

**THE PARENTING RESPONSIBILITY IN THE CONTEXT OF THE
CONVENTION ON THE RIGHTS OF THE CHILD AND
PROTECTION BEFORE THE EUROPEAN COURT OF HUMAN
RIGHTS**

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Abstract

The aim of this paper is to emphasize the importance of the UN Convention on the Rights of the Child (UNCRC) as a fundamental international document and an important framework for family law in the context of the parent-child relation. In order to achieve the highest standards of protection of individual rights and freedoms, modern legislations invest special attention to the principle of protection of the rights and the interests of the child. However, from the legal viewpoint, this principle has been affirmed with the adoption of the above mentioned UN Convention as a codifying document for the rights of the child. In this regard, there is a need to reform family law legislation of Macedonia in order to provide better protection of the child's interests through a complete implementation of the UNCRC and other important international documents in this field.

The provisions of the UNCRC as the most important international instrument for the protection of the rights of the child are usually cited as the main source for the work of the European Court of Human Rights (ECtHR) and the UN Human Rights Committee (UNHRC).

In order to tackle all the important dimensions of the problem, this article will include comparative theoretical references and legal provisions such as the European documents in the field of parenting responsibility (Council of Europe standards and documents adopted in The Hague conference).

Keywords: *parenting responsibility, respecting the interest of the child, European Convention on the rights of the child, European Court of Human Rights*

Introduction

The Geneva Convention was the first international document to proclaim special protection for children and responsibility of adults towards children. In 1924, after World War I it promoted the following slogan: “Humanity owes to the child the best that it has to give.“ The fundamental needs of children were summarized in five points. The document discussed the well-being of children and recognized their right to development, assistance, relief and protection (The 1924 Geneva Declaration). After World War II and the creation of the United Nations, the Universal Declaration of Human Rights was adopted in 1948 and proclaimed that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art. 2, par.1). This provision implies the need for special protection of the more unprotected creature of the human kind, that is the child. Therefore, on 20th of November 1959 the Declaration of the Rights of the Child was adopted, which states that “The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth” (Declaration of the Rights of the Child, 1959).

In order to provide a complete presentation of the rights and obligations of parents towards their children as well as a legal perspective of the protection of the rights of the child, it is of crucial importance to differentiate between the general and fundamental rights of the child provided in the national legislations and international documents and the rights of the child in the family law framework, including here the parenting responsibility towards the child. The focus of this research is to explain the protection of the rights of the child by having their best interests protected by their parents and by the state institutions through the implementation of the national laws and international documents.

1. The United Nations Convention of the Rights of the Child (UNCRC)

The United Nations Convention on the Rights of the Child of 1989 (Adopted by the UN General Assembly with the Resolution 44/25, on the 20th of November 1989, entered into force on the 2nd of September 1990) ratified in Republic of Macedonia in 1993 (Official Gazette no. 12/02) is of great importance in recognizing the child's status as a subject – holder of rights. This international legal instrument provides the child with certain rights as an independent individual including the freedom of expression and freedom of thought, the right to participate in decision making, the right to development, the right to know their origin, the right to birth registration, the right to a name, nationality and family relations, the rights of parents, the right to life, the right for the best interest, the right not be separated from his or her parents against the child's will, the rights to maintain contact with both parents if they separate, the right to privacy, the right to social security insurance and benefits. This convention identifies the rights of the child as fundamental human rights that deserve a special importance in the system of legal values in the legal order of a country. The rights of the child mentioned in this "catalogue" are globally accepted in almost every country which by the ratification of this document becomes responsible to respect these rights.

The fundamental demand of the UNCRC is the protection of the child's best interest, which is observed first of all as the responsibility of the parents. According to Article 3 of UNCRC, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Moreover, the second paragraph of this article provides an obligation for the parents to guard the child's best interest by stating that states parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. The best interest of the child should also be respected and protected by the institutions and services responsible for caring and protecting the child (art. 3, par. 3 of the UNCRC).

1.2. The parenting responsibility in the UNCRC

This Convention introduces, at an international level, new family law principles and standards such as respect for the child's best interest, priority of family modes of child care, joined responsibility of parents towards their children and respect for the child's views.

In regard to the rights of the child, the Convention promotes the fundamental and primary role of the family and parents in the child's life. The Preamble of UNCRC promotes the family as a fundamental entity of society and a natural environment for the development of the child's wellbeing. Therefore, the family needs to be protected and assisted in order to take full responsibility for its role in the community (Mickovic and Ristov, 2015, p.212). In this regard, it is not only the child who is protected, but also the family, the parents and the caregivers with whom the child lives. In support of this position the Convention introduces numerous responsibilities for the state parties that must respect the responsibilities, the rights and obligations of the parents while caring for the development of their children (Ibid, p.213).

The UNCRC includes provisions directly related to parenting. Parenting responsibilities are enumerated in articles 5, 18 and 27. The Convention implies that the fundamental and primary responsibility for educating and developing a child belongs to the parents. The parents should care about the interests of their children (art. 18 par. 1). On the other hand, the Convention implies that state institutions are obliged to assist the parents or legal guardians by offering effective assistance to help them implement their obligation to bring up the children as well as ensure the development of institutions, facilities and services for the care of children. (art. 18 par. 2).

In articles 5 and 27 the Convention articulates the obligations that parents need to undertake for the interest of their children. The parents are obliged to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention (art. 5).

The Convention obliges the parents to ensure appropriate living conditions for the development of their children. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. (art. 27).

Another very important right provided in UNCRC, relevant to parenting, is the right of the child to express their views. The child who is capable of forming his or her own views can express those views. UNCRC provides for the child to participate in all matters affecting the child and freely express their views in relation to these matters (art. 12). If the child is capable of forming his or her own views, the adults are obliged to take those views into consideration. Article 12 provides that States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child, without

forcing them to declare themselves if they do not want to or are not interested to do so. Ensuring this right is not limited with a certain age of the child, it rather depends on the ability of the child to form their views.

This provision has a double meaning in reference to the right of the child to express their own views. Firstly, in relation to the European Convention on the Exercise of the Children's Rights (1996), the child has the right to express his or her views and these views need to be taken into consideration while deciding the matter of which parent will have custody over him or her after a divorce. Secondly, this provision emphasizes the obligation of parents to seriously hear and considerate the views of the child and to encourage the child to participate in decision making processes in the family. Expectations that parents will ensure guidance for their children and assist them in their continuous development, ensuring the right for their views to be heard and taken into serious consideration indicates that a positive, open and responsible dialogue is evident between the parents and their child (Daly, 2008, p.23).

From the above mentioned, it can be concluded that the child has the right to protection in a way that will provide respect for their personality and individuality. On the other hand, the parents have the right to assistance from the state institutions in implementing their parenting responsibilities. The aim of parenting needs to include the guarantee of the promotion of the rights of the child in accordance with UNCRC (Doek, 2004, cited by Daly, 2008, p. 24).

It is important to emphasize that in parallel with the expectations that parents need to fulfill their parental obligations, there are also expectations that the state must ensure the needed measures of assistance. In this regard, UNCRC recognizes the "parenting ecology", namely, with regard to the variations within which parents fulfill their duties, the available resources and support also play an important role (Quinton, 2004 cited by Daly, 2008, p. 24).

Another very important right for the stable psychological development of children is the right of the child to know his or her origin and identity. This right is fundamental right guaranteed in numerous international documents. This right is thought to be crucial for this research because of the indirect relation with the parental right and because of the obligations that derive from the parental right.

This right is proclaimed in the UNCRC. According to article 7 of this Convention: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents." Article 8 correlates with the previous article stating that, "States Parties undertake to respect the right of the child to preserve his or her identity,

including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

The Convention emphasizes that the right of the child to know his or her parents does not have the character of an imperative norm, since in certain circumstances, this right can be limited or suspended altogether. The implementation of this right is provided under the “as far as possible” standard (Andrzejczak-Świątek, 2009, p.400), thus, the parents that decide to remain anonymous (by giving their approval for adoption of their child or by donating genetic material in cases of artificial insemination), will not be considered to be depriving the child of his or her rights.

1.3. Implementation of the UNCRC in the Family Law of Republic of Macedonia

Republic of Macedonia ratified UNCRC in 2002, however, a simple analyzes of how the Convention is implemented and how many of its provisions are part of the legislation of this country raises many questions. It should be emphasized that this convention is not fully implemented in the Law on Family in regard to parental rights and obligations. This law provides that the child’s right to express their own views relates only to certain issues (compliance to adoption, acceptance of fatherhood). However, the obligation to consider and respect the view of the child does not apply to the parental rights and obligations such as the maintenance of direct contacts with the nonresident-divorced parent. This right is entirely transferred to the Centre for Social Work. However, the scientific community of Macedonia severely criticizes the work of this state institution.

Another problem related to the implementation of UNCRC is the principle of the best interest of the child. According to professors Mickovic and Ristov in Family law of Macedonia, “the principle of the child’s best interest is not a basic principle of the Law on Family. On the other hand, the child’s best interest should be the primary and the most important concern of the state institutions in every case while deciding on the rights and interests of the child. This important principle is directly mentioned only in the provisions that regulate adoption! Differently from the Law on Family, this principle is included in the Law on Justice for children as well as in the Law on protection of children” (Mickovic and Ristov, 2014, p.6). The authors of this this paper consider that the principle of “child’s best interest” must be included in the fundamental principles of the Law on Family. Since this important principle is enumerated among the fundamental principles of the Law on family, it

should be implemented in all the provisions of this law, which would help to harmonize this law with the UNCRC. The above mentioned professors propose that the principle of the child's best interest be introduced in the fundamental principles of the Law on Family. "The best interest of the child is of crucial importance for the implementation of all the activities of the relevant state institutions when they decide on the rights and interests of the child in the family relations" (Ibid.).

A special critique in this direction is also related to the implementation of articles 7 and 8 of the UNCRC regarding the right of the child to know their origin and identity in cases of adoption and artificial insemination. According to the Family Law of Macedonia, the fatherhood of the child created by artificial insemination cannot legally be established (art. 62 of the Law on Family). Moreover, the Law on Family does not allow the initiation of a procedure to contest the fatherhood when the mother, with written consent of her spouse, is fertilized through artificial insemination (art. 71 of the Law on Family). Furthermore, the Law does not allow establishing or contesting motherhood or fatherhood in cases where the parenting relation is established via adoption (art. 75). These provisions are contradictory to the UNCRC that guarantees the right of the child to know their parents (art. 7) and the right of the child to preserve their identity and family relations with their parents (art. 8). In order to establish the best interest for the child and a stable physical and mental development after the divorce of their parents, many international documents, in addition to the UNCRC, have been adopted in the European region that explicitly regulate the parenting responsibility, the rights of children in the family law framework as well as the right of the child to maintain direct contact with the non-residing parent. The most important conventions include the following: The European Convention on Human Rights (1950); The European Convention on the adoption of children (1967); European Convention on the Legal Status of Children Born out of Wedlock (1975); European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1980); European Convention on the Exercise of the Children's Rights (1996); The Charter of Fundamental Rights of the EU (2000); The Convention on Contact concerning Children (2003); Brussels II-a Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (2003); The Hague Convention on the Civil Aspects of International Child Abduction (1980); The Hague Convention on protection of children and co-operation in respect of inter-country adoption (1993); The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996).

1.4. The European Court of Human Rights and the protection of the parenting relation

The UNCRC differs from other international documents because it contains a specific system of protection of the rights of the child. However, taking into consideration that the state that violates the rights of the child cannot be sued in an international level, the Convention does not provide for an effective mechanism of judicial protection (Mickovic and Ristov, 2015, p. 212).

Apart from the UNCRC, the rights of the child are also regulated in the Convention on the exercising of the rights of the child, the Convention on contacts in regard to children as well as in many other international documents related to human rights, since their provisions can also be implemented on behalf of children. The European Convention on Human Rights is the most important international document in this field because its implementation is protected by the mechanism of the European Court of Human Rights (ECtHR). ECtHR in its practice has developed a standard of protecting the rights of the child not only by implementing the ECHR but also indirectly implementing the provisions of the UNCRC (Ibid.).

1.4.1. The European Court of Human Rights and the protection of article 8 of the ECHR

The ECtHR is a judicial institution of the Council of Europe (CoE) for the protection of the rights and liberties guaranteed by the ECHR. Its mission consists of measures to ensure that the state parties respect the provisions of ECHR. In this regard, the Court analyzes the appeals given in the form of an application before the Court by natural persons, states and NGOs. By analyzing the specific cases, the Court decides whether any of the state-parties have violated any provisions of the ECHR, upon which the Court reaches a Decision which obliges the state-parties to undertake certain actions. The ECtHR decides on a just satisfaction for the applicant as well as assigning individual and general measures for the sued country.

It should be emphasized that the applicants before the ECtHR on the issue of protection of the rights of the child and of the protection of parental rights and responsibilities, refer to the article 8 of ECHR, namely, violation of the family life.

Article 8 of ECHR guarantees that: “Everyone has the right to respect for his private and family life, his home and his correspondence” (paragraph. 1). This paragraph refers to four rights: the right to respect of private life, the

right to respect for family life, the right to respect for the privacy of home as well as the right to respect for privacy of correspondence.

“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 wellbeing 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” (paragraph 2).

Any interference in the realization of the above mentioned rights is interpreted as a violation said rights.

“The concept of family life has undergone an important evolution since the adoption of the ECHR. This concept continues to evolve because of great changes in many aspects of the family life that impact the legal regulation of the family in all European countries. This relates to the quick changes that reflect from the dramatic increase of divorced marriages, extramarital partnerships and extramarital children as well as the increase of recombined families. The changes in the concept of family, are also a result of the quick development of the assisted reproduction medicine that brought up many legal and ethical dilemmas related to the concept of fatherhood, motherhood and parenthood (Mickovic and Ristov, 2015, p.309). As a result of this, in all contemporary European societies, the nature of the family concept has changed, including its structure and function, the family relations and the social environment as well as the relations between the members of the family. Because of these transformations of the marital and family relations, the ECtHR has accepted a flexible approach towards the issue of the interpretation of the concept and the essence of the family life (Ibid.).

In regard to the right to respect for family life, it is important to emphasize that many cases are brought before the ECtHR precisely because of the violation of article 8 of ECHR. According to the official statistical data of the ECtHR, there are **3924 cases** of this kind among which (June 17, 2016):

807 cases refer to the violation of respect for the family life

521 cases refer to the violation of the right to private life

180 cases refer to the violation of the privacy of the home (Statistics from official web page of European Court for Human Rights) (June 17, 2016).

A large number of cases refer to proving the family relationship between extramarital partners and their children, establishing/contesting parenthood, such as *Kruzovic v. Croatia*, *Mikulic v. Croatia*, similar cases include *Mizzi v. Malta*, *Shofman v. Russia* (the last two cases refer to the violation of the right to contest the fatherhood because deadlines were passed, according to national law).

A large number of decisions brought by the ECtHR refer to the parenting right, maintaining direct contacts and custody over children such as cases *Zaunegger v. Germany*, *Kuppinger v. Germany*, *Hoffmann v. Austria*, *Palau-Martinez v. France*.

The case *Sagueiro da Silva Mouta v. Portugal* is a typical example of the violation of the right to maintain direct contact with the child because of the sexual orientation of the parent. João Manuel Salgueiro da Silva Mouta, as a homosexual man who lives with his male partner, was impeded by his former wife to keep direct contact with their daughter after their divorce. ECtHR reached a decision according to which in this case there is a violation of article 14 (prohibition of discrimination) and article 8 of the ECHR.

Similar cases related to maintenance of direct contacts with children include *Lyubenova v. Bulgaria*, *Bajrami v. Albania*, *Nazareko v. Russia* (the applicant Anatoliy Nazarenko, was impeded to maintain personal contacts with his daughter after it was proven that he was not the biological father of the girl, and as a result his parenting rights were terminated. The ECtHR decided that there is a violation of article 8 of ECHR in this case and ruled that there was a violation of the right to maintain contact between the applicant and his daughter. Although they are not biologically related, the Court held that during their joined family life, they have developed emotional bounds characteristic for a father-daughter relation).

There is a large number of cases before the ECtHR which prove that national courts often violate the provisions that ensure the respect of family life and the parenting relationship guaranteed in international documents.

“The ECtHR established whether there is a case of “family life” according to the circumstances of every case, upon which the most important principle of deciding refers to the close personal relations between two or more persons. Taking into consideration that the Court investigates the circumstances separately in every case, it is impossible to enumerate all the situations where the Court holds that there exists a “family life” circumstance. However, taking into consideration the transformations in families in the last decades, which influenced the evolution of the judicial practice of ECtHR, it can be assessed that a large number of relations are protected as family relations today according to article 8 paragraph 1 of the ECHR” (Mickovic and Ristov, 2015, p.310).

Conclusion

It is evident that the EU institutions are active in their attempts of unification and harmonization of family law. However, it is an ambitious and difficult process demanding much efforts. The difficulties are evident, especially when they refer to family relations that are usually very personal and delicate, including the parent-child relation. On the other hand, the legal regulation of the family relations is deeply impacted by tradition, culture, religion, customs, history and other impediments that make the entire process of unification of the law across national lines very difficult. However, there is an evident effort in the realization of this plan on a European-wide level, especially in the field of the harmonization of international private law, material family law and family procedure law. Taking into consideration the complex process of harmonization, there is an evident number of international documents adopted to regulate this vital part of family law, many of them explained in this paper.

The family law of the European Union is slowly becoming a part of the legal provisions of all European countries, where the national courts are obliged to implement the European mechanisms related to the right of joined custody as well as the right of the child to express their views in relation to the joined parenting. The ECtHR plays a very important role in the protection of family rights of the child through the direct implementation of the provisions of the ECHR and the indirect implementation of the UNCRC.

In regard to the perspective of our country a very important process remains the harmonization of the family law legislation with the European and international regulations with the aim of enabling the parenting right to be executed in the best interest of the child. There is a need to introduce an explicit provision which would enable a supervision of the execution of the principle of the best interest of the child as a fundamental care of their parents, and as a secondary obligation for the state institutions.

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