HEARING A MINOR AS AN INSTRUMENT OF PROTECTING THE CHILD'S BEST INTERESTS IN POLISH AND MACEDONIAN PROCEDURAL LAW

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Abstract

The child's welfare has contemporarily become one of the fundamental, universal, and systemic values chiefly addressing authorities charged with applying the law, courts included.
While of supreme importance and not subject to valuation, the child's welfare concept remains vague and escapes definition, encouraging its perception as a preventive mechanism for child objectification. Acts of international law present standards exercising fundamental human rights while constituting an obligation to introduce appropriate national-level guarantees. The paper attempts to compare solutions applied in Polish and North Macedonian procedural law. A confrontation of the experience of countries drawing on dissimilar traditions and models ought to encourage continuous improvement of procedural solutions, and their proper application in view of the special status of minors.

Keywords: *civil proceedings; children's rights; the child's best interests; child protection in civil law proceedings; child hearing; hearing standards; comparative law research.*

I. Introduction

Every year, thousands of children across Europe take part in varied forms of judicial proceedings – in civil and criminal cases alike. Judicial procedures permit minors to take part therein in assorted processual roles, as parties, participants, or witnesses. Regardless of the role assigned, because the cases themselves usually involve considerable emotional gravity, children deserve special attention and protection, in legal and psychological terms alike. Justices

are expected to display specific personality traits that encourage positive relationships with minors, such as increased cognitive and emotional empathy. Justices are also expected to take the child's best interests into consideration when making decisions. The aforesaid is all the more important given that for centuries (until the 1920s), civilisation, culture and laws demoted children to a world of so-called societal silence, rendering them invisible, disempowering them, and depriving them of any right to their own voice (Gardziel, 2022, p.100).

Interpreted – legal tradition pending – as a general clause or a principle combined with relevant instruments of protecting the interests of a minor, the child's welfare has contemporarily become one of the fundamental, universal and systemic values chiefly addressing authorities charged with applying the law, courts included. Pursuant to Convention of the Rights of the Child provisions, the child has dignity and is entitled to all human rights; furthermore, under Article 3 of the Convention, in all actions concerning children undertaken by courts of law, the best interests of the child shall be a primary consideration[1] – the court shall be obliged to account for the child's welfare as the frequently recognised equivalent of the best interests of the child[2]. Article 3 of the European Convention on the Exercise of Children's Rights, in turn (Article 3, Convention on the Rights of the Child), provides that *"a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights: a) to receive all relevant information; b) to be consulted and express his or her views; c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision."* In addition, the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice point to the need for justice that is speedy, age-appropriate, focused on the needs and rights of the child, and respectful of the child's privacy.

Acts of international law present standards exercising fundamental human rights while constituting an obligation to introduce appropriate national-level guarantees (Słyk, 2015/4, p.17). These norms give rise to the duty of assigning priority treatment to the best interests of the minor in any case involving a child[3]. They determine the direction of legislative action while impacting the way of interpreting domestic substantive and procedural law provisions (Jędrejek, 2017, p.225). They induce the introduction and improvement of successive legal instruments designed to provide genuine protection to minors appearing before judicial authorities. Albeit varying in intensity, such solutions

[1] Just like public and/or private social welfare institutions, administrative authorities and legislative bodies.

[2] Supreme Court decision of January 16th 1998, Ref. No. II CKN 866/97, *LEX* No. 32579 (PL).

[3] Supreme Court resolution of June 12th 1992, Ref. No. III CZP 48/92, OSNC 1992/10, item 10 (PL).

are present across all European legal systems, irrespective of tradition or political, social and historical circumstances (Justyński, 2011, p.206).

Legislative actions and the judicial practice of individual countries may yield similar results and convergent conclusions, occasionally pointing to far-reaching differences. This justifies this publication, comparative legal research focused on solutions applied in Polish and North Macedonian procedural law. A confrontation of the experience of countries drawing on dissimilar traditions and models ought to encourage continuous improvement of procedural solutions, their proper application in view of the special status of minors and raising awareness in the legal community that the justice system cannot operate independently of modern legislative trends – or, importantly, psychological knowledge (Skubisz-Ślusarczyk, 2018/3897, p.134). The belief that *"the justice system ought to be child-friendly"* seems nothing but a truism, an adage replicated in one publication and analysis after the other. As it is, the experience of individual states shows that children taking part in judicial proceedings are still ignored, neglected and underinformed, their uncomfortable circumstances causing an increased sense of threat, anxiety and uncertainty[4].

II. Protecting the Child's Welfare in Polish Civil Proceedings

Pursuant to the first sentence of Article 72 clause 1 of the Constitution of the Republic of Poland,[5] *"The Republic of Poland shall secure children's rights protection"*. No broader meaning of the notion of a child's welfare (or the need to protect it) has been explicitly expressed in Polish legislation, urging representatives of the legal profession to reference so-called systemic interpretation when seeking the meaning of the same in conformity to principles of the legal system (Bodio, 2017, p.68). While of supreme importance (Stojanowska, 2000/1, p.55) and not subject to valuation, the child's welfare concept remains vague and escapes definition (Sokołowski, Stojanowska, 2014, p.638), encouraging its perception as a preventive mechanism for child objectification.

Albeit neither of the paramount acts of law – the Family and Guardianship Code (FGC) or Code of Civil Procedure – fundamentally allude to the notion of the child's welfare as a premise for judicial resolution (Article 56, para 2 of FGC), one might extract the value from applicable legal provisions, recognising it as one of overriding importance (Maroń, 2011, p. 73). While Polish courts do

[4] For more information, see *Child-friendly justice. Perspectives and experiences of children involved in judicial proceedings as victims, witnesses, or parties in nine EU Member States*, Luxembourg 2017, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-child-friendly-justice-children-s-perspective_en.pdf

[5] Constitution of the Republic of Poland of April 2nd 1997 (*Journal of Laws* 1997, No. 78, item 483).

occasionally restrict the principle of the child's welfare as applying to matters concerning the child only, pursuant to the *lege non distinguente* rule it should also pertain to property cases the resolution of which might affect the child's personal circumstances (Strzebińczyk, 2016, p.43).

Literature points to the fact that not only does the principle of the child's welfare *"permeate the entirety of family law" (*Smyczyński, 2014, p.19), but that it carries particular importance to interpreting procedural provisions (Jędrejek, p.230). As a result of the rank of acts of international law[6] and close associations of family and procedural law, most children's rights protection-related regulations have been incorporated into the Code of Civil Procedure. It would be worthwhile to precede a detailed commentary regarding judicial child hearings with a succinct presentation of the most essential processual solutions designed to protect the rights and interests of minors in Poland.

The majority of child-related cases is tried in non-litigious proceedings systemically based on a more paternalistic course of seeking and granting legal protection, and a more protective and active judiciary (Walasik, 2022/5, p.77). Furthermore, custody courts (as operating on non-litigious proceeding grounds) have been authorised to alter a valid judicial judgement should *"that be required in the best interests of the person affected by the proceedings in question"* (Article 577 of the Code of Civil Procedure). The provision restricts the ruling stability principle. The ruling stability principle is the authority of the judiciary obligatorily yielding to the overriding value of the child's welfare (Malczyk, 2018, p.289).

Minors' best interests can be protected through a mechanism described under Article 569 § 2 of the Code of Civil Procedure, its nature similar to the safeguard procedure (Jakubecki, 2014, p.199). In non-litigious proceedings, the custody court may in urgent cases proceed *ex officio* as required, by issuing any temporary rulings concerning minors (Zawiślak, 2002/7-8, p.42). The instrument affords flexibility in dispute resolution whenever the court is required to act speedily to protect the physical and/or spiritual development of a minor (Zembrzuski, 2009/4, p.58).

The most powerful processual position can be secured for a child in non-litigious proceedings by conferring upon him or her participant status coupled with *locus standi*[7]. Under such circumstances, the child's status is comparable with that of adult participants of judicial proceedings (Bodio, 2019, p.462).

[6] Supreme Court ruling of December 12th 2000, Ref. No. V CKN 1805/00, *LEX* No. 52400 (PL) provides that *"identical principles of protecting the child's welfare (best interests) can be found in the Hague Convention of October 25th 1980 on the civil aspects of international child abduction (the Hague Convention) (Journal of Laws 1995 No. 108, item 528), the Convention of the Rights of the Child of November 20th 1989 (...), and in other normative acts of the domestic legal order, the Family Code and Code of Civil Procedure".*

[7] In adoption cases, for example.

That said, the above is accompanied by the rule of the court's right to restrict or exclude a minor's personal appearance at judicial proceedings in view of ethical considerations (Cieśliński, Machała, 2021/1, p.45). In multiple cases, the Polish legislator has regulated the procedural circumstances of minors by applying special solutions (Kallaus, 2015, p.103). As a result, a statutory representative, guardian or custodian will usually stand in for a child before a court of law (Kotas-Turoboyska, 2022, p.49).

The majority of family cases involving minors is tried in the first instance by district courts – courts of the lowest level (Markiewicz, 2009, p.223). Because the court is a shorter distance to the place of residence for the person involved, these courts grant easier access to justice. In litigious cases, on the other hand, alternate jurisdiction of the court in child support/alimony cases and/or cases to ascertain paternity and related claims is an additional amenity (Article 32 of the Code of Civil Procedure). Action may be brought either before a court of general jurisdiction (pursuant to the *actor sequitur forum rei* principle), or on the basis of the authorised person's place of residence.

An unconditional evidentiary ban regarding marriage-related proceedings has been linked to the protection of children's rights. Pursuant to Article 430 of the Code of Civil Procedure, minors under the age of thirteen and parties' descendants under the age of seventeen shall not be heard as witnesses. This solution serves to protect children from the consequences of hearings frequently involving the disclosure of drastic and stress-generating facts (Flaga-Gieruszyńska, 2016, p.109).

Not only can the principle of the child's welfare become the *ratio legis* for procedural provisions – it may also justify the use of exceptions to rules contained in specific regulations, the derogation from the adversarial principle expressed in Articles 3 and 232 of the Code of Civil Procedure a case in point. In cases involving a minor, it shall be considered justified to resort to a special provision, such as judicial capacity for admitting evidence *ex officio* (second sentence of Article 232 of the Code of Civil Procedure) (Rylski, 2009, p.304).

III. Judicial Child Hearings in Polish Procedural Law

The child's right to express his or her own opinion is essential to developing self-confidence, and capacity and competence building (Brzozowska, 2017/2, p.55). This right can be exercised in varying settings: exchanges with family and friends as well as attending legal proceedings (Borkowska,2014, p.3). The principle of protecting the child's welfare in Polish civil proceedings has been expressed in a particular way in Article 216^1 of the Code of Civil Procedure, which specifies the form and manner of hearing a child before a court of law with regard to all and any matters concerning his or her person or property,

including parental custody cases.[8] While the child's capacity to be heard does not necessarily entail becoming a participant to proceedings (Bodio, p.321), it does from the civil law perspective offer empowerment albeit no *locus standi*.

A mechanism designed to gather fundamental facts of civil law cases incorporated into procedural law in 2009[9] has been expanded considerably in 2023[10] to include auxiliary regulations, the legal evolution ample proof of the will to develop the procedural instrument in the spirit of the Convention of the Rights of the Child and other standards of international law (Gardziel, M.K, p.106). The evolvement followed a discussion concerning the responsibility, form, and conditions of hearing minors (Cieśliński, Machała, p.45). As emphasised on multiple occasions, the primary purpose of the exercise was to establish – through a conversation with a child – his or her position in regards to a case pertaining to him or her, rather than secure a procedural evidence-gathering measure. Formalised evidence taking-related regulations – procedural sanctions in the form of a fine or criminal liability for giving false testimony – do not apply in this case. The child may refuse to take position on individual matters or with regard to the case as a whole.

Based on Article 12 of the Convention of the Rights of the Child (Article 12, part 1 of the CRC), the claim that a child should be heard in each civil case is imprecise. The application of the measure in question is relatively obligatory and depends on the subjective qualities of the child (Eysymontt, 2023, p.123). The capacity to hear a minor is determined by his or her mental development, health condition, and maturity. While the confluence of all three conditions is required, the admissibility of the child's hearing is assessed *ex ante*, without his or her participation. An assessment of the overall circumstances of the case, including its nature, may allow the court to conclude that the child's physical appearance at judicial proceedings may be inappropriate and/or harmful, interfering with the principle of protecting the child's best interests as a result. Conversely, while any deficits in a minor's intellectual development shall not be considered a disqualifying factor *a priori*, they may justify the course of the interview to be adjusted to reflect said minor's needs and/or capacities. The decision to take or omit a procedural step shall be made in the form of a non-actionable judicial decree.

While the overall catalogue of statutory premises arising from Article 216^1 of the Code of Civil Procedure has given rise to no objections, justices encounter the occasional obstacle in practice – in view of their professional and life

[8] A similar solution in cases examined in non-litigious proceedings has been provided for under Article 576 of the Code of Civil Procedure.

[9] By virtue of a Law of November 11th 2008 amending the Family and Guardianship Code and selected other Laws (*Journal of Laws* No. 220, item 1431), which came into force as of June 13th 2009.

[10] By virtue of a Law of July 28th 2023 amending the Family and Guardianship Code and selected other Laws (*Journal of Laws* 2023, item 1606), which came into force as of February 15th 2024.

experience – already at the stage of assessing *ex ante* whether the conditions for a hearing have been met. A positive decision with regard to the matter necessarily involves an expansion of the assessment. When hearing a minor, the court of law – in view of the child's circumstances,[11] mental development, health condition and maturity – shall take account of his or her opinion and/or reasonable wishes[12] (Article 216^1 § 2 of the Code of Civil Procedure).

Any procedural measure involving minors in civil proceedings shall be carried out in protective mode. This is why children shall be heard in closed sessions, held in rooms duly adapted on judicial premises, or – if justified by the child's best interests – off these premises (Article 216^2 § 1 of the Code of Civil Procedure). The purpose herein is to use so-called friendly hearing rooms resembling home rather than official surroundings (Gardziel, p.108). The conversation ought to be informal in nature.[13] The court is obliged to provide the child with conditions warranting privacy and discretion, conducive to free and undisturbed expression. The solution helps secure optimum conditions, improve concentration, and focus the child's attention on key circumstances of the case (Czeredecka, 2010/14-15, p.27).

The child's openness and willingness to talk to a judge depends on multiple conditions, personal circumstances included (Budzyńska, 2015/4, p.42). In each and every case, the justice shall describe the structure of a hearing to the child and explain the child's role and importance to the case, thus minimising any factors of anxiety caused by the unknown.

Importantly, such conversations cannot be attended by anyone else apart from the judge, the minor's parents or their representatives in particular. Such persons' presence could make the child feel awkward or give rise to conflicted loyalties. The hearing may, however, be joined by an expert child psychologist as the only other participant, should the minor require psychological assistance due to his or her health condition, mental development or age – or should the judge require support in identifying the child's needs during the hearing. The solution is facultative and is *de facto* considered an exception (Flaga-Gieruszyńska, 2024).

Official notes shall be the only form of documenting the hearing, otherwise not recorded with the use of any audio or audio-video recording device. Official notes shall be considered sufficient (Cieśliński, 2012/6, p.67), since any other solution could give rise to a risk of participants to proceedings gaining access to the case file, and getting the child involved in the conflict at hand as a result, or otherwise behaving in ways interfering with the child's welfare (Zajączkowska 2013/8-8 p.64).

[11] E.g. the impact of the child's family situation or other factors on his or her statement.
[12] Regarding hearing-related measures rather than the course or outcome of proceedings.
[13] The judge shall not be dressed in official attire (robe and chain).

The time and place of the child's hearing should be chosen carefully (Cieśliński, 2024/3, p.417). Pursuant to Article 216^1 § 3 of the Code of Civil Procedure, the measure can only be used once during judicial proceedings, unless the best interests of the child require the activity to be repeated, or the child expresses a need for another hearing. The solution is designed to restrict cases of the child being repeatedly summoned to court, questioning reprisal, or re-enactment of facts potentially resulting in secondary traumatisation. (Cieśliński, p.63) Should repetitive measures be required, they ought to be handled by the same court of law.

Polish procedural law provides for the child's direct contact with the judge (Muszczyńska, 2018/1, p.14) despite the many voices advocating for indirect judicial examination of the views and wishes of the child, i.e. through expert child psychologists (Słyk, 2015/4, p.20). On the one hand, it has been pointed out that the legislator was driven by the growing independence of minors in terms of making decisions or statements of will, while seeking to involve justices without automatically tying their decisions to expert witnesses' opinions. It has, however, been also emphasised that the relationship between two individuals has been mechanically reduced to a formal procedural measure construct (Skubisz-Ślusarczyk, p.140). Identifying a child's qualities and interpreting and assessing his or her statements correctly to accomplish an accurate and effective hearing has proven remarkably difficult in practice. Hearings can be a very demanding exercise for judges (Cieśliński, 2015/4, p.221) who are frequently struggling with psychological and/or pedagogical knowledge deficiencies, not to mention experience scarcity, in terms of assessing mental health, interpreting emotions or identifying potential disorders in particular. Such obstacles have an impact on judicial propensity for reaching for hearings as an instrument in civil proceedings (Bąk, 2015/4, p.82).

While over a dozen years of applying a statutory regulation is conducive to improving judicial practice (Cieśliński, 2017/29, p.142), doubts are still abundant whether Polish courts have been equipped with sufficient tools to carry out hearings in civil proceedings (Skubisz-Ślusarczyk, p.144). Despite the formal option for an expert child psychologist joining the procedure pursuant to Article 216 of the Code of Civil Procedure, postulates for the involvement of court-appointed psychologists, educators or physicians specialising in children and adolescents, i.e. persons with specialist knowledge and appropriate experience, are incessant. While the solution does increase the costs and length of proceedings, it allows for a reduction in the number of instances of procedural measures taken in contrary to the welfare and best interests of minors (Stojanowska, 1997/5, p.50).

Sporadic criticism of the institution notwithstanding, the measure of hearing minors is viewed well in Polish civil proceedings reality (Kuna, p.83). It goes without saying that it has contributed to child empowerment in Polish procedural law (Zajączkowska, p.59). It allows judges to secure information essential to the given case while allowing children to express themselves freely

regarding matters affecting them directly, in recognition of their age, stage of development and maturity, and type and nature of the case at hand, as well as the source and level of conflicts and/or antagonisms among the persons involved. In order for the instrument to become truly useful and effective, not only will procedural law have to be well-regulated – good practices have to be consolidated and training courses in basic child psychology also regularly organised for judges trying family and custody law cases.

IV. Protecting the Child's Welfare in North Macedonian Civil Proceedings

Pursuant to the Constitution of the Republic of North Macedonia (art.40), the Republic shall extend special care and protection to all families (Official Gazette no. 52/91, 1991).

The child's right to an opinion is the first and fundamental step within the concept of the child's participation in judicial proceedings, duly followed by the child's participatory rights. His or her legal position is preceded by two key factors constituting a source of legal regulation for children: the principle of the child's best interests, and his or her right to participation (Vlašković, 2014, p. 243).

When it comes to children's participatory rights, the basic general rule involves the child's right to an opinion, regulated by the Convention on the Rights of the Child,[14] on two levels, the general and the specific – or the procedural level. For the first time in history, fundamental rights of children have been regulated in the form of a Convention (art. 12 par.1 of the UNCRC). The right of the child is specified in the procedural sense: it has been emphasised that the child shall be allowed to be heard in all judicial and administrative proceedings referring to his interests, either directly or through a representative or an appropriate authority, in a manner prescribed by procedural rules of national legislation (art. 12 par. 2).

Assessing the child's best interests in proceedings is far from simple when the child's rights and interests are necessarily tied to the rights and interests of other participants to said proceedings. The child's welfare in civil proceedings shall be considered in combination with other rights of the child, such as the right to be heard, the right to protection from violence, the right not to be separated from parents, etc.

In consideration of litigation proceedings wherein family legal relations are to be decided, it should be primarily taken into account that general rules of

[14] European Convention on the Exercise of Childrens' Rights, Council of Europe, ETS No. 160, was opened for signing on January 25, 1996, and entered into force on January 7, 2000. (The Republic of Macedonia deposited the instrument of ratification with the EC on January 15, 2003, and the Convention entered into force on May 1, 2003).

litigation – such as standard rules of conduct designed to resolve classic property law disputes – do not reflect the specific nature of family law relations (Stanković, 2013, p. 582).

In other words, the procedure for exercising parental rights differs from general litigation proceedings in certain ways, such as the limited application of the principle of disposition, dominance of the investigative principle, exclusion of the public, and urgency of the procedure. (Stanković, p. 593). In such proceedings, the principle of fairness is applied in a particular way: the court is obliged to follow the child's welfare rule. In civil court proceedings, the child can appear in assorted procedural roles (as a party, participant, or witness), but it should be taken into account that the child does not have a legal capacity.

The Convention on the Rights of the Child has had an impact in advancing the child's procedural position in judicial and administrative proceedings pertinent to his or her interests. The child's right essentially means the recognition and preservation of his or her legal subjectivity allowing him or her to actively participate in social interactions as a subject rather than a passive object (Hrabar, Nova procesna prava djeteta-europski pogled [New procedural rights of the child- a European perspective], 2013, p. 105). The act of expressing an opinion is a consequence of personal views. The Convention on the Rights of the Child relativises the right, perceiving it through the prism of the child's circumstances (age and degree of maturity); it goes without saying that in such cases, individualisation is the only correct approach.[15]

Once judicial proceedings wherein the child has directly expressed his or her opinion have been closed, the court shall follow the principle of the child's best interests, providing him or her with feedback regarding the final decision, including information concerning the significance of his or her opinion thereto (It. 45 of General Comment No. 12, 2009). The feedback provided by the court is a guarantee that the views of the child are taken seriously rather than presented as a procedural formality.[16] Notably, the Committee on the Rights of the Child does not specify how decision-makers should communicate information to the child. Since it is unrealistic to expect the judge to do this in person due to the nature of the domestic judicial procedure, the condition can be met indirectly through the child's procedural representative; should the judge hear the minor directly, he or she may instruct the guardianship authority representative or another third party to convey the relevant information to the child. Macedonian Family Law does not define constituents of the child's welfare, nor are standards for its evaluation provided; the judiciary is expected to define this legal standard independently. The complexity of this principle requires the power of selective reasoning, as well as the logical abilities of those

[15] While the Convention provides individual states with an option to determine the age of the child from which his or her opinion will be taken into account, this gives rise to dilemmas regarding the development and maturity of the child.

[16] The UN Committee on the Rights of the Child states that information can be the basis for the child to submit legal remedies against the decision.

who determine the child's best interests in a particular case. This legal standard is most closely related to the right to a fair trial. The provision of Article 12 itself is divided into two paragraphs: the first paragraph specifies the child's right to *"freely express his or her views"* regarding all and any issues concerning him or her; the second paragraph includes procedural terminology referencing *"the child's right to be heard."* 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) (SeImani-Bakiu, 2016, p. 70). The application of Article 12 itself is quite broad, extending beyond children's procedural rights to the fact that the same are included in provisions of paragraph 2 (Hrabar D. , 2012, p. 119). Unlike the principle of the child's best interests, the *"child's right to an opinion"* is associated with certain limitations that expressed according to legal facts and standards. In this sense, the UN Convention on the Rights of the Child stipulates that the holder of the child's rights is capable of forming his or her own opinion – consequently, the child's opinion shall be given due attention in consideration of maturity and age. It is extremely important to emphasise that the child's right to express his or her opinion or to be heard during proceedings, while a right, is not mandatory. Competent authorities shall determine whether the child is capable of giving his or her opinion. According to the theory of procedural law, "the child will not have the business capacity, but the right to make a statement, i.e. the right to consultation, potentially after having been duly advised (Dika, 2008, p. 51).

In the context of the above assessment and the child's best interests, the following shall be considered:

- The right is based on the assumption that the child is capable of forming his or her own opinion. The burden of proof regarding the child's capacity for expressing an opinion does not lie with the child, but rather with the individual certain that the child is incapable of the same;
- All assessments shall be carried out on a case-by-case basis, in recognition of the child, facts at hand, and circumstances;
- The child's contribution shall be valued, regardless of the form of expression (play, body language, facial expressions, drawing, painting) – admission thereof offers very young children an opportunity to show understanding, choice and affection;
- The child's opinion in court proceedings shall be valued regardless of the form of expression. (Sutova, 2019, p. 305).

The child should be treated as a full-fledged human being: he or she shall be trusted, his or her needs, feelings, beliefs, and general individuality accepted. States who have ratified the Convention shall ensure that the child receives all information and advice required to determine his or her welfare. Any child deciding to express his or her opinion shall be notified of the right to refuse further participation at any time. With regard to the child's age or maturity, it

shall be taken into account that both factors can be evaluated separately in view of the information received, and the child's experience, environment, and social and cultural conditioning. That said, maturity ties in with the child's ability to comprehend and accept the consequences of any opinion. The ability to reason and ponder consequences is present mostly in studies and national norms; effective developmental psychology is a process, mostly linear, individual, and not particularly predictable. The importance of the child's opinion is a derivative of maturity, as age is not the ultimate independent or decisive factor. It is, however, noteworthy that the Committee on the Rights of the Child is against determining an age limit for children exercising their right of opinion in cases wherein their rights and interests are decided. The age limit does not indicate a child's level of understanding – very few children show a high level of maturity.

On the other hand, the environment wherein a minor is heard shall not be unpleasant, hostile, insensitive, or age-inappropriate. All procedures must be accessible and adapted to the child's needs. Consequently, it is necessary to involve properly trained staff, and arrange for adequate courtroom appearance and attire of people participating in the procedure, separate waiting rooms for children, etc. Once a competent authority decides that the child should be heard, it is necessary to decide how he or she will be heard: directly or indirectly, through a representative or an appropriate body. The UN Committee recommends, whenever possible, that the child be given the opportunity to be heard directly in any procedure. The child may be represented by a parent, lawyer, or another person (a Social Care Centre staff member, for example). That said, it is notable that many cases (civil, criminal, or administrative) give rise to a risk of conflict of interest between the child and his or her representative (usually the parent(s)). If the child's hearing is conducted through a representative, the child's views must be properly conveyed by the representative to the decision-making authority. Representatives must be aware that they are representing the interests of the child and not of other individuals, and thus conduct themselves as such. Capacity for representation shall conform to procedural rules of national law.

With regard to this particular matter, legal solutions are insufficient: the Family Law does not provide for the child's right to be heard, or for his or her wishes and/or views to be considered according to age or level of maturity. The above is particularly pronounced under circumstances of a decision of parental custody in divorce cases. To be specific: pursuant to Article 80 of the Family Law, the legislator did not provide for an obligation of the minor to be heard, or his or her opinion to be considered in divorce cases with regard to the choice of the parent entrusted with custody and education. This is one of the most serious shortcomings of Macedonian family legislation, not fully compliant with Article 12 of the UN Convention on the Rights of the Child.

V. Judicial Child Hearings in Macedonian Procedural Law

The Convention on the Rights of the Child is a global international agreement; in force for over two decades, it has been paving the way for a comprehension of the need to recognise and protect children's rights. Given the prerequisite of exercising children's rights, the Committee for the Rights of the Child issued General Comment No. 12 (The right of the child to be heard) in 2009. On the European level, the rights of the child are elaborated in detail in the European Convention on the Exercise of Children's Rights; they have also been specified in other international documents and the Charter of Fundamental Rights of the European Union.

Effective application of the child's right to be heard requires – pursuant to the recommendation of the Committee on the Rights of the Child – that five steps be followed, regardless of whether through formal or another procedure. These are: preparation, hearing, assessment of the child's abilities, feedback regarding the significance of the child's views/opinions, and enabling the procedure of applying legal means to protect his or her rights (see more: The child in the judicial process, the application of the European Convention on the Exercise of Children's Rights, Proceedings of the Ombudsperson for Children sessions, Zagreb 2012).

Courts decide on the rights of the child in civil and non-litigious proceedings, in recognition of the fact that occasionally, a specific right – such as visitation rights extended to non-cohabitating parents – or the question of which parent the child will live with, shall be determined depending on the legal workings of litigious or non-litigious proceedings, as the case may be. The procedural position of the child in civil and non-litigious proceedings to determine the child's status and/or custody rights should be resolved pursuant to a single law, a section of Family Law, or a section of the Law of Civil Procedure, duly tied to unified applicable legal regulations. The provisions of the international conventions should be supplemented with legal solutions that enhance the protection of children's rights, more specifically by defining the procedural role of the child as an independent party in legal proceedings. Having a representative appointed for the child according to the provisions of the Convention secures a better procedural position for the minor, since his or her rights are safeguarded regardless of the wishes, interests or capacity of either parent, or of restrictions applied by the Centre for Social Affairs. The Social Care Centre is frequently the initiator of such procedures, providing the court with relevant information regarding the child, and the parents perform processing and provide expert opinions and suggestions. Pursuant to Macedonian Family Law, the Social Care Centre, albeit an administrative body, has more powers than the court. Although Macedonia ratified the Convention in 2003, children still do not have the opportunity to exercise all rights extended to them by that document; the courts do not apply all measures specified in Article 6 of the Convention; and no action is taken on their initiative as prescribed with the Article 8 of the Convention. In ongoing proceedings, there

are no requests from children, either personally or through other persons and bodies, as provided for in Article 4 of the Convention, for the installation of a special representative. Also, there is no action according to Article 9 paragraph 1 of the Convention, authorising the judicial authority to appoint a special representative for the child. While the number of cases tried before Macedonian courts wherein children would benefit from such representation is significant (and, the number of cases is increasing), this gives rise to an entire array of issues that must be resolved beforehand, specifically through provisions of national law. Regulations will never predict all life situations – yet laws can and must prescribe the format of judicial proceedings and list all individual persons and authorities participating in the same.

While it is common knowledge that the Convention shall take precedence before domestic regulations, courts, judges, representatives of children, lawyers, and/or organizations such as the Social Care Centres must not be allowed to act arbitrarily when seeking specific ways of conforming to the Convention's provisions. If things were to go that way, different solutions would be reached depending on the opinions and will of the individuals, and in the end, the rights of both children and parents would be violated with far-reaching consequences. The question of applying provisions of the Convention efficiently arises as well. It once again brings to the fore the responsibility of the society – and anyone participating in court proceedings – to safeguard children's rights as effectively as possible, with possibly little pressure, stress, and discomfort for the child, and without undue delay – while protecting the procedural rights of all parties to and participants of the proceedings in question. Under the current practice, courts often have to co-operate with Social Care Centres to ensure respect for aforementioned rights of the child. They ought to collaborate with Social Care Centres' professionals, and experts trained in child interaction and children's opinion evaluation. Such professionals are authorised to enter the child's home for purposes of holding conversations in a space the child is familiar with, a sense of safety and comfort properly secured. Minors can express their opinions as part of an expert witness examination procedure provided that specific rules are followed – it can be organised for the child to express his or her opinion before a forensic psychologist or psychiatrist, who will then evaluate him and bring him before the court. Judges have the opportunity to invite children into the courtroom to express their opinions. This is an option not taken advantage of in the judicial practice of the Republic of North Macedonia. Judges would usually reach out for the option in cases involving older children,[17] interviews conducted in the

[17] Practice shows that children 10 years of age and older are heard most frequently. Macedonian legislation does not provide for a respective age limit. An analysis of the countries of former Yugoslavia yields a conclusion that solutions vary. Pursuant to Serbian and Croatian family law, for example, the age limit for children eligible for expressing their opinion is 10 and 14, respectively. These provisions are in breach of the comment of the Committee on the Rights of the Child, pursuant to which the right

presence of a psychologist and a guardian if appointed for purposes of the procedure, parents and their lawyers not present. While the Polish Code of Civil Procedure regulates child hearings, the practice is far from perfect. Despite the formal option of including an expert or child psychologist in proceedings pursuant to Article 216 of the Code of Civil Procedure, postulates for the inclusion of psychologists, educators, or court-appointed physicians specialising in children and adolescents (i.e. persons with specialist knowledge and appropriate experience) are abundant. Pursuant to Macedonian legislation, the Law of Civil Procedure does not attribute any provision that refers to this issue. While Macedonia has a series of regulations stipulating the right of the child to express his or her opinion, we still do not have adequate substantive conditions allowing the child to do so without exposure to additional stress or inconvenience. Space chosen for interviewing children is a fundamental issue. The child should feel safe and relaxed. Premises should be pleasant, warm, and informal. Courts or Social Care Centres do not have such facilities at the moment. People tend to wait for their hearings in court hallways and courtrooms are not in any way prepared to make children feel comfortable. Parents attend hearings accompanied by lawyers. Instead, including psychologists and/or social workers in judicial staff would be a welcome option as well. This would allow more efficient and swifter proceedings.

Spaces accommodating professional and social meetings for children and their parents – with professional supervision – ought to be secured. Well-equipped premises with proper staff would help resolve more issues than proceedings themselves. Appropriate technological solutions of recording child interviews should be chosen in order to avoid repetitive child hearings before a succession of experts. The right of the child to express his or her opinion should never turn into a procedure wherein the child is exposed to inconvenience, stress and repetition. In future amendments to the law, parental obligations should be clearly defined in the procedure by which the child expresses his opinion. The child should be prepared for being heard by a psychologist, Social Care Centre staff member, legal representative or justice. It would be advisable for parents to be instructed in preparing the child for an interview, and specifically warned not to question the child about the content of his or her conversation with the judge, psychologist, or representative, especially not about any opinions expressed. Should the child inadvertently reveal any of the above, parent must refrain from commenting thereon. Having expressed his or her opinion in judicial proceedings, the child must not be exposed to any inappropriate behaviour of his or her parents. Judges involved in such disputes must undergo additional training in child psychology law. While such training ought to be recognised as judicial right and obligation, educational options must be made available to the judicial community. Questions asked of the child should be formulated carefully in recognition of his or her age and maturity, with no direct

shall be tied to maturity rather than age, the former different for each child. Under certain circumstances, a six-year-old may be more mature than a twelve-year-old.

reference to the child's preferences in terms of parental custody. It is necessary to assess whether the child is expressing his or her genuine opinion or being manipulated; whether he or she is protecting the parent he or she considers weaker; whether he or she wants to please one of the parents, etc. In view of the above, the judge responsible for interviewing the child must be well educated, well prepared, open to co-operation with other experts, and (above all) sensitised to such procedures. Judicial specialisation in status and family cases should be pursued to a greater extent. When justifying any ruling, the court is obliged to clarify its findings and the manner of and reason for establishing them, along with a statement whether said findings had been based on evidence, the evidence presented, and how it has been evaluated. In order to ensure the right to exercise and protect the rights of children prescribed in the Convention and other regulations, it will be necessary – apart from amending and supplementing the law, and passing by-laws, acts and executive regulations – to secure proper material conditions, encourage judicial specialisation, offer education to all experts participating in court proceedings, and foster mutual co-operation and trust.

Notably, Macedonian legislation has been neglecting the child's right to opinion, stipulated in the Convention on the Rights of the Child, in procedural and substantive law alike. Related decisions have been left to judicial and administrative authorities taking part in respective proceedings. Noted legal shortcomings have been taken into account when drafting the Civil Code in its family law section; we believe that better legal solutions will be adopted, hopefully eliminating current shortcomings and preventing their consequences in judicial practice.

VI. Conclusions

The Convention on the Rights of the Child has made an impact in improving the procedural position of the child in judicial and administrative procedures referring to his or her interests. Fundamental children's rights have been regulated for the first time in the said Convention, Article 12 is one of its pillars. It confers upon the child the status of an actual subject of law rather than a passive object of protection that should be provided by parents or competent state authorities. The Committee on the Rights of the Child has made considerable efforts to demystify the best interests of the child. In this regard, it is of particular importance to determine the content of the said concept through an approach based on children's rights. The importance of the child's right to opinion has been emphasised as a form of the child's fundamental right to participation, of key significance in establishing the child's legal position. Article 12 of the Convention is not consistently implemented in the Family Law of the Republic of Macedonia – one of the basic weaknesses of Macedonian family legislation. The Law on Civil Procedure contains no provision stipulating the issue. Only selected Family Law articles mention the obligation

of hearing a minor once he or she reaches a certain age, and if competent authorities are to pass a decision concerning his or her rights and interests. Considering that North Macedonia has ratified the Convention, competent authorities are obliged to apply it.

Once judicial proceedings wherein the child has directly expressed his or her opinion have been closed, the court shall follow the principle of the child's best interests, providing him or her with feedback regarding the final decision, including information concerning the significance of his or her opinion thereto. It can thus be concluded that pursuant to current legal solutions, the legislator paid no attention to these issues, whether in substantive or procedural law. Legal reforms are needed as soon as possible, to resolve aforesaid matters focused on children's best interests.

Procedural solutions adopted in Poland may serve as a point of reference. Initiated in 2009, regulatory evolution has been a testimony to the will to develop that particular procedural instrument, in recognition of the Convention of the Rights of the Child provisions and other international law standards. In Poland, that regulatory evolution coincided with the progress of a debate regarding the responsibilities, forms and conditions associated with hearing minors, and extended protection of their rights in substantive and procedural law alike. Yet there is no shortage of doubt whether courts have optimum implements at their disposal, suited to deliver values prescribed in the Convention of the Rights of the Child. Improving statutory regulations in individual states ought to proceed harmoniously while improving related legal practice.

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