



CHALLENGES IN THE IMPLEMENTATION OF LAW NO. 18, DATED 23.02.2017, “ON THE RIGHTS AND PROTECTION OF THE CHILD”

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Abstract

This paper aims to present several theoretical and practical aspects related to the implementation of the Law “On the Rights and Protection of the Child.”¹ In adopting this law, the legislator sought to take measures to ensure that every child exercises their rights in accordance with their personal development and based on their best interests. Furthermore, in order to adopt concrete measures for the promotion, respect, and protection of children’s rights, the legislator has emphasized the need for cooperation among central and local structures, authorities, and organizations that safeguard children’s rights.

The Law “On the Rights and Protection of the Child,” as an important legal act in the field of children’s rights, reflects a series of principles already enshrined in international instruments that guarantee and protect the rights of the child. To ensure the child’s healthy physical, mental, moral, spiritual, and social development, as well as to secure an adequate family and social life, the law establishes the fundamental principle of the best interests of the child², which must be the primary consideration in all decisions concerning the child³.

Respect for the best interests of the child is a binding obligation for parents in the context of building stable family relationships, but it also constitutes a duty for key actors within the integrated child protection system. Therefore, the law also enshrines several other important principles, including:

- The principle of equality and non-discrimination;
- The principle that every child should live and grow up in an appropriate family environment, and that separation from the family should be considered only as a last resort;
- The principle of participation, listening to, and respecting the views of the child, in accordance with the child’s age and capacity for understanding;
- The principle of the primary responsibility of parents to provide their child with adequate living conditions, and to ensure their proper upbringing, development, well-being, education, and learning⁴.

Keywords: Child, Parents, Law No. 18/2017, ECtHR , Standards, Child Protection Measure

1. The Child’s Right to Live with Parents

Law No. 18/2017 explicitly guarantees the child’s right to live with their parents, as a concept of dual character. First, it addresses the idea that the child’s proper upbringing constitutes both a real

1 Law No. 18, dated 23.02.2017, “On the Rights and Protection of the Child,” published in the Official Gazette. No. 43, dated March 9, 2017, which entered into force three months after its publication in the Official Gazette.

2 See Article 6 of Law No. 18/2017

3 See Article 5 of Law No. 18/2017

4 Ibidem

right of the child and a concrete obligation of parents toward their children⁵. Second, it affirms that the child has the right to live with their parents and not be separated from them against their will⁶. Thus, the legislator establishes that parents are obliged to care for the life, health, physical and psychological development of their children, taking all necessary measures for their proper upbringing. Even in cases where the court decides that the child cannot live with the parents, such a decision must be based solely on the principle that this separation is in the best interests of the child. Every child has the undeniable right to live with their parents, and the competent authorities must take all possible measures to ensure the child's survival and development. For full and harmonious development of the child's personality, every child has the right to grow up in a family environment, in an atmosphere of happiness, love, and understanding⁷. In this regard, parents must make every effort to raise their children in such an environment, as children need the presence of both the mother and the father for healthy growth. The law emphasizes that economic hardship is not a sufficient reason for state authorities to decide on the separation of the child from the family or relatives with whom they live, nor for the removal of parental responsibility. This legal provision is particularly significant, as the best interests of the child are not always found where the economic conditions are better. A child separated from one or both parents has the right to spend time or maintain regular personal relationships and direct contact with them⁸, except when the court decides that this is contrary to the best interests of the child. The law stipulates that, in cases of disagreement between parents regarding the exercise of their right to maintain contact with the child⁹, the court sets a schedule of contact according to the child's age, the intensity of the emotional bond with the parent with whom the child does not live, that parent's behavior, and other relevant factors evaluated by the court on a case-by-case basis¹⁰. The law also provides that the court may take specific measures to ensure the child's return to their home

5 See Article 6

6 See Article 9

7 See Article 5 of the Family Code.

8 According to Article 9, paragraph 6 of this Law, personal relationships may be established through:
 “(a) meetings between the child and the parent or another person who, under the law, has the right to maintain contact with the child;
 (b) visits of the child to the residence environment;
 (c) the temporary stay of the child with a relative or person who does not regularly live with the child;
 (ç) correspondence or any other form of communication with the child;
 (d) sending information to the child regarding their parents or other persons who, according to the law, have the right to maintain personal relationships with the child;
 (dh) the transmission, by the person living with the child, of information about the child — including recent photographs, medical or psychological reports — to the other relative who has the right to maintain personal relationships with the child;
 (e) meetings between the child and their relatives or other persons with whom the child has an emotional bond, in a neutral environment for the child, with or without supervision, based on the child's best interests.”

9 **Article 30** of the Law provides that:

“...The parents of the child, regardless of which of them exercises parental responsibility, have the right to receive the necessary information and assistance for the child's upbringing, care, and education, and to obtain information about the child from schools, healthcare units, or any other institution in contact with the child.

Where both parents exercise parental responsibility but do not live together, decisions regarding the choice of education or vocational training, complex medical treatments or surgical interventions, the child's residence, or the management of their property, shall be made with the consent of both parents. In the event of disagreement between the parents concerning the exercise of parental rights and the fulfillment of their duties toward the child, either parent may request the resolution of the dispute by the competent court. After hearing both parents and obtaining the child's opinion, the court shall decide in accordance with the child's best interests.”

10 Same source, Article 9 of the Law.

after a visit or to allow meetings with the other parent according to the court's decision, in order to guarantee the proper continuation of the child's personal relationships with parents or other individuals with whom the child enjoys family life. Such measures may include fines for delays against the person refusing to comply with the set contact schedule, or financial guarantees against the parent who fails to respect the court's decision, where possible, in accordance with the provisions of the Code of Civil Procedure¹¹. The law further guarantees the child's right to move from one residence to another or to ensure their return to the country of origin in cases of unlawful removal¹². The child's movement within or outside the country must be done with the consent of both parents, or, in the event of disagreement, by a court decision, after obtaining the child's opinion or consent, in accordance with the child's age and capacity to understand¹³. Regarding return cases, the law provides that the child has the right to return as soon as possible to their parent or guardian. The return to the country of origin is permitted only if it is in the best interests of the child, a principle that must be observed throughout the process. The law also provides for the placement of the child in alternative care in cases where the child is temporarily or permanently deprived of their family environment, either because the parents have died, pursuant to a court decision, or when remaining in that environment is not in the child's best interests due to a protection measure. In the implementation of this measure, priority is given to placing the child in a family-type environment, in accordance with the child's best interests¹⁴. A child who is temporarily or permanently deprived of their family environment, or for whom it is not in their best interest to remain in that environment, has the right to special protection and assistance from the state, ensuring them alternative care, which may include placement in a care institution or in guardianship.

2. Standards Established by the European Court of Human Rights on the Protection of Family Life

The European Court of Human Rights (ECtHR) has found violations of Article 8 (the right to respect for private and family life) of the Convention when authorities have failed in their positive obligation to take necessary measures to protect family life. In the case of *Lyubenova v. Bulgaria*¹⁵, the applicant and her husband had temporarily gone abroad, leaving their child with the paternal grandparents. Following disagreements with her husband, the applicant returned to her country and was unable to contact her son. She complained about the domestic courts' refusal to order the child's return to her care. The ECtHR found a violation of Article 8 of the Convention, noting that Bulgarian authorities had failed in their positive duty to take necessary measures to protect family life and to facilitate the reunification of the mother with her young son. Analysis of this case shows that a violation occurred because, under domestic law, the return of children who did not live with their parents was applied only when both parents reached a mutual agreement regarding the child's residence. When such an agreement could not be reached, the court would decide the place of residence. Domestic authorities took no steps to return the child, who remained with his grandparents. Consequently, the mother was deprived of contact with her son, con-

11 Same source, Article 9, paragraph 7 of the Law.

12 Same source, Article 11 of the Law.

13 According to Article 29 of the Law: "The child, in any administrative or judicial process, is guaranteed free legal and psychological assistance, in accordance with their interests, development, and abilities. Legal and psychological assistance shall be provided directly and without obstacles to the child, based on the principles of non-discrimination and the child's best interests. Legal assistance to the child includes all administrative and judicial actions, as well as consultations carried out by the representative, the lawyer chosen by the child or appointed by the competent authorities according to current legislation, throughout the administrative or judicial process. Psychological assistance includes all actions and consultations carried out by the psychologist appointed by the competent authorities according to current legislation."

14 According to Article 31, paragraph 2 of the Law, alternative care may consist of:

"(a) placement of the child within the family of one of their relatives, if this is possible and not contrary to the child's best interests;

(b) placement of the child in a foster family, when biological parents or other relatives are unable to care for the child;

(c) placement of the child in a childcare institution, for the shortest possible period of time..."

15 Case of *Lyubenova v. Bulgaria*, Application No. 13786/04, Judgment of 18 October 2011, ECtHR.

stituting a violation of Article 8 of the ECHR. A parent's right to contact with their child cannot be denied except in exceptional cases where such contact would negatively affect the child's best interests. In several other cases, the ECtHR has found violations where domestic courts restricted a parent's contact rights because of mental health issues or disabilities. The case of *Bondavalli v. Italy*¹⁶ concerned the applicant's inability to exercise his right of contact with his son due to negative reports from social services, with which the child's mother had professional ties. The applicant complained that social services had excessive autonomy in implementing the Juvenile Court's decisions and that the court had failed to properly supervise their work. The ECtHR found a violation of Article 8, concluding that domestic authorities had not taken sufficient and appropriate steps to ensure the applicant could exercise his right of contact with his child, thereby violating his right to respect for family life. In *Kocherov and Sergeyeva v. Russia*¹⁷, the applicants—a father and his daughter—complained about the restriction of the father's parental authority due to his mild mental disability. The Court held that there had been a violation of Article 8, finding that the reasons given by the domestic courts for restricting the father's parental rights were insufficient to justify the interference in family life, which was disproportionate to the legitimate aim pursued. The case *R.M.S. v. Spain*¹⁸ concerned the placement of a child in foster care due to the mother's difficult financial situation, without considering subsequent changes in circumstances. The Court held that there had been a violation of Article 8, as the authorities failed to take adequate and effective steps to ensure the applicant's right to live with her daughter. The Court emphasized that a parent's financial condition cannot be the determining factor in severing the parent-child relationship. In *Kacper Nowakowski v. Poland*¹⁹, the case concerned a deaf and mute father's right of contact with his son, who also had a hearing impairment. The Court found a violation of Article 8 because the domestic courts, when deciding contact arrangements, failed to consider the child's interests and did not adopt appropriate measures to accommodate the father's disability. The father had an unquestionable right to maintain contact with his son, and despite the parents' difficult relationship and the father's disability, the authorities were obliged to take all reasonable steps to facilitate contact.

Conclusions

The Law provides a series of legal and institutional mechanisms for the rights and protection of the child, emphasizing that mechanisms and structures at both central and local levels cooperate and coordinate their work in implementing legislation and state policies on child rights and protection. An innovation introduced by this law lies in the child protection measures, which are implemented through interventions by institutional mechanisms to ensure respect for children's rights and the provision of services aimed at promoting the child's development and well-being within their family environment, or by placing them in alternative care when, in their best interests, they cannot remain under the care of their parents. Child protection is achieved through the application of protection measures, the implementation of interventions ensuring respect for children's rights, and the provision of services according to the child's needs, all of which aim at the child's development and well-being within the family environment, or by placing the child in alternative care when they are temporarily or permanently deprived of parental care and protection, or when, due to their best interests, they cannot remain under parental care. Law No. 18/2017 classifies protection measures as emergency and temporary protection measures, which include removing the child from the family and placing them in alternative care, or placing them under specialized supervision within the family environment. In principle, protection measures are applied in specific and evident cases. First, they are applied when the parents have died or have been declared dead by a court, are unknown, have been deprived of parental responsibility, and are in a situation of need for protection. Second, they are applied when the parent or legal guardian has been escorted, detained, arrested, or sentenced to imprisonment, and the

16 Case of *Bondavalli v. Italy*, Application No. 35532/12, Judgment of 17 November 2015, ECtHR.

17 Case of *Kocherov and Sergeyeva v. Russia*, Application No. 16899/13, Judgment of 29 March 2016, ECtHR.

18 Case of *R.M.S. v. Spain*, Application No. 28775/12, Judgment of 18 June 2013, ECtHR.

19 Case of *Kacper Nowakowski v. Poland*, Application No. 32407/13, Judgment of 10 January 2017, ECtHR.

child is in urgent need of protection. Third, they are applied when, in the best interests of the child, they cannot remain under parental care because their physical, moral, psychological, or emotional integrity is at risk. Fourth, they apply when the child has been abused, mistreated, exploited, or neglected, or has been abandoned by the parents since birth, or is under 16 years old and is not being cared for by anyone. The emergency protection measure for removing the child from the family and placing them in alternative care is a temporary protection measure applied when the child is found to be in a situation of high and immediate risk due to abuse, exploitation, neglect, or any form of violence. This measure also applies when the child has been abandoned at birth by the parents or is under 16 years old and found abandoned in any environment, as well as in cases where the child lacks parental care because the parents have been arrested, hospitalized, or are otherwise unable to exercise their parental responsibilities²⁰ During the process of verifying the child's situation by the child protection worker, the child's statement may be administered *ex officio* as evidence. The child's statement is considered valid regardless of the method of recording (written or audiovisual) provided it is taken in the presence of a psychologist and with the consent of the child aged over 10 years. During the validity period of an emergency protection measure, the parents cannot exercise their parental responsibilities. Placement of the child in alternative care is a temporary protection measure for a child without parental care, and when protection requires shelter or placement in alternative care. The placement is done in order of priority, first with a relative of the child; if this is not possible, then with a foster family; and finally, in a residential care institution when no other alternatives are feasible. When applying the measure of alternative care, consideration is given to ensuring that siblings are not separated. The protection measure for specialized supervision within the family environment is applied to a child who can be treated and protected within the family, under monitoring according to a plan set by the child protection structures. This measure also applies when the child can remain with one of the parents who has the capacity and ability to care for and protect the child from the actions of the other parent, who is suspected or proven to have abused, mistreated, exploited, or neglected the child. In cases where parents do not cooperate or do not consent to the child being followed under this protection measure, the child protection structures apply one of the other protection measures. In the case of emergency protection measures or protection measures involving placement of the child in alternative care, the decision remains in force until the relevant court decision is issued. The decision granting the protection measure of specialized supervision within the family environment remains in force until it is revoked by the director of the responsible social services structure, based on the proposal of the child protection officer, and is not subject to judicial review. Protection measures for children over the age of 14 are applied only after obtaining the child's consent. If the child does not give consent, the protection measure is taken by the director of the responsible social services structure; such a decision remains valid until a judicial decision is made by the court to uphold the measure, where judicial review is foreseen by the law. The court decision granting an emergency protection measure or the protection measure of alternative care remains valid until the child is placed under legal guardianship, in accordance with the legislation in force. In making its decision regarding protection measures and guardianship, the court considers the best interests of the child as the primary and overriding consideration. Overall, the law establishes high standards for guaranteeing and protecting children's rights. The best interests of the child are one of the fundamental principles underpinning all decisions concerning children, whether taken by social care institutions, the courts, or administrative authorities, as the child's best interests must always be the prevailing consideration in every case.

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²⁰ Article 56.

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