

THE ESTABLISHMENT OF A EUROPEAN COURT FOR THE RIGHTS OF THE CHILD AS A NEW CONTRIBUTION TO THE AREA OF FREEDOM, SECURITY AND JUSTICE*

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UDK: 347.6(4)EU
339.923:061.1>(4)EU
341.231.14-053.2
Izvorni znanstveni rad
Primljeno: prosinac 2013.

The legislation of the European Union relates to children's rights only to a limited extent and it can almost be said that the legal status of children of European citizens is only regulated on the level of principle. The activities of the European Union are somewhat more intensive in the field of soft law, but the impression is left that the legal rules protecting children are insufficiently clear. This paper cites European documents which, together with the Convention on the Rights of the Child, represent the backbone of legal regulation of children's rights in the European Union. The author believes that protection of children's rights by means of these documents is insufficient, and that work should begin on drafting a special regulation on children's rights which would regulate this area in much more detail. The author pays particular attention to the need and possibility that a specialized court for children's rights be formed within the European Court, so that the protection of children's rights would be appropriate and effective.

Key words: children's rights, Treaty of the EU, Charter of Fundamental Rights of the European Union, specialised courts

* This article has been written within the scope of the research project "New Croatian Legal System" of the Faculty of Law, University of Zagreb.

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1. INTRODUCTION

One of the important areas within the framework of the EU, is the area of freedom, security and justice. The area of justice¹ from Chapter V of the *Treaty on the Functioning of the EU*, undoubtedly relates to the laws in force and not only justice, and as a result also to legislative competence in the field of international and national procedural law.² This fairly wide area, subject to the regulation of European institutions, could, in our opinion, open the way for better protection of children's rights at the European level, which at this time is not at the desired level.

The purpose of subjective rights lies in their realization. Sometimes realization is only possible with the help of court jurisdiction. If we consider the protection of children's rights in national legislations, we notice certain differences, while the results of the protection certainly vary. These differences are the result of varying substantive legislation governing children's rights, differing degrees of (non-)specialized courts for family matters, the effectiveness of Ombudspersons for children, the degree of social and legal awareness of children's rights etc.

It should be mentioned that the problem of the lack of awareness of this unsatisfactory situation has been resolved, in a broad sense, by the *Third UN Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC)*, which entered into force in April 2014.³ The Protocol is a treaty which establishes an international complaints procedure for violations of children's rights contained in the Convention on the Rights of the Child (CRC), the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC) and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC). It solves the problem of the lack of a communications procedure in the CRC. The OP3 CRC provides two new ways for children to claim violations of their rights committed by States: (a) *a communication procedure*, which enables children to bring complaints about violations of their rights to the UN Committee on the

¹ In the original in English "area of ... justice" and French "espace de ... justice" differs from the German "Raum, ... des Rechts".

² Basedow, J., *Der Raum des Rechts und das internationale Privatrecht*, Zbornik Pravnog fakulteta u Zagrebu, vol. 62, No. 1-2, 2012, pp. 27 and 29.

³ As of 14 January 2014, there are ten state parties to the Optional Protocol: Gabon, Thailand, Germany, Bolivia, Albania, Spain, Portugal, Montenegro, Slovakia and Costa Rica.

Rights of the Child, if they have not been fully resolved in national courts, and (b) *an inquiry procedure* for grave and systematic violations of children's rights.

The effect of the Protocol on the legal mechanisms for the protection of children's rights in Europe is unavoidable. In the Annex there is a consideration that "... *the present Protocol will reinforce and complement national and regional mechanisms allowing children to submit complaints for violations of their rights*".

However, if we consider the system of children's rights today in the European Union on the level of principle, which is primarily reflected in numerous campaigns and non-binding documents⁴ often lacking creativity, we find it to be insufficient and unsatisfactory. We would agree with the assertions⁵ that a certain amount of will to improve the status of children is indeed present, and that these are only the beginnings of a legislative and active approach to children. It is precisely in this argument that we see the possibility of new forms of more complete and uniform protection of children's rights in all member states of the European Union.

2. "ROADMAPS" FROM THE EUROPEAN DOCUMENTS ON CHILDREN'S RIGHTS

The binding documents concerning children's rights in the European Union include several treaties with varying scopes and objectives regarding the regulation of these rights: *the Treaty on European Union, the Treaty on the Functioning of the EU, and the Charter of Fundamental Rights*.

The problems of children in Europe may vary, but they are characteristic of the Western society and they are specific⁶ in comparison with the problems of children in undeveloped or developing countries. Although all children's

⁴ E.g. Guidelines for the Promotion and Protection of the Rights of the Child (2007), Strategy on the Rights of the Child (2009), the Agenda for the Rights of the Child (2011).

⁵ Stalford, H., *Children and the European Union – Rights, Welfare and Accountability*, Hart, Oxford and Portland, Oregon, 2012, p. 5.

⁶ On European problems of children's rights see Hrabar, D., *Prava djece u Europskoj uniji – pravni okvir (Children's rights in the European Union – The Legal Framework)*, in: Korać Graovac, A., Majstorović, I. (eds.), *Europsko obiteljsko pravo*, Narodne novine, Zagreb, 2013, pp. 53-71. The author mentions three aspects of the problem: sociological (integration of children of asylum seekers, immigrants, Roma children), psychological (children separated from their parents), and children in the justice system (as victims of crime, violence and paedophilia).

rights⁷ are incorporated in the Convention on the Rights of the Child, to which all EU member states are party, and their protection lies in the field of national legislations and the Ombudspersons for Children, we still believe that it is necessary to impose an obligation on the EU member states, in a specific manner and on the level of joint principles, to ensure stronger and more harmonised legal protection of children's rights. This could be done by way of a binding document applicable to all EU member states. This entails the preparation of an appropriate piece of legislation (probably a regulation, as is usual in the European political and legal system) which would, starting from the Convention on the Rights of the Child, elaborate the most vulnerable rights of children in the European context, be based on their needs, and also be binding (under the threat of sanctions) on member states. This, in our opinion, should be the first step towards better protection of children's rights. The reason this is necessary is the fact that the EU is not a party to the Convention on the Rights of the Child, nor can it become one due to the express provisions of Articles 46 and 48.⁸ Indeed, we believe that such activity by the EU would contribute to a clearer definition of this integration, and the realization of its aims, since the European Union considers itself to be "... among other things, a legal system established to deal with a series of contemporary problems and realise a set of goals that individual states felt unable to manage alone".⁹

The EU functions on the level of regulations, directives and decisions, but the following documents are the indispensable foundations of legislative activities in the EU: *The Treaty on European Union, the Treaty on the Functioning of the EU, and the Charter of Fundamental Rights*. Therefore, these are the treaties, or acts which bind the member states of the EU to certain conduct. The Treaty on EU and the Charter are the most important in terms of legislative activities and for the assessment and improvement of the status of children's rights *pro futuro*.

⁷ There are more than 60 children's rights, which in fact pertain to their needs – daily, occasional, regular and exceptional. For more about this, Hrabar, D., in: Alinčić, M. *et al.*, *Obiteljsko pravo (Family law)*, Narodne novine, Zagreb, 2007, p. 224 sq.

⁸ Article 46 provides as follows: "The present Convention shall be open for signature by all States." Article 48: "The present Convention shall remain open for accession by any State." The EU, at least at its current stage of development, is not a state, not even a federal state or a confederacy, since first of all the members themselves are against it, which has been shown amongst other things, by the "fate" of the European Constitution.

⁹ Chalmers, D., Davies, G., Monti, G., *European Union Law*, Second Edition, Cambridge University Press, Cambridge, 2010, p. 3.

Article 3, paragraph 2 of the **Treaty on European Union**¹⁰ prescribes that the Union promotes the protection of children's rights¹¹, and in paragraph 5 of the same Article, the Union undertakes to protect human and especially children's rights.¹² This in fact presents a very general and, in principle, superficial and legally neutral level of legislation, which may serve as a foundation for elaboration in another document. "The promotion of protection of children's rights" and protection *in concreto*, may take place in different ways – from a mere declaration, the adoption of soft-law documents and various action plans to the creation of legislation which would render the protection of the rights belonging to children concrete and effective.

The Charter of Fundamental Rights of the European Union¹³ is the "crown of the efforts of the European Union in its dedication to the protection of human rights ... of the European Union".¹⁴ It features a declaration of the basic principles and rights of EU citizens, which are its universal values, and is deemed, in terms of its legal force, to be equal to the Treaty on European Union.¹⁵ The term "universal values" (as stated in the Preamble to the Treaty) reflects the key idea of the possibility of more concrete legal protection of the rights of children on the level of the EU and their universal recognition as part of the public order of not only the EU, but also of each national state. The fact is that most of the 54 articles of the Charter relate to rights and principles which are contained in the constitutions of the EU member states and the international documents in force in these countries. For the purpose of asse-

¹⁰ Consolidated version of the Treaty of European Union, OJ C 326, 26.10.2012.

¹¹ "...It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child."

¹² "5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

¹³ Charter of fundamental rights of the European Union, OJ C 326, 26.10.2012.

¹⁴ Majstorović, I., *Europski pravni kontekst i značenje za hrvatsko obiteljsko materijalno pravo (European legal context and its significance for Croatian substantive family law)*, Godišnjak akademije pravnih znanosti Hrvatske/Croatian Academy of Legal Sciences Yearbook, vol. IV, No. 1, 2013, pp. 77-91.

¹⁵ Hickman, T., *Beano No More: The EU Charter of Rights After Lisbon*, Judicial Review, No. 6, 2011, p. 113; see Stalford, H., *op. cit.* note 5.

ssment of the importance of children's rights from the Charter, it is important that they are mentioned independently of the rights of other (adult) European citizens or the family in general. The Charter must undoubtedly affect European law and the processes of the creation of policies relating to children, and therefore has "become an instrument of proof which will enable institutions to consider legislative proposals and national procedures critically, in order to ensure their conformity with fundamental rights".¹⁶ Further, the European Court is referring more and more often¹⁷ to one of the rights of children protected by the Charter, which, we believe is the foundation of the development of the key idea of this paper.

Children's rights from the Charter may be "found" in a large number of provisions and categorized into those which belong to children as well as to adult Europeans, since they relate to the regulation of families (e.g. the provision on the respect for private and family life, home and communication, the right of the family to enjoy legal, economic and social protection). Further, some of the provisions in the Charter, even though apparently neutral, may also relate to children (e.g. the right to freedom and security, the right to protection of personal data, the right to free expression and to receive information, the right to a free choice of occupation and the right to work, the right of ownership, the right of asylum, the right to protection from removal, expulsion or extradition, the prohibition of torture and inhuman or degrading treatment, the prohibition of slavery, forced labour and trafficking in human beings etc.). Further, some of the rights from the Charter are those that are (also) related to young age (e.g. the right to education, the prohibition of discrimination due to age, the prohibition of exploitation of children). Another group of rights which may relate to children include those which can be found within the framework of "family rights" (e.g. the right to marry and found a family).

The explicit and, in terms of its relevance, central provision on children's rights can be found in Article 24, which pertains to the rights of the child.

For the interpretation of the Charter and its application and further elaboration, various **principles** should also be considered. Of these, the principle

¹⁶ Stalford, H., *op. cit.* note 5, p. 41.

¹⁷ In relation to Article 24 of the Charter, see for instance, the case C-149/10 *Zoi Chatzi v. Ypourgos Oikonomikon* (2010), C-491/10 *Joseba Andoni Aguirre Zarraga v. Simone Pelz* (2011) OJ C63; Case C-200/10 *PPU J McB v LE* (2011) WLR 699 etc.; cf. www.curia.europa.eu

of equality before the law¹⁸ directly relates to children, while the principle of solidarity¹⁹, which serves as the basis for the provision on prohibition of child labour and various forms of protection of the family and motherhood (in the sense of prohibition of dismissal, maternity benefit and maternity leave)²⁰, has indirect relevance. In the same way, various **freedoms** envisaged for European citizens also apply mainly to adults (by their content) but are also applicable to children (for instance freedom of thought, conscience and religion²¹).

The chapter of the Charter relating to the Justice System (VI *Justice*) is applicable to children when they are involved in court proceedings.²²

3. CHILDREN'S RIGHTS IN THE EUROPEAN UNION

The central provision on children's rights from the Charter, Article 24, provides as follows:

1. *Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
2. *In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
3. *Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

The provision is very broadly formulated, probably with a view to uniting several principles and the substantive rights contained in the Convention on the Rights of the Child. The rights of the child set out in the Charter are fundamental rights on the level of constitutional rights, i.e. general and principle

¹⁸ But also non-discrimination, Article 21; Cultural, religious and linguistic diversity, Article 22; Equality between women and men, Article 23; The rights of the elderly, Article 25; Integration of persons with disabilities, Article 26.

¹⁹ Most relate to adults/workers.

²⁰ Social security and social assistance (Article 34) and Health care (Article 35); Environmental protection (Article 37) also relate indirectly to children.

²¹ For more on some of these rights, especially from the viewpoint of Croatia's accession to the European Union, see the paper by Hrabar, D., *op. cit.* note 6.

²² The Right to an effective remedy and to a fair trial, the presumption of innocence and right of defence, the right not to be tried or punished twice in criminal proceedings for the same criminal offence (the *non bis in idem* principle) etc.

rights. We tend to agree with some authors who have criticized the Charter²³, although, admittedly, it allows for some new steps *de lege ferenda europea* which we will address further in this paper. Namely, Article 24 is limited only to some children's rights, which may be an argument in favour of the fact that they are the "most problematic" or the most endangered children's rights of children of European citizens. At the same time, however, the wording of these provisions leaves an impression of a relative lack of interest of the European system in other rights of children which are endangered in the European environment.

The provision can be considered from three different viewpoints: children's rights, the principles and their relativism.

The children's rights mentioned include: the right to protection and care, the right to free expression of views, and the right to maintain on a regular basis a personal relationship and direct contact with both parents.

Further, the well-being of the child and his or her best interests are mentioned as principles against which actions relating to children are measured.

Finally, consideration of a child's view/opinion is judged by the age and maturity of the child.

The right to free expression of views, relativized in terms of the age and maturity of the child, is a standard that is already widely accepted in international agreements.²⁴

The right to personal relationships and direct contact of the child with both parents is a slightly narrower right in terms of its content than the one previously mentioned, but the Charter clearly provides for it because there is an increasing number of separated families and children in Europe who have problems growing up without one parent, while the legal systems, institutions and the other parent, prevent different forms of contact with the separated parent.²⁵

From the wording of the provision of Article 24 of the Charter, it may be

²³ McGlynn, C., *Rights for Children: The Potential Impact of the European Union Charter of Fundamental Rights*, 2002, p. 70 criticizes it as ill-conceived and a hard compromise between various concepts of children's rights as contained in various international documents; *cf.* in *op. cit.* note 5.

²⁴ From the Convention on the Rights of the Child to the Convention on Contracts, the Revised Convention on Adoption etc.

²⁵ Stalford, H., *op. cit.* note 5, p. 91 mentions that in the EU about 2.4 million new marriages are entered into each year, of which 13% are international in character. In 2007 1,047,427 marriages ended in divorce, of which 13% were international. Naturally, this frequently causes problems in the personal relationships between children and the separated parent.

concluded as follows: children have rights as independent and autonomous beings²⁶; they acquire them at birth, and children's rights referred to in the Charter cover a much narrower range than in other international agreements. The simplicity and superficiality of the provision may be considered as sufficient in the sense of encouraging European states and institutions to support children as they grow up, especially if we take into account the fact that all member states of the European Union are also parties to the Convention on the Rights of the Child, which regulates children's rights in great detail. However, we believe that they do not cover some other children's rights, which means that the way is open for a wider range of possibilities.

4. EUROPEAN INSTITUTIONS WITH POWERS TO ACT ON CHILDREN'S RIGHTS

Considering the European institutions that govern the European Union, the European Commission is the most important body for children's rights and their "codification", especially considering its power pursuant to Article 17 of the Treaty on European Union. This Article gives it so-called legislative and quasi-legislative powers²⁷, of which we point out the following: "*Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.*" Further, the Commission "*has a monopoly over the power of legislative initiative*"²⁸, which we consider to be a key element in the adoption of special European legislation on children's rights. However, the Commission does not have a monopoly in instituting legislative procedure, because it may also be instituted by the Parliament, Member States or the Council of the European Union.²⁹

The Council of Ministers, together with the Parliament, has executive power in relation to legislation (pursuant to Article 16 paragraph 1), and presents proposals for legislation to the Commission.³⁰

The European Parliament has limited legislative powers. However, it may forward a proposal to the Commission in the form of its own initiative report.³¹

²⁶ As in: Communication by the European Commission COM(2011)60 final, p. 3.

²⁷ See Chalmers, D. *et al.*, *op. cit.* note 9, p. 59.

²⁸ *Ibid.*, p. 61.

²⁹ *Ibid.*, p. 112.

³⁰ *Ibid.*, p. 69.

³¹ *Ibid.*, p. 86.

EU legislation abounds in different types of acts³² referred to and described in Article 288³³ of the Treaty on the Functioning of the European Union. Regulations “are the most centralising of all EU instruments and are used wherever there is a need for uniformity. As they are to have general application, they do not apply to individual sets of circumstances, but to an ‘objectively determined situation and produce(s) legal effects with regard to categories of persons described in a generalised and abstract manner’. The other hallmark of Regulations is their direct applicability. From the date that they enter into force, they automatically form part of the domestic legal order of each Member State and require no further transposition ... the fact that it is the Regulation which is the direct source of their rights and obligations”.³⁴ Therefore, a Regulation would be the most appropriate vehicle for the implementation of children’s rights on the European level.

The EU legislative procedure is regulated separately in Article 29 of the Treaty on the Functioning of the European Union. As concerns children’s rights, the so-called ‘Trilogy’, consisting of the Commission, the European Parliament and the Council, is of the highest importance. We can also mention the so-called *Joint Declaration on Practical Arrangements for the [Ordinary Legislative] Procedure* [2007] OJ 145/2 on cooperation between institutions in the context of joint decision-making on the level of tripartite meetings, which demonstrate the “democratic quality of law-making”.³⁵ The special legislative procedures – (a) the Commission submits a proposal to the Council, (b) the Council consults the Parliament, and (c) the Council adopts the measures – exist in order to create institutional balance³⁶ from which we may conclude that there is a need

³² Chalmers, D. *et al.* write: “Regulations were the most widely used of all, accounting for 31 per cent of all legislation. Decisions addressed to a party accounted for a further 27 per cent, with decisions not addressed to anybody accounting for 10 per cent of all measures. Directives and international agreements each accounted for 9 per cent of all legislation.” *Ibid.*, p. 98.

³³ Article 288 prescribes: “To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
Recommendation and opinions shall have no binding force.”

³⁴ Chalmers, D. *et al.*, *op. cit.* note 9, p. 98 *sqq.*

³⁵ *Ibid.*, p. 109.

³⁶ So *ibid.*, p. 110.

for these bodies to be united in their engagement in general, but also in this case which we propose should be resolved by a regulation.

5. THE EUROPEAN JUSTICE SYSTEM/JUDICIARY IN RELATION TO CHILDREN'S RIGHTS

A further step in contributing to the area of freedom, security and justice (from the Treaty on the Functioning of the European Union) would presume the creation of a system which would bring the abstract "inalienable" fact of the existence of (European) children's rights down to the ground, in a concrete possibility of protection of those same "contracted" and "agreed" rights on the European judicial level by the application of a (new) regulation. The existing justice system within the European Union is not promising, or "... *the relationship of which to the administration is often far from clear and marked by a lack of hierarchy or specialisation*"³⁷ and there is unquestionable need, justification and possibility, both on the formal and desired level, for founding a specialized court for children's rights.³⁸

That is to say, it is a well-known fact that the existence and possession of a right is not sufficient satisfaction for the subjects in question. The impossibility of protecting subjective rights means that they are a mere expression of good wishes, without the intention of them coming to life. The fullness of content of a right is only realized with the application of all the elements guaranteed by the justice system (for example: the principle of fairness, access to court, a reasonable time etc.), which in the end is the right path towards realization and enjoyment of the rights belonging to the subject. Specifically: what does it mean to a child if it has the right, for example, to express its own opinion, if no one listens and no one respects that opinion? This is an example of just one of the many rights of children that are endangered. Therefore, we believe that it would be appropriate to guarantee children full and impartial court protection of their rights.

The specific character of children's rights is reflected in two facts – apparently adults "grant" children rights by means of conventions, declarations, agreements and soft law. In reality they do not and cannot grant them those

³⁷ *Ibid.*, p. 143.

³⁸ So far only one specialized court has been founded for conflicts between employees of EU institutions and those institutions themselves; *cf. ibid.*, p. 149. *Cf. Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal* (2004/752/EC, Euratom) (OJ L 333, 9.11.2004).

rights, because children are entitled to their rights by the facts of their birth, existence, and being human.³⁹ Adults can only ensure the respect and protection of these rights. Those rights are specific because of the subject (the person entitled by law) – a child – to whom they belong by the argument of *iure naturali*. Another assertion stems from this fact – children, along with some other categories of people (e.g. the disabled, women, the elderly, the sick etc.) need the special attention, care and concern of adults, and also the creation of a system which will provide effective protection of those rights. On the level of national legislations it is possible to request and obtain protection of individual endangered children’s rights in court proceedings, but at the level of integrated Europe, it is not. National systems also include ombudspersons for children, whose role is again specific in that they monitor the conduct of the state towards children. On the global level the Committee on the Rights of the Child receives reports from states on the status of children’s rights.⁴⁰ This presents an attempt to effectively bring about harmonised application of the Convention on the Rights of the Child.

However, aware of the fact that children’s rights are violated in the EU on a daily basis, we believe that it is time to take a step further and to establish a separate *European Court for the Rights of the Child*. A real possibility for this is provided by Article 257 of the Treaty on the Functioning of the EU.⁴¹

³⁹ Or as “a right with which we are born” as stated by Johann Wolfgang von Goethe in *Faust I*, Vers. 1978, Mephistopheles.

⁴⁰ *Arg. ex.* Articles 43 and 44 of the UN Convention on the Rights of the Child. The Committee examines reports and sends states suggestions (i.e. criticism) and obliges them to publish the reports in their own country.

⁴¹ Article 257 (previously Article 225a of the TFEU) reads as follows: “*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.*

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

A court of this type acting in accordance with the Regulation on the Protection of the Rights of the Child, in a manner of speaking, would be a counterpart to the Courts in Strasbourg and Luxembourg, adjudicating on complaints lodged by children against their own state in cases of violation of their rights. We believe this idea to be acceptable, even though it needs further elaboration and despite the fact that its realization may prove to be a demanding task.⁴²

6. CONCLUDING REMARKS IN THE LIGHT OF THE NEW SPECIALIZED COURT

In view of the fact that the Charter does not confer powers to European institutions in terms of legislative measures, we believe that it is a matter of maturity, readiness and political responsibility on the level of European institutions to take a new step towards judicial protection of children's rights, observing at the same time the principles contained in the more recent documents adopted by the Council of Europe for the protection of children.⁴³ That is to say, at this moment, the European Union does not have a positive obligation to actively develop measures in the area of human, and consequently, children's rights⁴⁴, which we consider to be a serious shortcoming.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts."

⁴² It should be mentioned that there is resistance to specialized courts within the EU, which was at one time expressed before the Court, with the suggestion to establish specialized chambers instead within the Court, with the appointment of assistant rapporteurs, as experts who would draw up draft judgements and take part in the consideration of cases. This would of course assume a larger number of judges or chambers, cf. Weatherill, S., Beaumont, P., *EU Law*, Penguin Books, London, 1999, p. 210 sq.

⁴³ We refer in particular to the *Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice* (2010); on this see *amplius* Hrabar, D., *Otvorena pitanja sudovanja u obiteljskim stvarima (Načela i smjernice za novi lex de processibus familiaribus) (Open Questions of Adjudicating in Family Matters (Principles and Guidelines for a new lex de processibus familiaribus))*, in: Uzelac, A., Garašić, J., Maganić, A. (eds.), *Liber amicorum Mihajlo Dika. Djelotvorna pravna zaštita u pravičnom postupku. Pravosudne transformacije na jugu Europe*, Pravni fakultet u Zagrebu, Zagreb, 2013, pp. 277-300.

⁴⁴ Also: Stalford, H., *op. cit.* note 5, p. 46.

Since children's rights cannot be considered in isolation, as something belonging to children or something that adults need to ensure, through the synergy of all these factors, we arrive at the final answer relating to the life, status and rights of children in individual states, and, of course, in the EU as a whole. It is becoming increasingly clear that children's rights are a reality of the European Union. The founding of a specialized court for children's rights would be a contribution to the visionary idea of Robert Schumann and Jean Monnet, who believed in the development of the process of integration and that integration within a single economic area (coal and steel) would flow over into integration in other areas.⁴⁵ This court would make it possible to balance ideas about the need to protect children, and might prompt, one day, the foundation of similar courts in regions outside Europe. Following the model of the Court in Luxembourg, and the all-pervasive idea of the need for impartial protection of children in court proceedings, children should be represented by specialized attorneys well acquainted with children's rights. In view of the fact that the Court of Justice of the European Union also consists of specialized courts⁴⁶, and that the basic task of the Court is to ensure respect for the law of the European Union, and its uniform application and interpretation, it appears that the Court of the European Union is very important in the formation of the legal order of the European Union. However, some difficulties have been noticed in its functioning due to the volume of work⁴⁷, and changes have

⁴⁵ "Monnet and Schumann believed in the development of a process of integration, rather similar to a snowball that rolls down a hill gathering more and more snow as its descent accelerates. They thought that integration in one particular sector of the economy would spill over into integration in other sectors. Modern states are so closely interdependent that any element of cooperation tends to induce further cooperation. So, they believed, coal and steel were simply a start." Cf. Weatherill, S., Beaumont, P., *op. cit.* note 42, p. 5.

⁴⁶ The Court of Justice of the European Union includes the Court of Justice, the General Court and specialised courts (pursuant to the provisions of Article 19 of the Treaty on European Union). Since 2004 there has also been a European Union Civil Service Tribunal. The basic task of the Court is to ensure respect for the law in interpretation and application of the Treaty. The Court of Justice of the European Union, pursuant to the Treaties, renders decisions in proceedings instituted by member states, institutions or physical persons. By Protocol (no. 3) the Statute of the Court of Justice of the European Union was defined, which in 68 provisions (plus Annex I on the Civil Service Tribunal) regulates the questions of the composition of the Court and general representatives, the organization of the Court, proceedings before the Court, the General Court and the specialized courts (OJ C 83/210).

⁴⁷ Since 1952 26,800 judgements have been rendered, of which about 17,200 within

been suggested to resolve this problem.⁴⁸ A specialized court for the rights of the child would certainly contribute to the formation of that European legal order, which should be enriched by the said new regulation on the rights of the child, because it would ensure uniform case law regarding children's rights. We believe special emphasis should be placed here on the provisions of Article 68 of the Treaty on the Functioning of the European Union, pursuant to which the European Council establishes strategic guidelines for legislative and operational planning in the area of freedom, security and justice. From this it may be concluded that, with the open option of specialized courts, there are no hindrances to forming a separate court, which would rule on violations of children's rights, committed by member states of the EU.

Two facts should be kept in mind – first of all that children's rights should be taken more seriously, and that their protection requires another step forward. Furthermore, the development of individual rights (regardless whether they are those relating to individual areas or individual groups of people) also assumes their increasing vulnerability and the possibility of unwanted variations in their interpretation and protection, which may be expected precisely on the level of EU member states. The application of the law (that is the rules of European “legislation”) by national courts assumes that the national “courts will play, in terms of function, the role of European courts”.⁴⁹ However, such European Court for the Rights of the Child would provide correction to and guidelines for accurate interpretation of children's rights and prevention of further abuse of the law in individual EU members (or several of them collec-

the Court of Justice, 8,700 (from 1989) within the General Court and about 900 (since 2005) within the Civil Service Tribunal. In 2012 alone, the Court of Justice received 631 new cases, 595 were concluded; the General Court received 617 new cases in the same year, and resolved 688; the Civil Service Tribunal in 2012 received 178 new cases and resolved 121; cf. *The Court in figures*, http://curia.europa.eu/jcms/P_80908/?portal=j_55&printView=true.

⁴⁸ Two alternatives are mentioned – the establishment of regional courts or the development of specialized courts; cf. Chalmers, D. *et al.*, *op. cit.* note 9, p. 180.

⁴⁹ Čapeta, T., *Sudovi Europske unije. Nacionalni sudovi kao europski sudovi (The Courts of the European Union. National Courts as European Courts)*, Institute for International Relations, Zagreb, 2002, p. 93; also Temple Lang, J., *The Duties of National Courts under Community Constitutional Law*, *ElRev*, No. 22, 1997, p. 3, says: “Each national court in the European Community is now a court of law of the Community ... each national court, regardless of its powers, is a court of the Community with general jurisdiction...” (quoted from Čapeta, p. 93).

tively). The fact is that in “most cases, Community law⁵⁰ grants subjective rights, but does not prescribe the consequences of their violation, leaving this to national legislation”.⁵¹ This point of view is acceptable from the aspect of the sovereignty of states and their justice systems, but it is our belief that there should be a European Court that would contribute to unification of law and equal treatment. That is, the Latin expression *ubi ius ibi remedium*, should in this case, under the assumption of a joint European document on the rights of the child, also provide appropriate legal protection. Legal theory talks of the principles of the first and second generation, developed by the (existing) European Court, within the framework of specific legal rules, which limit national procedural autonomy.⁵²

The idea of founding a specialized court for the rights of the child should be interesting to the European Commission and the European Parliament, but also to the other bodies, because it would help avoid a large amount of unnecessary investment in the protection of children, which should simply be redirected to founding the Court.

The good intentions to protect children should be funnelled into reality and determination demonstrated through concrete action. The European Court for the Rights of the Child would mean closing the circle: possession of rights – protection of rights – realization of rights. Since children are people who are dependent on adults, it is precisely the adults who need to ensure that this court is created and one day begins to function for the welfare of all children in the European Union who comprise one fifth of its population.⁵³ In our view, this would not represent a “pile up” of institutions, or a weakening of the European Union in terms of administration; it is our belief that this strengthening of the system of human rights and thereby children’s rights, by establis-

⁵⁰ Today this may be read as the European Union.

⁵¹ Čapeta, T., *op. cit.* note 49, p. 93.

⁵² *Ibid.*, p. 94 *sq.*

⁵³ See *EU Youth Report – Commission Staff Working Document – Status of the situation of young people in the European Union* (10.9.2012), p. 13. According to data from Eurostat (of 3 August 2009) in 2008 in 27 member states of the European Union 5.4 million children were born, which means an increase in the average European birth rate by 0.3 per 1000 of the population, in comparison with the previous year. Of course, differences exist between individual countries, so Ireland, Cyprus, Slovakia and Poland lead with a share of more than 24% young people in their populations, whilst Denmark, Germany and Italy are at levels below 18%. However, prognoses speak of a reduction in the total number of children and the ageing of European nations; see data from Eurostat, *Youth in Europe – a Statistical Portrait*, 2009, p. 7.

hing small yet significant links, would lead to additional, comprehensive and effective protection. That is to say, the idea of creating a European Court for the Rights of the Child is not, in our opinion, superfluous, but rather provides the possibility to resolve effectively the issue of children's rights on the European level. Further, regarding the financing of this court, it may be expected that its establishment and functioning will lead to the easing of the burden on national courts, and, which is extremely important, to harmonisation of case law, and thereby to a consistent and equal (legal) status of all children in the European Union.

Sažetak

Dubravka Hrabar*

USPOSTAVA EUROPSKOG SUDA ZA PRAVA DJECE KAO NOVI DOPRINOS PODRUČJU SLOBODE, SIGURNOSTI I PRAVDE

Propisi Europske unije u skromnom se obujmu odnose na prava djece i gotovo da se može reći da oni tek na načelnoj razini uređuju pravni status djece europskih državljana. Aktivnost Europske unije nešto je jača u području soft law, no ostaje dojam o nedovoljno jasnim pravnim pravilima koja bi štitila djecu. U radu se navode europski dokumenti koji su, uz Konvenciju o pravima djeteta, okosnica pravnog uređenja prava djece u Europskoj uniji. Autorica smatra da su na takav način prava djece nedovoljno zaštićena te da bi trebalo pristupiti izradi posebne uredbe o pravima djece, kojom bi se s mnogo više pojedinosti uredilo područje prava djece. Posebnu važnost autorica pridaje potrebi i mogućnosti da se unutar Europskoga suda utemelji specijalizirani sud za prava djece kako bi zaštita dječjih prava bila primjerena i učinkovita.

Ključne riječi: prava djece, Ugovor EU-a, Povelja o temeljnim pravima EU-a, specijalizirani sudovi

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