

## CHALLENGES OF PROTECTING THE RIGHTS OF CHILDREN AND PARENTS WHEN SEPARATING A CHILD FROM THE FAMILY

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### **ABSTRACT**

*The right of the child and parents to enjoy each other's company is guaranteed by Article 35 of the Constitution of the Republic of Croatia, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 7 of the EU Charter of Fundamental Rights. However, when parents do not comply with their responsibilities, duties and rights for the proper growth and development of children, there is a threat and/or a violation of the children's personal rights and well-being. If we begin with the understanding that children's personal rights and well-being are of the highest value and are part of the public order, the state must provide their protection, which includes not only the imposition of repressive measures, but also the provision of special care and assistance in preserving the family unit.*

*The paper will provide an outline of the Republic of Croatia's international commitments concerning family law protection measures, as well as obligations emanating from national normative acts. In addition, the constitutional judicial practice and the practice of the European Court of Human Rights will be analyzed to determine whether the state follows its obligations to protect the rights of the child and parents when imposing repressive measures to protect the personal rights and well-being of the child, and de lege ferenda proposals for the improvement of national normative acts, i.e. guidelines for a more consistent application of the existing legal framework in the practice of imposing measures by which a child is separated from the family in accordance with European standards of respect for the right to family life.*

**Keywords:** *child's personal rights, child's well-being, right to family life*

## 1. INTRODUCTION

The family, as the fundamental unit of society, enjoys special protection and represents both the great value of society as a whole and, in principle, of each person individually. The state's obligation to protect the family derives from the highest legal act - the Constitution of the Republic of Croatia<sup>1</sup>, but it also represents state's international obligation, and is specifically elaborated in domestic normative acts.

In this sense, the first part of the paper will present the normative international and domestic legal framework when it comes to the state's obligation to protect the family, while the following will consider the relevant regulations guaranteeing every individual the right to respect for family life, as well as the positive and negative obligations of the state with regard to this fundamental human right of both parents and children, bearing in mind the focus of the work, primarily on the challenges of realizing and protecting of this right when imposing family law protection measures by which a child is separated from the family.

Along with the analysis of the permissibility of the state intervention into family life of parents and children, special attention will be given to consideration of the interests of the child and the interests of the parents when they collide, as well as the need that best interest of the child should be the paramount consideration, taking also into account the principle of proportionality, i.e. necessity, in accordance with the requirements set by the European standards of protection of the aforementioned right to respect for family life.

In this sense, the second part of the paper will be focused on the analysis of the practice of the Constitutional Court of the Republic of Croatia (CCRC) and the European Court of Human Rights (ECtHR) with regard to repressive child protection measures by which the child is separated from his/her parents in order to determine whether the state follows its obligation to protect the fundamental rights of the child and parents when imposing such measures, as well as obligation to respect the principle of the best interests of child as a decisive criterion when imposing such measures in order to give some guidelines or suggestions in the concluding part, both *de lege ferenda* and regarding the interpretation and application of the existing normative framework.

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<sup>1</sup> Official Gazette, Nos. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14. (further: Croatian Constitution).

## 2. THE FAMILY AS A VALUE UNDER THE SPECIAL PROTECTION OF THE STATE

The family is “a natural, primordial form of association and bringing people together on which every society rests.”<sup>2</sup> The family as a community exists as long as humanity, and represents a natural environment for the generally safe and healthy growth and development of children.<sup>3</sup> In the family the various needs of individuals are met, and its fundamental characteristics are emotional connection, mutual affection as well as closeness of its members and durability.<sup>4</sup> Family legislation does not contain a definition of a family, and the reason for this is because “it is difficult to legally define a phenomenon that is not static, and is influenced by socioeconomic and other factors in the social environment”.<sup>5</sup> What is indisputable is that parents and children make the so-called nuclear family because, in addition to being connected by marriage or extramarital union and kinship, they mostly live together.<sup>6</sup>

The family, as the fundamental form of the human community<sup>7</sup>, enjoys the special protection of the state according to the highest legal act in Croatian legal system - the Croatian Constitution.<sup>8</sup> The aforementioned protection of the family is being realized in the legal sense by the application of various regulations which elaborate this constitutional obligation of the state in detail.

In this regard, and considering the topic of the work, we would emphasize the provisions of the basic family law regulation - Family Act<sup>9</sup> and the norms of the Social Welfare Act.<sup>10</sup>

When imposing measures for the protection of the welfare of the child some of the fundamental principles of the FA must be pointed out according to which special obligations of the state, i.e. competent authority come to the fore. These principles

<sup>2</sup> Hrabar, D., *Uvod u obiteljsko pravo*, in: Hrabar, D. (ed.), *Obiteljsko pravo*, Narodne novine, Zagreb, 2021, p. 3.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Alinčić, M. *et. al.*, *Obiteljsko pravo*, Narodne novine, Zagreb, 2007, p. 7.; Korać Graovac, A., *Brak i obitelj kao vrijednost u hrvatskom pravnom sustavu*, Bogoslovska smotra, 85, 2015, 3, p. 800.

<sup>6</sup> Hrabar, D., *op. cit.* note 2, p. 4.

<sup>7</sup> Alinčić, M., *op. cit.* note 5, p. 3.

<sup>8</sup> Art. 61, para. 1.

<sup>9</sup> Official Gazette, Nos. 103/15, 98/19, 47/20, 49/23, 156/23. (further: FA).

<sup>10</sup> Official Gazette, Nos. 18/22, 46/22, 119/22, 71/23, 156/23 (further: SWA) The protection provided to the family based on the SWA can be recognized especially in the provisions on different types of social services, the content of which is determined in Art. 70, which reads: “Social services include activities intended to detect, prevent and solve problems and difficulties of individuals and the family, as well as the improvement of the quality of their life in the community.”

are: the principle of primary protection of the welfare and rights of the child (Art. 5), the principle of the primary right of parents to take care of the child and the duty of the authority to provide them with assistance (Article 6), and the principle of proportionality and the most lenient intervention into family life (Art. 7).

Besides preventive protection and assistance to family in crisis, in some cases adequate protection will require repressive state intervention into the family, as a last resort, when there is a threat or violation of the rights of a child who cannot be protected by less intrusive measures.<sup>11</sup> Namely, the protection of the family inevitably includes the protection of children, and everyone is called upon to protect the most vulnerable members of the community, in accordance with the Croatian Constitution.<sup>12</sup> Therefore, FA prescribes general civil duty to report to the Croatian Social Welfare Institute (CSWI) violation of the child's personal and property rights. In these cases, parents as primary caregivers do not fulfil their parental role properly and competent authorities are authorized to intervene according to the Constitutional principle of the special protection of children.<sup>13</sup>

In addition to the constitutional obligation to protect the family elaborated in domestic legislation, state obligation to protect family arise also from regional and global international documents. Thus, according to the Charter of Fundamental Rights of the European Union<sup>14</sup> „(t)he family shall enjoy legal, economic and social protection“ (Art 33 Para 1). Among the global international documents that guarantee family protection, we would single out the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In both documents we can find the same provision (Art. 16 Para 3, i .e. Art. 23 Para 1) which states that „(t)he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.“ Besides these instruments, the most important and comprehensive international document on

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<sup>11</sup> According to Art. 129, para. 1 FA, the separation of a child from the family is determined only if it is not possible to protect the rights and welfare of the child with any other, more lenient measure. The preventive measures regulated in FA (Art. 134, 139-148) are: warning of errors and omissions related to the care and raising of the child, measure of professional assistance and support in the exercise of parental care and measure of intensive professional assistance and supervision over exercise of the parental care. The competence for these measures lies with the Croatian Social Welfare Institute.

<sup>12</sup> „The state shall protect maternity, children and youth, and shall create social, cultural, educational, material and other conditions promoting the achievement of the right to a suitable life.“ (Art. 63 Croatian Constitution); „Everyone shall have the duty to protect children and infirm persons.“ (Art. 65, para. 1 Croatian Constitution).

<sup>13</sup> Art. 62 Croatian Constitution.

<sup>14</sup> Official Journal of the European Communities, 2000/C 364/01 More about Charter and its significance for family law relations see Korać Graovac, A., *Povelja o temeljnim pravima Europske unije i obiteljsko pravo*, in: Korać Graovac, A.; Majstorović, I. (eds.), *Europsko obiteljsko pravo*, Narodne novine, Zagreb, 2013., pp. 25 – 51.

children's rights - the Convention on the Rights of the Child<sup>15</sup> in the Preamble states: „family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community...“, as well as that „the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding...“. Therefore, in accordance with these international commitments we can conclude about the state interest and obligation of adequate assistance and protection of the family and its value at the level of a society. Namely, these norms are primarily principled views that are being elaborated in national legal system of every state and are more an expression of the value system and support to the family. The value of the family at the individual level is shown by the data of the European value research project (European Values Study) which is carried out in most European countries, and Croatia joined in 1999, according to which family is the fundamental value cherished by citizens as one of their priorities.<sup>16</sup> In addition to the protection of the family, which is the state obligation, it is the right of every individual to respect for family life, and in this regard, the role of the state is also important, both in terms of positive and negative obligations, which will be discussed in the next part of the paper. Namely, living together, i.e. joint life, the family life of parents and children represents multiple value for both children and their parents. As a rule, the family environment, i.e. the child's upbringing by the parents, is the most suitable for the healthy development of the child in every respect because it provides the child with, among other things, emotional security and stability, guidance as well as the protection and exercise of the child's rights.

In this sense, the task of the state is to protect family life and to intervene only in the case of the need for protection, i.e. in situations where parents unfortunately do not fulfil their parental function, i.e. their rights, obligations and responsibilities as persons who are primarily responsible to protect the well-being of their child<sup>17</sup> in an appropriate manner, regardless of whether it is because of lack of

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<sup>15</sup> Official Gazette of the Socialist Federative Republic of Yugoslavia, No. 15/90; Official Gazette – International Treaties, Nos. 12/93, 20/97, 4/98, 13/98 (further: CRC).

<sup>16</sup> For 85% of Europeans, family is very important. See Baloban, J.; Nikodem, K.; Zrinščak, S. (eds.), *Vrednote u Hrvatskoj i u Europi – Komparativna analiza, Kršćanska sadašnjost – Katolički bogoslovni fakultet Sveučilišta u Zagrebu, Zagreb, 2014*, p. 123. and Črpić, G., *Sociološki aspekti obiteljskopравnih instituta, pravna kultura i obiteljskopравni instituti*, *Godišnjak Akademije pravnih znanosti Hrvatske*, Vol. VIII, No. special issue, 2017, p. 7. More about this project on [<https://europeanvaluesstudy.eu/>].

<sup>17</sup> „States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may

parental competences, ignorance or evil intent, and consequently the child's rights are being threatened or violated.

Depending on the degree of endangerment and violation of the child's rights, the reaction of the competent authorities may consist of preventive measures or repressive measures by which the child is being separated from the family environment.

The imposition of such separation measures undoubtedly represents a form of interference in the sphere of the family life of parents and children and a form of encroachment on their fundamental right - the right to respect for family life, but not necessarily its violation, and in that sense, the normative regulation of guarantee of this right will be considered *infra*, as well as the justification of its limitations mainly bearing in mind the repressive measures of separating the child from the family.

### **3. THE RIGHT TO RESPECT FOR THE FAMILY LIFE OF PARENTS AND CHILDREN - RESTRICTIONS INTENDED TO PROTECT THE RIGHTS AND WELFARE OF THE CHILD**

Family life certainly includes the joint life of parents and children, and the right to respect for family life is one of the fundamental human rights guaranteed in the Croatian Constitution as well as in international treaties that are component of the domestic legal order<sup>18</sup>. Thus, the constitutional provision of Art. 35. reads: „Respect for and legal protection of each person's private and family life, dignity, and reputation shall be guaranteed “. In addition, it is worth noting the provision of Art. 16 Para 1 of the Croatian Constitution, which contains a restrictive clause: „Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, public morals and health.“ When it comes to international treaties, the (European) Convention on the protection of human rights and fundamental freedoms<sup>19</sup> is of exceptional value since its Art. 8 guarantees this right, i.e. legal good. This provision states:

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be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.“ (Art. 18 CRC).

<sup>18</sup> „International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.“ Art. 134 Croatian Constitution.

<sup>19</sup> Official Gazette – International Treaties, Nos. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10 (further: ECHR).

„1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.“

According to para 2 Art 8 the right to respect for family life is not absolute, since the interventions i.e. involvement of the public authorities will be allowed if the strictly defined precondition are met, i.e. the so-called qualified conditions.<sup>20</sup> The first precondition is that all interference into family life must be in accordance with the law, i.e. that the measure by which a child is separated from the family is grounded in domestic legal regulations on such state intervention.

In the Croatian legal system, the repressive measures by which a child is separated from the family are regulated in such a way that the legislator, among other things, has determined what preconditions must exist in order to impose each of the individual measures of separation, given that the separation of a child from the family is a broader concept which includes few different measures, which have in common the separation of the child from his/her family environment and entrusting him/her to the care of another person or a social care institution.

Namely, according to the provision of Art. 129 Para 2 FA “separation of a child from the family means any measure on the basis of which the child is separated from the family and placed with another person who meets the requirements for a guardian, in a foster family, in a social welfare institution or with another physical or a legal entity that performs social welfare activities.”

Having in mind that the separation of a child from the family represents interference in the fundamental human right of parents and children protected by the highest domestic legal act and the international legally binding documents, the legislator determined that the separation should not last longer than it is necessary to protect the rights and welfare of the child and that the measure of separating the child from the family must be regularly reviewed as well as that parents have the right to assistance and support in order to remove the causes of the separation and the child be returned to the family in accordance with his/her welfare (Art. 129, para. 4 and 5).

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<sup>20</sup> Omejec, J., *Značenje i doseg prava na poštovanje obiteljskog života u praksi Europskog suda za ljudska prava*, in: Hrabar, D. (ed.), *Presude o roditeljskoj skrbi Europskoga suda za ljudska prava protiv Republike Hrvatske*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2021, p. 5.

Namely, one of the goals or purpose of the measure is the return of the child to the family, if this would not be against the child's welfare or the preparation of another permanent form of care for the child, which includes adoption in cases when the most repressive measure is imposed to the parent who abuses or gravely infringes parental responsibilities, duties and rights (Art. 170 FA).<sup>21</sup>

Additionally, it is worth emphasizing that the purpose of separation must be the protection of the child's life, health and development, and the measure is justified if it is not possible to protect the rights and welfare of the child by some lenient measure (Art. 129 Para 1 and 3 FA).

Therefore, child protection in such circumstances certainly represents a legitimate aim in the context of the provision of Art. 8 Para 2 ECHR for which interference with the protected convention right is allowed.

While the child is separated from the family, it is necessary to provide adequate care for him/her outside the family (with another person, foster career or in social welfare institution) as well as to provide assistance to the parents in order to try to eliminate the reasons that led to the child being separated.

Separation of a child from the family is therefore a collective name for several different measures that share a common purpose, and the meaning of separation is primarily protection of the child's life and health and secondary giving assistance to the parents. Such measures aren't in no way a sanction or punishment of parents for violations of parental duties and responsibilities that led to the child being separated from them.

The aforementioned legal solutions follow the requirements of the ECHR when it comes to the preconditions for interference in the right of parents and children to respect for family life. Namely, in order for the interference be justified it must be in accordance with the law, done with a legitimate aim, which in the case of separation is the protection of the child's life, health and development, and must be recognized as "necessary in a democratic society".

A repressive measure will be considered necessary if it is based on relevant and sufficient reasons that must be explained in the decision on the imposition of the measure, i.e. „the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.“<sup>22</sup>

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<sup>21</sup> That is a measure of deprivation of parental care.

<sup>22</sup> *Olsson v. Sweden (No. 1)*, Application no. 10465/83, §. 67, Judgement of 24 March 1988; Kilkelly, The right to respect for private and family life -A guide to the implementation of Article 8 of the European



The demand for necessity is therefore closely related to the fundamental principle of proportionality that should, in addition to the principle of the primary protection of the best interest of the child, be applied when deciding on measures for the protection of the welfare of the child. In accordance with this principle, when choosing a measure that would be appropriate for the protection of the rights and welfare of the child, the competent authority (the court in an extra-contentious procedure or the Croatian Social Work Institute) must determine the measure that least restricts the right of the parents to take care of the child, if with such a measure, it is possible to protect the rights and welfare of the child (Art. 128 FA).

This is precisely because the right of the parents (and the child) to respect for family life would not be violated by imposing, for example, some of the measures by which child is separated from the family if it was possible to protect the child's welfare with one of the preventive measures, and such an intervention wouldn't therefore fulfil preconditions for justified interference into sphere of family life, i.e. the requirement of necessity according to the ECHR.

Namely, it is important to emphasize that the right of parents and children, as well as other family members, to enjoy each other's company is a key element of the right to family life.<sup>23</sup>

In this regard, it is particularly important that the competent authority, when imposing a protective measure of separation of a child from the family decides on contacts of a child and parents. In the circumstances of the separated lives of parents and children, contacts are the element of family life that remains to both parents and a child and it must be protected, having in mind that the purpose of the measure is to reunite the family if this would be possible, i. e. would not be against the best interest of the child.

Namely, if these contacts wouldn't be enabled during the separation period, that would lead to the alienation of the child, and this fact would make return of a child to the family after the end of the measure more difficult.<sup>24</sup>

However, since the fundamental principle in making decisions concerning the child, as determined by the Art. 3. CRC, is the best interest of the child, the court has the authority to decide on the prohibition of contacts or to determine their exercise under supervision, if such limitation is necessary and is proposed by the

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Convention on Human Right, Human rights handbooks, No. 1, Council of Europe, 2003.

<sup>23</sup> See: Korać, A., *Sadržaj i doseg prava na poštovanje obiteljskog života*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 49, No. 6, 1999, pp. 759-794.

<sup>24</sup> Rešetar, B., *Pravna zaštita prava na susrete i druženja*, doctoral thesis, Pravni fakultet u Zagrebu, Zagreb, 2009, p. 129.

child, parent or the CSWI.<sup>25</sup> In such cases there are actually additional restrictions concerning the right of parents and children to respect for family life, therefore it is necessary to justify such restrictions with additional, relevant reasons in order to prevent the violation of their convention right to respect for family life.

The fundamental purpose of the constitutional and convention guarantee of the right to respect for family life is to protect individuals from unfounded, arbitrary interference by the state in their right to an undisturbed family life.<sup>26</sup>

The guarantee of the aforementioned right is also contained in the Charter of Fundamental Rights of the European Union in Article 7. which reads: “Everyone has the right to respect for his or her private and family life, home and communications.”

The Charter also guarantees a whole range of other human rights, showing the commitment of the European Union to this particular area of human rights as well as to the rule of law.<sup>27</sup>

The CRC as the most important international document on children’s rights also guarantees children the right to live with their parents. Namely, according to Art. 9 Para 1 „1. (S)tates Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents,...“.

Therefore, and in accordance with the CRC, this right is not an absolute right, especially when its realization is against the best interests of the child. When it comes to state obligation Art. 3 Para 2 reads: „(S)tates 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

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<sup>25</sup> Art. 152, para. 1, Art. 157, para. 1, Art. 166, para. 2. However, when it comes to the most restrictive measure for protection of child’s right and interest – deprivation of parental care, the court will decide on contacts with the child only in exceptional cases, on proposal of a child or a parent who is being deprived of parental care. Having in mind the preconditions for such a measure, i.e. abuse and gravely infringement of parental responsibilities, duties and rights alongside with special circumstances in which such a measure shall be passed (Art. 170 and 171 FA), it can be expected that decisions on exercises of contacts with the child are extremely rare in practice.

<sup>26</sup> Schabas, W. A., *The European Convention on Human Rights – A Commentary*, Oxford University Press, 2015, p. 366.

<sup>27</sup> Majstorović, I., *Europsko obiteljsko pravo*, in: Hrabar, D. (ed.), *Obiteljsko pravo*, Narodne novine, Zagreb, 2021, p. 496.

individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures“.

Additionally, according to the CRC, the state is obliged to provide assistance to the parents in fulfilling their duties while strengthening care institutions and services (Art. 18 Para 2).<sup>28</sup>

From the aforementioned provisions we can conclude about the subsidiary role of the state in the protection of children. This fully corresponds to the negative obligation that the state has with regard to respecting the right to family life, i.e. refraining from intervening in the parent-child relationship except when it is necessary and in accordance with the law when parental care is inadequate, i.e. when there are parental failures in providing care for the child or neglect and violation of parental duties, rights and responsibilities, which results in the need to protect the welfare of the child through appropriate intervention by competent authorities.

When making decisions on repressive measures for the protection of the child's rights and welfare, the competent authorities are obliged to enable the child to express his/her opinion and to give due value to the expressed opinion of the child in accordance with his/her age and maturity (Art. 12 CRC).<sup>29</sup> This Convention right of the child and one of the fundamental principles of the CRC has been implemented in domestic legislation.<sup>30</sup>

To what extent are these international standards as well as the norms of domestic legislation brought to life in practice, we will consider by analysing individual decisions of the CCRC and the ECtHR. Therefore, next part of the paper will present an overview of court decisions on the violation of the right to respect for

<sup>28</sup> Cf. Majstorović, I., *Mjere za zaštitu osobnih prava i dobrobiti djece u njemačkom pravu*, in: Rešetar, B.; Aras S. (eds.), *Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta*, Pravni fakultet Sveučilišta J. J. Strossmayera u Osijeku, Osijek, 2014, p. 97.

<sup>29</sup> *Amplius* Committee on the rights of the child, General comment No. 12 (2009) – The right of the child to be heard, CRC/C/GC/12, 1 July 2009., available at: [<https://www.ohchr.org/en/treaty-bodies/crc/general-comments>], Accessed: 6 May 2024.

<sup>30</sup> The general provision guaranteeing this child's right is contained in Art. 86 FA, while additionally in Art. 130, para. 1 is stipulated that the child has the right to participate and express his/her opinion in all procedures for assessing and determining measures that protect his/her rights and welfare, as well as that a special guardian must be appointed for the child in procedures for determining measures in competence of the court (Art. 130, para. 3 FA). Child's procedural rights are specially regulated in the European Convention on the Exercise of Children's Rights (Official Gazette – International Treaties, No. 1/10). *Amplius* Hrabar, D., *Europska konvencija o ostvarivanju dječjih prava – poseban zastupnik djeteta*, in: Filipović, G.; Osmak Franjić, D. (eds.), *Dijete u pravosudnom postupku – Primjena Europske konvencije o ostvarivanju dječjih prava*, Zbornik priopćenja sa stručnih skupova pravobraniteljice za djecu, Pravobranitelj za djecu, Zagreb, 2012., pp. 103-116.

family life committed by imposing repressive measures by which a child was separated from the family.

#### 4. REVIEW OF THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA AND THE EUROPEAN COURT OF HUMAN RIGHTS

The family law perspective on the issue of the violation of the right to respect family life focuses on the state's obligations prescribed by the previously mentioned Article 8 of the ECHR, which concern the restraint of public authorities from unjustified and arbitrary interference in family life (negative obligation) and the provision of assistance in the implementation of the right to family life (positive obligation).

According to the interpretation of the ECtHR, positive obligations "must include actions and measures that are sometimes broader than the requirements of domestic regulations."<sup>31</sup>

To avoid a violation of the state's negative obligation, state interference in family life must be "in accordance with the law" and pronounced for a justifiable purpose that is "necessary in a democratic society".<sup>32</sup> In a democratic society, necessity is reviewed based on all of the circumstances of the case if the child's separation from the family is proportionate to the legitimate aim that the state's interference in family life attempts to achieve.<sup>33</sup> The legitimacy of the purpose is reflected in the protection of the best interests of the child when his/her rights and welfare are threatened and/or violated, and the state must ensure that before separating the child from the family, other, milder measures are considered to achieve the protection of the child's best interests.<sup>34</sup>

When we look back on the national legislation and evaluate its provisions, it is clear that the requirements for taking measures to separate a child from the fam-

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<sup>31</sup> Korać Graovac, A., *Hrvatsko obiteljsko pravo pred Europskim sudom za ljudska prava*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. IV, No. 1, 2013, p. 50.

<sup>32</sup> Korać, Graovac, A., *Obiteljskoppravna zaštita osobnih interesa djece prije izdvajanja iz obitelji: prava djece - odgovornosti i prava roditelja*, in: Ajduković, M.; Radočaj, T. (eds.), *Pravo djeteta na život u obitelji, Stručna pomoć obiteljima s djecom i nadzor nad izvršavanjem roditeljske skrbi kao proces podrške za uspješno roditeljstvo*, Zagreb, 2008, p. 52.; See *Haase v. Germany*, Application No. 11057/02, § 83., Judgement of 8 April 2004.

<sup>33</sup> Korać, Graovac, A., *ibid.*, p. 52.; See *Gnahoré v. France*, Application No. 40031/98, § 50. Judgement of 19 September 2000, *Haase v. Germany*, § 88.

<sup>34</sup> Korać, Graovac, A., *ibid.*, p. 52.; See *K. i T. v. Finland*, Application No. 25702/94, § 166., Judgment of 12 July 2001; *Kutzner v. Germany*, § 67, *P. C. i S. v. UK*, Application No. 56547/00, § 116., Judgment of 16 July 2002; *Haase v. Germany*, § 90.

ily are fairly broad.<sup>35</sup> The assumptions specified in this manner constitute legal standards that allow competent state bodies to make a decision as to whether they are met and whether they are in the best interests of the child, based on the facts of the case.<sup>36</sup> Even if these assumptions are met, the declared measure obviously limits the child's right to enjoy family life with his parents, thus the state must ensure that they "not last longer than necessary".<sup>37</sup> Furthermore, the mere fact that the child can be placed in an environment that will take better care of him/her does not justify the repressive measure of separating the child from the family and separating him/her from his biological parents, unless there are other circumstances that indicate the "necessity" of encroaching on family life.<sup>38</sup> Therefore, state bodies are required to constantly evaluate whether the circumstances that led to the enactment of the measure have changed (*rebus sic stantibus*).<sup>39</sup> Furthermore, during the application of the measure, the state is obliged to provide support in exercising the right to family life in such a way that, if possible, conditions are created for the child's return to the family by supporting the parents in eliminating the circumstances that led to the child's separation from the family.<sup>40</sup>

Interpreting the content of family life, the CCRC highlights the judgments of A.K. and L. v. Croatia (Application No. 37956/11, § 51, Judgment of January 8, 2013) and Vujica v. Croatia (Application No. 56163/12, § 87, Judgment of October 8, 2015) in which the ECtHR states that the enjoyment of parents and children in each other's company is a fundamental element of family life, which is, among other things, protected by the provisions of Article 35 of the Croatian Constitution, i.e. Article 8 of the ECHR, so measures that prevent the enjoyment of parents and children in each other's company constitute interference in that right.<sup>41</sup>

The CCRC considers that the circumstances in which it has to decide whether there has been a breach of the right to family life necessitate weighing the applicant's right to family life and the state's commitment to defend the best interests of the child.<sup>42</sup> Whereby, considering a possible breach of the right to family life, one

<sup>35</sup> Hrabar, D., *Obiteljskopравни odnosi roditelja i djece*, in: Hrabar, D. (ed.), *Obiteljsko pravo*, Narodne novine, Zagreb, 2021, p. 245.

<sup>36</sup> Korać, Graovac, A., *op. cit.* note 31, p. 52.

<sup>37</sup> Hrabar, D., *op. cit.* note 35, p. 245.; Art. 7, para. 1 CRC.

<sup>38</sup> Korać, Graovac, A., *op. cit.* note 31, p. 52.; See: *K. A. v. Finland*, Application No. 27751/95, § 92., Judgment of 14 January 2003.

<sup>39</sup> Hrabar, D., *op. cit.* note 35, pp. 245. i 252.

<sup>40</sup> *Ibid.*, str. 245.

<sup>41</sup> Preložnjak, B., *Lišenje prava na roditeljsku skrb - Odluka br. U-III-2684/2022 od 19. listopada 2022.*, in: Korać Graovac, A. (ed.), *Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta*, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, p. 175.

<sup>42</sup> *Ibid.*

should consider the legitimacy and necessity of the state's intrusion in family life, as well as the legitimate purpose of protecting the child's best interests.

Furthermore, referring to the judgments of the ECtHR<sup>43</sup> the CCRC emphasises sufficient and relevant reasons for intrusion in family life, which must be the result of an analysis of the entire family situation, for which the decisive factors are factual, emotional, psychological, economic, and health, in order to "achieve a fair balance between the interest of the child being separated from the parents and the interest of the parents to live with their child, where the best interest of the child had decisive importance."<sup>44</sup> When considering court proceedings in which a decision is made to separate a child from the family, the CCRC concludes that it is necessary to ensure the involvement of parents, but also of all interested parties, to the extent that will enable them to directly present relevant arguments in order to achieve a fair balance of interests.<sup>45</sup>

The CCRC considers ECtHR judgments like *B. v. the United Kingdom* (§ 64) and *X v. Croatia* (Application No. 11223/04, § 48, Judgement of 18 May 2006) when determining the necessity of interference in family life and the occurrence of a violation of the right to family life and points out that is crucial to assess whether the parents participated sufficiently in the decision-making process to separate the child from the family. In other words, are parental rights during the procedure protected, in manner that they were informed about the procedure and given the opportunity to be heard.<sup>46</sup> The CCRC points out that the removal of a child from the family should not be justified only by the fact that the new environment, where the child

<sup>43</sup> *Sommerfeld v. Germany* (Application No. 31871/96, § 62, Judgement of July 8, 2003), *Sahin v. Germany* (Application No. 30943/96, § 64, Judgement of July 3, 2003), *Neulinger and Shuruk v. Switzerland* (Application No. 41615/07, § 139, Judgement of 6 July 2010) and *Antonyuk v. Russia* (Application No. 47721/10, § 134, Judgment of August 1, 2013).

<sup>44</sup> U-III-34/2020 of 15 July 2020 par. 11., see: Preložnjak, B., *Lišenje prava na roditeljsku skrb - Odluka br. U-III-34/2020 od 15. srpnja 2020.*, in: Korać Graovac, A. (ed.), *Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta*, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, pp. 140-141.

<sup>45</sup> The CCRC emphasizes the importance of immediate evidence assessment in proceedings involving measures that encroach on family life. As well, it emphasizes that the CCRC is not authorized to make a decision on who a child should live with. *Ibid.*

The ECtHR's case law indicates that parties must be sufficiently involved in the decision-making process to provide appropriate protection of their interests. See *Venema v. the Netherlands*, Application No. 35731/97, § 91, Judgment of 17 December 2002, *P. C. and S. v. Great Britain*, Application No. 56547/00, § 119, Judgment of July 16, 2002, *T.P. and K.M. v. Great Britain*, Application No. 2894/95, § 72, Judgment of 22 November 2000, *Haase v. Germany*, Application No. 11057/02, §§ 94 and 95, Judgment of 8 April 2004; Korać, Graovac, A., *op. cit.* note 31, p. 52.

<sup>46</sup> Preložnjak, B., *Lišenje prava na roditeljsku skrb - Odluka br. U-III-2342/2022 od 19. listopada 2022.*, in: Korać Graovac, A. (ed.), *Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta*, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, p. 158.

will live after removal from the family, is more favorable for the child, but as well with the fact that the child's stay in the family will harm his/her health and proper development.<sup>47</sup> Since every decision to separate a family represents a very serious form of interference, the CCRC concludes that it is important that it has a temporary nature and that while the reasons that led to the separation of the child from the family last, the state does everything necessary to reunite the family.<sup>48</sup>

Furthermore, the CCRC emphasizes that when separating a child from his family or reuniting the family, the state is required, in accordance with the provisions of the CRC and FA, to allow a child who is able to form his/her own opinion to freely express his/her views on all matters relating to him/her, and to respect his attitudes and opinions in accordance with his age and maturity level.<sup>49</sup> For this purpose, the state must ensure that the child, directly or through an intermediary, i.e., an appropriate service, is heard in all procedures linked to him/her, in a manner that is aligned with the procedural norms of the national legislation.<sup>50</sup> The ECtHR also emphasizes the importance of allowing children to express their opinions in suitable situations (*Bronda v. Italy*, Application No. 40/1997/824/1030), §59, Judgment of June 9, 1998; *Dolhamre v. Sweden*, Application No. 67/04), §116, Judgment of June 8, 2010).<sup>51</sup>

<sup>47</sup> U-III-34/2020 of 15 July 2020, §§ 11-12; Preložnjak, B., *op. cit.* note 43, p. 141. CCRC refers to the practice of the ECtHR, i.e. judgments *Scozzari and Giunta v. Italy* (Application Nos. 39221/98, 41963/98, § 169, Judgment of 13 July 2000), *T.P. and K.M. v. the United Kingdom* (Application No. 28945/95, § 71, Judgment of 10 September 1999), *Ignaccolo Zenide v. Romania* (Application No. 31679/96, § 94, Judgment of 25 January 2000), and *Sabin v. Germany* (Application No. 30943/96, § 66, Judgment of 8 July 2003).

<sup>48</sup> *Ibid.*, p. 165. *K. and T. v. Finland*, No. 25702/94, 2001, § 154-155.; *Kutzner v. Germany*, No. 46544/99, 2002., § 65-66; *Saviny v. Ukraine*, No. 39948/06, 2008., § 48-49.

<sup>49</sup> Art. 12 para. 1 CRC; The provisions of the CRC are followed by the norms of the European Convention on the Exercise of Children's Rights, which aims to improve the child's procedural position by granting the child procedural rights (the right to be informed, to express his opinion, and to request the appointment of a special representative) and allowing child to be informed about proceedings before judicial bodies that concern him/her, either alone or through other persons or bodies. See: Šimović, I., *The right of the child to be heard in the Croatian family law system*, European Integration Studies; Miskolc, Vol. 19, 2023, 1; pp. 1-15, Majstorović, I., *The Realisation of the right of the child to express his/her views – How “visible” are children in Croatian family judicial proceedings?*, Ljetopis socijalnog rada, 24 (1), 2017, pp. 55-71.

Radina, A., *Praksa suda i posebnog skrbnika u postupcima radi odlučivanja o mjerama zaštite osobnih prava i dobrobiti djeteta*, in: Rešetar, B.; Aras, S. (eds.), *Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta*, Interdisciplinarni, komparativni i međunarodni osvrti, Pravni fakultet Osijek, Sveučilište Josipa Jurja Strossmayera, Osijek, 2014, p. 31.; Art. 1, para. 2, Art. 2, point c, Art. 3 and Art. 4 of the European Convention on the Exercise of Children's Rights.

<sup>50</sup> Art. 12, para 2 CRC.

<sup>51</sup> Radina, A., *Izdvajanje djeteta iz obitelji u praksi Europskog suda za ljudska prava*, Godišnjak Akademije pravnih znanosti Hrvatske, vol. VIII, Poseban broj, 2017, p. 99.

In this regard, a special guardian plays an important role, whose task is to represent the child and inform the child about his role in the procedure, the subject of the procedure that concerns him/her, and to familiarize the child with the convention right to express his/her opinion and the potential consequences of respecting his/her opinion and decisions.<sup>52</sup>

Although the Convention and legal norms guarantee the child the right to participate and express his/her own opinion in the proceedings in which his/her rights and interests are decided, the CCRC observed violations of these children's rights in the proceedings for imposing measures particularly because of the omissions in the work of special guardians.<sup>53</sup>

The reason for this is the Centre for Special Guardianship's broad scope of competence, which overloads special guardians with a large number of cases and has a negative impact on the quality of representation of children in court proceedings in which a special guardian is appointed for them.<sup>54</sup> As a result, "representation of children by special guardians is often reduced to simply filling out the form prescribed by law".<sup>55</sup> Therefore, it is difficult to expect that the best interests of the child will be protected in court proceedings, unless normative changes are made to the institution of special guardianship in the form of improving its organization and personnel capacities and/or allowing the child to be represented by a lawyer in accordance with the provisions of the European Convention on Children's Rights.<sup>56</sup>

<sup>52</sup> Čulo Margaletić, A., *Oduzimanje prava na stanovanje s djetetom i povjeravanje svakodnevne skrbi o djetetu - Odluka br. U-III-2901/2020 od 18. veljače 2021*, in: Korać Graovac, A. (ed.), *Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta*, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, p. 85.; More about the role of the special guardian in the context of the child's right to express his/her opinion see Šimović, I. *op. cit.* note 39. Regarding overload and other problems that special guardians encounter in practice, which ultimately affect the quality of representation of children in court proceedings see more in Lucić, N., *Child's special guardian – International and European expectations and Croatian reality*, *Balkan Social Science Review*, 2021, 17, pp. 108–112.

<sup>53</sup> U-III-2684/2022 of 19. October 2022, see: Preložnjak, B., *op. cit.* note 41, p. 184.

<sup>54</sup> Čulo Margaletić, *Oduzimanje prava na stanovanje s djetetom i povjeravanje svakodnevne skrbi o djetetu – U-III-1674/2017 od 13. srpnja 2017.*, in: Korać Graovac, A. (ed.), *Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta*, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, p. 86.; Šimović, I., *op. cit.* note 39., p. 11.

<sup>55</sup> Lucić, N., *op. cit.* note 52, p. 110.; See Report on the work of the Ombudsman for children in 2022, Ombudsman for children, Zagreb, 2023, pp. 22, 34.

<sup>56</sup> Lucić, N., *op. cit.* note 52, p. 110; Art. 2, Art. 5, Art. 9 of European Convention on the Exercise of Children's Rights; Hrabar, D., *Lišenje prava na roditeljsku skrb - Odluka br. U-III-249/2022 od 12. srpnja 2022.* in: Korać Graovac, A. (ed.), *Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta*, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, pp. 118-132.; Hlača, N., *Skrbnništvo*, in: Hrabar, D. (ed.), *op. cit.* note 2, pp. 391–392., Preložnjak, B., *op. cit.* note 41, p. 185.



## 5. FINAL REMARKS

Measures for the protection of the child's rights and well-being must be based on legal norms and must correspond or be proportionate to the degree of threat to the child's rights and well-being.<sup>57</sup> The evaluation of the necessity of public authority interference in the private lives of parents and children is critical in determining the existence of a violation of the right to respect for family life guaranteed by Article 35 of the Croatian Constitution, Article 8 of the ECHR, and Article 7 of the Charter.

In addition to necessity requirement, which is determined in more detail by the ECtHR in its judgments, on which the CCRC refers to in the explanations of its decisions, we would also emphasize a requirement that arises from the practice of the ECtHR and that is temporality of imposed repressive measures. Namely, measures by which the child is separated from the family should in principle be of temporary nature and be discontinued as soon as circumstances permit as well as that during imposed repressive measure parents should be provided with help and support to improve their parenting skills, having in mind an aim of state intervention and that is family reunification unless it would be contrary to the best interest of the child. To determine the child's best interests and to protect the rights and welfare of children expressed through physical, emotional, and educational needs in the long term, as well as to strengthen parental abilities to meet these needs, it is critical to allow the child to exercise his/her right to express his/her opinion in an appropriate manner in every proceeding concerning him/her.<sup>58</sup> However, there is no obligation of public authorities to make endless attempts at family reunification since unjustified insistence on giving biological parents the opportunity to take over exercise of parental care despite their lack of interest and reluctance leads to the question of whether the child's rights and interest are being violated by such prolongation of adequate intervention. Namely, parent's rights cannot be above the interest of their children.

Bearing in mind the aforementioned obligations of the state, i.e. competent authorities, it is of utmost importance strengthening the system of support and assistance to families who are in crisis. Timely recognition of risks, appropriate action and active work with families, especially parents, is necessary as a form of prevention of endangerment and violation of children's rights as well as prevention of

<sup>57</sup> Art. 7. FA "Measures that encroach on family life are acceptable if they are necessary and their purpose cannot be successfully achieved by taking milder measures, including preventive assistance, i.e. family support."

<sup>58</sup> U-III-34/2020 of 15. July 2020., para. 11. See Preložnjak, B. *op. cit.* note 44, pp. 133-148.; When assessing the well-being of children, public authorities also take into account the age of the children, the likely effect of changes in the children's life circumstances, the damage that the children have suffered so far or may suffer in the future. See Radina, A., *op. cit.* note 51, p. 105.; *Y. C. v. United Kingdom*, Application No. 4547/10, §§ 103, 135, Judgment of 13 March 2012.

separation of children from families, and facilitation of family reunification. This would also contribute to fulfilling the positive obligations of the state that derive primarily from the ECHR, which consist precisely in ensuring support for the exercise of the right to family life, i.e. effective respect for family life.<sup>59</sup>

Having in mind the unique role of parents as the primary and most important persons in the upbringing and development of the child and their responsibilities concerning caring and protecting of the child according to the domestic and international legal norms, we believe that setting requirements for their additional proactive involvement, depending on the parent's problems that affect their parenting abilities (knowledge and skills), would be worth to consider. That could be obliging (not just instructing) parents by the court decision on repressive measure to undergo adequate medical treatment or psychosocial treatment or other appropriate programs in order to remove inappropriate behaviour so that they can independently (over)take care of the child.<sup>60</sup> Namely, welfare of the child should be parent's basic concern and the state and society have a subsidiary role by render appropriate assistance to parents in the performance of their demanding and unique child-rearing responsibilities.<sup>61</sup>

Therefore, strengthening and investment in more effective functioning of the social welfare system, which is the first line of support for families, is undoubtedly a key prerequisite for fulfilling the aforementioned Convention obligation, but no less important, the constitutional obligation of family protection.

If we start from the family as the fundamental value of the vast majority of the citizens of the Republic of Croatia as well as citizens of the European Union, as confirmed by the research we referred to in the paper, then undoubtedly the family deserves greater respect, support and empowerment, which can only be achieved, *inter alia* with appropriate investments in a system that should be available to family members who are facing difficulties, especially parents and children.

However, if the preventive measures are not adequate or there is no progress on the part of the parent and according to the expert assessment, the life and health of the child in the family are threatened, prompt intervention is necessary. In accordance with the principle of timeliness<sup>62</sup>, relevant decision on repressive measure of

<sup>59</sup> See *Kutzner v. Germany*, Application no. 46544/99, Judgment of 26 February 2002.

<sup>60</sup> In practice this would inevitably represent a great challenge for intersectoral cooperation.

<sup>61</sup> Art. 18 para 1 and 2 CRC; See: Hrabar, D., *Uvod u prava djece*, in: Hrabar, D. (ed.), *Prava djece multidisciplinarni pristup*, Biblioteka Udžbenici, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016., p. 32.

<sup>62</sup> *Amplius see*: Šimović, I.; Majstorović, I., *Povreda prava na obiteljski život u postupcima međunarodne otmice djece: o značenju načela žurnog postupanja*, Hrvatska pravna revija, 17, 2017 (11), pp. 1-9.

competent authority should be made and in deciding competent authority must respect accepted international and national legal framework as well as to follow the guidelines deriving from the practice of the CCRC and the ECtRH in order to protect the rights and welfare of the child in a timely and appropriate manner, to respect the rights of the parents, i.e. to consistently and effectively ensure the exercise of the right to respect for the family life of parents and children.

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