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Convention on the Rights of the Child and some aspects of civil law and family law

ABSTRACT

The aim of this paper is to have a look at some institutions of civil law and family law in the light of the requirements of the Convention on the Rights of the Child, on the occasion of the 30th anniversary of this Convention. The child's incapacity or limited capacity to act, the child marriage and the child's right to be heard shall be envisaged from a legal historical perspective with a special regard to the age-limits and the modifications of these age-limits on the field of civil law and family law. The subject of the historical overview is the concerned regulations of Hungary, namely the changes in the Hungarian legal rules and the regulations of the effective Hungarian Civil Code which entered into force in 2014. The paper would like to provide a guide for a travel from the end of the nineteenth century to today's legal rules on the field of age-limits in connection with the above-mentioned institutions which designate the child's legal position concerning some children's rights. Some issues of the judiciary concerning the child's right to be heard in family law proceedings will be mentioned as well to highlight a problem of the everyday legal life. The final aim of this historical travel is to discover whether the discussed legal rules being in force today meet the requirements of the Convention on the Rights of the Child and to compare the legal attitude behind the effective legal rules and the attitude of the child-focused thinking, which shall be also analysed.

Key words: child's capacity to act, child marriage, child's right to be heard, age-limits, legal history of family law, Hungarian civil law and family law, requirements of Convention on the Rights of the Child

Introduction¹

The UN Convention on the Rights of the Child (CRC) adopted on the 20th of November 1989 has an extreme significance on the field of children's rights. The thirtieth anniversary of the CRC's adoption was celebrated in November 2019 in many countries as almost all countries joined this Convention. Although it is a huge success, that with the exception of one of them all states in the world are State Parties to the CRC such as the fact that the concept of children's rights, the international standards of children's rights and child protection have been discussed heavily since for some years there have been a lot of tasks to do.

The aim of this study is to have a look at how some main principles and points of the CRC and the child-focusing and child's rights-focusing approach are reflected in the civil law and especially in the Hungarian Civil Code. Firstly, I shall analyse the age and age-limit of being a child, secondly, the child's rights to be heard. Although I'm intended to demonstrate whether the analysed Hungarian rules of civil law and family law are in harmony with the CRC's requirements, it seems necessary to discover how these rules in the civil law and family law were regulated earlier, what kind of modifications happened during the decades and how the rules which are in force now have been shaping. This legal historical retrospection can contribute to the comparison of the legal attitude behind the effective legal rules and the attitude of the child-focused thinking.

The age-limit of being a child, the age-limit of having at least limited capacity to act and the age at which a person can marry shall be discussed with the aim to discover the main cornerstones of the history of the above-mentioned issues' regulations in the last seventy years. After determining whether the effective civil law rules meet the requirements of the CRC, the legal historical overview gives an opportunity to follow up whether the codification of these ages and age-limits is in any connection with the requirements of the child-focused standards and approach, or rather shows any reflection to those. What concerns the child's rights to be heard, besides the historical overview I give a short introduction into the discussions in the Hungarian judiciary concerning the child's right to be heard in family law proceedings. I should refer primarily in this context to the proceeding on the rendering of parental authority to the parents when parents do not live together.

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The requirements concerning the child' legal age, his or her capacity to act and child's marriage in the CRC

According to Article 1 of CRC “for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” The beginning and end of childhood is a complex issue, the age of 18 as the beginning of the legal age is a minimum rule according to the international covenant. This is a twofold problem as the person under the legal age has a need to be specially protected as a minor but on the other side while a child is protected, he or she may be deprived of some rights. Besides, considering different legal acts for different purposes, different minimum ages² should be important to take into consideration as a balance has to be made between the protection of the child and let his or her autonomy win. However, and it is a cornerstone of the CRC reflecting the child-focused approach that the CRC itself does not work with minimum ages or any ‘ages’ at all, except for the minimum requirement of the legal age at least as a main rule. As the Handbook for the CRC states the Convention does not require a specific age to be set in each case.³ The child's evolving capacities should be taken into attention when the child's parents, guardians, other legal representatives or the competent authority or court has to make a decision concerning the child according to Art 5 CRC. As children differ from each other the use of minimum ages for different legal acts does not only obscure these variances among children but also mask the individual development of a child. The respect for evolving capacities in each case is advantageous for children.⁴ The need of abandonment of rigid ages while a person is a minor is in inseparable connection with the principle of the child's best interests as it is also reflected in the approach that the rights in the CRC has to be taken into consideration with a holistic attitude.

Child marriage is a special legal act which should require a minimum age. It is a huge international problem affecting one of the most important legal institution of family law and just because of its significance in the persons' and the whole societies' life; marriage and the minimum age to marry is reflected in general international and European documents on human rights (among others Art 16 of the UN Convention on Human Rights of 1948 and furthermore UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962 have requisites concerning the marriable age). Child marriage is a complex problem generating several questions only

² R. Hodgkin, P. Newell, *Implementation Handbook for the Convention on The Rights of the Child*, Unicef, Genf 2007, p. 4.

³ *Ibidem*, p. 5.

⁴ *Ibidem*, p. 5.

in relation to the civil law aspects. Marriage affects someone's life, personal and property relations deeply and for long years in many cases. One of its typical legal consequence that the child acquires his or her legal age after having married and loses the protection which was provided during the childhood.⁵

The child's right to be heard according to the CRC

According to Art 12, CRC States Parties have to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child", and the child has to be "provided the opportunity to be heard in any judicial and administrative proceedings affecting the child." This Article is very special as it defines one of the main and fundamental principles of CRC and has to be interpreted together with all other rights of children including the child's best interests. Art 12 does not tie this right to concrete ages or a minimum age as the right to participate cannot be conditional on artificial reasons such as exact age. General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration determines elements which have to be taken into account when assessing the child's best interests and one of these factors is the child's views. I refer to the statement of this general comment literally – 'any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests'.

The State Parties have a clear obligation as the child has to be provided with the opportunity to be heard. In civil and family law proceedings, the child does not have any obligation to articulate his or her opinion and views but the state, competent authorities and courts are obliged to give the chance. It goes without saying that the hearing of the child is subject to many requirements with the aim to maintain the best interests of the child. Among others the hearing should happen in a child-focused manner. However, the first step in the proceeding, namely to satisfy the obligation to provide the hearing seems to be a point which may be discussed because of the societal and legal disbeliefs and disadvantageous traditions.

⁵ Ibidem, p. 8.

Legal age and age-limits for children in the Hungarian civil and family law also in historical context

Actual legal scene according to the Hungarian Civil Code

According to the Hungarian Civil Code, namely Act V of 2013, which entered into force on 15th of March 2014 (HCC)⁶, a minor is a person under the age of eighteen [Art 2:10(1)], so a person under 18 is a child. However, the second sentence of Art 2:10(1) states that upon conclusion of marriage, minors shall achieve majority. Marriage is the only legal fact which results in requiring majority earlier than at the age of 18. What concerns the child's capacity to act, minors under the age of fourteen shall have no capacity to act and minors shall have limited capacity to act if they have reached the age of fourteen and do not lack the capacity to act.⁷ These rules mean that no child can have full capacity under the age of 18 as she or he has not any capacity to act at all or a limited capacity to act. The age of 14 is a strict line between children having no capacity or a limited capacity and has the consequence that a child under 14 cannot get either full or limited capacity to act. If a child is between the ages of 14 and 18, he or she has limited capacity to act as a main rule. However, sometimes he or she has no capacity to act at all. According to Art 2:9(1) which states that if someone completely lacks the ability required to take care of his own affairs when making these juridical acts, the juridical acts will be null and void. On the other side if the child enters into a marriage with prior permission of the public guardianship authority, he or she achieves majority. The public guardianship authority may grant permission for a minor over the age of sixteen if this minor has limited capacity.

The age limits for having capacity are regulated in the Second Book on Individual as Subject of Law of the HCC and the Fourth Book on Family Law also contains some age limits. There are some legal acts to which the reach of the age of 14 is required (e.g. when the court decides on the exercise of the parental authority, the consent of the child older than fourteen shall be required for any decision on parental custody and placement regarding him or her as a main rule)⁸ or the limited capacity to act of the child (e.g. a minor having limited capacity to act may make his or her juridical acts regarding adoption in person, without the consent of their statutory representative).⁹ In some cases, the age of 16 has a legal significance. If the child reaches the age of sixteen, he or she may upon the approval of the public guardianship authority, without the consent

⁶ 2013. évi V. törvény a Polgári Törvénykönyvről. Act No V of 2013 on the Civil Code.

⁷ Art 2:13 and Art 2:11 of HCC, respectively.

⁸ Art 4:171(4) of HCC.

⁹ Art 4:145(1) of HCC.

of his parents, leave the parent's place of domicile or the place of residence appointed by the parents if it is not contrary to his interests.¹⁰ As a summary, it can be declared that beside the strict age limits of civil law (age of 18 as the age of reaching majority and full capacity and that of 14 as the age of acquiring of limited capacity as a main rule) the age of 16 also plays a remarkable role, mainly as the minimum age of entering into a valid marriage with the consent of the public guardianship authority.

Historical overview on the legal age in Hungary – from the age of 24 until the age of 18

What concerns the age of 18 as the age-limit of majority, it was introduced into the Hungarian law in 1953 when the Law Decree No. 23. 1952¹¹ (Law Decree) entered into force. Earlier the Hungarian Guardianship Act, namely the Act No. XX 1877¹² distinguished between a minor and a person of full age.¹³ As a main rule, a person could acquire his or her full age at the age of 24. Besides, the Hungarian Guardianship Act differentiated among several age-limits under the age of 24. A minor could acquire full age even under the age of 24. If the child reached the age of 18, she or he could be declared as of full age if the child had the ability and maturity required to take care of his own affairs. This declaration could be approved by the public guardianship authority upon the request and the closest relatives of the child and also the child was heard before the approval. The aim of the declaration as having full age was to remove the obstacles before the child's autonomous decisions if he was mature enough. A minor over the age of 20 could acquire full age if the father exercising paternal authority gave the child's assets to the child or gave his consent that the child should ground an independent household. The approval of the public guardianship authority was needed also in this case but if the requirements were fulfilled the approval had to be given.¹⁴

On the other side a person might remain as a minor after reaching the age of 24. The public guardianship authority could prolong his or her status as a minor if (e.g.) the child could not take care of himself or herself or his or her

¹⁰ Art 4:152(4) of HCC.

¹¹ 1952. évi 23. törvényerejű rendelet a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény hatálybalépése és végrehajtása, valamint a személyi jog egyes kérdéseinek szabályozása tárgyában. The Law Decree No. 23. 1952 on the issues of the entering into force and enforcement of Act No. IV 1952 on marriage, the family and guardianship (Family Act) and the regulation of certain personal law. The Family Act and the Law Decree entered into force in 1953.

¹² 1877. évi XX. törvénycikk a gyámsági és gondnoksági ügyek rendezéséről. Act No. XX of 1877 on the issues of guardianship and curatorship.

¹³ L. Sipőcz, *A gyámsági törvény (1877. évi XX. törvénycikk) magyarázattal. [The Guardianship Act (Act No. XX of 1877) with commentary]*, Budapest 1882, p. 10-11.

¹⁴ *Ibidem*, p. 20.

own affairs because of physical or mental disabilities. The court had competence for prolonging the status as a minor. Actually, a lot of procedural practical questions emerged in connection with the harmonization of the age above 24 and remaining a minor.¹⁵

What concerns women, or rather girls, if a girl was unmarried when she reached the age of 24, she acquired her full age. However, if she married under the age of 24, she acquired the full age when marrying. It had the consequence that she could marry from the age of 12 and she could acquire full age from the age of 12 on.

Important modifications happened in the Hungarian law after the end of the second World War even before 1953 when the age of 18 as the age of majority was introduced. In 1945 an order (Order of 1945)¹⁶ modified the Hungarian Guardianship Act and brought down the age limit of 24 to 20. Although instead of the age of 24 the age of 20 became the end of being a minor, the rules of the Hungarian Guardianship Act upon which it was possible to acquire full age earlier or prolong being a minor, remained in force. Some years later, in 1953 the decree and the Hungarian Guardianship Act were overruled by the Law Decree. As it was mentioned earlier, the age-limit of being a minor was brought down further to the age of 18 in the Law Decree which eliminated the legal possibilities of acquiring the full age earlier or prolonging being a minor. In 1959 when the (earlier) Civil Code was codified (Act No. IV 1959 on the Hungarian Civil Code; Civil Code of 1959)¹⁷, the rules on the persons' capacity to act were built into the Civil Code of 1959 and the age-limit of 18 was maintained. However, the exception was also maintained, namely that if the minor entered into a valid marriage under the age of 18, he or she acquired the adulthood.

The lowering of the age-limit of minority was evaluated as an important step also in the context of population policy¹⁸ and according to the testimony of the working material¹⁹ of the Ministry of Justice in 1958. There existed an intention to take over the 'living solutions' on the field of the persons' capacity

¹⁵ Ibidem, p. 32.

¹⁶ Az ideiglenes nemzeti kormány 1945. évi 10.470. M. E. számú rendelete egyes személyi és családi jogi rendelkezésekről. The Order of the Prime Minister of the National Provisional Government No. 10.470 of 1945 on some regulations of personal and family law.

¹⁷ 1959. IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről. Act No IV of 1959 on the Civil Code of the Hungarian Republic (it entered into force in 1960).

¹⁸ K Millényi, *Népességpolitikai jogszabályok 1945–1958*. [Legal rules on the field of population policy 1945–1958], "Demográfia [Demography] 1959, 2-3, p. 382.

¹⁹ Igazságügyminisztérium Törvényelőkészítő Főosztály: Összefoglaló a Polgári Törvénykönyv tervezetéről (munkaanyag, 48 oldal, 1958. október-november). Előkészítő anyagok az 1959. évi Ptk.-hoz. [Ministry of Justice, Department for Codification, Summary on the draft of the Civil Code (working paper, pp 48, October-November 1958). Preparing materials for the Civil Code of 1959], [in:] Az Igazságügyminisztérium iratanyaga az 1959-es Polgári Törvénykönyv előkészítésével és hatályba léptetésével kapcsolatban. [Documents of the Ministry of Justice in connection with the drafting and of the Civil Code of 1959 and its entry into force], Budapest, 2017, Vol. II, p. 781.

which meant the reservation of the age of 18. It is worth mentioning that this working material, which summarized the observations and comments arrived to the draft of the Civil Code, referred to the several proposals which unanimously promoted the necessity of raising the age-limit of being a minor from 18 to 20 with the justification that there were too many divorces among the spouses who married too young. These observations were however held as unacceptable because of the need of harmonizing the age-limit of exercising political rights and that of exercising rights in relation with family.²⁰

Historical overview on the children's capacity to act in Hungary – from the age of 12 until the age of 14

The Hungarian Guardianship Act did not contain unified rules on the children's capacity to act or rather persons who did not acquire their full age. This Act referred to other legal acts and to the fact that the legal acts containing rules on the minor's capacity to act remained in force if those were not contradictory to the Hungarian Guardianship Act. There were different effective legal rules on the field of civil law and family law regulating the minors' capacity to act in several different legal situations.²¹ On the other hand, the Hungarian Marriage Act, namely the Act No. XXXI. 1894²² defined who was a minor without a capacity to act and a minor with limited capacity to act when applying the Hungarian Marriage Act. Considering the age-limits persons under the age of 12 was deemed to having no capacity to act and a minor over 12 had, by age at least, limited capacity to act.

The Law Decree (1952) unified the age-limit on the field of civil law and family law which made a rather strict delineation between a minor without capacity to act and a minor who has limited capacity to act as a main rule. According to these rules, the child had no capacity to act until he or she reached the age of 12 and between the age of 12 and 18 the minor had limited capacity to act. In 1959 the regulation on persons was incorporated into the Civil Code of 1959 and essentially the rules of the Law Decree were overtaken. Actually, according to the testimony of the working materials of the codification process resulting in the Civil Code of 1959, although the raise of the age-limit of being a minor was at least slightly discussed, the age-limit of having limited capacity remained as being connected to the reach of a certain age.²³

²⁰ Ibidem, p. 781.

²¹ Art 7 of the Hungarian Guardianship Act. L. Sipőcz, op. cit., pp. 20-27.

²² 1894. évi XXXI. törvénycikk a házassági jogról. Act No. XXXI of 1894 on the law of marriage.

²³ <http://ptkiratok.hu>, (30.07.2020).

The regulations of the Civil Code of 1959 were revised in a complex way in 1977²⁴. The working and preparational materials of this codification process are preserved in the National Archives of Hungary and the publication of these archival sources gave an opportunity to follow on the codification even if the materials are sometimes missing pages or their locations are sporadic.²⁵ The working material contained a proposal to raise the age-limit of having limited capacity to act as a minor. It is interesting to have a look at the justifications of this proposal. The justification of the draft of the revising Act referred to the need of establishing the unification concerning the age-limit of a minor having limited capacity to act among the different branches of law. It was emphasized that the first stage of the compulsory (elementary) education lasts until the child reaches the age of 14 and the knowledge acquired in the elementary school can be generally accepted as the level of knowledge to guide and assess his or her own behaviour as the indispensable requirement of the capacity to act. The then effective rule of the Labour Act was also underlined as it made it possible to be employed from the age of 14 on and the age of 14 was needed to be a member in a cooperative and those have a common basis when defining the age of 14. Besides the fact that the socialist countries apply that age-limit, the justification mentioned that the age-limit of 14 fixed in the Civil Code has to be applied only for the circulation of property (obligations).²⁶ Another expert's comment remitted that the (then effective) Family Act (Act No. IV of 1952)²⁷ let a woman (I should say, girl) to marry from the age of 14 with the permission of the public guardianship authority.²⁸

A conclusion can be drawn that the correction of the age-limit of having limited capacity to act was discussed but mostly was supported by several and partly diverse arguments.²⁹ Only one argument was brought forward for

²⁴ 1977. évi IV. törvény a Magyar Népköztársaság Polgári Törvénykönyvéről szóló 1959. évi IV. törvény módosításáról és egységes szövegéről [Act No IV of 1977 on the modification and unified text of Act No IV of 1959 on the Civil Code of the People's Republic of Hungary].

²⁵ P. Nagy, *A Polgári Törvénykönyvről szóló 1959. évi IV. törvény 1997-es felülvizsgálata a levéltéri források tükrében* [The revision of the Act No IV. 1959 on Civil Code in 1977 in the mirror of the archival sources], [in:] *Az Igazságügyi Minisztérium iratanyaga az 1959-es Polgári Törvénykönyv 1977. évi novellájának előkészítésével és hatálybaléptetésével kapcsolatban.* [The records of the Ministry of Justice in connection with the preparation and entering into force the revising Act of 1977 of the Act No. IV. 1959 on Civil Code], 2018, p. 9, <http://impp/mhk/hu>, (30.07.2020).

²⁶ A PTK módosításának előkészítése [The preparation of the modification of the Civil Code] 1977. (HU_MNL_OL_XIX_E_1_c_0913_d) pp. 273-274. <http://impp/mhk/hu>, (30.07.2020).

²⁷ 1952. évi IV. törvény a házasságról, a családról és a gyámságról [Act No. IV of 1952 on marriage, family and guardianship].

²⁸ Észrevételek, javaslatok [Comments, proposals] (HU_MNL_OL_XIX_E_1_c_0918_d), p. 369. <http://impp/mhk/hu>, (30.07.2020).

²⁹ Upon the analysis of the archival records Nagy remarked that lively social debate took place and the proposal was mainly upheld. P. Nagy, op. cit., p. 19. .

maintaining the age-limit of 12 as the presumption that a minor of 12 does not mature enough physically, mentally and morally is contrary to the rights provided for those minors in communities and their public activities.³⁰ While arguing for the raise of this age-limit, it was admitted that the age-limit of 12 is an 'age-old' Hungarian rule but it shouldn't be maintained only because of being traditional.³¹

Historical overview on the child marriage in Hungary – from the age of 12 until the age of 16/18

The Hungarian Marriage Act distinguished between mature and immature persons and also between persons having or not having capacity to act. Besides, the Hungarian Guardianship Act contained regulation concerning the full age. Both the facts being mature and of full age had a significance as a precondition to marry. Not only a person of full age could marry but also a minor who was mature. A person was mature over 18 in case of a man and over 16 in case of a woman. If a minor over 16 or 18, respectively, wanted to enter into a marriage, the consent of the statutory representative was needed. If someone was incapacitated because of his or her age he or she could not marry. A minor under the age of 12 had no capacity to act when applying the Hungarian Marriage Act. If a woman (a girl) wished to enter into a marriage over the age of 12 but under the age of 16 the minister of justice could give dispensation and also the minister of justice could give it to a man (boy) who was to marry between the ages of 12 and 18. In 1945, the above-mentioned Order of 1945 did not only bring down the age limit of 24 to 20, but stated that both men and women acquire legal age with marriage and they remain of legal age even if the marriage terminates before reaching the legal age.

In 1953 the then new Family Act and the Law Decree entered into force at the same time. The Family Act regulated marriage, while the law Decree gave rules on personal rights. The Law Decree introduced the age of 18 as the full age and maintained 12 as the age-limit of having limited capacity to act. Besides, the Law Decree articulated in a provision that the minor who entered into a marriage acquired legal age before reaching the age of 18. The Family Act did not use the categories of matureness and immaturity anymore but made it possible that not only a person who reached the legal age but also a minor having

³⁰ Az 1977. évi IV. törvény hatálybalépése és végrehajtása [The entry into force of Act No IV of 1977 and its implementation] (HU_MNL_OL_XIX_E_1_c_0925_d) pp. 293-294. <http://impp/mhk/hu>, (30.07.2020).

³¹ PTK vitaanyag [Discussion paper of the CC] 1975 (HU_MNL_OL_XIX_E_1_c_0926_d). <http://impp/mhk/hu> (30.07.2020). This had been already mentioned by Sipőcz who reminded that in the old Hungarian law minors over the age of 12 had significant capacity to act. L. Sipőcz, op. cit., p. 22.

limited capacity to act could marry. The minor who reached the age of 12 could marry with the permission of the public guardianship authority according to the Law Decree (it is worth mentioning that almost nobody married at the age 12-14 at that time³²).

The year of 1953 meant a huge change in relation with a minor's marriage. As the first commentary to the then new Family Act summarized the new process and result³³, the new regulation became much easier than that one being in force earlier by eliminating the category of matureness and lowering the limit of legal age. Furthermore, only the permission of the public guardianship authority was needed and neither a dispensation was needed to be asked for, nor the consent of the statutory representative. If the prior permission of the public guardianship authority was missing, it could be given additionally later. The simplification as an advantage was emphasized also years later³⁴ just as the principle that the minor can decide himself or herself whether to marry or not and no competence remained with the parents or guardian. According to the Law Decree, a marriage, even invalid, could result in acquiring the legal age. The Law Decree's provision concerning the age requirements and consequences of marriage were upheld in the Civil Code of 1959.

The Act No I. 1974, which revised the Family Act and meant its first comprehensive reform, lifted the age-limit for marriage but applied a difference upon the basis of sexes. According to the new rules, men could marry from the age of 18 and women from the age of 16. The age-limit of marriage with permission was two years lower for both, which meant that men could marry with permission from the age of 16, while women from 14. According to the justification of the revising Act, the raising of the marrying age was based upon the general experiences and the public guardianship authority permitted a minor to marry if he or she was mature enough and all circumstances were given that the marriage should function socially in a proper way. The public guardianship authority could permit marriage in exceptionally justified cases for a girl over 14 and a man over 16. Act No. IV. of 1986, the second comprehensive reform of the Family Act, unified the marriageable age and lifted it to 18 for both men and women. However, the possibility for a minor to marry with permission was also upheld if the minor was over the age of 16. The equality of rights of men and women just as the protection of youth and the requirement that a person should marry if he or she has acquired the legal age served as arguments for the raise of the age-limit of marriage to the age of 18.

³² E. Weiss, *A házasság érvénytelensége [The invalidity of marriage]*, [in:] *A családjogi törvény magyarázata I. [Commentary to the Family Act vol I]*, ed. F. Petrik, Budapest 1988, p. 102.

³³ J. Bacsó, G. Rády, V. Szigligeti, *A családjogi törvény I. [The Family Act I.]*, Budapest 1955, p. 38.

³⁴ J. Bacsó, *A házasság érvénytelensége [The invalidity of marriage]*, [in:] *A családjogi törvény magyarázata [Commentary to the Family Act]*, eds J. Bacsó et al, Budapest 1971, p. 108.

Child's right to be heard in the Hungarian civil and family law in short historical context and according to the experiences

The right of the minor having limited or no capacity to act to be heard

The Second Book of the HCC which regulates the personal rights of natural persons provides new rules concerning the importance of the autonomy of the minor both when he or she has limited capacity to act or no such capacity. It depends on the reach of the age of 14 as a main rule. Earlier, in the Civil Code of 1959 there was no referral included in the legal norms to the autonomy and participation of the minor. The HCC in Art 2:14(3) determines that when making juridical acts that affect the minor himself or his property (the minor cannot do it himself or herself), statutory representatives shall take the views of the minor having no capacity to act but of sound mind into account in accordance with the age and maturity of the minor.³⁵ This requirement lies a burden on the parents and guardians as the child who does not reach the age of 14 has to be heard.

If the child has limited capacity to act, statutory representatives may themselves make juridical acts on behalf of minors having limited capacity to act,³⁶ and the HCC in Art 2:12(4) obliges the statutory representatives (parents or guardians) that when making juridical acts that affect the minor himself or herself or his/her property, to take the views of the minor having limited capacity to act into account. The HCC does not literally articulate that the minor between the ages of 14 and 18 should be heard but the hearing is an immanent requirement in Art 2:12(4).

The child's right to be heard according to the family law rules

Hungary joined the CRC in 1991 and the then effective Family Act was modified in 1995 and 1997 to meet the (main) requirements of the CRC. In the course of the recodification of the HCC it was emphasized that the CRC's requirements on child' rights have to be built not only into the Second Book but also into the specific regulations of family law. The recodification process began in 1998 and in 2001, when the first concept of the Family Law Book was drafted, the importance of the CRC as a benchmark among the international treaties was underlined. The concept referred to the fact that the Family Act had been modified in the nineties and essentially conforms to the standards of the CRC, however, it proposed that some principles of the CRC should have been

³⁵ Juridical acts of a minor having no capacity to act shall be null and void and his or her statutory representative shall act on his behalf with a tiny exception [Art 2:14(1)-(2) of HCC].

³⁶ Except where the law requires minors having limited capacity to act to make statements on their own or in the case of statements concerning the income earned from working by the minor having limited capacity to act [Art 2:12(4) of HCC].

incorporated into the Family Law Book as principles of family law.³⁷ The concept referred as an example to the requirement that the child has a right to grow up in his or her family as far as possible, but it was open whether such principles should have been incorporated as a principle of family law or rather a legal rule in relation with a special institution of family law. Just the child's right to be heard was planned to be built into the rules on parental authority.³⁸

Although the child's right to be heard according to Art 12 CRC constitutes a pillar of the Convention, it is not a principle in the Fourth Book of HCC but a requirement in the frames of the rules on the rights and obligations of parents under the aegis of parental authority. According to Art 4:148 HCC the child has to be involved in the parental decision-making as 'the parents are obliged to inform the child of any decisions affecting him and they shall ensure that their child who is of sound mind may express his views before the decisions are taken, and in the cases specified by an Act decide jointly with his parents. The parents shall take the child's views into account with appropriate weight, according to his age and maturity'. We have only sporadic experiences whether parents let their child exercise this right.

The need of the child's consent in proceedings concerning the child's family status and adoption

Two legal institutions are to be listed in connection which the child's role being very active already in the legislation of the Family Act, namely in 1952. These are the child's family status and primarily the settling of paternal status concerning the child and adoption.

Already the original text of the Family Act in 1952 contained a rule considering the system of paternal presumptions upon which the paternal status can be based that not only the consent of the mother and that of the statutory representative of the minor but also the consent of child being older than sixteen years is required for the declaration of paternity to be of full effect.³⁹ Similarly, the child had the right to request the establishment of paternity by the court.⁴⁰

³⁷ E. Weiss, *A készülő Polgári Törvénykönyv családjogi könyvének a Kodifikációs Szerkesztőbizottság által elfogadott koncepciója* [The Concept of the Family Law Book of the Civil Code in progress adopted by the Drafting Committee], "Polgári Jogi Kodifikáció [Civil Law Codification]" 2001, 4-5, p. 21-22. See also in: O. Szeibert (ed), *Weiss Emília családjogi és öröklési jogi kodifikációs tanulmányai* [Studies of Emília Weiss on family law and succession law], Budapest 2017, p. 156-157.

³⁸ E. Weiss, *Néhány gondolat a családjog kodifikációjához a készülő Polgári Törvénykönyvben* [Some thoughts on the codification of family law in the Civil Code in progress], [in:] *Eörsi Gyula emlékkönyv* [Memory book for Gyula Eörsi], eds T. Sárközy, L. Vékás, Budapest 2002, p. 249. See also in: O. Szeibert (ed), *Weiss Emília családjogi...*, p. 113.

³⁹ Art 37(4) of Family Act.

⁴⁰ Art 38(4) of Family Act. Similarly, if the mother's identity could not be established, the child might apply for the court to declare that the person indicated by the child is the child's mother [Art 40(1) of Family Act].

The child's advantaged role was not the result of a child-focused attitude coming from the recognition of child's rights. The Hungarian law concerned the judicial proceeding on the establishment of parentage as the child's claim⁴¹ having public interest.⁴² The age-limit of 16 years was brought down to 14 years in 1995 when the Family Act was modified⁴³ according to the requirements of the CRC. However, the justification of this modifying act did not explain the exact motivation of bringing down the age-limit. In the course of the recodification of HCC it was declared that no need emerged to change conceptionally the child's role in connection with judicial proceeding on the establishment of parentage.⁴⁴ As a consequence, the Family Law Book of HCC reserved that the minor over 14 plays a role in relation to the establishment of parentage. According to Art 4:101(5) the consent of the child over fourteen shall be required for the declaration of paternity to be of full effect.

The first text of the Family Act in 1952 required the concordant application of the affected partners, namely that of the adoptive parents and the child for the adoption which had to be authorized by the public guardianship authority.⁴⁵ It was also stated that legal statements regarding adoption had to be made in person, however, a child could not make a legal statement validly on his own. On behalf of a minor having no capacity to act, his or her statutory representative could make a legal statement, while on behalf of a child having limited capacity to act the consent of the statutory representative was needed to a valid legal statement.⁴⁶ (In 1952 the age-limit of a child having no capacity to act was 12 years.) This legal rule was changed in 1995 in harmony with the modification of the child's role in case of the establishment of parentage. It resulted in a solution according to which a child having limited capacity to act might make his or her legal statement in person, without the consent of the statutory representative. In the course of the recodification of HCC this rule was planned to be maintained. According to Art 4:145 (3) a child over 14 has to make the legal statement in person without the consent of the statutory representative and the child under 14, on behalf of whom the statutory representative makes the legal statement, who is of sound mind has to be heard by the public guardianship authority.

⁴¹ O. Csiky, *A gyermek családi jogállása [The family status of the child]*, Budapest 1973, p. 324.

⁴² *Ibidem*, p. 324.

⁴³ 1995. évi XXXI. törvény a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény módosításáról [Act No. XXXI of 1995 on the modification of the Act No. IV 1952 on marriage, the family and guardianship].

⁴⁴ O. Szeibert, *A Családjogi Könyv rendelkezéseinek formálódása a Polgári Törvénykönyv kodifikációja folyamán [The shaping of the regulations of the Family Law Book in the course of the codification of the Civil Code]*, [in:] *Fejezetek a Polgári Törvénykönyv keletkezéstörténetéből [Chapters from the history of codification of the Civil Code]*, ed. L. Vékás, Budapest 2018, p. 158.; E. Weiss, *A készülő Polgári Törvénykönyv...*, p. 35. See also in: O. Szeibert (ed), *Weiss Emilia családjogi...*, p. 186.

⁴⁵ Art 48(1) of Family Act.

⁴⁶ Art 59 of Family Act.

The child's right to be heard in case of rendering the exercise of parental authority

Besides, the child's right of participation is articulated in the HCC for the case when the court has to decide on the exercise of parental authority. That is not a newly incorporated rule as it was contained already in the Family Act. However, the interpretation of this rule and the reflections on that are worth being presented as this is one of the most discussed issues in the judicial process on parental authority in case of divorce. According to Art 4:171(4), which defines the action for settling the exercise of parental authority the court shall hear during the procedure both parents, except for irremovable obstacles and also the child shall be heard in justified cases or if requested so by the child, either directly or with involving an expert. For a child older than 14, the consent of the child shall be required for any decision on parental authority unless the child's choice endangers his development.

As it can be seen the child's right to be heard is not defined at all but the child over 14 has to be heard and besides, his or her consent is needed for the decision on parental authority as a main rule. This requirement became part of the Hungarian family law in 1995 when the Family Act was modified according to the requirements of the CRC. Until that time Art 74 of Family Act stated that in procedures on parental authority the minor has to be heard if it is necessary. In 1995 a rule, actually like the effective one, was incorporated into the Family Act. According to the justification of the modifying Act, the new text of Art 74 aimed at that the child should be heard over 14 and his or her consent should be needed as well. However, the then new legal text and its justification did not fit to the proper interpretation of Art 12 CRC even if the justification clearly refers to this Article of CRC. The justification tried to 'protect' the child and stated that it was the responsibility of the persons and courts dealing with the child to adjudge whether the hearing of child is possible or not as a hearing could mean a 'disproportionate neural burden' on the affected child. So, the then new legal rule did not articulate the child's right to be heard but only took a step towards it.

Although this new Art 74 did not determine an age over which the child should have been heard by all means but on the other side, the modification made it as a main rule that the consent of the child being over 14 is needed for the judgment deciding on parental authority. The justification emphasized that a child over 14 'has usually a definite opinion on with which parent he or she would like to live further on with'. This rule was not in harmony with the CRC's requirements as the child has only a right to be heard but it cannot be an obligation for him or her.

The Family Law Book of HCC maintained this rule almost absolutely. The difference is that the earlier rule in Art 74 of Family Act included a sentence that the court could get information on the child's opinion on settling of parental authority also by the parents' pronouncement. This meant that in case of divorce

upon the parents' mutual consent when they had to agree on all accessory issues including the agreement on the exercise of parental authority there was no need to hear the child over 14 but the court could orientate itself by the parents' agreement. As the 4:171(4) of HCC does not include this sentence the question emerged very soon during the judicial process on settling the parental authority whether the child over 14 has to be heard by all means or the courts can follow the judicial practice without the definite legal authorization that the court can get information about the child's viewpoint through the parents.

As far as it can be experienced the courts are divided and follow very divergent paths.⁴⁷ Some courts are on the opinion that without an authorisation the court has to hear the child, while other courts are convinced that the hearing is superfluous and it is better for the child if he or she is not heard at all if the parents reached a consensus. We can find intermediary solutions as well, as some courts make the parents declared whether they asked the child about his or her opinion on the exercise of parental authority. Although the parents are obliged to involve their child into the decision-making at home, if they are asked whether they discussed it with the child the judges can see the parents' surprised faces.

Conclusion

The child has to be protected as a child until at least the age of 18 (as a main rule) and his or her legal capacity to act seems to be dependent upon the legal acts, the circumstances and the child's development and evolving capacities as only the adjudgment of a concrete legal situation concerning a unique child can result in balancing the child's best interests. The child's voice plays a crucial role in these legal situations. The question is whether the legal rules on the child's capacity to act, the age-limits under 18 and the rules on the child's hearing are compatible with the requirements of the CRC.

The development of civil law proceeds on its own way and the same is true for family law whether family law is part of civil law or not. (In the socialist era family law was considered as a branch of law separated from classic civil law as civil law was held to regulate primarily property relations, while family law principally human relations. This concept had clear legal consequences also in the Family Act.) The HCC has its own perception about the human being as a legal entity in the frames of civil law. Already at the beginning of the codification of the HCC it was determined that the human being as a legal entity in the Civil

⁴⁷ The president of the Hungarian Curia (former Hungarian Supreme Court) established a board, namely the Counselling Board of the new HCC for the interpretation of the HCC in 2014. Also the Counselling Board could discuss the issue of hearing of the child. <https://kuria-birosag.hu/hu/ptk> (30.07.2020).

Code is an autonomous person patterned after the self-conscious, rational, risk-taking citizen acting responsibly and deliberately in the everyday life.⁴⁸ Also, from the decisions of the Hungarian Constitutional Court in the nineties the conclusion could be drawn that the then new perception about the human being in private law is a self-conscious, autonomous person who is able to manage his transactions as an adult and brave in risk-taking.⁴⁹ All human beings have legal capacity⁵⁰ and although it can be seen that a self-conscious person is in the focal point of the HCC, the protection of the weaker party in the private law is discussed in the last fifty years⁵¹ as well. What concerns the capacity to act, this has an absolute value⁵² and affects a whole legal system⁵³. Although I'm concerned about the fact that not all human beings entering into transactions under the aegis of civil law is self-conscious, it is obvious from the viewpoint of the civil law that all actors of the transactions of assets and property relations have to know who has capacity or limited capacity to act and who has no capacity at all. The real implementation of the children's rights would require a not so rigid approach but it would be contrary to the regulating logic of the civil law.

The historical overview lets us conclude that one of the main legal institutions of family law (and civil law) is marriage with close connection with the fact who is allowed to enter into a valid marriage. Marriage is about property relations in the context of civil law and I recall the fact that the age-limit of having legal age is very closely connected to marriage. For many years when the marriageable age was discussed again and again not the child was protected from marriage coercing serious legal consequences on the child but rather the marriage as an institution was protected. Today a child can enter into marriage over 16 with the permission of the guardianship authority but it is questionable whether it serves the interests of the child at all. Although the modification of the Family Act in 1995 aimed at implementing the CRC the traditions of civil law were very massive and those are massive today as well.

⁴⁸ L. Vékás, *A Kodifikációs Főbizottság 2000. június 1-jei határozatai [Decisions of the Committee on Private Law on the 1st of June, 2000]*, "Polgári Jogi Kodifikáció [Civil Law Codification]" June 2000, p. 3.

⁴⁹ T. Lábady, *Alkotmányjogi hatások a készülõ Ptk. szabályaira [Effects of constitutional law on the regulations of the Civil Code in progress]*, "Polgári Jogi Kodifikáció [Civil Law Codification]" June 2000, p. 15. See for this issue: B. Landi, *Emberkép, magatartásmérték, felelõsség [Perception of human being, measure of behaviour, responsibility]*, "Iustum, Aequum, Salutare" 2016, 1, p. 15, 49-63.

⁵⁰ Art 2:1 of HCC.

⁵¹ L. Vékás, *Parerga. Dolgozatok az új Polgári Törvénykönyv tervezetéhez [Studies on the draft of the Civil Code]*, Budapest 2008, p. 16.

⁵² Z. Csehi, *Chapter 5 Persons*, [in:] *Introduction to Hungarian Law. Second Edition*, ed. A. Harmathy, 2019, p. 93.

⁵³ A. Kőrös, "Jót s jól!" - helyes célok, alkalmatlan megoldások a cselekvõképesség tervezett szabályozásában [Proper aims and improper solutions in the planned regulation of capacity to act], "Magyar Jog [Hungarian Law]" 2009, 2, p. 104.

While the legal age, the age-limit of capacity to act and the marriageable age seem to be connected to traditions and traditional institutions of civil and family law, which are preserved, the protection of the child's interests misses the traditional approach in the sense of the CRC. I remind that whilst the child is not an object in the proceedings considering the adoption and parental presumption, it was a civil law tradition having been preserved. Moreover, if there is any tradition concerning the behaviour towards the child, it is a protective one but without taking into attention the child's voice. The hearing of the child is a very general issue, obliging not only and firstly the courts and other actors of the jurisdiction but the society and parents, guardians.

The child has a right to access information (Art 17), a right to freedom of expression (Art 13) and a right to express his or her views freely in all matters affecting the child (Art 12) and all persons and authorities are obliged to implement these rights. Actually, all legal acts should take into attention the importance of these rights and develop proceedings in the course of which the requirements of CRC on hearing of the child are met. What concerns the traditions, it is a typical attitude from the actors of jurisdiction that the child's right to be heard should be connected to a specified age. However, it is not fully compatible with the CRC. Besides, it seems to be a huge problem how the proper age or age-limit of the child to be heard could be determined. As it could be seen the determination of the legal age, the marriageable age and the age-limit for having capacity to act did not base upon psychological or any other scientific studies but the legislator followed a path both hundred years ago, in the middle of the 20th century and recently. Therefore, these ages and age-limits are not only unfit for taking into attention the child's unique evolving capacities but seem to be somehow arbitrary.

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SUMMARY

Convention on the Rights of the Child and some aspects of civil law and family law

One of the cornerstones of CRC is its holistic attitude, which includes the mentality that each child's evolving capacities are to be taken into attention when adjudging a concrete situation from the viewpoint of the child's rights, i.e., the child's limited capacity to act instead of age-limits. This is in relation with the fact that autonomy has to be provided to the child, while also the aim of protection has to be implemented. A highly discussed issue is the child's right to be heard, although the State Parties to CRC have an unambiguous obligation to provide this right to each child who can form his or her own views, which ability is not merely dependent upon age. The Hungarian Civil Code, which is the main legal source of Hungarian civil law and family law connects the child's incapacity and limited capacity to act to age-limits in its Second Book on Individual as Subject of Law through having established a clear regime containing irrebuttable presumptions concerning these age-limits. The Fourth Book on Family Law also functions with the help of age-limits regarding certain actions concerning family law institutions. The minimum age of having limited capacity to act is the age of fourteen and this age plays the most significant role in family law issues, as well. The historical overview on the children's capacity to act and child marriage went back until the first Hungarian Acts on Guardianship and Marriage, respectively, and dealt with the legal modifications of the twentieth century with special regard to the reasons of the changes of children's age-limits. A deep insight based upon the codification documents from 1959, 1977 and 1999–2013 is provided to discover the motivations of the main modifications in the analysed issues. This

overview let me conclude that the civil law regulation has been based on traditions of civil law and especially national civil law and rather the institutions determined the ages and age-limits concerning children than the results of the psychological development of a child and the mentality in harmony with child-focused standards. The child's right to be heard has a shorter legal history, although the CRC after having been ratified in Hungary in 1991 influenced the shaping of some rules of the Hungarian Family Act being in force until 2014. Although during the codification of the Hungarian Civil Code and its Books affecting directly children, the Second and Fourth Book the requirements of the CRC were deliberately taken into account, the traditions determined the analysed rules in an overwhelming way. As an example, the child's role is active concerning the settling his or her family status and adoption, but this has been a traditional role and not the result of the child-focused attitude. A mentionable discussion has emerged nowadays from the rule of the Hungarian Civil Code on rendering the exercise of parental authority and its possible judicial interpretations. This debate shows that while some regulations intend to implement the requirements of the child-friendly justice, the judiciary cannot find enough clues how to implement it in the practice. The analysed ages and age-limits being used traditionally in connection with some civil law and family law institutions assist the judiciary, but are unfit for taking into attention the evolving capacities of each child whose autonomy and articulation of his or her own voice should be provided while the child has to be protected.