because even though they are entitled to hold the title of merchant, it is not possible for minors and interdicted persons to operate the commercial enterprise by themselves. However, it is possible for these persons to operate these businesses on their own behalf and accounts through a legal representative.

2.2 Analysis of the issue within the context of article 13 of the TComC

We have already mentioned that in the event that a commercial enterprise is operated through a commercial representative or an attorney, the title of merchant belongs to the natural person represented, not to the representative. The situation will not be different for minors and interdicted persons operating a commercial enterprise that they own or inherited through their legal representatives. Article 13 of the TComC states that:

»The legal representative who operates the commercial enterprise belonging to minors and interdicted persons on their behalf is not considered a merchant. The title of merchant belongs to the represented. However, the legal representative shall be liable as a merchant in terms of the enforcement of criminal provisions.«

Therefore, it is impossible for the legal representatives who operate the commercial enterprise owned or inherited by minors and interdicted persons to have the title of merchant. It has been stipulated both in TCivC, and the TComC stipulate that the title of the merchant shall belong to the minor or interdicted person on whose behalf the business is operated.

Although it is stipulated that they cannot have the title of merchant, in terms of criminal sanctions, the legal representatives of minors and interdicted persons shall be under penal liability. Because, in the last paragraph of article 13 of the TComC, the legislator explicitly refers to this situation. In the event of non-compliance with the legal norms or rules that the commercial enterprise must comply with, if the work or actions performed constitute criminal liability, this criminal liability will be incurred not against the minor or interdicted person, but against the legal representative who performs transactions on behalf of the minor or interdicted person (Reform Serisi Yayın Kurulu, 2020, p. 54). Therefore, in cases such as the bankruptcy, fraud, or tax evasion of a commercial enterprise owned by a minor or an interdicted person and operated by their legal representative, the legal representative will be held liable. In our opinion, it would be reasonable to say that one of the factors behind the introduction of this provision is the principle of individual criminal responsibility (for the same opinion, see Hirsch, 1939, p. 128).

It should be noted that article 13 of the TComC only applies to persons who have a legal representative (Arkan, 2021, p. 130). In the event that a minor or an interdicted person operates a commercial enterprise without a legal representative, it will not be possible to say that these persons have the title of merchant (Arslanlı, 1959, p. 46; Erem, 1971, p. 74; Arkan, 2021, p. 130). Because when we review articles 14 and 15 of the TCivC, respectively, the articles are as follows:

»Those who do not have the power of discernment, minors and interdicted persons do not have the capacity to act.« and *»Without prejudice to the exceptions specified in the law, the acts of a person who does not have the power of discernment do not have legal consequences.«*

Therefore, since minors and interdicted persons do not have the capacity to act, it is not possible for them to be held liable for these actions or activities.

2.3 Analysis of the issue within the framework of the Court of Cassation decision

In our opinion, it would be beneficial to analyze a decision of the Court of Cassation dated 2004 (for Supreme Court (Yargıtay) Decision: Y.2.HD, 22.03.2004, E.2004/2052, K.2004/3561) to understand the issue. When we examine the case regarding the decision, we see that the plaintiffs' children were born in 1995, were not yet of legal age at the date of the decision and opened a commercial enterprise on their behalf; they stated that they would transfer movable, immovable and vehicles related to the business to the minor and requested the appointment of a trustee, and that the child's ability to incur debt through a legal transaction between the child and the parents or between the child and a third party for the benefit of the parents depends on the participation of a trustee and the approval of the judge; the plaintiffs claim that if the interests of the legal representative and the interests of the minor or interdicted person conflict in a particular matter, the guardianship authority will appoint a representative trustee; they also claim that the mother and father are the legal representatives of the minor and that the establishment of a written judgment is contrary to the procedure and the law while a representative trustee should be appointed for the minor.

3 Inheritance of a commercial enterprise to a minor

Our law has no particular regulation regarding the transfer of a commercial enterprise by inheritance. However, if the transfer of a commercial enterprise to third parties is possible under our law, it would be appropriate to say that the transfer by inheritance is also possible (İmregün, 2005, p. 12; Cengil, 2016, p. 102).

Article 599 of the TCivC reads as follows:

»The inheritors acquire the inheritance as a whole upon the death of the legator in accordance with the law. Without prejudice to the exceptions stipulated in the law, the inheritors directly acquire the real rights, receivables, other property rights, possession over movables and immovables of the legator and become personally liable for the debts of the legator. Designated inheritors also acquire the inheritance upon the death of the legator. The legal inheritors are obliged to deliver the inheritance to the appointed beneficiaries in accordance with the provisions on possession.«

Therefore, the inheritance is transferred to the inheritors upon the legator's death. For this reason, the transfer has a place in the law. According to the principle of integrity, following the article 11(3) of the TComC, it is not necessary to carry out the mandatory disposition transactions separately for the transfer of the commercial enterprise, and there is no objection to the transfer of the enterprise as a whole to be subject to legal transactions. Therefore, the commercial enterprise is transferred to the inheritors as a whole, together with both tangible and intangible elements. In addition, the procedures and protocols regulated in the legislation and related to the transfer of the commercial enterprise are not applicable to the transfer by inheritance. Because this transfer by inheritance is realized legally in accordance with the principle of universal succession. The death of the legator results in the transfer of the commercial enterprise to the inheritors.

The first people to have a say in the division of the inheritance upon the death of the legator are undoubtedly the inheritors (Ozanemre Yayla, 2011, p. 224). The inheritors can decide how and to what extent the inheritance will be divided (Kılıçoğlu, 2009, p. 307). However, this freedom of inheritors should not breach the mandatory provisions of the law (Kılıçoğlu, 2009, p. 309). The situation will certainly be the same for a commercial enterprise that is subject to inheritance. The inheritors may leave the commercial enterprise to a sole person or they may share it collectively. As mentioned above, in accordance with the principle of integrity, the commercial enterprise should be transferred and shared in such a way that it can continue its activities or in a manner that will maintain its continuity.

Although the inheritors have the first say in the distribution of the inheritance within the framework of freedom of will (Kılıçoğlu, 2009, p. 309), today, it is not always possible to make a joint decision in the distribution process. At this point, upon the request of one of the inheritors, it is also appropriate in Turkish law (TMK Clause 650) for the judge to request this distribution to be finalized. Upon this request, the judge determines the assets and liabilities in the estate and then determines the value. After this valuation, two situations arise. In the first one, the assets are sold and the amount obtained is distributed to the inheritors according to this value determination; in the second one, the assets may be allocated to a single person. In terms of commercial enterprise, the first issue to be examined should be the value of the enterprise. Because when the commercial enterprise is evaluated as a whole, it is a very valuable structure. Therefore, the inheritors will not benefit from the

distribution of this structure. For this reason, the fact that the commercial enterprise does not cease to exist, in other words, not to be distributed, always stands out when the potential to generate income for the inheritors is taken into consideration.

Share allocation is applicable pursuant to article 650(3) of the Turkish Civil Code. The article reads as follows:

»The inheritors shall form shares from the property of the estate according to the number of heirs or kins. If there is no agreement, each of the inheritors may request the settlement of the shares from the magistrate court. In determining the shares, the judge shall take into account local customs, the personal circumstances of the inheritors and the will of the majority. The allocation of shares shall be made in accordance with the agreement of the inheritors. If this is not possible, then a lot shall be drawn.«

It should be noted here that in the absence of an agreement, the judge cannot allocate shares at their own discretion. However, according to some authors in the doctrine, if an application is made to the judge for share allocation, the judge has the authority to allocate shares to the inheritors directly. We also believe that this approach is correct. Because a commercial enterprise is an important economic entity and an organization that undeniably impacts commercial life. It is important that its activities continue and its functioning is not impaired. At this point, it would be the most appropriate decision that the person who will undertake this task or the person to whom the shares will be allocated should be the person who has this competence. The judge is the most competent person to determine this in the dispute. Therefore, in our opinion, it would be appropriate to leave such discretion to the judge.

It is unnecessary to have full capacity to act to qualify as a merchant. We have already mentioned that minors and interdicted persons also acquire the title of merchant and have the title of merchant. It should be noted that such persons cannot operate the commercial enterprise on their own behalf and account, their legal representatives must carry out transactions on their behalf and activity. Although the merchant title belongs to the minor and the interdicted person, the legal representatives carry out the activity and make transactions at this point. Likewise, in the case of voluntary representation such as commercial proxy and commercial representative, they carry out the affairs of the commercial enterprise on behalf and account of the merchant; they do not carry the title of merchant themselves (Bilgili & Demirkapi, 2016).

Although it is impossible for minors and interdicted persons to actually operate the commercial enterprise transferred to them by inheritance, it is legally permissible for them to manage it in their own names and accounts when it is transferred by inheritance. For example, if the commercial enterprise of the father is inherited by a minor, the minor may inherit the commercial enterprise in its entirety under the existence of the principle of integrity. However, it should be noted that the presence of a legal representative is also required for the minor to carry out the continuity and sustainability of the commercial enterprise. Because the legal representative must maintain the commercial enterprise on behalf and account of the minor. In the event that the minor, who inherited the inheritance, carries out the commercial enterprise on their own behalf and account, even partially, these acts will be deemed not to have been carried out, as the transactions they carry out will result in incapacity within the framework of the TCivC. As we have mentioned, if criminal liability arises as a result of the transactions carried out by the legal representatives on behalf and account of the minor; here, the criminal liability of the legal representative will come to the fore, not the criminal liability of the minor and the interdicted person.

4 Conclusions

Articles 12-14 of the TCOmC regulate the qualifications of natural persons to have the title of merchant. Accordingly, persons who operate a commercial enterprise on their own behalf and account, even partially, if not entirely, are entitled to the merchant title. The TComC takes the concept of commercial enterprise as a basis for the acquisition of the title. Therefore, the commercial enterprise plays a role in the classification of the merchant since the first condition for the acquisition of the title is the existence of a commercial enterprise. Based on article 12 of the TComC, three elements stand out and these are as follows: the existence of a commercial enterprise; the sustainability and continuity of the commercial enterprise; and finally, the operation of the commercial enterprise, even partially, on one's own behalf and account. In addition, our legislation does not stipulate any qualification or registration requirement for acquiring the title of merchant. It follows that the registration to be made here is explanatory, not constitutive. In addition, as a natural reflection of the fact that it does not stipulate any capacity requirement, it is possible for minors and interdicted persons to own a commercial enterprise and acquire the title of merchant.

Although minors and interdicted persons acquire the title of merchant, they can't operate the commercial enterprise on their own behalf and account. Therefore, their legal representatives operate the commercial enterprise by acting on their behalf and account. It should be noted that the minor and the interdicted person hold the merchant title. Although it is the legal representatives who carry out the transaction and carry out the activity, the title of merchant belongs to minors and interdicted persons. In article 13 of the TComC, criminal liability is established. Accordingly, legal representatives who carry out or operate commercial enterprise activities on behalf and account of minors and interdicted persons are not merchants, and in addition, when a criminal liability arises due to the activities of the commercial enterprise, the burden is on the representative. In other words, if there is a breach of an obligation that the commercial enterprise is obliged to comply with and the criminal liability for this is regulated by law, the legal representatives acting on their behalf are responsible, not the minors and interdicted persons.

Any particular regulation does not stipulate the inheritance of a commercial enterprise, but since it may be passed on to third parties through the transfer of the enterprise, it is also possible that it may be subject to inheritance. Although most of the regulations regarding inheritance are applied at this point, the procedures regarding the transfer of the commercial enterprise through sale will not be applied to the transfer of the commercial enterprise by inheritance. Since the transfer in this case is already legal. The death of the legator results in the transfer of the commercial enterprise to the inheritors.

Because when the commercial enterprise is evaluated as a whole, it is an invaluable structure. Therefore, it is difficult to state the benefit of the inheritors in the distribution of this economic structure. For this reason, the fact that the commercial enterprise does not cease to exist, in other words, not to be distributed, always stands out when the potential to generate income for the inheritors is considered. In addition, following the principle of integrity, the commercial enterprise should not be considered a separate structure but a whole and should be transferred accordingly.

Although it is impossible for minors and interdicted persons actually to operate the commercial enterprise inherited by inheritance, it is legally permissible for them to pass it on to their own names and accounts when acquired by inheritance. For example, a 15-year-old person who is not yet of legal age, may inherit the commercial

enterprise inherited by the legator under the umbrella of the principle of commercial enterprise integrity. At this point, it should be noted that the existence of a legal representative is required for the minor to ensure the continuity of the commercial enterprise and its activities. As we have mentioned, the legal representative must maintain the commercial enterprise on behalf and account of the minor.

In the event that the minor who inherited the commercial enterprise, even partially, conducts the commercial enterprise on their own behalf and account, these acts will be deemed not to have been carried out, as the transactions they carry out will result in incapacity within the framework of the TCivC. As we have mentioned before, if criminal liability arises as a result of the transactions carried out by the legal representatives on behalf and account of the minor; here, the criminal liability of the legal representative will come to the fore, not the criminal liability of the minor and the interdicted person.

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Protecting Children's Rights in Civil, Criminal and International Law – under a Touch of Digitalization

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The publication focuses on the crucial topics of protecting children's rights in civil, criminal, and international law. In today's rapidly evolving digital landscape, ensuring the well-being and rights of children has become more complex yet paramount. This comprehensive exploration delves into the multifaceted legal frameworks and challenges surrounding children's rights in various legal domains. From issues of custody and education to juvenile justice and international treaties, this book offers insights into the evolving landscape of child protection laws. With a keen focus on navigating the digital age's influence on children's rights, this publication serves as a valuable resource for legal professionals, policymakers, educators, and advocates dedicated to safeguarding the rights and welfare of children.

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ZAŠČITA OTROKOVIH PRAVIC V CIVILNEM, KAZENSKEM IN MEDNARODNEM PRAVU – PRIDIH DIGITALIZACIJE

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Ključne besede:
otrokove pravice,
nacionalna in mednarodna pravna izhodišča,
družinska razmerja,
ukrepi za varstvo otrokovih pravic,
varnostni sistemi,
digitalno okolje

Publikacija se osredotoča na ključne teme zaščite otrokovih pravic v civilnem, kazenskem in mednarodnem pravu. V današnjem hitro razvijajočem se digitalnem okolju je zagotavljanje blaginje in pravic otrok postalo kompleksnejše, a hkrati nadvse pomembno. Ta celovit pregled se poglobi v večplastne pravne okvire in izzive, povezane z otrokovimi pravicami v različnih pravnih področjih. Od vprašanj varstva in vzgoje ter izobraževanja do kazenskega prava mladoletnikov in mednarodnih pogodb. Pričujoča publikacija ponuja vpoglede v razvijajoči se okvir zakonodaje o zaščiti otrok. Z osredotočenostjo na navigiranje vpliva digitalne dobe na otrokove pravice ta publikacija služi kot dragocen vir za pravne strokovnjake, oblikovalce politik, učitelje in zagovornike, ki so posvečeni varovanju pravic in blaginje otrok.

Univerzitetna založba Univerze v Mariboru

This book, comprised of diverse chapters ranging from legal frameworks to practical applications, provides a comprehensive understanding of the complexities surrounding child rights in today's world... Readers gain valuable insights into the diverse challenges faced by children across different jurisdictions, as well as the varied legal responses aimed at ensuring their protection and well-being.

Niteesh Kumar **Upadhyay**
Symbiosis Law School Noida India

Covering critical issues in children's rights, the monograph underscores the importance of legal protection for this vulnerable demographic. It represents a significant step in advancing awareness and advocacy for children's well-being, with authors contributing substantially to this vital cause.

Daniel **Brantes Ferreira**
Ambra University United States of America

Publikacija Protecting Children's Rights in Civil, Criminal and International Law - under o touch of Digitalization veoma je vredan prilog literaturi koja se bavi pravima deteta. Ovu, već dovoljno dinamičnu oblast koju su potresle značajne promene sa promenom koncepta (prava) deteta, dodatno menjaju okolnosti koje menjaju društvo u celini – digitalizacija i upotreba veštačke inteligencije. Imajući u vidu da su deca vulnerabilna društvena grupa kojoj treba naročita zaštita države i društva, ova publikacija daje dragocen uvid u izazove koje digitalizacija nosi. Zaključci autora mogu poslužiti kao dragocene smernice jačoj i prilagođđenoj zaštiti prava deteta.

Andjelija **Tasić**
University of Niš Serbia

Due to its relevance and the significance of the content addressed by the scientific monograph, the monograph represents an important contribution in the field of law, as it will be interesting and useful for both professional and lay readers in the countries where the authors come from (Slovenia and Turkiye), as well as in countries within the broader European and non-European community.

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