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Miona Rajić[1]
Filip Mirić[2]

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CHILD REMOVAL AND CHILD SURRENDER IN SERBIAN AND AUSTRIAN LEGISLATION

Abstract: This paper explores the concept of the removal and surrender of children. It describes the execution procedure of child removal in accordance with the Austrian comparative law and examines the court's role in decision-making within this legislative framework. It elaborates on the tasks and responsibilities of the custodial authority. An issue in the Law on Enforcement and Security Interest of the Republic of Serbia, which favors the custodial authority over individual judges, is also examined. Additionally, relevant legal norms pertaining to constitutional, family, and criminal law in the Republic of Serbia are discussed. The paper concludes by suggesting potential remedies to address the identified issue.

Keywords: *child rights, child removal, child's best interests, guardianship, child protection.*

1. Introduction

The right to family life stands as one of the most fundamental human rights, albeit constrained by certain demands. When parents bring a child into the world, it becomes imperative to ensure the provision of basic necessities for the child for it to lead a dignified and decent life.

[1] Miona Rajić, MA in Law, PhD student, Union University School of Law, miona_rajic@yahoo.com.

[2] Filip Mirić, PhD, Research associate and independent expert technical associate for PhD studies and student affairs, Faculty of Law, University of Niš, filip@prafak.ni.ac.rs.

This right extends beyond the individual's power of decision-making or individual freedom; it encompasses the creation of another life. Is it morally acceptable, even just, for adults to exercise their rights while the newborn cannot? Does the child possess the opportunity to fulfill only select personal rights? Are the interests of those who bring the child into existence deemed more important than the child itself, whose fundamental interests could not be met without suitable conditions? The satisfaction of one person's rights cannot come at the expense of another. A child is entitled to basic necessities such as food, water, shelter, education in moral principles, but it should also face certain disciplinary measures. Certain punishments are deemed to be solely in the child's best interest (Archard, 2014, pp. 140–141). According to Jean-Jacques Rousseau's thesis on priority, parents, as the primary caregivers, bear the responsibility to fulfill their duties towards the child. If they are unable or lack the means to do so, they are not obliged to fulfill that duty. However, in such cases arrangements must be made for another individual who can adequately care for the child (Archard, 2014, p. 149). The right to have a child, as well as the child's right to a dignified life, entails care and nurture that is in the best interest of the child (Convention on the Rights of the Child, 1989, 1997). The right to a child, along with the child's entitlement to a dignified life, implies care and nurture that aligns with its best interests (Convention on the Rights of the Child, 1989, 1997). Therefore, the process of removal and surrender of a child under the care of another individual, in cases where the child faces harm, does not compromise familial or parental rights; instead, it prioritizes the child's right to live and grow. This institute entails protecting the child's essential needs and ensuring the conditions necessary for its well-being. This not only impacts the child's development (or education) but also that of its caregiver. The objective of this procedure is not to merely remove the child from the family environment but to support the family in overcoming life's challenges and then reintegrate the child into the family. Given the sensitivity of this matter, court intervention is necessary, as the most qualified and capable authority to make final decisions in this domain is the court. This does not exclude other relevant institutions or individuals involved in child protection (such as the Center for Social Work, custodial authority, school, psychologist, pedi-

atrician, psychiatrist, etc.), who can all contribute to the quality of this process. However, the existing deficiencies in Serbian legislation hinder the optimal resolution of the issue of separating the child from its family, particularly in terms of ensuring the child is provided with a safe and secure living environment. According to the Law on Enforcement and Security Interest of the Republic of Serbia, the jurisdiction of the court has been transferred to the custodial authority. However, this is not the most effective means to ensure the child's well-being and proper development of its abilities. Furthermore, this provision is also not in line with the Constitution, which serves as the highest legal document in the country, with which all other legal acts must comply. Through a comparative analysis of Austrian comparative law, we aim to present the role of the court and the specific scenarios necessitating judicial decisions. Additionally, we will illustrate the circumstances wherein the custodial authority must inevitably provide assistance and support to the child. By doing so, we aim to provide clarity regarding who should actually be entrusted with decision-making in such a delicate issue concerning the child.

2. Historical development of the institute of child removal and surrender

The evolution of family dynamics, particularly regarding child rights, has paralleled the advancement of human rights. Child rights gained full recognition and significance within the general legal frameworks of most nations during the latter half of the twentieth century when numerous international agreements affirming these rights were adopted. Prior to this, legal regulations primarily centered on the rights and duties of parents towards children until the correlative connection of these rights with the rights of the child became recognized and articulated. From a historical-legal perspective, parent-child relations have undergone a profound transformation. In traditional patriarchal societies, paternal authority was predominant. However, the development of human rights brought about a "democratization" of relationships within the family and substantial protection of children's rights and interests (Vavan, 2019, p. 10). In Roman law, the patriarch of the family, known as the *pater familias*, held extensive authority over both the property and

family members, a concept termed *patria potestas*. With nearly boundless private legal power within the household, the father lived by his own law and was the only family member with legal and business capacity. All other family members, including children, were subject to his authority throughout their lives. A male child could only assume the role of *pater familias* if all his male ancestors had died. The father's authority extended over to the child's person and possessions. In terms of the child's person, the father had the right to make life-or-death decisions, sell the child, impose any punishment, arrange marriages, accept or disown the child from the family, all without the child's explicit consent. Children, on the other hand, lacked property rights, as the father was the title holder of all current and inherited assets (Vavan, 2019, p. 11). From the fall of the Byzantine Empire until the 20th century, numerous countries adopted important acts proclaiming human and civil rights, such as the Declaration of the Rights of Man and of the Citizen, the U.S. Constitution, the Napoleonic Code (French Civil Code), the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch), and others. Despite these developments, the traditional view of family and its dynamics largely persisted unchanged. The patriarchal system, characterized by the dominant role of the father, remained prevalent within family communities. Nevertheless, paternal authority acquired a broader context, with the increased acknowledgment of the mother's role and the establishment of parental obligations. For instance, in the Austrian Civil Code, parents are obligated to rear their children, care for their lives and health, provide for them, facilitate the development of their physical and mental abilities, as well as lay the foundation for "future child welfare" through religious education and passing of useful knowledge. While property acquired by the child could become their own, during paternal authority, the management of such property remained under the father's control (Vavan, 2019, p. 13).

In central and southern Serbia, the Serbian Civil Code of 1844 and the Guardianship Act of 1872 were in effect. The Serbian Civil Code, within its third chapter, regulated the relationships between parents and children. The father held significant authority as well as obligations. Parents were mandated, among other responsibilities, to ensure the provision of food and clothing, care for the lives and health of their children,

facilitate their physical and mental development, and provide religious instruction. Importantly, these duties were primarily attributed to the father, as specified in the Code. Children, on the other hand, were expected to respect and obey their parents and refrain from actions contrary to their parents' will. In addition to the aforementioned acts, family relations were also governed by religious marriage ceremonies, and all marital disputes were subject to ecclesiastical law. The Serbian Orthodox Church's Marriage Regulation of 1933 marked the codification of ecclesiastical law concerning marital relations. At that time in the Bačka and Banat regions of Vojvodina, Hungarian law was applied, some examples include the Marriage Act of 1894, the Guardianship Act of 1877, the State Registry Act of 1894, and the *Tripartitum* – Verbecius's Collection of Hungarian written and custom law were among the laws enforced in this region. In the region of Srem, family law matters were regulated by the Austrian Civil Code of 1811 (Vavan, 2019, p. 19). Throughout the 20th century, Serbia implemented a series of laws, these included the Basic Marriage Law of 1946 and the Marriage Law of 1974, the Basic Parent-Child Relationship Law of 1947 and the Parent-Child Relationship Law of 1974, the Adoption Law of 1947 and 1976, the Basic Guardianship Law of 1947 and the Guardianship Law of 1975, as well as the Family Law of 2005 (Vavan, 2019, p. 20).

Throughout the 20th century, several significant documents were created, such as the Geneva Declaration on the Rights of the Child in 1924, the Declaration on the Rights of the Child in 1959, and the United Nations Convention on the Rights of the Child in 1989. These instruments bind UN member states to provide protection and necessary care for the well-being of children. Consequently, legal frameworks increasingly define the institute of parent-child relations instead of emphasizing parental rights. During the twentieth century, legal systems in many countries began to recognize the enforcement procedure as a distinct and independent process regulated by the General Act. The power to enforce judgments was given to either courts or specially authorized individuals, known as extrajudicial (public or private) enforcers. Family laws often supplemented enforcement laws, particularly regarding the execution of court decisions concerning family dynamics and parent-child relations (Vavan, 2019, p. 13). In 2000, a new law on the en-

forcement procedure was introduced with the intention of expediting judicial processes. However, some of the decisions were heavily criticized by legal scholars and professionals.

In the context of parent-child relations, a significant milestone was reached with the initial introduction of child surrender, a novel form of enforcement of award. The law stipulated that the court must prioritize the protection of the child's interests to the greatest extent possible. Furthermore, a three-day deadline from the date of the decision's delivery was set for surrendering the child to the parent or another designated individual or organization, with the possibility of facing monetary penalties for non-compliance. If the enforcement could not have been achieved through monetary penalties, the court would proceed with child removal with the assistance of custodial authority. The enforcement procedures regarding other aspects of family relationships were not specifically regulated by law. Serbia's Enforcement Procedure Act of 2004 marked the first general act governing the enforcement procedure at the country level. This law broadened the range of enforcement measures and regulated the execution process for child surrender and removal in more detail; nonetheless, akin to previous regulations in the domain of enforcement procedures, the law does not specifically anticipate or regulate certain potential types of enforcement within family relations (Vavan, 2019, p. 17). The Law on Enforcement and Security Interest was enacted in 2011. When it comes to enforcement procedures related to family relations, this legislation regulates the process of child removal and surrender in detail. Article 226 specifically stated that enforcement for the surrender of the child could be determined and executed based on a court decision regarding parental rights, regardless of whether the decision explicitly ordered the surrender or not. If the court decision had not explicitly ordered the surrender of the child, the court would have issued an enforcement order and set a deadline for the surrender. Pursuant to Article 228, the court had the power to enforce the surrender by imposing fines or imprisonment on individuals who refused to comply or who took actions to obstruct the enforcement process. According to Article 230, the court would have delivered the enforcement order for the removal and surrender of the child to the custodial authority at least 10 days before the enforcement took place.

A psychologist would have been responsible for planning the activities and collecting relevant data for the enforcement, after which they would have informed the court and provided an opinion on the most appropriate means of enforcement. Additionally, the psychologist had the responsibility to consistently prioritize the best interests of the child throughout the entire process and offer timely support to both the child and the parent or the individual to whom the child was surrendered. Article 231 stipulated that the actual execution of the child removal and surrender process was to be conducted by a judge in collaboration with a psychologist affiliated with the custodial authority, school, family counseling center, or another specialized institution dealing with family relationship mediation, and if necessary, with the assistance of the police. Out of all the execution procedures related to family relations, the Law offers a rather modest regulation regarding the enforcement process for maintaining personal relationships with the child, as well as procedures addressing protection from domestic violence, child protection, and other decisions concerning family relations (Vavan, 2019, p. 18).

3. Legislation of the Republic of Austria

According to paragraph 138 of the Austrian Civil Code (ABGB), the paramount consideration in all judicial decisions and actions involving a child is the child's well-being or its *best interest*. The legal concept of the best interest of the child lacks a singular definition. Nonetheless, several parameters contribute to assessing the well-being of the child, such as providing appropriate care, respecting the child's rights and interests, ensuring the child's safety from harm etc. (Grabner et al., 2018, p. 7). The best interest of the child primarily entails its care and upbringing. Care involves safeguarding the child's physical well-being and health. The duty of supervision and rearing includes fostering the child's development, education, abilities and inclinations, as well as nurturing their physical, spiritual, and moral strengths. Furthermore, it includes managing the child's property, preserving it in its entirety, and, potentially, increasing it (such as in cases involving substantial assets like significant sums of money or inheritance of real estate, but not everyday legitimate earnings or a student's income). **In terms of caring for the**

child, it is essential to ensure its right to financial support. Legal representation of the child should also be provided within the scope of caring for the child. It is necessary for a parent or other legal guardian to be able to make legally significant decisions on behalf of the child with third parties (e.g., consenting, approving, or demanding...). The actions of the legal representative on behalf of the minor also involve approving certain actions, especially those initiated by the minor itself. The validity of legal transactions initiated by the child is contingent upon the consent of its legal representative (Grabner et al., 2018, p. 8). Legal representation, in addition to these domains, also extends, according to paragraph 169 of the Austrian Civil Code, to changing the child's name, its affiliation with a specific religion, representation in civil proceedings, as well as the right to asylum. Parents are required to ensure certain financial means during the period of child care to enable the child to enjoy its fundamental rights. According to paragraph 1 of the Company Law (*Unternehemsgesetzebuch*), if the guardian is unable to provide a specific amount of money for raising the child, certain benefits can be sought from the state (Grabner et al., 2018, p. 9). As per paragraph 177 ff, guardianship can be assigned to various parties including parents (unmarried mothers), grandparents, foster families, suitable individuals appointed by the court (in the absence of first-line relatives), and ultimately, the court may grant guardianship to the Agency for Child and Youth Welfare (*Kinder-und Jugendhilfeträger*). This arrangement is frequently approved, particularly for unaccompanied minor migrants. In such cases, the Child and Youth Protection Agency (CYPA) must submit a request to the court which then approves guardianship for unaccompanied migrant children (Grabner et al., 2018, p. 11).

If parents are unable to fulfill their guardianship responsibilities, which results in the infringement of the child's rights, the Guardianship Court decides whether guardianship rights should be granted to the grandparents (either one or both) or to the foster family (or a single foster parent) (paragraph 178 of the Austrian Civil Code). In cases where the designated individuals are unavailable or unable to assume guardianship rights, the CYPA is contacted. The court's decision-making process primarily adheres to the specified scale (corresponding to the legal order of priority) to ensure the preservation and protection of the family

unit. However, the Guardianship Court also adjudicates in many other important situations. In cases of parental divorce, the issue of visitation rights can be resolved either through unanimous agreement between the parents or through court mediation. If parents cannot reach an agreement, then, according to § 180 of the Austrian Civil Code, the court is the one to decide. If initially only the mother holds guardianship and later both parents agree to share it, they must present this decision to the Guardianship Court, as per paragraph 177(2) of the Austrian Civil Code. Third parties can also bear obligations towards the child. Any individual residing in the same household as one of the parents and the child is essentially obligated to participate in the guardianship process (Grabner et al., 2018, p. 12). In addition to parents, step-parents, (unmarried) partners of one parent, or adult relatives are also obligated to safeguard the child's interests. They are required to assist with parental duties in everyday life rather than just cohabiting with the child. Additionally, paragraph 90 of the Austrian Civil Code stipulates the obligation of assistance by an individual residing with one of the parents. This entails the duty of the spouse to provide optimal support and aid to the child's parent in fulfilling his or her guardianship duties, including helping the parent in the daily care of the child if necessary. In cases where the parents are unable to act as the child's guardians and no suitable person is available to assume this role, custody is entrusted to the CYPA in accordance with paragraph 209 of the Austrian Civil Code. The CYPA effectively fulfills its custodial duties by regularly involving suitable independent entities (such as private institutions for child and youth protection) or individual assistants; this approach ensures that guardianship responsibilities are executed optimally. This is what fulfilling the obligation of guardianship de facto entails (Grabner et al., 2018, p. 13). However, there are numerous other situations where only the court can make decisions that serve the child's best interests. In this regard, the court oversees specific domains: 1) instances where a change of the child's residence is necessary and the new location exceeds a distance of 600 km within the country, which may prompt a request for a new court decision regarding guardianship (as per the Supreme Court ruling, OGH 60b19/17p); 2) in cases of parental conflict or communication breakdown, the court has the authority to deny support to an un-

married father, if such circumstances pose a threat to the well-being and safety of the child (based on the decision text AUSL EGMR 03.12.2009. Bsw 22028/04); 3) if a twelve-year-old child firmly rejects contact with its father, and their relationship has long been broken, with visits from the father not improving the bond and not being in the child's best interest, then, for example, fourteen-day visits can be terminated by court order despite the father's desire to maintain contact (based on the decision of the Supreme Court, OGH 25.08.2016, 5 Ob 129/16f); 4) in cases where parental conduct is harmful to the child and not in its best interest, yet the guardianship remains with the parents, the court may impose specific obligations on the parents, such as counseling, therapy sessions, or regular engagement with the CYPA (according to the decision of the Supreme Court, OGH 5Ob17/17m) (Grabner et al., 2018, p. 14).

Under Austrian law, unaccompanied minor migrants arriving in the country and seeking asylum are afforded protection for their basic rights, needs, and interests. They are entitled to legal representation during the asylum approval process and thus need appropriate guardianship. Their rights are regulated by legal ordinances concerning guardianship rights and duties tailored for foreigners and non-Austrian nationals (as determined by decisions of the Supreme Court, OGH 7 Ob 209/05v, 4Ob7/06t). In such instances, the court again holds the ultimate authority to make decisions. It is crucial to ensure that the safeguarding of these individuals' rights is entrusted to a suitable individual or institution (typically the AZDM/KJHT). Despite the absence of their parents in these proceedings, these minors retain the right to be heard (Article 6 of the European Convention on Human Rights). In cases where parents cannot be located (referred to as qualified absence), a *curator in absentia* is appointed (as determined by the Supreme Court's decision, OGH 4Ob150/16m) (Grabner et al., 2018, p. 15). Unaccompanied minor refugees who are 14 years old or older have the autonomy to apply for asylum independently; however, during all other proceedings related to asylum-seeking or immigration, they must have a legal representative (Grabner et al., 2018, p. 34). In the event that the parents of unaccompanied minor migrants/refugees arrive in the country, the court has the authority to formally transfer guardianship back to the parents (Grabner et al., 2018, p. 20).

In Austria, the Guardianship Court is responsible for verifying the legality of interventions or terminating the guardianship. Whenever concerns arise regarding the child's safety, well-being, and best interests, the Guardianship Court has the authority to terminate guardianship or limit it to a single individual or approve, through a judicial decree, a unanimous agreement reached by the parents. In situations where there is a delay or the child is at risk and waiting for a court decision is impractical, the CYPA can take immediate action to address the danger; this implies that a court order can be requested within eight days. The guardianship court may transfer guardianship to the CYPA in the following circumstances: when the child's well-being is at risk, when it is necessary to remove the minor from his or her current environment, when the guardian fails to implement appropriate actions, when there are no close relatives or other close/suitable individuals available to assume guardianship. The CYPA is mandated to develop a plan of assistance to the child and implement the necessary measures, irrespective of the child's origin or residential status (Grabner et al., 2018, str. 17). In situations where a child's safety is at risk or there are concerns about its well-being, everyone (professionals will act in accordance with their fields) is obliged to contact the CYPA (Article 37 of the Federal Law on Assistance to Children and Youth /B-KJHG). Limiting guardianship should only occur as a last resort in ensuring the child's welfare, which is the ultimate goal. When deliberating the termination or limitation of guardianship, the child's wants should be considered and weighed against its age and capacity for decision-making (more information can be found in the Adult Protection Act under the concept of "decision-making capacity" – Erwachsenenschutzgesetz, Concept: "Entscheidungsfähigkeit"!). The level of maturity exhibited by a minor directly influences the weight his or her decisions carry. Minors aged 14 and older have the right to actively participate in legal proceedings concerning care, rearing, and visitation rights. They can act as parties in legal proceedings and independently submit requests or pursue certain legal remedies against court decisions. From the age of 10, children can express their views before the court, while younger children can do so in specific institutions or child protection centers (Article 104 ff of the Law on Non-Contentious Proceedings /AussStrG) (Grabner et al., 2018,

p. 18). The measures aimed at assisting in the upbringing of the child can be applied either with or without the consent of the legal guardian. If parents must meet specific obligations (such as attending counseling sessions or undergoing therapy) or if family assistance is necessary, the responsibility for the child's care and rearing remains with the parents. However, if the child faces unfamiliar situations (such as a crisis or prolonged periods of absence), all responsibilities including the child's care and rearing are transferred to the CYPA (Grabner et al., 2018).

There are two primary methods of child removal and surrender – voluntary and involuntary. The term child removal is typically used in relation to court-ordered decisions, while surrender pertains to agreements made between the parents and a third party. Voluntary caregiving assistance is regulated by § 27 of the Federal Child and Youth Support Act/B-KJHG. Parents can mutually agree with the Agency on the surrender of the child and in such cases the agency assumes responsibility for the care and upbringing of the child, while the parents retain the obligation of supporting the child financially by covering all the necessary expenses. Involuntary child rearing is regulated by § 28 of the Federal Child and Youth Support Act. If parents oppose the necessary child rearing measures, the court may authorize the CYPA to take all the necessary actions for the child's care and rearing. The court alone has the power to revoke this decision when the reasons for endangerment of or risk to the child's welfare cease to exist. The agency only assumes responsibility for the child's care and rearing as well as for providing legal representation in these matters, while the parents retain the duty to provide educational support to the child. These guidelines fundamentally imply working with families to ensure the child's welfare. The objective of child removal is primarily to reintegrate the child into the family (as well as safeguarding the family unit). The agency has the authority to transfer rights and delegate duties to third parties, but only to those within its purview (Grabner et al., 2018, str. 20). Should the court consider returning the child to the original family, it must carefully weigh all pertinent circumstances and conditions affecting the child. Foremost among these considerations is whether the child's well-being is still at risk. Additionally, the impact of the changes in living conditions on the child must be thoroughly examined (in the process of deciding on the

child's return, the child's welfare always takes precedence over parental rights). It is essential to note that the potential for better care and nurturing with a third party compared to the parents cannot be the primary reason for removing the child from the family.

The Family Court is responsible for providing guidance and support to children and adolescents to ensure their procedural rights are respected. In fulfilling this role, the court may refer minors to available counseling options. Counseling sessions for minors should be tailored to their specific developmental stage, cognitive abilities, and levels of comprehension. This obligation must be taken (and approached) with utmost seriousness so that minors seeking assistance understand the purpose and significance of their request. Children up to the age of 14, and in some cases up to 16, may receive assistance or what is termed child protection by the court (as per § 104a of the Law on Non-Contentious Proceedings/Außerstreitgesetzt). This involves guiding and supporting the child throughout the process as deemed necessary. Those providing assistance to the child are not considered parties to the proceedings nor the child's legal representatives. The appointment of "child protection" in court proceedings can only be assigned *ex officio*. One cannot file a request for child protection during the proceedings (Grabner et al., 2018, p. 22). On the other hand, family support mechanisms also exist. Designed to expedite legal proceedings, reconcile disputing parties, and improve the quality and sustainability of family-court processes, the concept of family court protection has been introduced (according to § 106a of the Law on Non-Contentious Proceedings). Family court protection entails a specific set of rights, such as access to documents and the right to communicate with the child. However, the primary focus of this process is the best interests of the child (Grabner, Paumgartten, Grasl. op. cit., p. 22). The ability to provide guardianship hinges on the child's age and overall developmental stage, (according to the decision of the Supreme Court, OGH 1Ob37/16x). In cases where a child is subjected to violent disciplinary methods, is faced with violence from a third party, or for example, when the child's care is entrusted to a cult, judicial intervention may lead to the removal of the child (guardianship) (according to decisions of the Supreme Court/Oberste Gerichtshof: 2Ob593/92, 1Ob593/92, 1Ob2078/96m) (Grabner et al., 2018, p.

23). For instance, if a fifteen-year-old girl expresses reluctance to return home due to ongoing conflicts and reports being locked in by her mother a year prior, guardianship cannot be transferred to another person/entity without a prior explanation from the mother. This is especially significant if the situation reflects a typical family conflict without posing harm to the child's well-being, as indicated in the OGH 5Ob33/15m ruling (Grabner et al., 2018, p. 23).

The necessary measures regarding the transfer of custody to the CYPA encroach upon the realms of the right to privacy and the right to family life (Article 8 of the European Convention on Human Rights). In legal practice, such measures are only justified when they are in the child's best interest and when there is a need to avert potential harm to their well-being. In this context, the pivotal factor is not the material standard of living for the child, but rather identifying the most suitable individual to provide care, nurture, and rear the child. Challenges persist regarding the child's integration into the new environment, which necessitates the establishment of reunification programs. Each program should be ranked according to the child's age (as per the Supreme Court's ruling, OGH 1Ob99/16i). Even if a child receives better care in a social institution or with a third party compared to their parents, that fact on its own does not necessarily imply that parental guardianship should be limited (according to RS0048704) (Grabner et al., 2018, p. 23). According to paragraph 188 of the Austrian Civil Code, the court has the authority to restrict or prohibit visitation if there are indications of violence during visits or if there is evidence of parental alienation (in such cases, the child may experience emotional distress leading to the exacerbation of its overall well-being) (Grabner et al., 2018, p. 25). Furthermore, if a custodial parent fails to fulfill his or her obligation to keep informed (inquire) about the child during the period of separation, the court may allow the non-custodial parent to obtain information directly from a third party (as established by the Supreme Court ruling, OGH 4O 104/15w). The court's decision also holds significance in situations where the domiciliary parent (the legal guardian) intends to relocate internationally, in such cases the domiciliary parent must promptly inform the other parent about the planned relocation, so as to allow him or her an opportunity to address the matter in court or file a request

for an injunction if deemed necessary. Failure to obtain court approval before relocating the child constitutes unlawful removal, as underscored by the Supreme Court ruling (OGH 9 Ob 8/14p).

Each child has the right to be cared for in the most responsible manner possible and parents must not resort to violent behavior. As stated, if parents disagree on legal representation, they can bring the matter to the Guardianship Court. According to paragraph 161 of the Austrian Civil Code, parents are prohibited from engaging in acts of violence and are obliged to behave in a kind and proper manner, while minors are obligated to obey their parents as long as such obedience remains within the bounds of the law (i.e., does not constitute a criminal offense) (Grabner et al., 2018, str. 29). The most intriguing provision of the law is that a child can appeal to the court regarding its rights. The child's wants must be considered, but only to the extent that it does not compromise the child's well-being or disrupt its life. The child's wants are particularly significant if the child can comprehend the importance and implications of the measures taken and if it can form its own opinions based on decision-making abilities. When executing an order for the removal of a child, the child's age, development, and persona must be taken into account. Additionally, the child has the right to file certain requests with the court if its parents (or one of them) oppose its wishes. Children are holders of fundamental rights and freedoms from birth. Under paragraph 137 of the Austrian Civil Code, the use of violence, physical or mental suffering within caregiving and upbringing, is impermissible. On the other hand, some restrictive measures implemented as part of the upbringing responsibility (e.g., supervision, fostering social skills, fostering independence) are allowed. However, arbitrary deprivation of freedom is impermissible (Grabner et al., 2018, str. 30). On the other hand, a child may, against its will, be placed in a psychiatric institution, but only if the child poses a danger to others (third parties) or to itself, provided that all necessary conditions are met. Older minors can request placement in a clinic, alongside their legal guardian, while younger minors can only be placed in a clinic with the guardian's consent (Grabner et al., 2018, p. 36).

There are other important areas requiring the Guardianship Court's approval: a child's right to citizenship, marriage, residence, relocation

abroad, education, name change, religious affiliation, right to personal data, and personal photograph/image (Grabner et al., 2018, str. 37). Consequently, the custodial authority may seek permission from the Court in cases such as the change of the child's name or surname, adherence to a specific religion, placement in foster care, or obtaining of citizenship, among others. When it comes to handling a minor's assets, except for daily life necessities, the Guardianship Court's permission is also necessary (e.g., significant sums of money or the establishment of a company). Parents can also be held accountable in court for damage caused to the child due to offensive statements or incitement to unlawful acts (according to the decision of the Supreme Court, OGH 10Ob27/15s) (Grabner et al., 2018, p. 31). If a minor commits an offense punishable by law, the CYPA can request measures for the removal and surrender of the child. Conversely, older minors are personally responsible for their own actions (Grabner et al., 2018, p. 35). In compliance with the requirements for the care and rearing of the child, the legal guardian may decide on the child's residence. If the child is elsewhere (with the other parent), the legal guardian may request the child's return. The surrender of the child, as emphasized, primarily falls under the jurisdiction of state authorities, i.e. it necessitates a court decision, while self-help is permissible in exceptional circumstances or in the case of imminent danger. In any case, the child's right to a specific residence must not contravene its best interests (according to the decision of the Supreme Court, OGH 10Ob31/04p) (Grabner et al., 2018, p. 39).

4. Legislation in the Republic of Serbia concerning the removal and surrender of the child

In the positive law of the Republic of Serbia, this field is regulated by constitutional, family, executive, and criminal law norms. According to Article 65, paragraph 2 of the Constitution of the Republic of Serbia, the court is the institution responsible for terminating parental rights: "All or individual rights may be revoked from one or both parents only by the ruling of the court if this is in the best interests of the child, in accordance with the law." (Article 65 of the Constitution of the Republic of Serbia, 2006). According to Article 261, paragraph 1 of the Family Law,

"the child may initiate action in a dispute over the protection of his/her rights and in a dispute over the exercise or deprivation of parental rights before a court of general territorial jurisdiction or before a court on the territory of which the child has residence or a dwelling place" (Family Law, 2015). Article 273, paragraph 1 of the Family Law also states that the deprivation of parental rights is only possible by a court decision. "In its judgment on a dispute over the protection of a child's rights the court may decide on the exercise or deprivation of parental rights." (Family Law, 2015). The removal and surrender of the child are regulated by Article 376 of the Law on Enforcement and Security Interest. However, this provision has been amended in a manner unsuitable for addressing such sensitive and important issues as the protection of children and families. The provision reads: "The court notifies the party that filed the motion for enforcement and the person to whom the child is to be surrendered of the time and the place of apprehension and surrender of the child, according to the rules that govern the service of process in person. The child shall be apprehended and surrendered by the custodial authority in the presence and with supervision of the court. The psychologist of the custodial authority shall, during removal and surrender of the child, monitor the behavior and reactions of the child and the person from whom the child is seized, provide support with the aim of preventing or restraining behavior that could cause conflict or traumatic reaction of the child, advise the court how to carry out removal and surrender of the child with the least amount of damage to the growth and development of the child, and take, on his own, all measures necessary for the said purposes and enter his observations into the minutes on removal and surrender of the child and sign it." (Šarkić & Nikolić, 2021, p. 665).

On January 1st, 2020, significant changes were made regarding the role of custodial authorities in the process of removal and surrender of children, the most crucial enforcement procedure in family dispute resolution. However, the legislature did not provide a precise distinction between the Center for Social Work, as an administrative and expert body, and the existence of the custodial authority as a professional body within this body. Article 2 of the Law should indicate the linguistic difference between the Center for Social Work and the custodial authority as well as different procedural scenarios where the guardianship author-

ity may be present during decision-making and enforcement (Šarkić & Nikolić, 2020, p. 265). The custodial authority participates in family law disputes, a type of dispute concerning parent-child relationships such as establishing or contesting paternity or maternity, revoking parental rights, handling disputes in the prevention of domestic violence, etc. The custodial authority not only has the right to initiate legal proceedings but is also obligated to do so as soon as it becomes aware that the legal conditions for protecting the child's rights or for exercising or abolishing parental rights are met; the custodial authority must also take urgent measures to protect the child's person, rights, and interests upon learning about possible reasons for deprivation of parental rights (Šarkić & Nikolić, 2020, p. 265). However, the custodial authority may hold various procedural positions in the enforcement process. This could correspond to the position of the enforcement creditor, enforcement debtor, proxy, representative, third party, mandatory participant, or optional participant. As the child's legal representative in litigation, the custodial authority derives greater powers in the enforcement court proceedings as the enforcement creditor based on the legally determined right to submit an enforcement instrument, all aimed at protecting the child. It is thus clear that the Center for Social Work, as a custodial authority in the enforcement process, is most commonly present in the capacity of an enforcement creditor in court proceedings pertaining to family relationships. The success of implementing decisions in familial relationships depends primarily on the custodial authority (Šarkić & Počuča, 2020, p. 23). Of course, the specificity of the position of the Center for Social Work can be seen in the scenario where a parent who believes that the conditions for regaining parental rights have been met – and the process for depriving parental rights was initiated by the social welfare center through a lawsuit – won the case against the center and subsequently designated the custodial authority as the debtor after obtaining an enforcement order. This becomes even more pronounced in cases where the custodial authority has placed the child in institutional care (a facility for children without parental care) or in foster care settings. In such situations, in our opinion, the custodial authority should assume the role of the debtor (Šarkić & Nikolić, 2021, p. 256).

One of the most contentious provisions in the Law on Enforcement and Security Interest, according to authors Professors Šarkić and Počuča, is Article 376, paragraph 2. It literally stipulates that the child should be forcibly taken and handed over by the custodial authority in the presence and under the supervision of the court. The custodial authority is not identified as a legal entity to which the execution of the removal of the child is to be entrusted under the law regulating enforcement and security matters. It seems that this provision is contrary to the concept of judicial enforcement proceedings. Professors Šarkić and Počuča consider it highly inappropriate and unsuitable for the court to exempt itself, by applying the provisions of the Law on Enforcement and Security Interest, from such a delicate obligation as the child removal procedure (Šarkić & Počuča, 2020, p. 26). The removal of a child, given its unique nature, ought to fall solely within the jurisdiction of the court. This process should not be delegated to auxiliary court entities (such as court executors, court associates, judicial assistants, etc.), but rather should be exclusively handled by a judge. While these instances may not be common, it remains imperative that the judge assume responsibility in the most sensitive and specific disputes such as in cases involving the separation of children from their parents and the establishment of new familial dynamics, where the biological parent-child bond is (either fully or partially severed, with both parents or only one) and a legal relationship is established instead. Undoubtedly, these actions do not constitute repressive measures; rather, they are undertaken to protect minors and uphold the highest global standards, which emphasize the establishment of the strictest criteria for the protection of children's rights (Šarkić & Počuča, 2020, p. 26). The constitution ensures that judicial decisions are enforced by the court and the court cannot absolve itself of responsibility for executing judgments. The process of involuntary child removal is a practical action taken to protect the child's interests. During this process, with the assistance of psychologists, educators, healthcare professionals, the Ministry of Internal Affairs, among others, the judge intervenes to remove the child from parents who are unwilling to voluntarily surrender the child. In such situations, the use of coercive measures may be necessary to remove the child. It is important to note that the custodial authority is not an enforcement entity. This measure is not

repressive, but protective of the child's welfare. The judge is obliged to directly oversee the execution and determine whether and when the child should be removed from its parents, should the removal from the home be gradual, would there be need for medical assistance for the child, the debtor, or third parties. The judge must decide in which situation and to what extent force should be applied (for example, to detain those obstructing execution, to remove those inciting violence or hindering execution, to enter a closed room where the child is hiding or being kept, etc.) (Šarkić & Počuča, 2020, p. 30). Article 1 of the Law on Enforcement and Security Interest outlines the process by which courts and public bailiffs enforce the claims of the enforcement creditor through compulsion. Additionally, Article 4 of the same law specifies that the court holds exclusive jurisdiction over the enforcement of actions that can only be undertaken by the enforcement debtor, such as non-compliance or endurance [...], and similar situations. Additionally, according to Article 368, paragraph 2 of the Law on Enforcement and Security Interest, the court within whose jurisdiction the child is situated is responsible for the involuntary removal of the child; this action is initiated either ex officio or upon request from the party submitting the enforcement proposal. Paragraph 3 states that the court in charge of adjudicating the enforcement proposal may transfer certain enforcement actions to a court not directly authorized for the execution process. The inclusion of both the obligation and the power granted to the custodial authority for the forcible removal of a child (the act itself, i.e., the action of removal and surrender) is, at best, highly contentious and, ultimately ineffective. Such a practice lacks legal basis and is thus unsustainable. The expert panel, comprised of custodial authority members (psychologists, pedagogists, social workers, lawyers, and the like), assists the court in implementing the most delicate decisions regarding familial relationships by drawing upon its members' expertise and knowledge (Šarkić & Nikolić, 2020, p. 262). The court cannot be absolved of responsibility or lose authority concerning the removal and surrender of the child, nor can it transfer such powers to the custodial authority. It is legally nonsensical for such a substantial authority to be conferred upon the custodial authority through legislation governing civil enforcement matters. We believe that custodial authorities are neither suitable nor qualified

for executing enforcement actions, specifically the act of removing and surrendering a child, given the delicate dynamics of familial relationships. In the context of enforcement proceedings, alternative mechanisms such as monetary penalties, directives for the removal of individuals obstructing enforcement, temporary detention of those who pose a risk to the safety of children or other participants in the process by obstructing enforcement, mediation in dispute resolution, among other measures, ought to be employed. The custodial authority lacks the requisite expertise and capacity to employ such measures effectively. Hence, we maintain that this authority should not have been transferred from judicial jurisdiction to the custodial authority (Šarkić & Nikolić, 2020, p. 263). The custodial authority can assist the judge in the following matters: assessing whether the child is defacto in danger, which necessitates coercive enforcement; evaluating the potential effectiveness of dialogue with parents; determining when monetary penalties or the threat of imprisonment would be effective; advising on the optimal timing to initiate enforcement actions; considering whether to suspend the enforcement process; considering whether to delay the enforcement process; assessing the need for urgent medical assistance, psychiatrists, psychologists, and other medical professionals; determining when and how to conclude the enforcement proceedings etc. The designation of the judge as the responsible entity has been a practice in prior legislations as well, whereby a specific party would have been tasked with the responsibility of overseeing this intricate procedure. According to Šarkić & Nikolić (2021), the individual judge bears the responsibility of meticulously assessing the circumstances surrounding the execution process. Collaborating with the custodial authority's expert pannel, school psychologists, and local community members, the judge evaluates the most effective course of action for ensuring the child's well-being. This includes determining whether in given circumstances prompt and efficient removal of the child is more appropriate than gradual persuasion of the parents (p. 667). Therefore, the custodial authority can at any point initiate and engage in proceedings concerning children's rights. What is particularly relevant to our paper is that the court has the power to impose a prison term (this decision is subject to appeal) lasting until the child is surrendered and with a maximum duration of 60 days

(Šarkić & Počuča, 2020, p. 28). The provision permitting appeals to postpone enforcement adds further complexity to the situation, as the primary aim of these procedures is to facilitate prompt execution, safeguard against rights abuse, and prevent any irreparable harm to the child. The option to lodge an appeal and the subsequent decision-making period provide sufficient time during which the debtor or a third party obstructing the enforcement can take actions to temporarily or permanently prevent the enforcement proceedings (hiding the child, taking the child abroad, obtaining passports or other official documents enabling departure from the country, etc.) (Šarkić & Počuča, 2020, p. 29). In paragraph 1 of Article 375, the Law mandates that the enforcement decision be transmitted to the competent custodial authority no later than ten days before the commencement of enforcement, with a psychologist acting on behalf of the custodial authority in the enforcement process. This provision appears to have been crafted by someone lacking firsthand experience in such matters. Ten days can be an eternity in the context of surrendering or removing a child (Šarkić & Nikolić, 2020, p. 261). In this process, the role of the psychologist is crucial for the child's well-being. The psychologist is tasked with attempting to facilitate the voluntary surrender of the child and conducting informative and advisory sessions with the individuals with whom the child resides. It is advisable to inform the enforcement debtor beforehand that voluntary surrender would be much more beneficial for the child and would help avoid numerous traumatic situations. The custodial authority is allowed to advise the court on suitable methods of child surrender as well as suitable arrangements concerning the physical environment where the enforcement procedure is to take place. Beforehand, a thorough on-site assessment and evaluation of the child's psychological profile must be conducted. The custodial authority's psychologist is obliged to prioritize the protection of the child's best interests both prior to and during the enforcement process, as stipulated in Article 371 of the Law, which sets the standard for this type of procedure (Šarkić & Nikolić, 2020, p. 262). The legislature has not stipulated procedures for implementing decisions related to arranging child visitation, changes in visitation terms, managing parent-child relationships, and the like. The Family Law addresses temporary measures for protection of the child against violence

or prevention of irreparable harm. Regrettably, from the perspective of enforcement law in the Republic of Serbia, there are no mechanisms in place to govern the enforcement of temporary measures, nor is the court's role in the process of enforcing decisions concerning children's rights violations clearly delineated (Šarkić & Nikolić, 2020, p. 264). And lastly, it is crucial to emphasize the necessity for the Law to define the obligation of determining the child's best interests within the context of enforcement proceedings; this obligation should not be restricted solely to the court but should encompass all parties engaged in the enforcement process—public enforcement officers tasked with enforcing child support obligations, custodial authorities, healthcare practitioners, members of the Ministry of Internal Affairs, experts or providers of expert opinions, translators, interpreters, and others (Šarkić & Nikolić, 2020, p. 265).

In conclusion of this exposition on the positive legal framework in the Republic of Serbia regarding the removal and surrender of children, it is important to emphasize that child abduction is a significant and separate problem. Within the criminal legislation of the Republic of Serbia, a particularly severe form of the crime of abduction is when the abducted person is detained for over ten days or subjected to cruel treatment or experiences severe health deterioration or suffers other grave consequences. Perpetrators of this criminal act against a minor will be sentenced to imprisonment for a period of three to fifteen years (Article 134 of the Criminal Code, 2019). When discussing the safeguarding of children and minors, it is crucial to mention Article 59 of the Police Act, which mandates that the police promptly initiate search measures for individuals and objects upon receiving information (Police Act, 2018). In conjunction with provisions within constitutional, family, and enforcement laws, the principles of criminal law also enhance the overall protection of children from abduction and they all collectively form a distinctive legal framework.

5. Conclusion

In this study, we have observed the inherent complexity surrounding the issues of child removal and surrender. Namely, every decision pertaining to the welfare of the child necessitates the presence of judicial authority. Judicial authority takes precedence in making final decisions regarding child protection and while it may coordinate and collaborate with other institutions, such as the Center for Social Work or the custodial authority, its power must never be transferred to another entity. This enforcement procedure entails designing and shaping the child's life, it is a stage that cannot be replaced by any other form of assistance in the process of relocating the child from its family environment. No other form of assistance could provide the same agility, urgency, protection, or prosperity as this procedure. If essential protective mechanisms are lacking, achieving the ultimate goal becomes impossible. This goal is not only the act of providing immediate care for the children in dire circumstances, but also a process that can have long-term consequences for the child if the situation is not addressed adequately and promptly. Hence, addressing these issues appropriately entails more than simply adhering to the prescribed legal procedure; it involves establishing a balance among citizens (parents, children, and others), between governmental bodies and social institutions, and, above all else, it means facilitating conditions that serve the child's best interests. The Austrian law mandates the care of not only citizen children but also unaccompanied foreign children entering the country. This demonstrates a high level of consistency with international law as well as the UN Convention on the Rights of the Child. It is significant to emphasize that, in this case as well, precedence is given to the jurisdiction of the Guardianship Court. It is noteworthy that Austrian legislation regulates child-rearing methods as well as penalizes vulgar conduct by parents. Significantly, Austrian law defines concepts such as the child's capacity for discernment, which demonstrates lawmakers' serious intent to respect the best interests of the child. The enforcement procedure in Austria is very compact, this means the court makes decisions in a continuous manner and follows a legal hierarchy/scale to determine the most suitable custodian for the child. It thoroughly evaluates the child's accommodation to

ensure it aligns with the child's age, understanding of the situation, and developmental stage. This underscores the gravity of the judicial process and the commitment in safeguarding the child's rights. Various other subjects, including the CYPA, doctors, psychologists, etc., participate in the process, which shows consistent and collaborative interagency efforts. On the other hand, according to the provisions of the Law on Enforcement and Security Interest of the Republic of Serbia, there is a kind of confusion between the roles of the court and the custodial authority, i.e., they are are reversed. The court, for instance, cannot perform functions such as monitoring because that task belongs to the custodial authority, primarily the psychologists within it. These roles need to be more clearly defined, accurately outlined, explained, and clear, as they impact the welfare of the child and form the basis for its future life. Any shortcomings in this process result in disproportionate repercussions for the child. The child is a sensitive being, and the experience of being separated from its family can be deeply emotional. However, it is the collective responsibility of society to prevent the implementation of unsuitable and inappropriate legal solutions. Consequently, aligning the law with international documents, comparative law decrees, and, most importantly, the Constitution of the Republic of Serbia is crucial. The Constitution stipulates that the loss or restriction of parental rights must be authorized exclusively through judicial processes. In the Republic of Serbia, there is a need to legally regulate the concept of *the child's best interests*, classify it, and ensure its recognition by all relevant professionals. Accordingly, it is crucial to strengthen the relationship between the child and its family. As per the UN Convention on the Rights of the Child, this aspect is consistently highlighted as paramount in child-related work and the significance of its integration into national legislation in the most effective manner is underscored.

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