# The Right of the Child to Express His or Her Views in Civil Proceedings and the Position of the Child Under the Rules of Criminal Procedure in Lithuania

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## A. Introduction

> The child should be respected and heard; the child has the right to express his or her views freely and those views of the child should be given due weight (Article 12). This Article is contrary to the tradition and the interests of the parents, therefore, adults have problems in accepting it.[1]

The observation above represents the general attitude to the right of the child to express his/her opinion in Lithuania. The observation can be developed even further. In the light of a desire to maintain parental authority and power, this right of the child is easily lost in the daily routine.[2] It was observed in addition that a decade ago parents and guardians were the main protectors of the rights of the child and the mere term the 'rights of the child' is unacceptable to society because of the belief that the rights of the child are covered within the rights of the family rather than being something that could exist separately.[3] These observations indicate the major transformation that the legal system, institutions and society itself are undergoing.

The purpose of this paper is thoroughly to analyse the evolution of legal thought, the attitude of the society at large and its institutions. The paper describes the legal provisions of the Civil Code, the Code on Civil Procedure, the Criminal Code and the Code on Criminal Procedure relevant to the child's right to express his/her

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1 L. Trakinskienė, *Visuomeninio Ombudsmeno vaidmuo Lietuvoje*, *in* Konferencijos: Vaiko teisių apsaugos kontrolierius (Ombudsmenas) Lietuvoje medžiaga. Vilnius 1999 m. gruodžio 9 d. Conference Papers, at 19 (2000). Author's translation from Lithuanian to English.

2 G. Sakalauskas, Vaiko teisių apsauga Lietuvoje 15 (2000).

3 Ombudsman's Reports on its Activities during the Year of 2001: Lietuvos Respublikos vaiko teisių apsaugos kontrolieriaus veiklos ataskaita – 2001 01 01 – 2001 12 31. Available online in Lithuanian only: http://vaikams.lrs.lt/informaciniai/ataskaita20020415.doc, at 4.

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views and the status of the child as the victim. These provisions are illustrated with legal analysis and reflection on developments in the legal system undergoing transition. The paper seeks to demonstrate the actual situation that exists behind the misinterpretation and inconsistent application of the law. It seeks to walk the footprints of the child in the shoes of the child and to hear the cries of the child unattended by the system.

There are several definitions that are used throughout the paper. The first definition is the child. Lithuanian law offers several definitions concerning the child, for instance, the child, the minor and small-aged child. The paper and the legal provisions quoted in this paper define the child and the minor within the definition set out in Article 1 of the UN Convention on the Rights of the Child. Thus, for the purposes of this paper the child or minor means "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[4]

Another important term is *civil capacity.* Article 2.5 of the Civil Code of the Republic of Lithuania defines civil capacity as: "on attaining full age, i.e. when a natural person is eighteen years of age, he, by his acts, shall have full exercise of all his civil rights and shall assume civil obligations."[5] The age of 18 or majority signifies the person's attainment of civil capacity. Lithuanian law accordingly treats the child as a person without civil capacity or with limited civil capacity.

This paper provides a complete overview on the child's right to express his/her views in civil proceedings (Part C of this paper) and the status of the child as the victim and/or eye-witness in criminal proceedings (Part D of this paper). These different parts are structured to present a general overview of the relevant provisions in the whole legal system of Lithuania; description of the relevant legal provisions is separated from analysis of actual application.

## B. Lithuania and the International Convention on the Rights of the Child

Lithuania acceded to the International Convention on the Rights of the Child on 8 January 1992; the Parliament of the Republic of Lithuania (*Seimas*) ratified the convention on 3 July 1995. Treaty ratification is the prerequisite for the international treaty to have the force and rank of law in the hierarchy of the

[4] Article 1 of the Convention on the Rights of the Child: adopted and opened for signature, ratification and accession by GA Res. 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with Article 49. Office of the High Commissioner for Human Rights. Available at http://www.unhchr.ch/html/menu3/b/k2crc.htm.

[5] The Civil Code of the Republic of Lithuania of 18 July 2000 No. VIII-1864 (as last amended on 11 November 2004). Official translation only of the initial act of 2000 is available in English: http://www3.lrs.lt/cgi-bin/preps2?Condition1=245495&Condition2=. The text with the latest amendments available in Lithuanian online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=246124&Condition2=.

legal system of Lithuania. This part is devoted to analyzing the approach taken to international law obligations in the legal system of Lithuania: legislation, application in courts and administrative practice.

## I. Monism v. Dualism

Monism and dualism are the two theories which explain the practice of states parties to international treaties in their approach to their international obligations in their internal legal systems. The monistic theory provides that international obligations are supreme within the internal legal order of the state; international obligations apply directly and any inconsistent provisions of national law are automatically null and void. The dualist approach provides that the international and the internal legal orders exist independently from one another.[6]

### 1. Legislative Basis in Favour of the Monist Theory

Lithuania is considered to have adopted the monist attitude towards its obligations embodied in international treaties it ratifies.[7] The legal basis for this is Article 138(3) of the Constitution, which proclaims: "International agreements ratified by the *Seimas* of the Republic of Lithuania shall be an integral part of the legal order of the Republic of Lithuania."[8] This provision gives the rank and force of internal law to all ratified international treaties. In addition, this particular provision is considered to be directly applicable in the legal system, which implies that it is binding upon all the bodies of the state: the legislature, administration and the judiciary.[9]

Accordingly, the relevant Law on Ratification proclaims the UN Convention on the Rights of a Child an adopted law.[10] Thus, it is clear that in Lithuania the ratified international convention forms an integral part of the internal legal system and has the force and rank of internal binding law.

However, the provisions of the Constitution are silent on the relationship of the ratified treaty with the internal laws of Lithuania. More specifically, it does not seem to solve the question of supremacy of the ratified treaty as regards its relationship with internal national law. Therefore, Article 11 (2) of the Law on

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6 P. Malanczuk, Akehurst's: Modern Introduction to International Law 63 (1997).

7 V. Vadapalas, Tarptautinė teisė: bendroji dalis 55-62 (1998) and D. Jočienė & K. Čilinskas, Žmogaus teisių apsaugos problemos tarptautinėje ir Lietuvos Respublikos teisėje 16 (2004).

8 The Constitution of the Republic of Lithuania (Approved by the citizens of the Republic of Lithuania in the Referendum on 25 October 1992) of 6 November 1992 (as last amended on 13 July 2004 No. IX-2343, No. IX-2344). Official translation. Available Online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=239805&Condition2=.

9 Vadapalas, *supra* note 7, at 45 and 56; also V. Vadapalas, *Incorporation and Implementation of Human Rights in Lithuania*, *in* M. Scheinin (Ed.), International Human Rights Norms in the Nordic and Baltic Countries (1996), at 113 as paraphrased *in* Jočienė & Čilinskas, *supra* note 7, at 16.

10 The Law on the Ratification of the United Nations Convention on the Rights of the Child of 3 July 1995. No official translation into English or French is available. The text in Lithuanian is available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=18370&Condition2=.

the Treaties[11] is relevant, as it accords supremacy to the provisions of ratified[12] treaties when in conflict with the provisions of national laws. Thus, the Law on the Treaties explicitly accords supremacy to the provisions of the ratified treaties over the conflicting provisions of national law.

To sum up, the main legislative basis of Lithuania regards its obligations entered into in the ratified treaties as *an integral part of its internal legal system and accords both the status of ordinary legislation, which also entails direct application and the supremacy of ratified treaty against any incompatible provisions of national law.*

## 2. Application in Courts as the Basis for Dualism

This analysis of the Constitution and the Law on Treaties indicates that treaties ratified by Lithuania are of direct application as regards the administration and courts.

Nevertheless, some academic writers have observed the phenomenon whereby, although the Constitutions of several Central and Eastern European States incorporate treaties as an integral part of the internal order and sometimes provide that treaties are superior over ordinary national legislation, there remains doubt as to the *"actual implementation" of these broad provisions "by the courts and administration" [which] matters much more than "lofty constitutional texts"*.[13] The Constitution of the Former Soviet Union, for example, embodied the human rights of its population, but the reality was that people were not allowed to practise them. A Russian scholar has noted "[…] elitism, bureaucracy, a caste system, censorship, and elections that are empty formalities den[ied] Soviet citizens […] [the freedoms that truly socialist societies deserve] […]."[14]

In this respect, it is worthwhile mentioning that "*even in the instances where a state declares that it is bound by the treaty provisions internally (this way implying a monistic attitude towards the international law), but the internal courts*

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[11] The Law on Treaties of the Republic of Lithuania of 22 June 1999 No. VIII-1248 (as last amended on 7 July 2005). No official translation into English or French is available. The text in Lithuanian is available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=260053&Condition2=.

[12] The term 'ratified' is particularly important. Although it has no direct implications to the UN Convention on the Rights or the Child as it is ratified, it gives rise to certain problems of status as to the treaties, which were acceded to, but not ratified. This concern is particularly true about the International Covenant on Civil and Political Rights of 1966, the Optional Protocol to it of 1996 and the International Covenant on Economic, Social and Cultural Rights of 1966. The special problem here is that Lithuania (the body, which has temporarily represented the Parliament of Lithuania) merely acceded to these international treaties on 12 March 1991. For a thorough analysis, *see* Jočienė & Čilinskas, *supra* note 7, at 20.

[13] Malanczuk, *supra* note 6, at 68. Emphasis added.

[14] Worded by D. K. Shipler, Russia: Broken Idols, Solemn Dreams: A Provocative Look at the Russian People 153 (1986). *Reproduced in* S. Voluckytė, Why is Lithuania Lagging Behind in Terms of Economic Development: A Legal Analysis from the FDI Point of View (LL.B. thesis on file at Concordia International University Estonia, Tallinn), at 4-5 (2002). The author of the Thesis was awarded the Outstanding Student Award for the Best Thesis of the Year by Concordia International University Estonia and the Encouragement Premium by the European Committee under the Government of Lithuania in 2002.

*would give priority in application to the provisions of national law or apply the provisions of international law only if the provisions of national law so provide – this approach would amount to the dualist approach to the international law in the internal system of the state concerned*."[15]

This remark makes it important to analyze the provisions which set out the norms Lithuanian courts must apply when deciding proceedings before them. These provisions are contained in Articles 1 (2) and 33 (1) of the Law on Courts.[16] Article 1 (2) stipulates that "the Law on Courts is based on the principles embodied in the *Constitution of the Republic of Lithuania, other laws and the international treaties of the Republic of Lithuania*."[17] The wording of this provision seems to accord *priority* to the *other laws of the Republic of Lithuanian* rather than *the international treaties of the Republic of Lithuania.* A similar concern arises as to the wording of Article 33 (1), which proclaims that the courts when adjudicating on cases *shall rely on the Constitution of the Republic of Lithuania, the Law on Courts and other laws of the Republic of Lithuania, and the international treaties of the Republic of Lithuania, regulations of the Government, other legal acts, which are compatible with laws.* The wording of these two articles creates considerable unclarity concerning the rank of treaties in court proceedings.

The prevalent academic opinion, however, is that this provision is to be interpreted so as to afford priority and supremacy to Lithuania's international obligations. This interpretation is thought to be consistent with the judgments of the Lithuanian Constitutional Court.[18]

In this regard, it is important to turn to Article 33 (2). This Article proclaims that the Courts in their proceedings *shall rely upon* the orders of the Constitutional Court of the Republic of Lithuania and *shall consider*[19] the judgments of the Supreme Court and Chief Administrative Court published in their respective bulletins.[20] Consistently with this provision, the Supreme Court of the Republic of Lithuania (Article 23 (2) (2)) and the Chief Administrative Court of the Republic of Lithuania (Article 31 (2) (2)) are both tasked to shape consistent court practice within their areas of competence. In accordance with the Articles 23 (2) (2) and 31 (2) (2), these courts "*analyze the law enforcement practices of the courts and provide for recommendations on law interpretation*."[21] These two provisions imply that the highest instance courts are not empowered to set the mandatory rules of actual practice in courts. They do not set the precedent that must be applied in the individual cases that arise in the first instance courts.

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15 Vadapalas, *supra* note 7, at 45. Translation and empasis added by the author.

16 The Law on Courts of the Republic of Lithuania of 31 May 1994 No. I-480. (as last amended on 18 May 2004). No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=234033&Condition2=.

17 Translation and emphasis added by the author.

18 *See* Vadapalas, *supra* note 7, at 57-58.

19 In practice, it is not interpreted to mean that an individual judge is bound to follow.

20 Translation, wording and emphasis added by the author.

21 Translation and emphasis added by the author.

To conclude the analysis on courts, the legislative supremacy of ratified treaties in the application of legal acts is derived analytically rather than visibly set.[22] The judicial instruments that accord priority to ratified treaties are included in the list of the applicable legislation under Article 33 of the Law on Courts.

## II. Self-executing v. Non-self-executing Treaty and Administrative Action

In addition to the *monist* and *dualist theories*, the discussion on whether the international treaty is a *self-executing* or a *non-self-executing* comes into play when the provisions of a treaty need to be applied. Although this legal doctrine is used to justify the direct application of treaties by the courts in the US,[23] this paper shall apply this doctrine to analysis of administrative action in Lithuania. This is so because many academic writers in Lithuania generally agree that in situations when the provisions of the UN Convention on the Rights of the Child are applicable directly, in practice these specific provisions in question cannot be enforced directly as the provisions of the national law should be adopted in order to enable administrative application.

This argument is echoed in the works of international academic writers, who state that the systems of the strictly *dualist* traditions of the former Socialist countries required "a specific national legislative act before treaty obligations could be implemented and had to be respected by national authorities" and "international law could generally not be invoked before […] administrative agencies, unless there was an express reference to it in domestic law."[24] In Lithuanian law, specific references to treaty provisions are customarily being made.[25] Thus, rather than coming back to the theoretical discussion of *monism v. dualism*, the attitude of the administration on the treaty as *self-executing* and *non-self-executing* could smooth the departure from the monist to dualist perception.

This could be particularly true of the UN Convention on the Rights of the Child as many of the provisions it contains call for direct action by the government of the state party. Thus, it is necessary to analyse administrative practice in Lithuania concerning international legal obligations on the rights of the child.

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[22] Nonetheless, the Senate of the Supreme Court Judges acknowledges the UN Convention on the Rights of the Child as suitable source of law without going into any analytical detail. Lietuvos Aukščiausiojo teismo teisėjų senato nutarimas Nr. 35 Dėl įstatymų taikymo teismų praktikoje, nustatant nepilnamečių vaikų gyvenamąją vietą, tėvams gyvenant skyrium (Teismų praktika 2002 m. Nr. 17, at 333-347) 2002 m. birželio 21 d. Nr. 35. as reproduced in Šeimos teisė: Vaiko teisių apsauga, at 151-152 (2003).

[23] Malanczuk, *supra* note 6, at 68.

[24] *Id.*

[25] For the list of the specific national provisions that invoke the provisions on international treaties, *see* Vadapalas, *supra* note 7, at 59-60.

## 1. Administrative Practice and the UN Convention on the Rights of the Child

The view that the UN Convention on the Rights of the Child is binding upon governments rather than applicable directly is expressed in the comments of the UNICEF. It simply states that "[b]y ratifying [the UN Convention on the Rights of the Child], national governments have committed themselves to protecting and ensuring children's rights and they have agreed to hold themselves accountable for this commitment before the international community."[26] An important mechanism to ensure accountability of the states party is that upon ratification of the UN Convention on the Rights of the Child a state party is required to report to the Committee on the Rights of the Child under Article 44. However, the Lithuanian government submitted its initial National Report only after a three years' delay.[27] This delay could imply a lack of preparedness and lack of serious attitude and real intention to implement wholeheartedly its international obligations. The following paragraphs shall analyse what is done in Lithuania to follow and implement its international obligations, whereby Lithuania has undertaken "*to put in place the guarantees and mechanisms to ensure that the rights are de facto respected*."[28]

## 2. The National Legal and Administrative Framework for the Rights of the Child and its Interpretation

Lithuania has adopted a legal framework to incorporate the obligations listed in the UN Convention on the Rights of the Child and set up an extensive administrative framework to implement its international obligations. The description of interpretation issues sets out the reasoning of the authorities that led to the establishment of the legal and administrative system incorporating Lithuania's international obligations under the UN Convention on the Rights of the Child.

### *a) Interpretation*

A legal and administrative framework analysis on the rights of the child would be insufficient and incomplete without first examining two distinct views set out in academic writings from 1996. One view – the minority view – stated that the legal framework for the rights of the child was sufficient even before 1996; the other view argued, however, that Lithuanian legal system did not have the general framework created for the protection of the rights of the child. This later view prevailed in the administrative and legislative reasoning and action.

The representative of the minority view is Lithuanian author Dr. Babachinaitė. In her early description of the rights of the child in Lithuania she stated: "[…] the legislative framework is sufficient, only some corrections have to be made. The main problem here is that the legislative application contradicts the Constitution and statutes. […] this detrimental habitual practice of application of legislative

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[26] UNICEF, Introduction to the Rights of the Child Convention, http://www.unicef.org/crc/crc.htm.

[27] C. Klein, UN Recommendations, in Children's Rights in the Legislations of the Baltic States: Situation, Problems and Determination, Conference Papers, at 76 (1998).

[28] *Id.* Emphasis added.

acts has evolved into a legal tradition, a social tradition in fact, whereby violation of statutes is ignored."[29] This view best serves to depict even the current practice of the administration, particularly in the instances where the rights of the child are violated.

The majority view, which influenced the administrative practice, basically stated that Lithuania's legislation did not contain any general principles on the rights of the child even after the UN Convention on the Rights of the Child had been ratified.[30] Their basic argument was that the UN Convention on the Rights of the Child was only declaratory and its provisions did not create any enforcement mechanisms. The authors argued that the goals of the Convention are better achieved through the incorporation of the provisions of the Convention in legislation specifically for the protection of the rights of the child.

The minority view explains the general attitude of the authorities and society when the implementation of the legal provisions is concerned, while the majority view tries to explain the lack of administrative action on the basis that the legal rules do not provide for the basis of legal administrative action.

### *b) Legal Framework*

The government thought it was indispensable to adopt legislation which was specific to the protection of the rights of the child in Lithuania and incorporated the UN Convention on the Rights of the Child of 1989 and the Declaration on the Rights of the Child of 1959, even though the Lithuanian Constitution provides certain rights to children equally with adults.

Generally, it is thought that the Lithuanian Constitution provides for the specific rights to the children as the indivisible part of the society. The authors, however, are not consistent in their views concerning which specific articles of the Constitution grant rights specific to the child. Some authors indicate that the Constitution guarantees the entire range of fundamental human rights it guarantees to all citizens and listed in Articles 18-37 of the Constitution.[31] Others argue that the Constitution guarantees only limited rights to children, such as, the rights concerning and the constitution of families (Articles 38 and 39 of the Constitution) and educational guarantees (Articles 40 and 41 of the

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[29] G. Babachinaitė, *Vaiko teisės: jų samprata ir įgyvendinimo problemos*, *in* Vaikų teisės ir jų igyvendinimo garantijos, Conference Papers, at 22 (1996) Author's translation. The same opinion on the legal system is found in *supra* Ombudsman's Reports on its Activities during the Year of 2001, note 3, at 100 -101; whereby it states that the legal system seems sufficient, but the rise in the number of complaints filed raises reasonable doubts on the effectiveness of the system. Its main proposal listed on page 124 that the state should attach priority and make the implementation of the rights of the child and seek solutions to the problems of the child – the priority area in the state policy.

[30] *See* for instance, A. Dapšys, *Vaiko teisių apsaugos pagrindai: įstatymo projektas, jo aktualumas, paskirtis, svarbiausios nuostatos*, *in* Vaikų teisės ir jų įgyvendinimo garantijos, Conference Papers, at 30 (1996) and G. Kiaulakis, *Vaiko teisių gynimo teisiniai mechanizmai*, *in* Vaiko teisės ir pilietinė visuomenė, at 26-27 (2000).

[31] *See* for instance, Kiaulakis, *supra* note 30.

Constitution).[32] Although, these views are quite inconsistent, there is at least one provision that the authors seem to agree upon. This provision is paragraph 3 of Article 39 of the Constitution, which states: "Minors shall be protected by law."[33] Thus, all academic commentators have agreed that the rights of the child should be protected by law.

The Constitution grants statutory legal protection to the rights of the child. This is essential for the full implementation of the UN Convention on the Rights of the Child, which is granted the force and status of a statute (law)[34] under the internal legal system of Lithuania in line with Article 138 (3) of the Constitution.

Although legally the UN Convention is accorded the status and force of law, it is thought to be insufficient and accordingly its provisions have also been incorporated in national legislation, namely the Law on the Framework of the Rights of the Child Protection of the Republic of Lithuania.[35] This law is intended to incorporate all the declarative rights of the child embodied in the Convention and to validate certain mechanisms that would guarantee these rights, which are lacking in the text of the Convention. Internally, this Law is the 'constitutional' basis for the rights of the child in Lithuania.

### *c) Administrative Framework*

The government has fulfilled its duty under the UN Convention on the Rights of the Child to establish an administrative mechanism that would guarantee these rights in practice. This has led to the establishment of a complicated web of responsible state and non-state institutions.[36]

Two main institutions are responsible for the direct application of the UN Convention of the Rights of the Child. In 1993 the Government established the Offices for the Protection of the Rights of the Child under the Ministry of Employment and Social Security.[37] The activities of these offices are confined to the territories of specific cities, municipalities and regions. The second responsible

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[32] Dapšys, *supra* note 30. This view (on Article 39 and 41) is upheld by Kiaulakis, *supra* note 30. In this respect the Senate of the Supreme Court Judges accepts that the Constitution safeguards the individual rights of the child (life, health, liberty, etc.) and the rights that are specific to the child (Articles 38, 39 and 41 of the Constitution). S*ee supra* note 22 at 151-164.

[33] *See* The Constitution, *supra* note 8.

[34] Under the English legal system statute is a law made by a legislature. However, under the Lithuanian legal system a statute (statutas) is a separate kind of law. Just like the code is in any legal system, for instance. Therefore, officially the laws, although passed by the legislature, are translated into laws rather than statutes.

[35] The Law on the Framework of the Rights of the Child Protection of the Republic of Lithuania of 14 March 1996 No. I-1234 (as last amended on 1 May 2003). No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=210371&Condition2=.

[36] The general institutional framework is outlined in Title X of the Law on the Framework of the Rights of the Child Protection of the Republic of Lithuania. Article 58 of this law lists the state and its institutions, municipal authorities and organizations that are to guarantee the rights of the child in Lithuania.

[37] The initial act is replaced by the Regulation of the Government of the Republic of Lithuania on the General Rules of the Office for the Protection of the Rights of the Child of 17 December 2002

institution the Ombudsman on the Rights of the Child was established quite recently on 18 July 2000.[38] Its main function is to hear complaints of violations of the rights of the child.[39]

Although a comprehensive system has been established on paper for the protection of the rights of the child in Lithuania, it is widely thought that this system is ineffective. There are several reasons for this view. The institutions responsible for the protection of the rights of the child generally have to rely on outdated laws and legal acts that are generally inconsistent with the current situation and in particular with the demands of the market economy.[40] Another concern is that the legislation severely limits the powers and competences of the Ombudsman for the Protection of the Rights of the Child; the Ombudsman cannot intervene in the activities of the state and municipal institutions and is not permitted to influence the decision-making process of these institutions.[41] However, in addition to these minor problems, there is one especially serious defect, which is particularly grave when the individual rights of the child are to be secured.

The UN Committee on the Rights of the Child in its Report of 2001 identified one major deficiency in the web of institutions dedicated to protect the rights of the child, namely that there is no institution responsible for coordinating all the activities of the state institutions concerning the protection of the rights the child.[42] This concern was noted in Lithuania but every attempt to address the problem resulted in the same tasks being undertaken by a number of different institutions. For instance, on 30 April 2002 the President of Lithuania initiated the draft law, which introduced a central and coordinating institution in line with the recommendations made by the UN Committee. However, the government did not follow the initiative and instead the tasks of the central institution have been

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No. 1983. No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=216580&Condition2=.

38 The draft law on this institution was ready in 1997, but the narrow interpretation of Article 73 of the Constitution delayed its enactment. The main arguments in the discussion were two. The first one was that the Constitution permitted for the establishment of the Ombudsman, which was already present in the system. While the second argument was that usually the separate individuals violate the specific rights of the child, but not the state authorities or municipalities through their activity or inactivity and the red tape. For this depiction, *see* A. Mikalauskaitė, *Vaiko teisių apsaugos kontrolierius (Ombudsmenas) Lietuvoje*, *in* Konferencijos: Vaiko teisių apsaugos kontrolierius (Ombudsmenas) Lietuvoje medžiaga, Vilnius 1999 m. gruodžio 9 d., Conference Papers at 9-10 (2000).

39 Article 12 of the The Law on the Ombudsman for the Protection of the Rights of the Child of the Republic of Lithuania of 25 May 2000 No. VIII-1708 (as last amended on 14 October 2003). No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=220639&Condition2=.

40 For a very practical depiction, *see* I. Kerienė, *Lietuvos Respublikos vaiko teisių apsaugos pagrindų įstatymo įgyvendinimas Vilniaus mieste*, *in* Vaikas tarp smurto ir išnaudojimo, at 27 (2000)

41 G. Imbrasienė, *Vaiko likimas – bendras rūpestis*, 3 Žmogaus teisių žinios 7 (2001). Also in Ombudsman's Reports on its Activities during the Year of 2001, *supra* note 3, at 13.

42 The recommendations made by the UN Committee on the Rights of the Child are listed in *Jungtinių Tautų vaiko teisių komiteto išvados*, 4 Žmogaus teisių žinios 8-10 (2002).

delegated to five different ministries in accordance with their area of competence.[43] Thus, the result today is that there is no central coordinating institution established in the area of the protection of the rights of the child.[44]

The lack of a central coordinating institution in the area of the rights of the child is particularly worrying in regard to procedures where the child is a victim of an infringement, as in such cases there is considerable duplication of work between institutions.[45] Such a result is correctly summarized as the rights of the child getting lost in the paperwork; it has also been said that the authorities tend to protect the rights of the child more than the actual child, because their primary concern is the paperwork more than the child himself.[46] The very absence of a coherent system, which documents and supervises the uniform application and implementation of the rights of the child is the main condition which allows violations of the rights of the child to persist.[47]

## C. The Rights of the Child in Civil Procedure

Only recent amendments to the Lithuanian Civil Code introduced the very basic property rights of the child. The previous legal tradition regarded the rights of the child as derived rights.[48] This meant that the child did not possess any rights as an individual, but rather derived these rights through the rights of his or her parents. Therefore, before going into a deeper analysis of the rights of the child in civil procedure affecting him or her, it is helpful to have a brief overview of the development of the rights of the child in the Lithuanian Civil Code.

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43 *Siūlomi įstatymų pakeitimai vaiko teisių apsaugai stiprinti*, 8 Žmogaus teisių žinios 2 (2002).

44 Ombudsman's Report on its Activities during the Year of 2004: Lietuvos Respublikos vaiko teisių apsaugos kontrolieriaus veiklos ataskaita – 2004 01 01 – 2004 12 31. Available online in Lithuanian only: http://vaikams.lrs.lt/GALUTINIS%20%20METŲ%20VEIKLOS%20ATASKAITOS%20TEKSTAS%202005-03-29%20.doc at 41.

45 There are several very good studies in this area. The results of a wonderful empirical study accomplished are described in I. Svirskaitė-Tamutienė, *Valstybinių institucijų vaidmuo siekiant užkirsti kelią vaikų prievartai*, *in* Vaiko teisių apsaugos kontrolės institucijos, Conference Papers, Vilnius (2001). Descriptive analysis of the system in A. Valantinas, *Tarpžinybiniai kliuviniai dirbant su krizėje atsidūrusiais vaikais*, *in* Vaikas tarp smurto ir isnaudojimo (2000). An exhaustive analysis from the viewpoint of a school teacher: L. Deveikis, *Institucijų, dirbančių vaiko teisių apsaugos srityje, bendradarbiavimas*, *in* Vaiko teisės ir pilietinė visuomenė (2000). A very general depiction is available in Sakalauskas, *supra* note 2.

46 G. Purvaneckienė, in Vaiko teisių apsaugos kontrolės institucijos, Conference Papers, Vilnius, at 5 (2001)

47 Ombudsman's Reports on its Activities during the Year of 2001, *supra* note 3 at 111 and 106.

48 For a very good summary on the child as the exerciser of his/her individual rights under the Civil Code of the Republic of Lithuania, *see* J. Stripeikienė, V*aiko, kaip savarankiško teisės subjekto, problema*, 42 Jurisprudencija 34, at 12-17 (2003).

## I. Historic Overview of the Civil Code

Dr. Jackonienė in her paper emphasizes that Lithuania never had its own family code or any other regulatory system for family issues.[49] Until 1940 there were four systems of civil law (which included provisions on family) in force in Lithuania. In the largest part of Lithuania, Part 1of Volume X of the Collections of Civil Laws of the Empire of Russia was in force. The second system of legal acts covered a different part of Lithuania (Suvalkija). In this part, the Civil Code of Napoleon, the Civil Code of 1825 and the Law on Matrimony of 1836 were in force. In the third part of Lithuania, the City of Palanga, the Collection of Civil Laws of Baltic Provinces was in force. In the fourth part of Lithuania, the Land of Klaipėda, the Civil Code of Germany was in force. 1940 signalled the beginning of the formation of the Family and Matrimonial Law as a separate system from the civil code.[50] The Law on Matrimony and the Law on Matrimonial Registration were adopted in 1940. Since Lithuania did not have any separate system of family law, Lithuania acceded to the Code on Matrimony, Family and Tutelage of the Soviet Federation Social Republic of Russia. This code was in force in Lithuania until 1 January 1970. From this date, the Code on Matrimony and Family of the Soviet Social Republic came into force (the Code of 1970). This code transposed the framework provisions of Laws on Matrimony and Family of the Soviet Union and its Republics.[51] Dr. Jackonienė emphasizes in her paper that the very few provisions that existed regulated only very minor issues and did not form a comprehensive system of family law. This code was misleadingly renamed the Code on Matrimony and Family of the Republic of Lithuania, although its substance was not altered, after Lithuania regained its independence on 11 March 1991.[52] Only in 2000 did a new Civil Code (the Code of 2000) replace the Code of 1970.

The Code of 1970 contained only very few rights of the child, such as the preservation of the child's individuality, parentage (filiation), adoption and the individual duties of the child related to property.[53] These narrowly defined rights did not reflect the rights of the child guaranteed by the UN Convention on the Rights of the Child. However, these two sets of provisions co-existed in Lithuania's legal system for eight years until 2000 following the accession to the UN Convention on the Rights of the Child in 1992. Nevertheless, the UN Convention on the Rights of the Child became Lithuania's internal law only in 1995 upon its ratification and adoption of the separate framework law on the rights of the child. Even though these separate laws introduced the broader rights of the child, the Code of 1970 contradicted the basic rights that the UN Convention on the Rights of the Child guaranteed.[54]

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[49] J. Jackonienė, *Šeimos teisės normų, reguliuojančių asmenines vaiko teises, derinimas su vaiko teisių konvencija*, *in* Vaikų teisės ir jų įgyvendinimo garantijos, Conference Papers, at 14-15 (1996).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* The precise examples are listed in part C.III.

Probably the major achievement of the Code of 2000 was the introduction of the property rights of the child. Previously, the child was not entitled to have separate property rights; instead, the courts described the child as the dependant and the parents were entitled to the personal use of the child's property. [55]

This historical description serves as background and gives some indication of the outdated rationale that may still be present in the minds of people, including judges.

## II. Structure of the Civil Code and the Right of the Child to Express His/Her Views

The Civil Code of the Republic of Lithuania of 2000 (Code of 2000) recognized the rights of the child more broadly than the Code of 1970. It also introduced novelties such as the child's emancipation and the concept of 'parental authority'.[56] No less important is Article 1.13 of the Code of 2000, which echoes the supremacy of international treaties set out in Article 11 of the Law on Treaties. In this respect, Article 1.3 of the Code of 2000 recognizes international treaties as sources of civil law in the first place.

Before the adoption of the Code of 2000, two provisions of the Law on the Framework of the Rights of the Child Protection recognized the right of the child to express his/her views. These two provisions were Article 23 (4) and Article 35 (2) (2). Article 23 (4) of this law stated that the court in deciding (in line with the provisions of the Code of 1970) on the residence of the child shall consider the views of the child as to with which parent the child wants to reside. The second provision, Article 35 (2) (2) obliged the parents to pay due regard to the child's views when considering the future educational institution or teaching methods, which best suited the child. The Law on the Framework of the Rights of the Child Protection recognized the right of the child to his/her opinion more narrowly than the wording of Article 12 of the UN Convention on the Rights of the Child did:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Even the academic writers, in fact, recognized the right of the child to put forward his/her views expressly only in divorce cases.[57] Only later did the Ombudsman for the Protection of the Rights of the Child in its first investigations draw society's attention to the fact that the views of the child are lost in state-run orphanages

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[55] Stripeikienė, *supra* note 48 at 13.

[56] R. Baranauskienė, *Nauji įstatymai – pagalba skriaudžiamiems vaikams*, *in* Smurtas prieš vaiką šeimoje ir visuomenėje, at 45 (2001).

[57] *See* for instance, Babachinaitė, *supra* note 29.

where the interests of the child and his/her views are ignored and the child is punished if s/he does not abide by the internal rules.[58] An empirical study carried out on the complaints that the Ombudsman received during 2002-2003, showed that the parents and close relatives of the child identify the scope of the rights of the child differently than the experts working in the area of the protection of the rights of the child.[59] This study also showed that other grievances outperform the grievances on the right of the child to express his/her views. Complaints concerning the right of the child to express his/her views are less important than the complaints about violence, visiting rights of divorced or separated parents of the child or close relatives, the issue of children neglected by their parents, discord between a child's parents and psychological traumas that the child suffers when his/her interests are infringed.[60] This small description helps to place the more specific provisions on the right of the child to express his/her views in civil procedure.

## 1. Two General Provisions in the Code – Articles 3.164 and 3.177 (and 3.178)

Two general provisions in the Code of 2000 recognize the right of the child to express his/her views in court directly. These Articles are 3.164 and 3.177 of the Code. Article 3.178 of the Code complements Article 3.177 of the Code and recognizes the right of the child to make his/her views known indirectly. Before going into a deeper analysis of these provisions, it is necessary to set out the general structure of the Civil Code of 2000 in respect of these articles.

The Civil Code of the Republic of Lithuania of 2000 contains Six Books. The provisions of the Third Book deal with the issues of family law. This particular book contains eight Parts. Part IV "Mutual Rights and Duties of Children and Parents"[61] of this Book contains Chapters from IX to XII. Chapter XI "Parental Rights and Duties in Respect of their Children"[62] contains five Sections. Only Section Two "Children's Rights and Duties"[63] and Section Four "Disputes over Children"[64] are relevant for the expression of the child's views in court. Section Two contains Article 3.164, while Section Four contains Articles 3.177 and 3.178. These Articles are discussed and analyzed under the headings a) and b) in a more detail.

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[58] G. Imbrasienė, *Vaiko teisių apsaugos kontrolierė*, *in* Vaiko teisių apsaugos kontrolės institucijos, Conference Papers, Vilnius, at 16 (2001); Ombudsman's Reports on its Activities during the Year of 2001, *supra* note 3, at 104.

[59] G. Navaitis & E. Gibavičiūtė, Vaiko teisių šeimoje pažeidimai: situacijos analizė, 1(3) Socialinis darbas: mokslo darbai 50-56 (2003).

[60] *Id.* Especially, at 52 and 54.

[61] The Civil Code of 2000, *supra* note 5.

[62] *Id.*

[63] *Id.*

[64] *Id.*

### *a) The Child Should Be Heard, but the Interests of the Child Prevail - Article 3.164*

The official translation of Article 3.164 "Involvement of a Minor in the Assurance of His or Her Rights" of the Civil Code of 2000 reads as follows:[65]

> 1. In considering any question related to a child, the child, if capable of formulating his or her views, must[66] be heard directly or, where that is impossible, through a representative. Any decisions on such a question must be taken with regard to the child's wishes unless they are contrary to the child's interests. In making a decision on the appointment of a child's guardian/curator[67] or on a child's adoption, the child's wishes shall be given paramount[68] consideration.
>
> 2. If a child considers that his or her parents abuse his or her rights, the child shall have a right to apply to a state institution for the protection of the child's rights or, on attaining the age of 14, to bring the matter before the court.

These two paragraphs of Article 3.164 of the Code 2000 shall now be analyzed separately.

#### *i) The Right of the Child to Complain at the Age of 14 and Below*

According to the commentary on paragraph 2 of this Article, this provision acknowledges the right of a 14 years old child to file a complaint to the court if the child believes that his/her parents abuse his/her rights, while a child below this age is allowed to complain to the state authorities established for the protection of the rights of the child.[69] The commentary emphasizes that upon the receipt of such a complaint in accordance with Article 3.163 (4) the state authority for the protection of the rights of the child has to take measures after having determined that the parents or one of the parents abuse the rights of the child.[70]

In this very same respect, the commentary acknowledges that the right of a 14 years old child to file a complaint to court is highly restrictive.[71] It is restricted to the sole grievance – the child believes that his/her parents abuse his/her rights. Here the commentary notes that Article 38 (3) of the Civil Code of Procedure

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65 *Id.*

66 Although this is the official translation of the act, the form entailing obligation is different from the one expressed in Article 3.176 of the code. Under Article 3.164 the suitable translation is 'should', while in Article 3.176 the suitable translation is 'must'.

67 In this paper the words 'guardian' and 'curator' are substituted by 'tutor' and 'guardian'. These legal concepts are explained in part C.II.3.d. of this paper.

68 In the author's view the word 'exclusive' should substitute the word 'paramount'. At least this meaning of the word is taken and explained in the commentary to the code. In fact, the translation should be worded in the following order: the preferences of the child regarding the selection of the child's tutor/guardian or on the adoption of the child should be exclusively paid regard to when deciding on these matters.

69 Commentary on the Civil Code of the Republic of Lithuania Book III: Lietuvos Respublikos civilinio kodekso komentaras: Trečioji knyga: šeimos teisė, at 315 (2002).

70 *Id.*

71 *Id.*

of 2002[72] allows the 14 years old child to launch civil proceedings only in the matters where the child has civil capacity.[73]

It should be mentioned in addition that the Civil Code of 2000 accepts that a 14 years old child has the civil capacity to conclude only minor household-type transactions, which are not required to be concluded in any obligatory legal form (i.e. notary public confirmation, written form, which requires legal registration) (Art. 2.7 (3)). Article 2.8 (2) in addition to Article 2.7 of the Civil Code of 2000 allows the child of the age of 14 and below the age of 18 independently to use his/her acquired income and property and make independent use of his/her copyright and industrial design rights in addition to his/her minor household-type transactions under Article 2.7. The commentary defines the *minor household-type transactions* as the purchase of food, minor office equipment for school (i.e. pens, pencils, rulers), books, newspapers unless the transaction price is small and is paid in cash the moment the transaction is concluded.[74] Again, the commentary mentions that this provision should not be interpreted without Article 2.7 (4).[75] Article 2.7 (4) holds the parents or the statutory agents (i.e. adopters) of the child accountable where the child below the age of 14 fails to fulfil his/her contractual obligations unless the parents could prove their innocence. It is sufficient for the parent to prove that the parent was seriously ill or other people took care of the child when the parent(s) was away.[76]

To summarize, the child below 14 years of age is not allowed to complain to court for any grievances; while a 14 year-old child is allowed to initiate the civil proceedings only in two areas. Firstly, a 14 year-old child may initiate civil proceedings regarding his/her minor household transactions and certain independently acquired property rights. Secondly, a 14 year-old child may initiate civil proceedings if s/he believes that her/his parents abuse his/her rights. The commentary illustrates this kind of occasion with the following example.[77] For instance, a child wants to go on an excursion abroad. In order to do this the parents have to give him/her the written consent authorizing him/her to go abroad. Unfortunately, the parents do not give the consent to the child. The commentary claims that in the given circumstances, the 14 year-old-child may launch civil proceedings individually on the ground that his/her parents abuse his/her rights.[78] However, it is sufficient to assume that Article 3.164 (2) is very closely related with the whole set of provisions that permits restrictions on parental authority (Section Five of Chapter XI of Part IV of the Third Book of the Civil Code of 2000). These provisions are particularly relevant when severe abuse of the

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[72] The Civil Code of Procedure of the Republic of Lithuania of 28 February 2002 No. IX-743 (as last amended on 20 January 2005). No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=250014&Condition2=.

[73] Commentary on the Civil Code of the Republic of Lithuania Book III, *supra* note 69, at 315.

[74] Commentary on the Civil Code of the Republic of Lithuania Book II: Lietuvos Respublikos civilinio kodekso komentaras: Antroji knyga: asmenys. Justitia: Vilnius (2002), at 31.

[75] *Id.,* at 32.

[76] *Id.*

[77] Commentary on the Civil Code of the Republic of Lithuania Book III, *supra* note 69, at 316.

[78] *Id.*

inalienable rights of the child is present in the family. Thus, this set of rules shall be discussed together with the rules on criminal proceedings in Part C of this paper.

*ii) The Right of the Child to be Heard, the Age of the Child and the Interests of the Child*

The commentary on the first sentence of paragraph 1 of Article 3.164 of the Civil Code of 2000, states that the provision is in line with and duly incorporates the provisions of Article 12 of the UN Convention of the Rights of the Child.[79] The commentary defines the right of the child to be heard in any proceedings relating to him/her, including the divorce case where the child is questioned about his preferences on the residence with one of the two parents in divorce proceedings (but not whether the child wants his/her parents to divorce).[80] However, the Civil Code of 2000 and the Code on Civil Procedure of 2002 both set more detailed rules for divorce proceedings. Therefore, the right of the child to express his/her views in the divorce proceedings will be discussed separately under the heading (b). In a more general approach, first sentence of paragraph 1 of Article 3.164 of the Civil Code should normally be regarded as the general rule granting the child the right to express his/her views in any proceedings affecting him/her if special rules do not provide otherwise.

The commentary suggests that the child should be requested to express his/her views in court directly when the child is 10 years old if the child is mentally healthy.[81] This suggestion is made because the more specialized provisions of the Civil Code determine the age of 10 as sufficient for the child to be able to express his or her views. The commentary suggests that psychological expertise could be requested in cases where it is difficult to determine whether the child is capable of expressing his/her views.[82] The commentary also suggests that where a child is small, but is able to talk and is below the age of 10, the psychologist is to determine whether the child is capable of forming and expressing his/her views.[83] These are the basic rules that the commentary suggests applying when the child is about to express his/her views in the civil proceedings affecting him/her.

The second sentence of paragraph 1 of Article 3.164 of the Civil Code of 2000 states the circumstances where the wishes of the child should be "given paramount consideration". These cases are the child's adoption and the appointment of tutelage or guardianship to the child. In this respect the commentary states that the opinion of the child should be regarded exclusively, but this does impose an obligatory duty to do so.[84] The commentary explains that the opinion of the child is paramount but not binding because if the child is opposed in general to being

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79 *Id.*, at 313.
80 *Id.*, at 314.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*, at 315.

adopted, but this refusal would be likely to infringe his/her own interests, the interests of the child in being adopted should prevail.[85]

Paragraph 1 of Article 3.164 of Section Two of Chapter XI of Part IV of the Civil Code of 2000 constitutes the general provision for the child to express his/her views in court. Distinct provisions of the Code determine the age of the child who is capable of forming and expressing his/her views. Although, the Code lists certain situations where the views of the child should prevail, the commentary advises the court to establish the primary interests of the child if the child seems to be unable to understand his/her interests or unable to substantiate his/her objection.

### *b) Pending Procedures: The Child* Must *Be Heard in Any Procedure Affecting Him or Her – Articles 3.177 and 3.178*

Article 3.164 of the Code of 2000 is the opening provision for the right of the child to be heard in court and to open a certain type of civil proceedings on his/her own. However, paragraph 1 of Article 3.164 is generally applicable for the hearing of the child in any civil proceedings affecting the child. Section Four determines more specialized rules in the hearing of the child in any proceedings related to the child.

In this respect, Article 3.177 "The Child's Right to Express his or her Views" of the Civil Code of 2000 reads "When adjudicating on disputes over children, the court must hear the child capable of expressing his or her views and ascertain the wishes of the child."[86] This article recognizes the right of the child to express his/her views in court directly. However, this provision has to be read together with Article 3.178 "Mandatory Participation of the State Institution for the Protection of the Child's Rights".[87] This article sets the opportunity for the child to express his/her views in court indirectly and reads as follows:[88]

> 1. The state institution for the protection of the child's rights must participate in the examination of disputes over children.
>
> 2. Having investigated the conditions in the family environment, the state institution for the protection of the child's rights shall present its opinion to the court. In adjudicating the dispute, the court shall take into consideration not only the opinion, but also the wishes of the child and the evidence adduced by the other parties.

Section Four of Chapter XI of Part IV of the Civil Code of 2000 lists the disputes (Articles 3.173 - 3.176) to which Articles 3.177 and 3.178 more specifically apply. These four types of disputes are grouped as follows: disputes over the name and/or surname of the child (Article 3.173), disputes over the place of residence of the child (3.174), disputes over the visiting rights of the divorced parent (3.175) and disputes over the visiting rights of the close relatives of the child (3.176). In all of these disputes the child has the statutory right to express his/her views and to be

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85 *Id.*
86 The Civil Code of 2000, *supra* note 5.
87 *Id.*
88 *Id.*

assisted by the Office for the Protection of the Rights of the Child in expressing and making his/her views known to court. This duty is also in line with point 15.3 of the Regulation on the General Rules of the Office for the Protection of the Rights of the Child[89] setting out the very general obligation of the relevant Office to take part in trying disputes over children. In such proceedings the Office has to prepare its opinion on the general situation of the child in family. The provisions relating to disputes over the child's name or surname, place of residence or visiting rights of the divorced or separated parents of the child or the close relatives of the child are more thoroughly described.

*i) Disputes over the Name and/or Surname of the Child*

Article 3.161 (1) of the Civil Code declares the right to one's name and surname. Likewise, Article 3.166 determines the rules applicable in giving the name and Article 3.167 sets the rules applicable in granting the surname to the child. The provisions of Article 3.173 sets the legal rules for the disputes over the child's name and surname and Article 3.177 sets the legal obligation to hear the views expressed by the child. In addition to this, the Office for the Protection of the Rights of the child takes a mandatory part in these proceedings (Article 3.178).

*ii) Disputes over the Place of Residence and the Visiting Rights of the Divorced or Separated Parents of the Child*

The Lithuanian Civil Code provides both for marriage dissolution (divorce) and separation. Article 3.49 provides for three grounds on which marriage may be dissolved. The first ground for dissolution is based on the application and mutual consent of the spouses. The second ground the application of one of the spouses. The final ground of application is based on the proof of fault of one or both of the spouses. Article 3.73 lists three grounds for separation. Such grounds are when the life of the spouses together becomes intolerable or may damage the interests of their children or the spouses have no interest in living together anymore. On these grounds, one of the spouses may apply to court to declare separation. The spouses may also apply jointly for separation by forwarding the contract on separation to the court. One year after the initial application, the spouses may apply to court for the dissolution of marriage (Article 3.79 (4)). This brief introduction to divorce and separation gives the very general idea of the grounds and circumstances under which marriage is dissolved or an agreement on separation is concluded.

In all these instances the provisions of the Civil Code oblige the court to decide on the place of residence and the visiting rights of divorced or separated parents of under-aged children. The relevant provisions are Articles 3.43 (2), 3.59, 3.53 (3) and 3.76(1). In addition, to these provisions Articles 3.48 and 3.80 provide for the mandatory participation of the relevant Office for the Protection of the Rights of the child in such court proceedings. In line with these Civil Code provisions,

[89] *See* Regulation of the Government of the Republic of Lithuania on the General Rules of the Office for the Protection of the Rights of the Child of 17 December 2002 No. 1983. No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=216580&Condition2=.

points 15.1 and 15.2 of the Regulation on the General Rules of the Office for the Protection of the Rights of the Child[90] require the relevant Office to prepare its opinion for the court on whether the divorce or separation of parents would damage the rights of the child.

*iii) Disputes over the Visiting Rights of Close Relatives*

Article 3.135 of the Civil Codes defines *close relatives* as parents and their children and grandparents and their grandchildren, and siblings. Article 3.176 of the Civil Code allows the close relatives, normally, the grandparents and siblings of the child to dispute their visiting rights in court. The child must express his/her views on the visiting rights of his/her close parents (Article 3.177) and the Office for the Protection of the Rights of the Child must take part in these proceedings (Article 3.178).

In all the proceedings described under heading (b) the child is requested to form and express his/her views in the proceedings listed more specifically under the headings (i) to (iii) and any other pertaining disputes over the child. Article 380 of the Code on Civil Procedure sets out the general rules applicable to the child's participation in a trial when the decisions are taken in family cases. The applicable rules state that when any question related to the child is being decided, the child should be heard directly during the trial or when it is impossible through his representative[91] (paragraph 1, first sentence). The views expressed by the child should be paid due regard only if these views are not contrary to the general interests of the child (paragraph 1, second sentence). The first sentence of paragraph 2 of the Article states that child may choose any applicable means to express his/her views (i.e. in writing, orally). From the age of 14, the child is allowed to express his/her agreement with, or objection to, the proceedings involving him/her (second sentence). This agreement or objection is to be signed by the 14 year-old-child and included in the records of the case (second sentence).

To summarize, Article 3.164 of the Civil Code is the opening clause allowing the child to express his/her views in court. This Article in distinction to Article 3.177 is worded *should* be heard instead of *can* or *must*. Article 3.177 is the specific provision which applies to hearing the child's views in any pending procedure relating to the child, but to very specific legal proceedings, namely disputes over the selection of the child's name and/or surname, disputes over the residence rights of the child and visiting rights of the parents that are normally determined in the divorce and separation cases of the child's parents and the visiting rights of the grandparents or siblings of the child. In all of these instances Article 380 of the Code on Civil Procedure determines more specific rules for the hearing of the child in trial. According to these rules, the child may participate in any legal proceedings affecting him/her. The rules on the hearing of the child and his/her opinion differ according to the child's age. Under the age of 14 the child

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90 *Id.*

91 Normally, the Office for the Protection of the Rights of the Child.

may express and make his/her views known directly or indirectly, while at the age of 14 the child gains the right to agree to, or object to, the proceedings involving him/her.

### *c) Educational Welfare and the Child's Right to Shelter*

Lithuanian legislation guarantees the general right of the child to education, but does not specify the right to educational welfare. Rather the law guarantees the right of the child to living conditions. The right to education, shelter and living conditions of the child are closely related to the child's right to educational welfare.

The Constitution and the Law on the Framework of the Rights of the Child Protection[92] acknowledge the right of the child to education. For instance, Article 41 (1) of the Constitution declares that education is mandatory for persons under the age of 16. Article 14 of the Law on the Framework of the Rights of the Child Protection identifies the child's right to education among the other social rights of the child. Moreover, Article 34 (1) of the same law sets out the general provisions on the child's right to education, while Article 35 of the same lists the sources of law on the child's right to education and lists guarantees of free education in Lithuania. Following theses provisions Article 37 obliges school teachers to keep track of and inform the parents and the relevant Office for the Protection of the Rights of the Child about truant children. Lastly, Article 38 of the law is applicable to imprisoned children and/or children imprisoned in solitary confinement cells. This Article provides that imprisonment shall not affect a child's right to education.[93] The framework for the child's right to education is thus established.

The Law on the Framework of the Rights of the Child Protection also identifies the right of the child to shelter. For instance, Article 21 (2) of this law states the general obligation of parents to care for the child, to support the child materially and to provide the child with the shelter and maintain it on equal footing. In addition, Article 4 (5) establishes the child's right to shelter. Accordingly, Articles 4 (6) and 13 (5) establish certain guarantees to safeguard the child's right to shelter. For instance, Article 4 (6) of the law states that concluded transactions that violate the child's right to shelter are invalid. In addition, the relevant Office

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92 *Supra* note 35.

93 In this respect, the UN official has described the system of juvenile justice in Lithuania as "[…] a disgrace for a society, which prides itself to attach the highest value to democracy and human rights." *See* Klein, *supra* note 27, at 99. The relevant descriptions also available in A. Dziegoraitis, *Problems in Protecting the Rights of the Child in Law and Order Institutions.* Children's Rights in the Legislations of the Baltic States: Juvenile Justice. Children in Conflict with Law. Alternatives to Imprisonment. Conference Papers. Vilnius (2001); and A. Dapšys, A. Piliavecas & G. Sakalauskas, *The System of Children's Rights and their Protection in Lithuania: The General Situation, Problems, Solutions and Perspectives,* Children's Rights in the Legislations of the Baltic States: Situation, Problems and Determination. Conference Papers. Vilnius (1998). However, separate articles show that the problems of juvenile justice are even more acute in the area of application of administrative law. *See* L. Kietytė, *Vaiko teisių apsaugos reguliavimo administracinės teisės priemonėmis problematika*, 4(45) Teisės problemos 72-78 (2004). General remarks on the system of Criminal Code and Administrative Code are available in *infra* note 142.

for the Protection of the Rights of the Child is to issue its opinion whether the transaction in question is contrary to the interests of the child (i.e. denies the child the right to shelter). The current Civil Code does not transpose this obligation, but Article 581 (4) of the Code on Civil Procedure, states that the summary court proceedings apply to transactions where the rights of the child to shelter might be infringed. The parents of the child must furnish the court with the data on the family assets and have the obligation to prove to the court that the transactions in question in respect of the place of residence of the family would not affect the child adversely or infringe the child's right to shelter. The academic writers suggest that in the transactions where the home of the family is being sold a particular obligation to defend the right of the child to shelter should lie upon the notary public who is in charge of confirming the property transactions.[94] The academic writers specifically note that many children were denied their right to shelter before these legal provisions came into force. These children became homeless and were abandoned through the sale of property by their socially excluded parents or during the privatization transactions.[95]

The provisions of Article 11 of the Law on the Framework of the Rights of the Child Protection identifies and defines the child's right to living conditions. This Article guarantees the child the right to living conditions essential to the child's physical, mental, emotional and moral development. It follows from this Article that the obligation to ensure these living conditions primarily lies on the parents, representatives of the child, state and municipal institutions. The Office for the Protection of the Rights of the Child is normally entrusted to prepare its opinion in the civil proceedings affecting the interests and rights of the child. These applicable provisions are structured so as to reflect the difference between the family environment and living conditions of the child. For instance, the Office has the obligation to prepare its opinion on the family environment in any proceedings relating to the child (point 15.3 of the Regulation), while it has to prepare its opinion on the living conditions when the child applies to court to restrict the parental authority of his/her parent or parents (point 15.5 of the Regulation).[96]

This distinction may indicate that the child may not apply to the Office for the Protection of the Rights of the Child for the sole reason of educational welfare and his/her living conditions; rather the whole procedure applies when the child applies to restrict the parental authority of his/her parents. However, the Office for the Protection of the Rights of the Child is entrusted with the very general duty to ensure the protection of the rights of the child.[97] The distinction between

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94 Kiaulakis, *supra* note 30, at 29.

95 *Id.* Also Dapšys, *supra* note 30, at 29. A social study on how the child becomes neglected and abandoned by the parents: B. Ivanauskienė, *Vaikų teisių apsaugos problemos Lietuvoje: Vaikų, netekusių tėvų globos socialinė charakteristika*, Sociologija: praeitis ir dabartis (2000), at 81-86.

96 S*ee* Regulation of the Government of the Republic of Lithuania on the General Rules of the Office for the Protection of the Rights of the Child of 17 December 2002 No. 1983. No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=216580&Condition2=.

97 *Id.* Point 7.1.

the family environment and living conditions of the child is also reflected in the reasoning of the Senate of the Supreme Court Judges. For instance, in the cases on the determination of the child's place of residence upon the divorce or separation of the child's parents, the Senate emphasizes that in determining the family environment, the court must assess the level of the child's attachment to his/her parents and siblings, consider the attitude of each of the child's parents to the bringing up of the child and the participation of the parents in this process, relationship between the child and each of his/her parents and only then assess the living conditions worded in Article 11 of the Law on the Framework of the Rights of Child Protection.[98] In assessing the prospective living conditions of the child, the court assesses the type of the parent's work, work regime and assets of the parents and the attitude of the divorced/separated parent's partner or new spouse.[99] Thus, it is not sufficiently clear how the Office for the Protection of the Rights of the Child would normally react to the child's complaint about his/her infringed right to education through the denial to shelter and inappropriate living conditions in the family.

As long as the educational welfare is concerned, there are several closely interrelated rights pertaining to it, namely the right of the child to education, the shelter and the living conditions. There is no uniform practice of the Offices for the Protection of the Rights of the Child in protecting any legal right of the child. Therefore, the practical responce to the violation of the rights of the child may vary with each municipality of Lithuania. The analysis on the issue of practical response is extended in part C.III.

## 2. The Child Must Be Heard and His/Her Consent is Necessary

The Lithuanian legal system of civil rules provides for three instances that set the legal duty to hear the child and provide for the express consent of the child. These instances are adoption, change of name on adoption and emancipation.

### *a) Adoption*

Separate provisions of the Civil Code of 2000 and the Code on Civil Procedure 2002 require the consent of the child upon his/her adoption. Article 3.215 sets the legal basis to require the consent of the child to be adopted and its official translations reads:[100]

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98 *Supra* note 22, 151-164, at 153 and 153-158.

99 *Id.*

100 The Civil Code of the Republic of Lithuania of 18 July 2000 No. VIII-1864 (as last amended on 11 November 2004). Official translation only of the initial act of 2000 is available in English: http://www3.lrs.lt/cgi-bin/preps2?Condition1=245495&Condition2=. The text with the latest amendments available in Lithuanian online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=246124&Condition2=.

> 1. Where the child to be adopted has already reached the age of 10, the child's *written*[101] consent to the adoption shall be required. The child shall file his or her consent with the court; adoption without such a consent shall not be permitted.
>
> 2. Where the child is under 10, he must be heard by the court if he or she is capable of expressing his or her views. In taking the decision, the court shall take account of the child's wishes if those wishes are not contrary to the child's interests.

The rules on the child's consent prescribed in this Article vary with the age of the child. Paragraph 1 of the Article provides for the rules for the consent of the child at the age of 10, while paragraph 2 of the Article sets down the rules for the child's preferences under the age of 10. The main message of the Article is that it is impossible to adopt a 10 year-old child without his/her consent expressed in writing. In adoption proceedings of a child under the age of 10 the court is legally obliged to pay due regard to the expressed preferences of the child, but if the court feels that these preferences contradict the interests of the child, the court may well ignore these preferences. The deciding age of the child is the age of 10. Only when the child proposed for adoption is 10 years old, does the child gains the right to express his/her consent in writing and the objection of the child makes the adoption impossible.

The Code on Civil Procedure of 2002 sets more detailed rules on the consent of the child in Article 485. Article 485 (1) states that the 10 year-old child short-listed for adoption should be heard in trial. During this hearing the court has to ascertain whether the child wants to be adopted, to become the adoptee and *whether the child wants the adopters to be recognized his/her parents and to be recognized the child of the adopters himself/herself*[102] (second sentence of Article 485 (1)). Mirroring Article 3.215 of the Civil Code, the third sentence of Article 485 (1) of the Code on Civil Procedure states that adoption is not allowed without the written consent of the 10 year old child adoptee.

Article 485 (2) of the Code on Civil Procedure also mirrors the provisions of Article 3.215 of the Civil Code and sets the rules for the hearing of the child under the age of 10. The child-adoptee shall be heard in court if the child is capable of forming and expressing his/her views (first sentence). The views of the child may be expressed orally or in writing or by any other means of the child's choice (second sentence). The court is obliged to pay due regard to the expressed views of the child, but may well ignore these views if it deems that the expressed views contradict the interests of the child (third sentence).

Paragraphs 3-7 of Article 485 of the Code on Civil Procedure set additional rules relevant to the expression of the views of the child in adoption proceedings. Paragraph 3 states that the court may invite a specialized psychologist in order to ascertain whether the child is capable of expressing his/her views or to explain the expressed views of the child.

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[101] The word 'written' is inserted by the author to bring the official translation closer to its meaning expressed in Lithuanian.

[102] The part of the sentence in italics was absent in the former Civil Code. S*ee* Commentary, *supra* note 69, at 410.

Article 485 (4) in conjunction with Article 194 (1) of the Code on Civil Procedure set the rules that are to be applied in court when hearing the child. Article 194 (1) sets the general rules applicable for the hearing of the eye-witness-child in the civil procedure. In accordance with the provisions of this Article, when the child under the age of 16 is heard the statutory agents are and a teacher or state institution for the protection of the rights of the child *may be* summoned. Likewise, if the child is under the age of 18 the summoning of the statutory agents, teacher or state institution for the protection of the rights of the child lies within the discretion of the court. The statutory agents, teacher or state institution for the protection of the rights of the child may address questions to the child if the court permits them to do so (last sentence of Article 194 (1)). In line with this provision Article 485 (6) of the Code on Civil Procedure the participating teacher and/or psychologist and other persons participating in the proceedings may address questions to the child only with the permission of the court.

Article 485 (5) of the Code on Civil Procedure provides that in exceptional circumstances the court may oblige any person participating in the proceedings to leave the court-room during the hearing of the child. The dismissed person must be informed about the expressed views of the child on his/her return to the court-room (second sentence of Article 485 (5)).

The last paragraph of Article 485, paragraph 7 obliges the court to explain to the adoptee the outcomes that his/her consent creates. The second sentence of this paragraph states that if the court deems that the consent the child was obtained by extortion or deception, or was subject to illegal financial gain, it may refuse to order the adoption.

This overview introduces the basic guarantees regarding a child proposed for adoption. The written consent of 10 year-old child is necessary for the child to be adopted. If the child refuses adoption, the 10 year-old-child may not be adopted. The court is obliged to explain the child all the legal consequences that his/her consent creates. The child must be heard and allowed to express his views on adoption in court. In exceptional circumstances the court is allowed temporarily to dismiss any person participating in the adoption of the proceedings during the hearing of the child. The court may refuse to authorize adoption if the consent of the child has been delivered as a result of extortion, deception or was subject to illegal financial gain.

The expression of objection to the adoption of the child below the age of 10 is more complicated. For instance, the child may refuse specific adopters, but may not refuse adoption as such.[103] This is because the court would normally hold that the expressed views of the child contradict the general interests of the child to be adopted[104] and have parents in line with the UN Convention on the Rights of the Child. The commentary generally suggests that the child should be heard in court directly.[105] However, this rule should be interpreted more restrictively. For instance, the participation of the child who is too small to talk would be

[103] *Id.*, at 409.
[104] *Id.*
[105] *Id.*

senseless.[106] This child, the commentary suggests, should be heard through the representative of the institution for the protection of the rights of the child.[107] The commentary also suggests that when the child is between 3 to 5 years old and it is impossible to determine whether the child expresses the views of his/her own without the presence of the specialized professional, professionals may be invited to decide on the maturity of the child.[108] These are more detailed insights of the commentary on the expression of the views of the child under the age of 10.

There is one major inconsistency in the legal rules on the participation of the institution for the protection of the rights of the child, normally, the Offices for the Protection of the Rights of the Child, in the adoption proceedings. Under Articles 484 (2) and 484 (4) of the Code on Civil Procedure the participation of the institution for the protection of the rights of the child in the adoption proceedings is mandatory. However, the participation of this institution in the hearing of the child under the Articles 485 (4) and 194 (1) of the Code on Civil Procedure and point 15.8 of the Regulation on the General Rules of the Office for the Protection of the Rights of the Child[109] is of a more discretionary nature.

### *b) Change of Name on Adoption*

There is only one instance where the Civil Code provides for the change of name of the child. This instance is the adoption of the child. This instance should be distinguished from Article 3.173 of the Civil Code, which allows the parents to petition the court if they find themselves in a dispute over the name and/or surname of the child. In this instance, the child, if capable of expressing his/her views, must express these views under Article 3.177 of the Civil Code. This situation is described in Part B (II) (1) (b) of this paper above.

The adoptee during the adoption proceedings has the right to express his/her views on the change of his/her name and/or surname at the event of adoption in line with paragraphs 1 and 2 of Article 485 of the Civil Code. Paragraph 2 applies to the expressed views of the child under the age of 10, while paragraph 1 applies to the expressed views of the 10 year-old-child. Paragraph 1 states that the 10 year-old-child has to agree to the change of his name and surname, while in accordance with paragraph 2 the child below the age of 10 is required to state his/her views on the change of his/her name and surname. In both cases the court has to pay due regard to the views expressed by the child. Under Article 3.228 (1) of the Civil Code if the child capable of expressing his/her views agrees, his/her name may be changed. At the request of the child capable of expressing his/her views the surname of the child may be left unaltered after the adoption proceedings in line with Article 3.228 (2) of the Civil Code.

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106 *Id.*, at 410.
107 *Id.*
108 *Id.*
109 *See* Regulation of the Government of the Republic of Lithuania on the General Rules of the Office for the Protection of the Rights of the Child of 17 December 2002 No. 1983. No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=216580&Condition2=.

During the adoption proceedings the child *capable of expressing his/her views* regardless of his/her age may express agreement or objection to his/her new name and may request the court to leave his original name unaltered. The court is obliged to adhere to the views expressed by the child.

### *c) Emancipation*

Rules on emancipation of the minor were introduced with the new Civil Code of 2000. Emancipation was neither recognized nor existed in the former Civil Code of 1970. In view of the right of the 16 year-old-child to seek emancipation for the conclusion of contractual rights and obligations, another novelty introduced in the Civil Code of 2000 must be considered. It was mentioned previously that the former Civil Code of 1970 did not recognize any property rights of the child. These property rights were derived rights from the property of the parents; the property of the child and his/her parents were not separated. In this respect Article 2.8 (2) in addition to Article 2.7 of the Civil Code of 2000 allows the child of the age of 14 and below the age of 18 independently to use his/her acquired income and property, to use his/her copyright and industrial design rights and to conclude his/her independent minor household-type transactions. This is the legal context in which the detailed rules on emancipation are introduced.

There is only one Article, which introduces the set of rules on emancipation in the Civil Code of 2000. This Article is 2.9 of the Civil Code of 2000 and its official translation reads as follows:[110]

> 1. Where a minor is sixteen years of age the court may emancipate him after he or his guardian, parents, institutions of guardianship or he himself has filed a declaration to that effect with the court if there are sufficient grounds to believe that he may exercise all civil rights and discharge his obligations alone. In all cases a minor has to give his consent to be emancipated.
>
> 2. The court may annul minor's emancipation on the request of parents or child care institutions[111] in the event that exercising his rights and discharging his obligations a minor causes damage to his own or other persons' rights or lawful interests.

Paragraph 1 of this Article is the legal basis for the 16 year-old minor to seek emancipation. Although, the Article permits the minor, his parent or his guardian or the guardianship institution to file the application on emancipation to the court, the final consent of the minor is essential.

Article 442 (3) in conjunction with Article 5 (4) of the Code on Civil Procedure of 2002 prescribes that the cases on emancipation shall be heard on the basis of an application to this effect. Section Four of Chapter XXVIII of Part IV defines the special procedural rules applicable in the emancipation cases. Article 475 (4) states that in addition to the documents listed therein and submitted to court the written consent of the minor should be present when it is not the minor himself/herself who has launched the proceedings. Article 477 (4) of the Code on Civil Procedure states that the court shall confirm the minor's written consent upon

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[110] *Supra* note 5.

[111] Tutelage/guardianship institutions.

hearing the explanations of the minor during the trial. This Article also provides that in the absence of the minor's written consent, the minor is allowed to submit his/her written consent during the trial. In any circumstances the court is obliged to explain to the minor all the pertaining legal consequences that his/her written consent creates (under the last sentence of Article 477 (4)). Article 477 (5) of the Code on Civil Procedure grants the last safeguard to the minor, as it enables the minor to cancel his/her written consent at any stage of the proceedings before the court takes its decision whether to emancipate the minor. These are the general guarantees that the Civil Code and the Code on the Civil Procedure guarantee the minor on the application for emancipation to safeguard his/her consent during the legal procedure.

Articles 476 (1) and 477 (2) of the Code on Civil Procedure establish the mandatory participation of the Office for the Protection of the Rights of the Child. On this occasion the institution is required to submit its opinion on the child's readiness to undertake and process his/her civil rights and obligations independently. This obligation is also embodied in point 15.4 of the Regulation on the General Rules of the Office for the Protection of the Rights of the Child.[112]

The Office for the Protection of the Rights of the Child is entrusted with the legal obligation to furnish the court with an opinion on the minor's independent civil capacity; in accordance with the commentary, the emancipated minor in gaining the right fully to exercise his/her civil capacity (for instance, to conclude transactions or make good any damage caused) is not entitled to exercise any other rights that are conditional on the attainment of the specified age.[113] For instance, the emancipated minor does not gain the duty to undergo military service, or obtain the right to vote, the right to drive, the right to change his/her sex, to marry (has to seek court's permission to marry under the age of 18), nor the right to adopt children, to become a tutor or a guardian.[114] The civil rights of the emancipated child of the age of 16 and below the age of 18 are limited to the conclusion of contractual rights and obligations.

Paragraph 2 of Article 2.9 of the Civil Code of 2000 does not require the consent of the minor to withdraw emancipation. In case of misbehavior by the minor, the parents or the child care institutions (and the public prosecutor)[115] have the right to apply to court to withdraw emancipation granted to the minor. These provisions are also set out in Article 479 of the Code on Civil Procedure of 2002.

In accordance, with Articles 463 (6) and 464 (3) of the Code on Civil Procedure the same Article 479 of the Code on Civil Procedure of 2002 procedure applies to the withdrawal (or restriction on the right) of the right of the 14 year-old minor or the minor below the age of 18 independently to use his/her own property.

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[112] *See* Regulation of the Government of the Republic of Lithuania on the General Rules of the Office for the Protection of the Rights of the Child of 17 December 2002 No. 1983. No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=216580&Condition2=.

[113] *Supra* note 74, at 35.

[114] *Id.*

[115] *Id.*, at 36.

To sum up, the child at the age of 16 has the right to file at the court an application requesting his/her emancipation. Other persons may initiate the proceedings on emancipation, but the child must consent to the proceedings in writing. The court confirms the written consent of the child after having heard the explanations of the child. If the written consent of the child is absent during the initiation stage of the proceedings, the child may submit his/her written consent during the trial. The court must explain the legal rights and duties that the written consent of the minor in the emancipation proceedings create. The child is allowed to withdraw his/her consent at any point of time during the trial, but before the court reaches its decision.

In distinction from its ordinary role to make the view of the child known in court, the Office for the Protection of the Rights of the Child has to file an opinion with the court stating whether the child is ready to undertake and fulfill the civil rights and duties arising upon the emancipation of the child.

When the child is granted emancipation s/he does not gain any additional rights that are conditional to the attainment of legally prescribed age. Upon emancipation the child gains the right independently to conclude contracts and independently to enter the contractual obligations as well as to make good any damage caused by failure to fulfill obligations.

Misbehavior of the emancipated child serves as a sufficient ground to initiate proceedings to withdraw emancipation. The same ground and procedure is applicable when it is deemed that the property rights of the 14 year-old child or of the child below the age of 18 should be suspended or restricted.

## 3. The Consent of the Child is Necessary, but Insufficient

In the set of civil rules on marriage, pregnancy termination, filiation, tutelage or guardianship the consent of the child is insufficient.

### *a) Marriage*

The relevant provision for the marriage of the child is Article 3.14 "Legal age of consent to marriage" and its official translation reads:[116]

> 1. Marriage may be contracted by persons who by or on the date of contracting a marriage have attained the age of 18.
>
> 2. At the request of a person who intends to marry before the age of 18, the court may, in at summary procedure, reduce for him or her the legal age of consent to marriage, but by no more than three years.
>
> 3. In the case of a pregnancy, the court may allow the person to marry before the age of 15.
>
> 4. While deciding on the reduction of a person's legal age of consent to marriage, the court must hear the opinion of the minor person's parents or guardians or curators and take into account his or her mental or psychological condition, financial

[116] *Supra* note 5.

> situation and other important reasons why the person's legal age of consent to marriage should be reduced. Pregnancy shall provide an important ground for the reduction of the person's legal age of consent to marriage.
>
> 5. In the process of deciding on the reduction of the legal age of consent to marriage, the state institution for the protection of the child's rights must present its opinion on the advisability of the reduction of the person's legal age of consent to marriage and whether such a reduction is in the true interests of the person concerned.

The main message of this Article is that the child under the age of 18 may institute proceedings in court to be allowed to be married before s/he attains the age of 18. The court may take the decision to allow the under-aged person to marry by reducing his/her marrying age. The court may reduce this marrying age by three years at most. This makes it possible for the child to be married at the age of 15. Paragraph 3 lists a number of factors that the court shall take into account while considering the child's application for the reduction of his/her marrying age. The factors that need to be taken into account are the mental or psychological condition of the child, the financial situation of the child and the reasons that may be important to allow the reduction of the prescribed legal age for marriage. The last sentence of paragraph 3 mentions one major reason for the reduction of the prescribed legal age for marriage, namely pregnancy. Pregnancy must be taken into account when reducing the legal limit for the age to be married. For instance, if the child is pregnant and is under the age of 15, the court may allow the reduction of marrying age.

Paragraph 5 of Article 3.14 grants a major role to the Office for the Protection of the Rights of the Child. It is in line with its duties listed in the Regulation on the General Rules of the Office for the Protection of the Rights of the Child. Point 15.6 of the Regulation[117] and Article 3.14 of the Civil Code both provide for the participation of the Office for the Protection of the Rights of the Child. In line with these two provisions the Office has to present its opinion whether the age of the child should be reduced or not for the purposes of marriage and whether marriage of the child is in line with the best interests of the child.

In Lithuania, a child may apply to court to have his/her legally prescribed age suitable for marriage to be reduced. The court is obliged to hear the opinion of the Office for the Protection of the Rights of the Child on whether it is in the interest of the child to have his/her age reduced for the purposes of marriage and whether the age should be reduced. The court is obliged to take into its account three factors when giving out its ruling on this matter. Firstly, the court has to consider the mental and psychological health of the child, secondly, the financial situation of the child and thirdly, other circumstances that might be considered important. Pregnancy is treated as a very serious circumstance that allows reduction of the marrying age; pregnancy is a sufficient ground to permit the child under the age 15 to be married.

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[117] *See* Regulation of the Government of the Republic of Lithuania on the General Rules of the Office for the Protection of the Rights of the Child of 17 December 2002 No. 1983. No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=216580&Condition2=.

### *a) Pregnancy of Minors, Termination*

There is only one provision in the Civil Code, which is relevant to the termination of pregnancy of the minor. This relevant provision is Article 2.25 (2) "Right to the Inviolability and Integrity of the Person" and its official translation reads:

> Intervention into a human body, removal of parts of his body or organs shall be possible only with his consent. Consent to a surgical operation shall be given in writing. Where a person is incapable[118] his guardian shall give his consent, in the event of castration, sterilisation, abortion, operation, removal of organs of an incapable person, however, authorisation of the court shall be necessary. Such consent shall not be necessary in emergency cases when person's life is endangered and has to be saved while the person himself is unable to express his will.

The persons who do not have the civil capacity (i.e. children) have no power to authorize intervention to be made into their bodies. The legal guardians of such person may grant such authorization. However, in case of pregnancy termination of the child only the court is authorized to grant the permission for such intervention. No authorization is needed only if such intervention is needed to save the life of the pregnant child. The other provisions of the Civil Code are silent on this matter. Likewise, the Code on Civil Procedure does not establish any detailed rules on how such a request should be pursued and authorized in court. Nonetheless, the commentary on this Article concludes that the court may grant such authorization in summary proceedings.[119]

### *b) Proceedings for the Determination or Acknowledgement of the Child's Parents (Filiation)*

Chapter X "Filiation" of the Civil Code contains the legal provisions on determination and acknowledgement of child's parents. This chapter contains five sections, but none of these sections explicitly mentions blood evidence[120] or foresees the need for the consent of the child with the exception of Section Two.

For instance, the provisions of Section Three "Paternity Affiliation" and Section Four "Contesting Paternity (Maternity)" do not provide for child's participation or the expression of his/her views in court at all. Only at the age of 18 or emancipation does the child acquire the right to initiate this kind of proceedings (Articles 3.147 (2) and 3.151 (1)).

Only Section Two "Acknowledgement of Paternity" is specific about the rights of the child. Article 3.142 (3) allows the child to initiate the proceedings to acknowledge paternity. However, the parents must support this action of the child with their written authorization. If parents of the child refuse such authorization, the child may apply to court to receive the court's authorization on this matter. Also Article 3.142 (2) requires the written consent of the 10 year-old-child to initiate

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[118] The word 'incapable' means 'the person who does not have the civil capacity'.

[119] Commentary on the Civil Code of the Republic of Lithuania Book I: Lietuvos Respublikos civilinio kodekso komentaras: Pirmoji knyga: bendrosios nuostatos. Justitia: Vilnius (2001), at 76.

[120] For instance, Article 3.148 (2) (1) permits scientific evidence, but gives no reference to the blood expertise.

the proceedings, if the child himself/herself has not initiated the proceedings.[121] Under Article 3.144 (1) the court may ignore the 10 year-old-child's objection to initiate proceedings whereby the paternity of the child would be acknowledged. In contrast to this provision, the court may not waive the adult-child's objection to proceedings under Article 3.144 (3).

The Office for the Protection of the Rights of the Child is obliged to participate in these proceedings (Article 3.153) and may initiate the proceedings to acknowledge paternity of the child if his/her father refuses to acknowledge it (Article 3.147 (2)). However, point 15.7 of the Regulation on the General Rules of the Office for the Protection of the Rights of the Child obliges the Office for the Protection of the Rights of the Child to participate only in the Section Four ("Contesting Paternity (Maternity)") proceedings.[122]

The 10 year-old-child or older may initiate legal proceedings to obtain acknowledgment of his father. If the 10 year-old-child dislikes the proceedings, s/he is allowed to object to the proceedings, but the court may ignore this objection. The child may initiate filiation proceedings without parental authorization only after the age of 18. Although the provisions of the Civil Code provide for the participation of the Office for the Protection of the Right of the Child, the rules specific to this institution foresee its engagement only in the proceedings where the parenthood of one of the child's parents is being contested.[123]

### *c) Tutelage and Guardianship of the Child*

One of the last instances where the consent of the child is needed, but is insufficient is the determination of tutelage and guardianship of the child.

The general principle on tutelage and guardianship is set out in Article 3.251 of the Civil Code. This Article states that tutelage concerns children under the age of 14, while guardianship concerns children from the age of 14. Likewise, Articles 3.238 (1) and 3.239 (1) define the legal concepts of tutelage and guardianship. Tutelage is defined as guarding, protecting and representing the interests of persons who have no civil capacity, while guardianship is defined as guarding, protecting and representing the interests of persons who have limited civil capacity.

The whole Part VII of the Civil Code is devoted to Tutelage and Guardianship, but only Chapter XVIII is devoted for the Tutelage and Guardianship of minors.

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[121] The general rule is that the father of the child in concord with the mother of the child initiates the proceedings (Article 3.142 (1)).

[122] *See* Regulation of the Government of the Republic of Lithuania on the General Rules of the Office for the Protection of the Rights of the Child of 17 December 2002 No. 1983. No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=216580&Condition2=.

[123] The main problem recognized academically is that the provisions do not require the initiation of the proceedings contesting parentage together with the proceedings on determination on parentage. This legal gap is accepted to contradict Article 8 of the European Convention for the Protection of Human Rights. *See* G. Sagatys, *Biologinės ir faktinės tėvystės santykio problema ir vaiko teisės*, 37(29) Jurisprudencija 96-106, at 100 (2003).

The provisions of Article 3.249 (2) of the Civil Code state that the views of the child should be expressed and are very important when determining his/her tutelage or guardianship.

There are two types of tutelage and guardianship. They both can be permanent or temporary (Article 3.252 (1)). They are both instituted when the child is abandoned or being neglected by his/her parents. The difference between the temporary and permanent tutelage and guardianship is that the court awards the permanent tutelage or guardianship (Article 3.264 (3)), while the municipality mayor may award temporary tutelage or guardianship (Article 3.264 (1)) of the abandoned or neglected child. The role of the Office for the Protection of the Rights of the Child is eminent in determining the temporary or permanent tutelage or guardianship of the child.

The Office for the Protection of the Rights of the Child is entrusted with the major role in determining the child's temporary or permanent tutelage or guardianship. The views of the child must be expressed and taken into consideration. However, the consent of the child or his/her objection is insufficient in the proceedings.

### 4. Child's Right to Silence

The Code on Civil Procedure of 2002 is completely silent on the general right to silence. It neither mentions the right to silence of the child nor the adult. The Civil Code of 2000 does contain provisions on the right to silence. These provisions are limited to the provisions on contracts and contractual obligations and do not differentiate children from adults. Unfortunately, there is no authorized state institution which has followed the general practice concerning the child's silence or refusal to express his/her views when asked to do so in civil proceedings.

The Senate of the Supreme Court Judges discloses only one instance how the child should be approached if s/he does not express his/her views openly in the court proceedings when the decision is taken on the child's place of residence upon the divorce/separation of his/her parents. The Senate states that if the child does not express his/her views directly on with which parent he wishes to reside, the court has to determine whether the child is mature enough to be capable to express his/her views and, if so, the court should find out to which parent the child is more attached.[124] However, this rule does not truly amount to the right to silence.

## III. The Expression of the Child's Views in Practice

It was mentioned earlier that there is no central coordinating institution, which could set the uniform and appropriate enforcement practice for the rights of the child. The Office for the Protection of the Rights of the Child is the institution established to represent the rights of the child in court, to safeguard and secure the rights of the child in every instance it is called upon or where it has the legal obligation to intervene. With the establishment of the Ombudsman for the

[124] *Supra* note 22, at 156.

Protection of the Rights of the Child, a state institution to hear and investigate complaints on the violation of the rights of the child throughout Lithuania came into being. Its annual reports available online give very useful insights to the structure and types of complaints that the institution receives. Overviews of the Senate of the Supreme Court Judges conclusions are also very helpful in assessing the general application of Article 12 of the UN Convention on the Rights of the Child as transposed in the Lithuanian Civil Code and the Code on the Civil Procedure. However, to date there is only one such overview and its summary is relevant to one aspect of the civil procedure. This aspect is the determination of the place of residence of the child in the divorce/separation cases of his/her parents.[125] Although the list of sources on actual application is limited, it still offers some insights in the application of the child's rights to express his/her views in court.

The limited materials available do demonstrate some trends in practice concerning the expression of the child's views. The Ombudsman in its report of 2001 emphasized that parties to proceedings often attempted to manipulate the child and make the child express the views of the party in the proceedings, rather than the own views of the child.[126] In the same report the Ombudsman also emphasized that the Offices for the Protection of the Rights of the Child that have the legal duty impartially to represent the interests of the child do not always obey or follow its duty. It has been biased and represents the interests of the child unfairly in the civil proceedings.[127] The report has also noted that the state authorities are not always keen on according supremacy of the UN Convention on the Rights of the Child over the colliding national law norms.[128] In its report of 2002 the Ombudsman noted that other state institutions are keen to ignore the position of the Office for the Protection of the Rights of the Child, arguing that other problems matter more than the interests of the child.[129] In the report of 2003 the Ombudsman argued that the right of the child to express his/her views is not properly implemented.[130] The Ombudsman in its report of 2004 outlined the general trend of society's perception in the implementation of the rights and interests of the child.[131] It suggested that society is usually inactive in implementing and safeguarding the rights of the child, it is often unaware about the guaranteed rights that the child has and usually addresses the authorities or takes the necessary action too late to safeguard these rights. In this respect, the

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125 *Supra* note 22, at 164-210.
126 *Supra* note 3, at 21.
127 *Id.*, at 29-30.
128 *Id.*, at 111.
129 Ombudsman's Reports on its Activities during the Year of 2002: Lietuvos Respublikos vaiko teisiu apsaugos kontrolieriaus veiklos ataskaita – 2002 01 01 – 2002 12 31. Available online in Lithuanian only: http://vaikams.lrs.lt/informaciniai/ataskaita20030519.doc, at 73.
130 Ombudsman's Reports on its Activities during the Year of 2003: Lietuvos Respublikos vaiko teisiu apsaugos kontrolieriaus veiklos ataskaita – 2003 01 01 – 2003 12 31. Available online in Lithuanian only: http://vaikams.lrs.lt/informaciniai/ataskaita2003.doc, at 56.
131 *Supra* Ombudsman's Reports on its Activities during the Year of 2004, note 44 at 25.

Ombudsman also noted that usually society seems to be reluctant in protecting the violated rights of the child in courts. These are the general trends in the general protection of the rights of the child, including the right to express views.

The Senate of the Supreme Court Judges has prepared a general overview of the implementation of the right of the child to express his/her views in the divorce/separation proceedings of his/her parents in court. The Senate noted that no uniform practice of the courts exists. The general rule that the Senate seems to set is that the views of the child should be heard regardless of the child's age.[132] The essential element here is whether the child is capable of forming and expressing his/her views.[133] The child should be heard in court directly only if it does not infringe his/her interests (health, the sensitivity of the child, etc. should be taken into the court's consideration).[134] The Senate notes that courts in the proceedings for the determination of the child's place of residence often state in their decisions that the place of residence selected by the court serves the interests of the child but do not outline these interests or substantiate its statement.[135] The Senate has also pointed out that not all courts abide by the rules that the child could be heard in court indirectly (through the Office for the Protection of the Rights of the Child) and that the hearing as such should be determined by the child's capacity to express his/her views. For instance, the Office for the Protection of the Rights of the Child may have learned the views of the child before the court hearing, but the court nevertheless decides that, as the child is 10 years old[136] and thus meets the threshold, he shall be heard in court directly, without considering any negative impact which the direct hearing may have on the child.[137] The Senate also refers to instances where neither courts nor Office for the Protection of the Rights of the Child attempted to learn the views of the child to the proceedings.[138] Nevertheless, the Senate also refers to instances where the views of the child were expressed and considered in appeals.[139] The Senate acknowledged the general trend in the case-law that when an experienced psychologist upon the court's order determines that the child is not mature enough to express his/her views, the preferences and the views of the child are ignored completely by courts.[140] Generally, the Senate looks very favourably on the courts' attempts to create an informal environment empty of any psychological pressures on the child for the hearing of the child's views in court.[141] These examples given by the Senate of the Supreme Court Judges demonstrate the inconsistent and varying application of civil code norms in the courts.

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132 *Supra* note 22, at 158.
133 *Id.*
134 *Id.*
135 *Id.*, at 172.
136 The former Code on Matrimony and Family stated that the child should express his/her views in court directly at the age of 10. This provision was replaced in 1999 to allow the hearing of the child depending on the capacity of the child to express his/her views. *Id.*, at 173.
137 *Id.*, at 174.
138 *Id.*
139 *Id.*, at 175.
140 *Id.*, at 176.
141 *Id.*

## D. The Rights of the Child in the Criminal Procedure: The Child as the Victim of Violations

There are very many instances when the child becomes the victim because the adults or his/her peers violate his/her inalienable rights. The human rights overview of 2004 published in 2005 has identified these main violations of the rights of the child: "violence against the child at home and at school, poor protection of the rights of the child in criminal procedure (the child as the victim, the child as the eye-witness, the child as the wrongdoer); state-run orphanages that do not secure the interests of the individual child; child sexual abuse; violations of the child's right to shelter."[142] The statistics of the Ombudsman for the Protection of the Rights of the Child reflect these very same problems.[143] The subsequent paragraphs describe and analyze the rights of the child in criminal procedure. The description and analysis in these paragraphs is based on the assumption that the child is the victim and the eye-witness under the Lithuanian Criminal Code of Procedure.

### I. Legal Framework and Analysis

Before turning to the Lithuanian Criminal Code of Procedure it is essential to set out in more detail the rights and guarantees that the Law on the Framework of the Rights of Child Protection of the Republic of Lithuania[144] is praised for having secured.

#### 1. Obligations under the Law on the Framework of the Rights of the Child Protection

The Law on the Framework of the Rights of Child Protection provides for more detailed rules on the child's protection in society and sets rules on responsibility for aggression against a child.

##### *a) The Child's Protection in the Society*

The Law on the Framework of the Rights of Child Protection in the "Title VII The Child and the Society"[145] secures the rights of the child in the social environment. Article 43 titled "The General Provisions on the Child's Protection from the Negative Influences from the Social Environment"[146] is usually praised for having provided the legal basis for the general accountability of legal and natural persons as well as of the state and non-state institutions for the rights of the child. Paragraph 1 of this Article imposes the legal obligation on these persons

[142] Žmogaus teisių įgyvendinimas Lietuvoje, 2004 metų Apžvalga, at 47 (2005) Author's translation.
[143] *Supra* note 131, at 11.
[144] *Supra* note 35.
[145] Author's translation.
[146] Author's translation.

to secure the child against negative influences. In addition, the second sentence of paragraph 1 declares that the promotion of the healthy style of living and the legal education of children are important trends in the area of the social policy. Paragraph 2 of this Article proclaims that persons who demonstrate physical or psychological violence or who involve children in criminal activities or other wrongful acts are to face criminal or administrative charges. Paragraph 3 of the very same Article proclaims that the child who became the victim of the crime committed against him/her or faced the act of violence, or was maltreated, should be assisted to recover his/her health and to reintegrate himself/herself back in society. Paragraph 4 of Article 43 embodies a somewhat moral obligation and turns it into a legally binding one. It makes it legally binding for the natural and legal persons to report to the police or the institution dedicated to the protection of the rights of the child concerning children who are in need of help. Article 43 has been praised as providing the legal basis for criminal and administrative responsibility concerning the duty to bring children in danger to the attention of the public authorities.

The "Title VII The Child and the Society" of the Law on the Framework of the Rights of the Child Protection of the Republic of Lithuania consists of Articles 43-47. The provisions of Article 43 are set out in the paragraph above. The provisions concerning moral character are listed through Articles 44 to 46. For instance, Article 44 states that the child should not be taught to smoke or to drink alcoholic beverages (first sentence of paragraph 1). The second sentence of the paragraph 1 prohibits children from working in the production or distribution sector of tobacco or alcoholic products. Paragraph 2 of Article 44 concerns administrative or criminal responsibility of the person who urges the child to drink alcohol or makes the child drunk. Article 45 contains similarly structured provisions for the child's protection from consumption of narcotic, toxic or other strong substances. Paragraph 2 of Article 45 concerns the administrative or criminal responsibility of persons who are at fault in making the child consume narcotic, toxic or other strong materials and substances. Article 46 "The Child and Games, Movies, Media"[147] prohibits the showing, selling, giving, copying and renting of games, films, audio and image records, literature, press, journals (to children) that directly stimulate or promote war, maltreatment, violence, pornography or otherwise are detrimental for the child's mental and moral growth. The second sentence of this Article concerns administrative and criminal responsibility for those activities. All these provisions are useful for protecting moral character, and developing programs and general guidelines for schools or specialized anti-drug or anti-alcohol policies. In fact, these "legal provisions" resemble information brochures rather than legal provisions that are legally binding and entail sanctions for their violation. Rather than setting some separate legal sanctions for certain banned activities, those provisions let the reader know that such activities are already banned under the provisions of administrative and criminal codes and the administrative and criminal sanctions are already in place.

[147] Author's translation.

The final provision of Title VII Article 47 is particularly interesting. Article 47 is supposed to secure and protect the child from sexual abuse. Paragraph 1 of Article 47 informs the reader of awaiting administrative or criminal responsibility for the activities, such as, the child's involvement in sexual activities, prostitution, pornography or the child's involvement in the distribution of pornographic or erotic material. Paragraph 2 of Article 47 states that the child should be taught how to avoid sexual abuse; however, again, this provision is more useful for the moral character, targeted programs at schools or lectures on parenting.

Thus, Title VII of the Law on the Framework of the Rights of the Child Protection serves to provide additional information about activities already banned under the provisions of administrative and criminal codes and the applicable sanctions rather than creating new legal obligations.

### *b) Legal Responsibility for the Violation of the Rights of the Child*

Title IX of the Law on the Framework of the Rights of Child Protection is devoted to establishing legal safeguards, or more accurately, reminding the reader of the legal responsibility for violations of the rights of the child. Title IX contains Articles 55 to 57. Article 55 creates a more general legal basis for responsibility for violations of the rights of the child while Articles 56 and 57 are more specific as to the addressees of these Articles.

Article 55 establishes general statutory responsibility. It simply states that "persons who had violated the rights of the child foreseen in the Constitution of the Republic of Lithuania, in this and other laws and other legal acts, regulating the protection of the rights of the child, shall be responsible in accordance with the legally defined procedure."[148] This is the legal foundation for responsibility arising from a violation of the rights of the child.

Article 56 establishes the legal responsibility for the parents and other legal representatives/agents of the child. Article 56 contains three paragraphs. Paragraph 1 of Article 56 provides that the parents or other legal representatives/agents of the child shall face civil, administrative or criminal charges if these persons violate the rights of the child, do not or fail to bring up, educate, look after, maintain the child, or treat the child in a violent way or otherwise mistreat the child. Paragraph 2 of Article 56 grants the right to the child and an obligation for other persons concerned to complain about the mistreatment of the child to the institution responsible for the protection of the rights of the child, or other authorities that are legally obliged to undertake specific action to help the child. Paragraph 3 of Article 56 states that if the health or the life of the child is threatened because the parents or any other legal representative/agent of the child violently mistreat the child, the state authority charged with the protection of the rights of the child is entitled alone or together with the police officers to take the child away from them. Thus, Article 56 creates the basic mechanism to protect the child. The parents are banned from mistreating the child and if they do so, they are to face civil, administrative or criminal charges. In addition, the child is granted the right to address the authorities concerned if s/he is mistreated

[148] Author's translation.

or maltreated in the family. Finally, the authorities have the right to take the child away from the parents if the action or inaction of the parents constitutes a threat to the health or life of the child.

The provisions of Article 57 establish the legal responsibility of persons, other than parents or legal representatives/agents of the child. This Article contains three paragraphs. Paragraph 1 of Article 57 states that natural or legal persons who illegally prevent the child from exercising his/her rights and freedoms or otherwise violate the rights of the child shall bear statutory responsibility (foreseen in statutes). Paragraph 2 of Article 57, in addition, states that the heads of teaching or health care institutions, teachers and administrators are to bear statutory responsibility if these persons psychologically or physically mistreat the child or otherwise violate the rights of the child. Paragraph 3 of Article 57 establishes the legal obligation for the employees of the state and municipal institutions in charge of supervising matters[149] concerning children to inform the competent institutions about the violations of the rights of the child. Paragraph 4 of Article 57 sets out the legal basis for the dismissal for immoral behaviour of employees in the state and municipal sector who supervise matters[150] concerning children,. Paragraphs 1 and 2 of Article do not create any specific statutory sanctions but provide that these sanctions and procedures exist in the provisions of other legal acts. Paragraphs 3 and 4 do create some sanctions that are new but probably, these sanctions would be more appropriately listed in the specific job instructions.

Title IX of the Law on the Framework of the Rights of the Child Protection contains Articles 55 to 57 that are supposed to set the framework for the responsibility for the violation of the rights of the child. However, the provisions of Article 55, paragraph 1 of Article 56 and paragraphs 1-2 of Article 57 mainly relate to the responsibility already contained in the civil, administrative or criminal code or which ought to be contained in the provisions of other statutes. Paragraphs 2-3 of Article 56 do create the legal basis of certain actions. For example, the child has the right to address the responsible authorities for help if he thinks his/her rights are violated. In addition, the authorities are allowed to take certain actions, such as taking the child away from the family in circumstances where his/her health or life is threatened. Nevertheless, the appropriateness of the provisions of paragraphs 3 and 4 of Article 57 are questionable, because these provisions are more specific to the job instructions and training than to a legislative act of general scope.

## 2. The Child and the Criminal Procedure

Now we shall turn to the provisions of the criminal code. It was said beforehand that the Criminal Code of Procedure of Lithuania grants three statuses to the child: the child as the victim, the child as the eye-witness and the child as the wrongdoer. The following passages shall examine the child's position of the victim and the eye-witness.

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[149] In the Lithuanian text the meaning is even narrower than 'matters'.

[150] *Id.*

Before turning to define the legal status of the child as the victim and the eye-witness, some very general structure of the Lithuanian Criminal Code of Procedure pertaining to these two positions of the child must be introduced. The Criminal Code of Procedure of the Republic of Lithuania contains only two Articles applicable to the child in the capacity of victim or eye-witness. These two Articles are Article 186 and Article 280.

Article 186 applies to the pre-trial hearing of the child as the victim or the eye-witness, while Article 280 applies to the hearing of the child as the eye-witness during the trial at first instance. However, the provisional participation of the child in the court as the victim was meaningless, if the law did not empower the child to initiate the criminal procedure.

### *a) The Right of the Child to Initiate a Criminal Procedure*

The provisions of the Law on the Framework of the Rights of Child Protection described above lists certain activities committed against the child (drugs and alcohol addiction; and broadly defined sexual abuse) that are banned and are specified as offences or crimes in the administrative and criminal codes. In addition, paragraph 2 of Article 56 of the Law on the Framework of the Rights of the Child Protection establishes the child's legal right to complain to various authorities, including the police when s/he thinks that her/his rights are infringed. Moreover, Article 18 (2) of the Law on the Ombudsman for the Protection of the Rights of the Child of the Republic of Lithuania[151] allows the child to file complaints to the Child's Ombudsman whenever s/he believes that her/his rights are violated or infringed. More importantly, the child may file the complaint with the Ombudsman without having to follow any formal requirements that Article 22 of this Law lists for the complaints submitted to the Ombudsman; the child has the general guarantee that his/her complaint shall be examined within one month under the procedure applicable.[152] All these legal provisions may actually lead to granting the child the right to initiate even criminal procedure by himself/herself. However, all the practical aspects of these procedures are covered in D.II.

Although, various legal provisions grant the right to the child to complain to authorities and seek redress, these legal provisions are not exhaustive. These provisions do not answer the question whether the child is allowed to be the party in the criminal procedure alone. Articles 53 and 55 of the Criminal Code of Procedure provide the answer. These two Articles provide for two separate types of agents/representatives to ensure the rights of the child. Article 53 deals with statutory agents, while Article 55 concerns authorized agents. The authorized agent in accordance with the provisions of Article 55 is the attorney or his assistant attorney. This Article also allows the public prosecutor or the judge to authorize any other person who has received a university legal degree

[151] *Supra* note 39.

[152] Article 23 (1) of the same law. However, paragraphs 2 and 3 provide that the Ombudsman's investigation may be extended, but may not take longer than six months.

to be the authorized agent. Paragraph 4 of Article 55 set out the right to receive legal assistance guaranteed by the state. However, it must be pointed out that the victim-child cannot benefit from legal assistance guaranteed by the state.[153]

In accordance with paragraph 1 of Article 53 the statutory agents can take part in the criminal procedure and defend the interests of the child, so long as this does not contradict the interests of the child. Paragraph 2 of Article 53 defines statutory agents as parents, tutors, guardians of the child or the authorized persons of the institution, which takes care of the child (i.e. orphanages). Paragraph 3 of Article 53 sets out the procedure under which the statutory agents can take part in the procedure. Under this procedure, the statutory agent has to seek the authorization of the pre-trial investigator or the public prosecutor and the court to be able to take part in the procedure. This authorization is not granted if these persons believe that the participation of a certain person as a statutory agent would harm the interests of the child. Under these circumstances, the pre-trial investigator, the public prosecutor or the court has the obligation to make sure that another statutory agent takes part in the procedure. In case it is impossible, these authorities have to appoint temporarily another person who is able to protect and ensure the interests of the child. Thus, the law puts the legal obligation upon three authorities (the pre-trial investigator, the public prosecutor and the court) at least to choose and to authorize the statutory agent who is able to protect the interests of the child and to ensure that this authorized person does not harm the interests of the child during the procedure.

Thus, though the child has the right to initiate the criminal procedure, the child cannot stand in this procedure alone as the statutory or authorized agents have to assist the child and defend the interests of the child in the criminal proceedings. However, in practice, the child is not appointed an attorney.

### *b) The Child as the Victim*

In the Criminal Code of Procedure a single provision guarantees the procedural rights of the child directly. This provision is Article 186, which creates specific guarantees in the hearing of the child.

Paragraph 1 of Article 186 states that the victim-child shall be heard in the pre-trial procedure upon the agent's, public prosecutor's or attorney's request made in the interests of the child. The provisions of paragraph 2 of Article 186 state that the victim-child should be normally heard only once. It also allows audio and visual recording to be made during this hearing. In addition, the second sentence of paragraph 2 places an obligation upon the judge to ensure that the victim is secure from any negative influences from the suspect and/or his/her agent, if these persons attend the hearing. Paragraph 3 of Article 186 grants the right to the child's agent to attend the hearing. In addition, the second sentence of this paragraph allows the parties to the procedure to ask for and the pre-trial investigator, the public prosecutor and the judge have the right to invite a representative from the institution devoted for the protection of the rights of the child or a psychologist to assist the authorities in the hearing.

[153] Svirskaitė-Tamutienė, *supra* note 45, at 33.

The initial description of these provisions shows that these provisions are more of voluntary than of mandatory nature. The victim-child is heard in the pre-trial procedure not automatically, but only when agents of the child, the public prosecutor or the attorney so request. Although, the hearing of the victim child should be normally arranged only once, it could be repeated. In addition, the commentary of the Code of Criminal Procedure states that only the judge has the exclusive right to hear the child.[154] It follows from the commentary that neither the pre-trial investigator nor the public prosecutor has the right to hear the child before the judge holds the pre-trial hearing. However, the commentary states that the pre-trial investigator and the public prosecutor have the right to talk to the child beforehand and this conversation is not the hearing within the meaning of this Article.[155]

The same Article obliges the judge to ensure that the suspect or/and his/her agent do not have any impact on the child during the hearing. Interestingly enough, this commentary interprets this obligation as meaning that that the judge has to watch the suspect closely and all agents (including the parents of the child) to ensure that they do not ask questions or perform gestures or other acts that may induce the child to give incorrect information during the hearing.[156] The commentary points out that the child could find himself/herself in a very large and highly unpleasant company during the hearing. Specifically, the hearing is attended by the pre-trial judge, the public prosecutor, the agent of the child, the suspect, the attorney of the suspect and a psychologist.[157] However, with this point made, this concern is exhausted in the commentary. Nevertheless, there are sources bold enough to point out that the sole presence of the child in the court-room together with the child's aggressor in addition to numerous unfamiliar faces by itself amounts to enormous psychological pressure on the child.[158] In addition, other sources point out that rules of the criminal procedure do not protect the child from additional violence outside the court-room. The truth is that the child is beaten up the very minute s/he leaves the court-room.[159]

These are the very general guarantees that the victim-child is provided for in the criminal procedure. The child is allowed to be assisted by the agents (i.e. parents) and by the institutions responsible for the protection of the rights of the child and by a psychologist. The parents (or the persons legally recognized as parents) of the child are the primary persons to assist and defend the rights of the child in the criminal procedure. If the participation of the parents in the criminal procedure is detrimental to the interests of the child, the pre-trial investigator, the public prosecutor and the judge have the right to disallow the participation of the parents. If the parents of the child are dismissed from the procedure, other persons are to be appointed to guarantee the rights of the child. The participation

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[154] Commentary on the Criminal Code of Procedure of the Republic of Lithuania Part I: Lietuvos Respublikos baudžiamojo proceso kodekso I komentaras (I-IV dalys) (2003), at 492.
[155] *Id.*
[156] *Id.*, at 494.
[157] *Id.*
[158] *Supra* note 142, at 51.
[159] Kerienė, *supra* note 40, at 30.

of the institution responsible for the protection of the rights of the child and a psychologist is rather a discretionary decision of the pre-trial investigator, the public prosecutor or the judge than the mandatory obligation.

### *c) The Child as the Eye-witness*

The Code of Criminal Procedure contains two Articles that are tailored to the hearing of the child as the eye-witness. These relevant two Articles are 186 and 280. Article 186 is relevant for the pre-trial hearing of the eye-witness child. Article 280 provisions are applicable to the trial procedure at the court of the first instance, specifically, the hearing of the child. The provisions of Article 186 are applicable both to the victim-child and the eye-witness child. The following paragraphs describe the provisions that more specifically address the guarantees in the hearing of the eye-witness-child.

#### *i) The Provisions of Article 186*

The provisions of Article 186 address the hearing of the eye-witness-child in the pre-trial procedure. Paragraph 1 of Article 186 sets out that the child can be heard on one of the two conditions: the hearing of the child can be arranged on the request of the child's agent, the public prosecutor, the attorney of the suspect if the hearing is in the interests of the child (the same rule as to the victim-child). Secondly, the public prosecutor alone may request the pre-trial judge to arrange the pre-trial hearing of the child in line with the provisions of Article 184 (1) of the Code. Article 184 (1) provides for three conditions. Firstly, the public prosecutor deems it impossible to hear the eye-witness child in the trial. Secondly, the public prosecutor believes that the eye-witness-child could alter his/her testimony later on or rely on the right to refuse to testify afterwards. Thirdly, the public prosecutor believes that the child eye-witness would be able to testify more thoroughly in the pre-trial procedure than in trial. This is the whole set of conditions that must be met in order to arrange the hearing of the child in the pre-trial procedure. In all instances, the right to initiate the pre-trial hearing of the child is the prerogative of the public prosecutor. However, the agents of the child and the attorney of the suspect may request the hearing of the eye-witness-child only if this hearing serves the best interests of the child.

Paragraph 2 of Article 186 sets out the same guarantee to the eye-witness child, as it provides for the victim-child. The requisite guarantee is that normally the child should not be heard more than once. This provision also allows for the audio and video recording of the hearing. In addition, the judge has the obligation to ensure that the suspect and the attorney of the suspect do not take any action during the hearing to influence the testimony of the eye-witness-child. The additional statutory guarantee for the eye-witness-child is that the hearing of the child should be arranged only in exceptional circumstances. In this regard, the commentary acknowledges that the testimony of the child could be of great help to the trial. However, it also acknowledges that to arrange the hearing of the child's testimony is even more difficult with younger children. The younger the child is, the keener he may be to fantasize or to say things that the adults expect

the child to say. The commentary also emphasizes that the Code does not set the age limit of the testifying child, but the testimony of the child could be of exceptional value when it becomes impossible to determine the main facts of the case in any other way.[160]

The guarantees that paragraph 3 of Article 186 sets out for the hearing of the eye-witness-child are largely the same as to the victim-child. It is only worthwhile mentioning in addition, that the provisions of the former Code did not allow the agents of the child to participate in the hearing of the child.[161]

The provisions of Article 186 of the Code of Criminal Procedure are largely the same and albeit some particularities to the status of the child as the victim or the eye-witness are drafted to suit both statuses of the child. The main five guarantees of the child in the pre-trial hearing are the following. Firstly, the statute provides that the child is not obligatorily heard. The child is heard only if it is in the interests of the child. Secondly, the child is supposed to be heard only once. Thirdly, the child's statutory or authorized agent is there to assist the child in the procedure and to make sure that the rights of the child are not violated in the hearing. Fourthly, the judge is obliged to supervise the actions of the suspect and the attorney of the suspect and ensure that these persons do not influence the testimony of the child. Fifthly, the pre-trial investigator, the public prosecutor and the judge have the right to invite the representative of the relevant institution, which is responsible for protecting the rights of the child and a psychologist to assist the child in the pre-trial hearing. These are the main five guarantees the child-victim and the child-eye-witness have in the pre-trial hearing.

*ii) The Provisions of Article 280*

The provisions of Article 280 of the Criminal Code of the Procedure are the only provisions that talk about the position of the child in the trial. The status of the child that the provisions aim to set out certain guarantees is the trial hearing of the eye-witness-child.

In line with this purpose, the provisions of paragraph 3 of Article 280 state that the eye-witness-child shall not testify in the trial if it is thought that the child could entail a grave psychological trauma or suffer other serious consequences. Instead the testimony of the child is to be read during the trial. Thus, the participation of the eye-witness-child is not obligatory.

Unlike the provisions of Article 186, paragraph 1 of Article 280 states that the participation of the representative of the institution devoted to the protection of the rights of the child or a psychologist is mandatory during the trial hearing of the child. In distinction from Article 186, the second sentence of paragraph 1of Article 280 states that the parents or the statutory agents of the eye-witness-child are to participate in the hearing only when their participation is needed. The third sentence of this paragraph states that the representative of the rights of the child institution or a psychologist, the parents of the eye-witness-child or other statutory agents can address questions to the child during the hearing

[160] *Supra* note 154, at 491.
[161] *Id.*, at 493.

upon the authorization of the chair of the trial. It is quite evident that the wording of Articles 186 and 280 of the Criminal Code of Procedure is different and the rules that were of the optional character under Article 186 acquire mandatory weight under Article 280. It is also quite evident that the statutory agents (usually parents) of the child are allowed to play a much less prominent role under Article 280 than they play under the Article 186.

The last guarantee is that the eye-witness-child in the criminal trial is free to walk away from the trial as soon as his/her testimony is over, unless the court decides otherwise in accordance with paragraph 2 of Article 280 of the Criminal Code of Procedure.

To sum up, the eye-witness-child has different guarantees in the pre-trial and trial criminal proceedings. The child could be called upon to testify in the pre-trial proceedings if the public prosecutor, the agents of the child or the attorney of the suspect decided that the testimony of the child serves the interests of the child. In addition, the public prosecutor has the right to initiate the hearing of the eye-witness-child if the testimony of the child is substantial to the case. In the trial proceedings if the testimony of the child is deemed to cause grave disturbances to the child, the child is not heard, but the documented testimony of the child is to be read out aloud during the trial. Most importantly, the importance of participation of the agents of the child and the institution of the rights of the child or a psychologist is not the same during the pre-trial and the trial proceedings. While the participation of the statutory agents in the pre-trial hearing is obligatory as they are to ensure the interests of the child, the participation of these agents in the trial becomes somewhat selective. Similarly, the participation of the rights of the child institution or a psychologist becomes mandatory in the trial procedure, while it appears optional and discretionary in the pre-trial proceedings.

*iii) Conclusions*

The Criminal Code of Procedure acknowledges the child as the victim and the eye-witness. Although these statuses are intertwined, the law does not afford the same level of protection to the child in these two positions. The child-victim is allowed to participate only in the pre-trial procedure, while the child-eye-witness may participate both in the pre-trial proceedings and the trial. However, the biggest legal concern is that the provisions are worded differently and thus inconsistent interpretation could follow. For instance, the law in the trial hearing of the eye-witness-child expressly provides for the mandatory participation of the rights of the child institution or a psychologist, while this question is open to the discretion of the pre-trial investigator, the public prosecutor or the judge in the pre-trial proceedings where the child is the victim or the eye-witness. The greatest practical concern is that these rules on the victim-child and eye-witness child do not safeguard the child from the enormous psychological pressure during the trial and do not safeguard the child from additional instances of violence from the same aggressor.

## II. The Reality and the Attitude

The state can adopt the best legal provisions to secure the rights of the weakest members of the society, but these rules can turn into empty declarations if they are not followed and not properly enforced. The provisions of Lithuanian legislation allow the child to take action to secure and defend his/her rights. The child is empowered to initiate criminal proceedings against his/her aggressor. To pursue this, the child has to address the relevant authorities – the institutions for the protection of the rights of the child and the police. The legislation provides for a number of specialized rules, including the specialized provisions in the Criminal Code of Procedure. However, the descriptive analysis of these rules does not demonstrate whether they are effective in practice. Thus, analysis of actual implementation and the attitude of the society and authorities become indispensable.

### 1. The Right of the Child to Complain

The legislation described above allows the child to complain and address the authorities that are supposed to protect the rights and interests of the child. A specialized empirical study reveals several trends regarding the complaints that the institutions receive.[162] First of all, in most instances the parents, physicians, teachers and the child alone most frequently inform the authorities concerned about instances when the child has been subject to a violent act. Secondly, it is a very rare practice that the institutions active in the field do exchange the information that a child suffered violence with other institutions active in the field. In this regard, from the whole network of institutions that took part in the survey (Offices for the Protection of the Rights of the Child, the offices of the public prosecutor, the courts, the police, the medical institute and its units and the children hospitals) only two institutions (the courts and the experts of forensic medicine) usually receive the information about the violent acts committed against children from another state institution. The office of public prosecutor informs the courts and the experts of forensic medicine about the instances of violence committed against children. Thirdly, the findings of the study showed that the Offices for the Protection of the Rights of the Child or the juvenile police inspectors do not usually refer the cases on the violent acts (physical violence or sexual abuse) committed against the child to the office of public prosecutor and courts. In addition, the specialized offices for the protection of the rights of the child would normally observe the family where violence is present, but would not take any active action, except documentation.[163] It is only on very rare occasions that these offices would use their statutory right to take the child away from the family where the child is subject to violence or any other harmful behaviour. In these instances, usually the relatives, neighbours and friends of the child or the child alone address the office of public prosecutor and courts. Thus, what the results of the study imply is that the child has to complain to the police directly as

[162] Svirskaitė-Tamutienė, *supra* note 45, at 29.
[163] *Supra* note 142, at 48.

the specialized offices instituted for the protection of the rights of the child would not normally refer the case of the act of violence to the police. The child has to complain to the police alone or seek the assistance of an adult outside the Office for the Protection of the Rights of the Child to help him/her to file the complaint. This assumption is reinforced even more by the publicly announced fact that Offices for the Protection of the Rights of the Child had initiated less than 19 per cent of total criminal proceedings for the acts of violence against children in 2002.[164]

However, even in the instances when the child does complain to the authorities alone or with the assistance of an adult this does not mean that the police would open the investigation or that the criminal procedure shall be instituted in courts. One of the major setbacks is that there are no qualified experts to gather evidence of violence when there are no visible bodily marks on the victims.[165] The greatest concern, however, remains that the authorities are not usually keen on instituting or opening the proceedings.[166] In fact, they take no action to protect the alleged victims at all.[167] It is usually the case that the authorities do not open an investigation even when the bodily injuries of the child are present.[168] There are plenty of situations when the authorities would simply ignore the cries for help.[169] Only after the repeated acts of violence the authorities would react.[170] Even in these instances this reaction would not offer any durable solution. The child would normally be returned to the violent families.[171] These illustrations show that the child alone or with the assistance of the adults would normally have to walk a long way for the criminal procedure to be opened against the child's aggressor.

The conclusion is that the child has the statutory right to complain and seek assistance but in practice the child would not be normally accorded any assistance when complaining alone or with the help of an adult. The discretion to open the investigation or to institute criminal proceedings lies within the discretion of the authorities concerned.

## 2. The Testimony of the Child to be Heard Only Once

Although, the Code of Criminal Procedure provides that the child should be heard only once, the reality is not even close to this goal.

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[164] Regulation of the Government of the Republic of Lithuania on the Program Improving the Activities of the Municipal Offices for the Protection of the Rights of the Child of 18 September 2003 No. 1179. (came into force on 25 September 2003). No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=218046&Condition2=vaiko, at point 10.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*, at 48-49.

According to the Code of Criminal Procedure in the pre-trial proceedings, the pre-trial judge shall hear the child. In the case of the eye-witness-child, the child could be heard within certain limits twice in the pre-trial and trial proceedings. Thus, it is quite evident that even the law, which aims to establish that the child should be heard only once, in fact is flexible to allow the hearing of the eye-witness-child to take place twice (the pre-trial and trial proceedings).

As referred to in section A of the Part III of this paper, the Commentary on the Code of Criminal Procedure states that the provisions of the code actually mean that the pre-trial judge has the exclusive right to hear the victim or eye-witness child. The practice, however, shows that the victim-child is heard a number of times before the proceedings reach the stage that the provisions of the Code describe.

In fact, an empirical study on the institutional framework concludes that the child would normally be heard at least once by every institution in the chain (the Office for the Protection of the Rights of the Child, juvenile police, physicians, psychologists, the office of the public prosecutor and finally the courts).[172]

To conclude, the legislation establishes that the child should be heard only once. In case of the eye-witness-child the legislation provides for the possibility of arranging the hearing of the child at least twice. Firstly, the provisions explicitly allow the hearing of the child in the pre-trial proceedings. Secondly, the provisions on the trial proceedings also allow for the child to be heard. In reality, the case of the victim-child is even more complicated. The legislation provides that the victim-child should be heard in the pre-trial proceedings by the pre-trial judge and only once. However, the child might have to repeat her/his story on numerous occasions in the chain of institutions before s/he could be heard by the pre-trial judge.

### 3. The Child Assisted by Parents as Statutory Agents

The Code on the Criminal Procedure provides that normally the parents of the child are expected to be statutory agents that protect the interests of the child during the criminal proceedings.

In reality, the academic materials emphasize that in practice it is nearly impossible to protect the child if an aggressor is present in the family. Some of the authors indicate that it is much easier to secure the rights of an orphan child than to protect the rights of the victim of a violent act or sexual abuse.[173] More interesting, however, is the fact that although the state remains responsible for the orphan or abandoned children, the state has no statistics concerning the exact number of orphan children present in its institutions.[174] Thus, one has to be quite careful in making assertions that it is easier to protect one group of children when compared to another. It is only clear that in practice the child is most likely to receive all the help the child might need only with the willingness and supervision of the child's parents or adopters (the statutory agents).

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[172] Svirskaitė-Tamutienė, *supra* note 45, at 29-31.
[173] Kerienė, *supra* note 40 at 28.
[174] *Supra* note 142, at 50.

This paper has argued that the relevant provisions of the Code on Criminal Proceedings could be interpreted so that the child would be entitled to receive the legal help that the state normally guarantees to its citizens. However, the practice shows that these provisions are not interpreted as widely. Rather they are interpreted very narrowly. In practice, an attorney (the authorized agent) *is not appointed* to protect the rights of the victim-child.[175] Thus, the law is not interpreted so as to enable a child to receive the legal aid which the state normally provides to citizens.

The empirical data shows numerous situations whereby the opened pre-trial criminal proceedings were terminated at the parent's intervention even though the child's aggressor is present in the family. The following paragraphs seek to illustrate these instances.[176] The parents of the child deny that the child was subject to violence. The public prosecutor would normally terminate the criminal proceedings if the parent injured his child because she used drugs. The police initiate criminal proceedings against the step-father of the child who has beaten the child, the mother visits the child and the child changes his testimony. The father of 11 children threatens his children to slice them into pieces, the parent is arrested, but upon signing a promise he is released to his family. The Constitution declares equality in the application of laws, but frequently cases are terminated if the parent of the child occupies high office the same source suggests.[177] The cases are numerous where children ask to be admitted to the boarding-school because their parent inflicts injuries on them, but these children remain within families upon the violent parents' refusal to allow children to attend boarding-school. A father sexually abused his 7 year-old daughter; the Office for the Protection of the Rights of the Child is aware of this fact, but the child remains within her family. The social worker visits the child in the family, but no active action, except observation, is taken. These shocking illustrations had been recorded in the questionnaires distributed to 198 experts that have the legal duty to secure and protect the child from violence.

Although, it could be argued that the described study (of 2001) does not reflect the real situation after the introduction of the Civil Code of 2000, the human rights overview of 2005 includes no less shocking illustrations of the suffering children in their own families.[178] Thus, it becomes indispensable to reflect the rules on the restriction of parental authority embodied in the Civil Code of 2000.

## 4. Restricting the Parental Authority under the Set of Rules of the Civil Code of 2000

The Civil Code sets the legal rules for restriction of parental authority. The provisions of Article 3.155 establish the scope of parental authority and its official translation reads:[179]

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175 Svirskaitė-Tamutienė, *supra* note 45, at 33.
176 In doing so the author relies on Svirskaitė-Tamutienė, *supra* note 45.
177 *Id.*
178 *Supra* note 142.
179 The Civil Code of the Republic of Lithuania of 18 July 2000 No. VIII-1864 (as last amended on

> 1. Until they attain majority or emancipation, children shall be cared for by their parents.
>
> 2. Parents shall have a right and a duty to properly educate and bring up their children, care for their health and, having regard to their physical and mental state, to create favourable conditions for their full and harmonious development so that the child should be ready for an independent life in society.

Thus, until the child emancipates or attains the age of 18, the parents have the authority and duty to educate and bring up their child, care for the health of the child and create the conditions for the complete and harmonious development of the child to be ready to pursue his/her independent life in society upon maturity.

It was mentioned earlier that under Article 3.164 (2) the child may apply for the restriction of the parental authority over the child. The child may initiate proceedings in court at the age 14, while the child below the age of 14 may address a request to the Office for the Protection of the Rights of the Child. In addition Article 3.182 (2) gives the whole list of persons entitled to initiate the court proceedings to restrict parental authority. Under this Article one of the parents, close relatives, the Office for the Protection of the Rights of the Child, public prosecutor or tutor/guardian may initiate these proceedings.

Such proceedings may be initiated on the grounds listed in Article 3.180 (1) and its official translation reads:[180]

> Where the parents (the father or the mother) fail in their duties to bring up their children or abuse their parental authority or treat their children cruelly or produce a harmful effect on their children by their immoral behaviour or do not care for their children, the court may make a judgement for a temporary or unlimited restriction of parental power (that of the father or the mother.)

Proceedings to limit parental authority may be initiated on the following grounds: if the parents neglect or abandon their children, abuse their authority, treat their children cruelly or behave immorally, which produces negative effects on children.

When the proceedings are initiated, the participation of the Office for the Protection of the Rights of the Child is mandatory (Article 3.184 and point 15.5 of the Regulation)[181] and the views of the child who is capable of forming his/her views should be considered in court (Article 3.183 (3)).

The Civil Code provides for the legal rules to protect and safeguard rights of the abused children as illustrated under the heading c), but sufficient action to enforce these rules is not taken as the examples show.

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11 November 2004). Official translation only of the initial act of 2000 is available in English http://www3.lrs.lt/cgi-bin/preps2?Condition1=245495&Condition2=. The text with the latest amendments available in Lithuanian online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=246124&Condition2=.

[180] *Id.*

[181] Regulation of the Government of the Republic of Lithuania on the General Rules of the Office for the Protection of the Rights of the Child of 17 December 2002 No. 1983. No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=216580&Condition2=

## 5. Institutions and Special Assistance to the Child (Specialized Offices, Psychologists, etc.)

The child is only the object of observation. Damage is being done to the child, but the child is left helpless in his/her own pain. This is the general concern that the academic papers raise. There is no system of effective help.[182] There is no effective system in place to help the victim-child of sexual abuse and violence.[183]

In this respect a study concluded on the basis of the questionnaires distributed to the Offices for the Protection of the Right's of the Child, the offices of the public prosecutor, the courts, the police, the medical institute and its units and the children hospitals reflected the actions that each of the institutions takes when informed about the victim child.[184] The study found that, of the complaints received by these institutions, 68% of children had experienced psychological violence, 92% physical violence and 83% sexual abuse.[185]

This empirical study found that the institutions undertake the following actions to help the victim-child. The *Office for the Protection of the Rights of the Child*[186] hears the child, visits the family of the child and hears the aggressors. If the child was subject to violence in his/her own family, the question of the child's separation from his/her family is considered. Some Offices for the Protection of the Rights of the Child look for a psychologist who could assist the child. After the investigation, the child is sent to the police and the office of public prosecutor.

The *juvenile police*[187] upon the receipt of a complaint concerning an abused child, collects the initial material on the abuse, hears the child, the parents of the child, witnesses and determines the offender against the child. If there are sufficient grounds, the medical examination of the child is arranged. The material is then forwarded to the office of public prosecutor. The police inform the Office for the Protection of the Rights of the Child upon receipt of information about the abused child. If the child was psychologically abused, the child is sent to the psychologists and/or the Office for the Protection of the Rights of the Child.

The *doctors* and the *experts of forensic medicine*[188] determine whether the abused child has suffered injury. Doctors conducting the medical examination call upon the forensic medicine experts and inform the police and sometimes the Office for the Protection of the Rights of the Child. Doctors and forensic medicine experts are only very rarely called on for assistance in the instances where the child was psychologically abused.

*Psychological services*[189] provide an initial consultation for an abused child. If the patients so desire, the psychologists advise the patients to turn to the Office

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182 Babachinaitė, *supra* note 29, at 23.
183 Kerienė, *supra* note 40, at 28. Ombudsman's Reports on its Activities during the Year of 2004, *supra* note 44, at 32.
184 Svirskaitė-Tamutienė, *supra* note 45, through 28-35.
185 *Id.*, at 28.
186 *Id.* Summarized from 29.
187 *Id.* Summarized from 29-30.
188 *Id.* Summarized from 30.
189 *Id.*

for the Protection of the Rights of the Child and/or police. In certain instances the psychologists themselves inform the police and the Office for the Protection of the Rights of the Child. The psychological services provide psychological assistance for the parents and other persons if they willingly accept their help.

The *public prosecutor's office*[190] upon the receipt of information about the child's physical or sexual abuse hears the child, arranges the medical examination of the victim, arrests the accused, examines the place of crime and collects evidence. After having determined the substance of the crime, the criminal court proceedings are initiated and material of the case is forwarded to the court. The *court*[191] examines the case and rules on it.

This is the procedure that the respondents to the questionnaires described. Nevertheless, the author in her paper concluded that the child is the object of observation.[192] For instance, the child after the court proceedings is taken care of only by the Office for the Protection of the Rights of the Child and partly by the juvenile police. This job is limited to compilation of bureaucratic data. These are only very rare occasions when a social worker or psychologist is appointed for the child to provide psychological counselling before and after the trial to help the child overcome trauma. In addition, if the trial results in acquittal or if a trial is not initiated at all, the child is usually left without any substantive help. Only if the parents or tutors/guardians of the child take the initiative to apply to a psychologist and psychiatrists to receive counselling is help provided for the child. In general, counselling is not provided to the aggressor of the child, especially if his guilt remains unproved.

This empirical study showed[193] that the institutions do not usually collaborate with one another. Action is not coordinated between the institutions. The system of institutions, which is supposed to help the child and protect the interests of the child is ineffective because the functions of the institutions duplicate each other, the employees of one institution do not usually know the duties of a different institution and the employees of the institutions do not bear individual responsibility for ignoring the infringements of the rights of the child or for a failure to help the child on time.

Another important finding of the study was that there are no specialized staff in the institutions that are supposed to help the abused child. There is no staff who dealt solely with the rights' of the child violations. In fact, the author concludes that the protection of the rights of the child is not the primary function of these authorities, but rather an additional task that the employees in these institutions perform in the course of their work.[194] Concerns that there should be specialized family courts or judges specialized to deal with children and violations of their rights have been raised even earlier.[195] The lack of specialized knowledge and

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[190] *Id.*
[191] *Id.*
[192] *Id.* Summarized from 30-31.
[193] *Id.* Summarized from 31-32.
[194] At 29.
[195] *See* L. Jūrėnienė, *Vaiko teisinės padėties problemos nūdienos Lietuvoje*, Vaikų teisės ir jų įgyvendinimo garantijos, Conference Papers, at 26 (1996).

expertise, especially the unpreparedness of judges and police to work with the child,[196] in the institutions and the lack of continued cooperation on the matters of the abused child are also emphasized.[197]

Some newly adopted legislation, projects and programs provide some hope that some of the problems pertaining to the child's position will be solved.[198]

## E. Conclusions

Lithuania acceded to the UN Convention on the Rights of the Child in 1992 and ratified it in 1995. This paper provides a complex and exhaustive overview of Lithuania's legal framework pertaining to the rights of the child. The main emphasis of this paper is the right of the child to express his/her views in civil procedure and the position of the child in criminal procedure (victim and eye-witness). The legal rights and guarantees of the child are described and reviewed in the context of transition of legal thought; the interpretation of Lithuania's international obligations under the UN Convention on the Rights of the Child and the application of the law in practice have been thoroughly analysed.

Under the Soviet system, the Soviet – and hence the Lithuanian – legal system adopted a strictly dualistic approach. Currently, Lithuanian law adopts a monistic approach to international law obligations. The practice however shows that this view is not consistently followed or applied in practice.

Although the legislature of Lithuania treats the UN Convention on the Rights of the Child as its internal law and gives supremacy to its provisions over the norms of national law, the legislator incorporated the provisions of the Convention into the provisions of additional national law. Following this the Law on the Framework of the Rights of Child Protection of the Republic of Lithuania came into force in 1996.

An extensive administrative system was entrusted with the task of protecting the rights of the child in the daily routine of individual institutions. However, there are only two main institutions active in the field of protection of the rights of the child. Offices for the Protection of the Rights of the Child established in 1993 are active throughout Lithuania at the municipality, regions and individual city level. These offices are not coordinated with each other and do not set a

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196 *Supra* note 142, at 51.

197 Svirskaitė-Tamutienė, *supra* note 45, at 32.

198 *See* Resolution of the *Seimas* of the Republic of Lithuania on the Approval of the Concept of State Policy on Child Welfare of 20 May 2003 No. IX-1569 (came into force on 31 May 2003). Official translation available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=242678&Condition2=; Regulation of the Government of the Republic of Lithuania on the Plan of the State Political Strategy and Its Implementation Measures for the Year of 2005-2012 in the Area of the Child Welfare of 17 February 2005 No. 184. (came into force on 23 February 2005). No official translation into English or French available. The text in Lithuanian available online: http://www3.lrs.lt/cgi-bin/preps2?Condition1=250552&Condition2= and Summaries of the Strategies and Programmes on the Child Welfare. Ministry of Employment and Social Affairs. No official translation into English or French available. The text in Lithuanian available online: http://www.socmin.lt/index.php?442518442.

uniform practice for the protection of the rights of the child in Lithuania. Another institution – the Ombudsman for the Protection of the Rights of the Child - was created in 2000. This institution does not serve as the central and coordinating authority for the protection of the rights of the child, but rather it hears individual complaints on the rights of the child violations. A central coordinating institution is lacking, allowing inconsistent practice in the protection of the rights of the child and numerous violations to continue.

Until 2000, Lithuania never had its own Civil Code. The Civil Code of 2000 was the first comprehensive set of rules on civil matters. Article 3.164 of this Code is the central provision concerning the right of the child to express his/her views in the civil procedure. The general rule it establishes is that the views of the child *should* be heard, but the court must take decisions in the interests of the child. In its structure this rule obliges the court to have regard to the ability of the child to express his/her views, the age and maturity of the child. This provision (Article 3.164) is applicable to any procedure where the child is involved.

The rules on the right of the child to express his/her views are more specific to the selection of the child's name, place of residence and visiting rights of his/her parents decided during the divorce or separation procedure of the child's parents and the visiting rights of the close relatives of the child. Articles 3.177 and 3.178 of the Civil Code apply in these cases. Article 3.177 establishes that the court has the legal duty to find out the preferences of the child and to rule accordingly if the preferences of the child are not in conflict with the interests of the child. Article 3.178 ensures the possibility for the child to express his/her views indirectly to court as set out in the first sentence of paragraph 1 of Article 3.164 of the Civil Code. This representative role is allocated to the relevant Offices for the Protection of the Rights of the Child.

At the age of 14 the child gains the civil capacity to conclude some minor household transaction and certain independently acquired property rights without having to receive the authorization of his/her parents. In addition, the child at the age of 14 gains the right to initiate civil proceedings if s/he believes that his/her parents abuse or violate his/her rights.

The rules of the Civil Code explicitly require the express consent of the child in civil proceedings on adoption, change of name on adoption and emancipation. In adoption proceedings, the child gains the right to express his/her explicit consent or objection at the age of 10. If the consenting child or the child who has raised his/her objection is 10 years old the court has the legal duty to follow the express will of the child. The statutory mandatory age threshold of 10 also applies in the determination of the child's name and/or surname during the adoption proceedings. The age of sixteen is the statutory threshold to seek the emancipation of the minor. The child at the age of 16 may apply for the emancipation proceedings and the proceedings may not be initiated if the child refuses these proceedings.

The consent of the child is insufficient in the proceedings relating to marriage, pregnancy termination, filiation proceedings and tutelage or guardianship of the child. The statutory age allowing the conclusion of marriage is the age of 18. However, the child may apply to court with the request to have the legal threshold decreased. With the court's permission the child may marry at the age of 15. The

condition of pregnancy allows the child to marry below the age of 15. Only the court may give authorization permitting termination of the pregnancy of the child. The Civil Code provides for three types of filiation proceedings. The proceedings to affiliate paternity, contest paternity or maternity and acknowledge paternity. The 10 year-old-child gains the right to consent or object to the proceedings to acknowledge paternity, but the court is empowered to waive the child's objection to the initiated proceedings. The views of the child should be considered in the proceedings to determine tutelage or guardianship, but the child has no power to object these proceedings.

The provisions of the Civil Code and the Code on Civil Procedure are silent on the child's right to silence. There are no sources which offer practical insights on the approaches taken. Nevertheless, the practice concerning the application of the child's right to express his/her views in civil proceedings, demonstrate that practice is inconsistent application and hence raises the probability that similar inconsistency exists in this field. Persistent violations of the child's rights are an acute problem in itself. However, the problem becomes even more worrying when the rules drafted to protect the rights of the victim-child and/or eye-witness child during the criminal procedure do not safeguard the child from additional attempts of violence against the child by the same aggressor.

The provisions of the criminal code are drafted to place the main duty on parents (or other statutory agents, i.e. tutors/guardians) of the child to safeguard and implement the procedural rights of the child. However, in reality most grave physical, sexual and psychological violence is committed within families; parents are often the main aggressors against the child. The rules to protect the child against violence present in the families are in place, but frequently not enforced.

The procedural rights of the child undergoing criminal proceedings are not interpreted to safeguard the child's right to have access to free legal assistance (attorney), which is a statutory right ensured to the parties in criminal proceedings. One of the most worrying aspects of the legal rules is that the victim-child may be subject to enormous psychological pressure in the proceedings. In addition the legal rules are open to interpretation to fail the receipt of assistance to the child by psychologist or the relevant Office for the Protection of the Rights of the Child. Nevertheless, practice shows that even where the child is assisted by a psychologist and/or the relevant Office for the Protection of the Rights of the Child, the child is not in position to escape additional acts of violence just outside the court-room which have been exacerbated by the proceedings opened by the victim-child.

Legal attempts to safeguard and secure the rights of the child in civil and criminal proceedings are made, but these attempts are insufficient. Most of the legal guarantees are in place, but are often not followed or enforced in practice. There is pressing need for a major transformation in the minds of people to secure the rights of the child as the central foundation of the society, rather than regarding these rights as something additional to the daily routine of their professional lives and something that is in conflict with their own self-interest.