Chapter I

Content of the Right to Parental Responsibility in the Case Law of the European Court of Human Rights

Michał Poniatowski

"It is easier to rule a country than raise four children"
Winston Churchill

1. Introduction

The analysis of the content of parental responsibility requires examining not only the particular legal systems of Central and Eastern European countries individually but also as a whole.[1] These orders are not isolated from each other and are in an appropriate bilateral or multilateral relationship with each other; they are also elements of the European legal culture. Among them, for example, there may be a reception of law. The process of shaping the European legal culture was and is complex.

Bearing in mind parental responsibility, it is worth mentioning that, already in antiquity, the state had been defined by Aristotle as a community of families. To this day, the family is the basic unit of society. It is worth remembering that in international law, the definition of the family as the natural and fundamental cell of society

1 Cf. also Mostowik, 2014.

Michał Poniatowski (2022) Content of the Right to Parental Responsibility in the Case Law of the European Court of Human Rights. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 13–35. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2022.pscrpr_2

is widely regulated in both universal and regional acts.[2] The family as a value is one of the foundations of the European legal culture and, chronologically, it predates lawmaking in its existence.[3] The case law of the European Court of Human Rights (ECHR), operating under the Convention for the Protection of Human Rights and Fundamental Freedoms, has a special place in this legal culture.[4] Its analysis allows to examine the issue of parental responsibility from a broader perspective because parental responsibility is a universal topic that is naturally related to humans; it concerns not only the countries of Central and Eastern Europe but also other parts of Europe (or of the globe). Therefore, although the case law of the ECHR refers to individual countries, its legal argument often includes a reference to other states individually or a group of them, and in the comparative aspect, the Court refers to the legal orders of states—even from outside Europe—seeking certain international standards in them.

Several questions arise at this point in the context of the analysis of the Court's case law in the area of parental responsibility. First, how is the family itself judged as a value? Can we (or should we?) adopt solutions from other parts of Europe directly in the area of parental responsibility or promote our own solutions embedded in our constitutional axiology to be adopted in particular countries? Is pluralism in this respect possible? Do states have a margin of appreciation in shaping parental responsibility and what may be its limits?

Owing to the sensitivity of the value represented by the family (whose component is parental responsibility), it should be assumed that the case law of the Court should first classify this value as fundamental, analogically to the way it is defined in the legal order of a given state. Owing to the diversity of solutions in force in particular legal systems, states should, as a rule, exercise a margin of appreciation in

2 In the first case, it is possible to refer to Art. 16 sec. 3 of the Universal Declaration of Human Rights of 10 December 1948 (New York), according to which, "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State*." Similar regulations can be found in Art. 23 of the International Covenant on Civil and Political Rights of December 19, 1966 (New York), Art. 10 point 1) of the International Covenant on Economic, Social and Cultural Rights of December 19, 1966 (New York), preamble to the Convention on the Rights of the Child of December 20, 1989 (New York), preamble to the Convention on the Rights of Persons with Disabilities of December 13, 2006 (New York). In the second case, it is possible to refer to acts covering the African region [Art. 18 sec. 1 of the African Charter of Human and Peoples' Rights of June 27, 1981 (Nairobi)], America [Art. 17 sec. 1 of the American Convention on Human Rights of November 22, 1969 (San José), Art. 15 sec. 1 of the Additional Protocol to the American Convention on Human Rights of November 17, 1988 (San Salvador)] or of Europe [point 16, part I, Art. 16 part II of the European Social Charter of October 18, 1961 (Turin), point 16 part I, Art. 16 of Part II of the Revised European Social Charter of 3.5.1996 (Strasbourg)], where the family is defined as the basic, but not natural, unit of society.

3 It is worth adding that, according to the Polish Constitutional Court, the constitutional axiology is ahead of the law which should be consistent with it. Cf. Judgment of the Constitutional Court of December 8, 2009, file ref. no. SK 34/08, Journal of Laws No. of 2009, No. 215, item 1675, OTK ZU 11A / 2009/165.

4 Hereinafter referred to as the Convention.

shaping parental responsibility—this freedom, however, having its limits. Therefore, first, the axiological aspect of parental responsibility and, consequently, the relation of the judgments of the ECHR to the legal order of states, followed by its subjective and objective aspect, together with elements of a procedural nature, is presented in this study.

Owing to its framework, the study contains an analysis of selected judgments of the Court, disregarding detailed descriptions of the facts in specific cases. It attempts to reach conclusions resulting from selected lines of the ECHR's jurisprudence. Thanks to this, and comparing this chapter with the content of other chapters of this monograph devoted to individual countries of Central and Eastern Europe, it is possible to come to additional comparative conclusions.

In the case law of the ECHR, one can also find the content of "parental responsibility."[5] In this study, the abovementioned responsibility is understood broadly. It is worth adding, however, that in the Court's jurisprudence, in the context of the relevant legal orders, the concept of "parental authority" also appears,[6] as well as the concept of "parental rights" [7] or "parental care."[8] Sometimes, the Court uses

5 Cf. Judgment of the ECHR of April 5, 2005, Monory v. Romania and Hungary, application no. 71099/01; judgment of the ECHR of February 5, 2015, Furman v. Slovenia and Austria, application 16608/09; judgment of the ECHR of April 2, 2015, Ribić v. Croatia, application 27148/12; judgment of the ECHR of January 18, 2018. Oller Kamińska v. Poland, application no. 28481/12; judgment of the ECHR of March 6, 2018, Royer v. Hungary, application no. 9114/16. It is worth noting that the concept of "parental responsibility" is also analyzed by the Court through the definitions used in a given state's legal provisions. In the case of Great Britain, the Court indicated that "parental responsibility" in respect of a child automatically vests in the mother and, where she is married, in her husband. It may, additionally, be granted to certain other persons […]. "Parental responsibility" means all the rights, duties, powers, responsibility, and authority, which, by law, a child's parent has in relation to the child and their property (section 3 of the Children Act 1989—"the 1989 Act")," judgment of the ECHR of April 22, 1997, X, Y, and Z v. The United Kingdom, application 21830/93, § 25. It is worth noting an interesting solution in the form of the possibility of exercising parental authority also by entities other than the mother or her husband. 21830/93, § 25.

6 Cf. also judgment of the ECHR of May 18, 2006. Różański v. Poland, application 55339/00; judgment of the ECHR of June 29, 2007. Folgerø and others v. Norway [Grand Chamber], application no. 15742/02; judgment of the ECHR of March 23, 2016. Blokhin v. Russia [Grand Chamber], application no. 47152/06. Cf. also Judgment of the ECHR of December 21, 1999, Salgueiro Da Silva Mouta v. Portugal, application no. 33290/96; judgment of the ECHR of July 13, 2000, Elsholz v. Germany, application no. 25735/94; judgment of the ECHR of July 13, 2000, Scozzari and Giunta v. Italy, applications nos. 39221/98 and 41963/98; judgment of the ECHR of December 16, 2008. Kaleta v. Poland, application no. 11375/02; judgment of the ECHR of March 29, 2016, Kocherov and Sergeyeva v. Russia, application no. 16899/13; judgment of the ECHR of October 8, 2019 Zelikha Magomadova v. Russia, application no. 58724/14.

7 Cf. also judgment of the ECHR of May 18, 2006. Różański v. Poland, application 55339/00; judgment of the ECHR of June 29, 2007. Folgerø and others v. Norway [Grand Chamber], application no. 15742/02; judgment of the ECHR of March 23, 2016. Blokhin v. Russia [Grand Chamber], application no. 47152/06.

8 Cf. also Judgment of the ECHR of February 1, 2018, Hadzhieva v. Bulgaria, application 45285/12; judgment of the ECHR of February 2, 2021. X and others v. Bulgaria, application no. 22457/16; judgment of the ECHR of April 8, 2021. Vavřička and others v. The Czech Republic (Grand Chamber), application nos. 47621/13 and 5 others.

these terms in this regard in the same case.[9] Sometimes the Court, pointing to these concepts in the legal order of a given state moves on to its own legal argumentation without even referring to these concepts.[10] In the case law of the Court, the nomenclature in this respect is not uniform.

2. Axiological aspect

This is where the fundamental question arises: does parental responsibility have its source only in the juridical text itself? What if this issue was not regulated by law? Would parents stop protecting their own children? It is difficult to imagine a society in which parents would not be responsible for their own children owing to the lack of legal regulations. It is almost intuitive to say that parental responsibility is the natural foundation of communities such as family and society. It is worth pointing out that within the constitutional standards (which, in principle, have primacy over international law), there is a position that law should result from constitutional axiology.[11] This is the position of, among others, the Polish Constitutional Court or the Supreme Court, according to which the constitutional axiology should be considered (1) when creating law (the obligation of the legislative authority)[12] and (2) when applying the law (the obligation of the executive and judiciary authority).[13] These responsibilities should not be separated from each other, rather they should be held by particular authorities in conjunction with each other.[14]

Therefore, it should not be surprising that the analysis of the ECHR' case law in the field of parental responsibility first requires to present the axiological outline of the countries in this part of Europe. In the opinion of the Constitutional Court

9 Cf. also judgment of the ECHR of July 6, 2010, Neulinger and Shuruk v. Switzerland, application no. 41615/07; judgment of the ECHR of November 26, 2013, X v. Latvia, application 27853/09; judgment of the ECHR of September 3, 2015, M and M v. Croatia, application no. 10161/13; judgment of the ECHR of February 7, 2017, Wdowiak v. Poland, application no. 28768/12; judgment of the ECHR of October 30, 2018, S.S. v. Slovenia, application no. 40938/16; judgment of the ECHR of October 8, 2019, Milovanovic v. Serbia, application no. 56065/10; judgment of the ECHR of October 28, 2021, Kupás v. Hungary, application no. 24720/17.

10 Cf. Judgment of the ECHR of July 26, 2011, Shaw v. Hungary, application no. 6457/09.

11 Simultaneously, it is worth adding that the Community's law also emphasizes that the Union is based on values such as the dignity of the human person. Art. 2 of the Treaty on European Union (consolidated version). Cf. also Andrzejewski, 2021, p. 168.

12 Cf. Decision of the Constitutional Court of March 30, 2009, file ref. no. SK 38/07, OTK ZU 3A / 2009/43; the judgment of the Constitutional Court of May 7, 2014, file ref. K 43/12, Journal of Laws 2014, item 684, OTK ZU 5A / 2014/50.

13 Cf. Judgment of the Supreme Court of February 14, 2008, file ref. no. II CSK 532/07.

14 For example, through the demand to change the law.

itself, the Convention protects specific values.[15] As shown in the previous example of approach, the Convention should also be interpreted through the prism of these values.[16] The issue of fundamental values also applies to Art. 8 of the Convention, which protects the right to respect for private and family life.[17] Therefore, from the point of view of the Constitutional Court, axiology cannot be underestimated. The analysis of a specific case—without reference to the constitutional axiology of a given state—only by pursuing the interpretation of a legal text conceived in a given legal system not only seems to be incomplete, but it may also turn out to be faulty. Since quoting only the norms of a given state—and even more so, of several unrelated states—for the purpose of a comparative study may be insufficient, a holistic approach should be adopted by supplementing the interpretation of a legal text with an appropriate analysis of the axiology underlying a given norm, in particular in unprecedented cases.[18] Systemic and functional interpretation should be of particular importance.

15 Cf. Judgment of April 9, 2009, Šilih v. Slovenia [Grand Chamber], application no. 71463/01. According to § 147 of that judgment: "The Court reiterates in this connection that Article 2 together with Article 3 are amongst the most fundamental provisions in the Convention and also enshrine the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324)," whereas, according to § 163 of that judgment: "However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner." In this judgment, a parallel reference can be made to both the values recognized in democratic societies and the values underlying the Convention. Thus, these values should be taken into account when considering individual cases.

16 Pursuant to § 101 of the judgment of February 4, 2005, Mamatkulov and Askarov v. Turkey [Grand Chamber], applications nos. 46827/99 i 46951/99, "In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (see *Soering*, cited above, p. 34, § 87, and, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 18, § 34)."

17 Pursuant to § 66 of the judgment of July 16, 2014 [Grand Chamber] Hämäläinen v. Finland, application no. 37359/09: "They concern the importance of the interest at stake and whether 'fundamental values' or 'essential aspects' of private life are in issue (see *X and Y v. the Netherlands*, cited above, § 27, and *Gaskin*, cited above, § 49), or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment conducted under Article 8 (see *B. v. France*, 25 March 1992, § 63, Series A no. 232-C, and *Christine Goodwin*, cited above, §§ 77-78)." Cf. also § 43 of the judgement of December 2, 2008 K.U. v. Finland, application no. 2872/02: "While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State's margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions (see X and Y v. the Netherlands, cited above, §§ 23-24 and 27; August v. the United Kingdom (dec.), no. 36505/02, 21 January 2003; and M.C. v. Bulgaria, no. 39272/98, § 150, ECHR 2003-XII)."

18 Often, the Court simply lists standards from individual countries without further scrutinizing them. Cf. Judgment of March 11, 2011, Lautsi and others v. Italy [Grand Chamber], application no. 30814/06, § 26-28.

Axiological links between states can be found in particular regions of Europe and often throughout it. As for the countries of Central and Eastern Europe, they also have many common experiences; in this regard, experiences from the twentieth century ought to be mentioned, although earlier centuries shall not also be forgotten, where, apart from economic or cultural exchange, countries had to cooperate to protect not only their own borders and security but also their faith as the then religious states within the so-called bulwark of Christianity. One can mention, for example, the reign of the king of Poland and Hungary, Louis of Hungary, in the fourteenth century. Christianity represented, at that time, a kind of bond not only in this part of Europe.

In the analyzed countries of Central and Eastern Europe, Christian values were particularly entrenched, serving to protect against real threats. What is characteristic of the Middle Ages is that the values embodied by Christianity were universal in nature when it came to Europe's area. The importance of the family should also be clearly emphasized, since the Holy Family occupies a special place in Christian theology. The protection of the family or marriage was also guaranteed by canon law, which applies to believers regardless of their nationality.[19] At that time, in some legal systems, canon law or the law of other religious communities frequently influenced the regulation of family matters.[20] The centuries-old functioning of such regulations also had an impact on constitutional axiology; therefore, the heritage of this part of Europe should not be forgotten.

The twentieth century is, for the countries of Central and Eastern Europe, a period of common experiences of the conflagration of World War I and II and those related to the totalitarian systems: fascist, Nazi, or communist, respectively.[21] Some of the countries in this part of Europe had to experience, in a short time, the functioning of even more than one of these systems, which also wreaked havoc in the axiological sphere. One of the assumptions of these systems was the maximum subordination of man to the state,[22] hence the systemic struggle of the state with family ties, which allowed for the individual's greater dependence on the state. An example here is the German institution named Lebenborn operating in the Third Reich; its organizational units were also created in the occupied territories, where children taken from local families were Germanized. As for Poland, it is also worth mentioning the case of the so-called children of the Zamość region[23]: in the years 1942–1943, over 30,000

19 Simultaneously, this law was universal (within the framework of the universal Church) and local (within particular churches).

20 This influence could be observed even in the twentieth century through the role of the Code of Canon Law of 1917. Cf. Paździor, 2013, p. 523.

21 Cf. also Lenkovics, 2021, p. 22.

22 It is worth mentioning here the philosophy of law and, for example, G. Hegel, who was accused of his philosophy being the source of modern totalitarianism owing to the concept of making sacrifice for the state. Cf. Gadacz, 1988, pp. 12–13. Simultaneously, according to this philosopher, the ethical community has its own developmental forms, ranging from the family, then the civil society, to the state. Ibid., p. 6. The appropriate subordination of the individual to society can be seen in the philosophy of another German philosopher: Marx. Cf. Iwasiński, 2015, pp. 154–155.

23 Zamość is a town located about 100 km from Lublin.

children were displaced from these areas by the Germans. Many of them were later murdered in concentration camps, such as 14-year-old Czesława Kwok, who was killed with a phenol injection and whose famous symbolic photo was taken in Auschwitz-Birkenau.[24] The communist authorities also used family-law instruments to fight the opposition.[25] The above examples illustrate the attitude of totalitarian states toward family values and related parental responsibility.

It should come as no surprise, then, that after Central European states regained their sovereignty, their constitutional axiologies came to include the extensive protection of the family.[26] This protection was already included at the constitutional level. After regaining their sovereignty, individual states had the opportunity to shape this protection on their own without the need to obtain approval from external communist authorities, as was the case after the end of World War II. The constitutions were adopted shortly after. Simultaneously, they concluded international agreements, both multilateral and bilateral. In the first case, it is worth mentioning the Convention on the Rights of the Child of November 20, 1989[27]; interestingly, its preamble indicates the functioning of "the human family" based on the dignity of the human person. Simultaneously, in the preamble, the Convention expresses the conviction that the family—as the basic unit of society and the natural environment for the development and well-being of all its members (especially children)—should be provided with the necessary protection and support so that it can fully fulfill its obligations in society. These two fragments of the Convention undoubtedly testify to the great value of the family in the international space. In particular, the reference to the "natural" environment refers, in its essence, to axiology. This is not overlooked by the ECHR, which, while analyzing individual cases, often looks for international standards.

24 https://polishhistory.pl/my-name-was-czeslawa-kwoka/ (of May 21, 2022).

25 An example is how prisoners of the communist regime who had previously served in the Home Army were deprived of parental rights. Cf. https://trojka.polskieradio.pl/artykul/2745419 (Accessed: May 21, 2022).

26 For example, pursuant to Art. 48 of the Constitution of the Republic of Poland of April 2, 1997, "1. Parents have the right to raise their children according to their convictions. This upbringing should take into account the child's level of maturity, as well as the freedom of their conscience and religion and their beliefs. 2. Limitation or deprivation of parental rights may take place only in the cases specified in the act and only based on a final court decision," whereas, pursuant to Art. 53 section 3 of this constitution, "Parents have the right to provide their children with moral and religious education and teaching in accordance with their convictions. The provision of Art. 48 sec. 1 shall apply accordingly." Simultaneously, according to Art. L of the Constitution of Hungary of April 18, 2011, "(1) Hungary shall protect the institution of marriage as the union of one man and one woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. The mother shall be a woman, the father shall be a man. (2) Hungary shall support the commitment to have children. (3) The protection of families shall be regulated by a cardinal Act." English translation: https://www.parlament.hu/documents/125505/138409/ Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178 (Accessed: May 21, 2022). Cf. also Stanić, 2021, pp. 194–195.

27 In Poland, it entered into force on July 7, 1991, Journal of Laws 1991 No. 120, item 526.

In the case of bilateral agreements, it is worth mentioning the concordats which, thanks to bilateral relations, are more detailed and closer to the constitutional axiology of a given state than in the case of multilateral international agreements. For example, in accordance with Art. 11 of the Concordat between the Holy See and the Republic of Poland of July 28, 1993,

> The Contracting Parties declare their will to cooperate in the defense and respect for the institution of marriage and the family that are the foundation of society. They emphasize the value of the family, and the Holy See, for its part, reaffirms the Catholic teaching on the dignity and indissolubility of marriage.[28]

Thus, the parties to this international agreement emphasized *expressis verbis* the value of the family, which is recognized but not created in this act. Importantly, this value had been previously recognized in the two autonomous and independent legal systems of the parties to the concordat.

It should also be emphasized that axiology is not a single-element set, but it consists of many elements; further, there may be a conflict of values, for example between parental responsibility and the religious freedom enjoyed by children.[29]

Simultaneously, it is impossible to define the hierarchy of all values at once as there is no one-size-fits-all answer. Of course, at the forefront of all values is the dignity of the human person as the source of human rights. However, many values rank differently depending on the circumstances of the case and the different value that is contrasted with them,[30] and in this case, it is necessary to maintain the balance. Potential conflicts may occur at the same level of normative acts that are carriers of particular values but also at different levels. The easiest way is when the conflict is between standards that occupy a different place in the hierarchy of sources; then, it is enough to apply the classic conflict of laws rules.

Considering the above, it can be concluded that parental responsibility is based on axiology. This basis is of broad rather than individual nature, and these values

28 Journal Of Laws 1998 No. 51, item 318.

29 Religious freedom is one of the fundamental values protected by the Convention. Cf. Judgment of December 4, 2008, Dogru v. France, application no. 27058/05. According to § 72 of that judgment, "[…] Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognized and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention." The examples illustrate the scale of potential practical problems. It is possible to imagine a child at the age of 17 who loses the faith of their parents and, exercising their own religious freedom, changes their faith to their chosen one. However, what if, in a shared house, the child wanted to remove the religious symbols of the parents' faith from every room? At this point, a conclusion can be reached in the form of the principle of religious freedom "growing in importance" along with the degree of the child's maturity. However, this is not a legal principle but only a legal rule. The religious freedom of a child (like that of the parents) is also not absolute.

30 A good illustration of the weighting of individual values is provided by the legal argument of the ECHR in the judgment of January 15, 2013, Eweida and others v. The United Kingdom, applications nos. 48420/10, 59842/10, 51671/10 and 36516/10.

are fundamental not only from the perspective of the Convention. It is the duty of the legislature, and then the executive and judiciary authority, to respect this axiology. This applies to both lawmaking and law application.

The Convention protects certain values as being fundamental, including respect for family life and the right to found a family. In the Court's opinion, the Convention should also be interpreted with due regard to the values it protects.

The axiology expressed in the Convention, like the constitutional axiologies of individual European countries, consists of many elements. Conflicts can arise between individual values. In such a case, these values should be weighed, and the appropriate balance should be maintained between them.

The countries of Central and Eastern Europe have a similar axiology, which is mainly owing to their similar history and cultural heritage.[31] As a consequence, their legal systems should also be similar, with particular emphasis on the values of the family. It can be said that axiology determines the "normativization vector."

In the context of the ECHR's case law, a postulate may be proposed that the constitutional axiology of a given state (or in the comparative aspect, of a group of axiologically similar states) should be analyzed each time before the ECHR issues a judgment, with special attention being paid to the guidelines for linguistic, systemic, and functional interpretation. In particular, in matters of parental responsibility, judgments issued within the legal system of states operating under a different axiology should not be cited without reflection.

3. Relation of the ECHR's case law to the states' legal system

At this point, reference should be made to the relation of the ECHR's case law to the legal system of individual countries. First, it should be noted that the ECHR functions based on an international agreement concluded by individual states in the form of the Convention for the Protection of Human Rights and Fundamental Freedoms, which was drawn up in Rome on November 4, 1950.[32] The conclusion of this agreement was established as a result of the Convention's operation prior to the Court's case law. Therefore, the ECHR's case law is, by its nature, applied by individual states based on the voluntary acceptance of the international principle of *pacta sunt servanda*. It should be noted that the individual states that concluded this agreement co-create European standards but are not to supposed to compulsorily apply the Convention in isolation from the aforementioned axiology. The

31 Cf. also Garayová, 2021, p. 223; Graovac, 2021, pp. 37–38, 72.; Kraljić, 2021, p. 255; Králíčková, 2021, pp. 81–82; Lenkovics, 2021, 16.

32 In Poland, this agreement was published in the Journal of Laws (Journal of Laws of 1993, No. 61, item 284).

ECHR's case law does not, in principle, precede the provisions of the constitutions of particular states as well as the constitutional axiology itself.[33] However, one can imagine, for example, a state that shapes the constitution so as to form a totalitarian system. It would introduce, for instance, the death penalty for political crimes. In such a case, the Court may refer to international standards (e.g., shaped by the Convention) disregarding the provisions of such a constitution and even the constitutional axiology shaped by society influenced by propaganda. Such a legal argument should, however, be applied with caution and cannot be treated instrumentally.

As a consequence of this relation, in this Court's case law, one can notice cases of multiple examination of a given state's legal system, along with its relevant jurisprudence, and compare it with that of other European countries' and even of those from outside Europe, such as the case law of the American Supreme Court.[34] As part of its study, the ECHR may conclude that some regulations represent a universal standard[35] but also that some issues do not fall within a certain European standard.[36] In practice, however, it is difficult to determine what is already to be deemed a standard and what not, and transitional forms are also possible. It is not easy to establish that, for example, if there is a solution in place in most European countries, it is already a standard. In particular, this concerns such sensitive issues as the national regulation of parental responsibility issues, which consists of many elements.[37] In fact, this type of assessment boils down to prudence and is generally directed toward individual protection in light of the Convention's norms.

The Court's case law includes a second perspective, since, depending on the result of the Court's study, a given country may operate within the so-called margin of appreciation, potentially benefiting from the existing pluralism of legal solutions.[38] Within this doctrine, the margin of appreciation is balanced with individual interests, whereas the protection of private and family life makes this margin narrower.[39];

33 It is easy to imagine a dispute resulting from the inconsistency of the ECHR's judgement and the one issued by a particular Constitutional Court. Similar disputes can be observed between the case law of the Court of Justice of the European Union, which promotes the primacy of the Community's law, and the jurisprudence of individual constitutional courts.

34 Cf. Judgment of the ECHR of January 15, 2013, Eweida and others v. The United Kingdom, applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 48.

35 For example, issues related to pre-trial detention and the right to a fair trial or to the prohibition of torture.

36 For example, no universal ban on the use of religious symbols exists in public places.

37 For example, issues related to the religious upbringing of one's own children.

38 This type of broad argument was presented by the court in the Lautsi case. Cf. Judgment of the ECHR of March 11, 2011, Lautsi and others v. Italy [Grand Chamber], application no. 30814/06. Regarding the margin of appreciation, a broad argument can also be found in studies in the field of legal sciences. Cf. also Nowicki, 2021, pp. 358–360.

39 Cf. ibid., p. 360. According to this author, "*From the court's case law it can also be concluded that restrictions on the exercise of rights that are particularly important in a democratic society, such as freedom of the press, personal freedom, protection of private and family life, require stricter control, causing, consequently, a restriction of that margin of appreciation*."

thus, the Court's case law subsequently influences the very legal system of a given state. This influence takes place without the direct consent of the state concerned.

However, one may see the indirect expression of this consent during the conclusion of the abovementioned international agreement. The Court must operate within its own competence in the framework of this original consent and permitted interpretation of the Convention. The doctrine emphasizes that this interpretation is not of static nature.[40] However, the Court should not arbitrarily interpret the Convention and disregard the historical aspect. Simultaneously, it is worth noting that the Convention was not adopted by European states even in a similar period. In the case of the countries of Central and Eastern Europe, the imposed communist regime was an obstacle; when this disappeared, the Convention had already been in force for several decades, and the development of the Court's case law already significant.[41]

It is also worth noting that the judgments of the Court concern specific cases and that transferring the jurisprudence theses themselves to different legal system may lead to defective conclusions, in particular when the aforementioned axiology functioning in the legal system of a given state has been omitted.

Considering the above, it can be concluded that the relation of the ECHR's case law to the legal system of states may be assessed from the perspective of a given state's legal system (*ad intra*) and from the perspective of the Court's case law (*ad extra*). These two perspectives shall not be isolated from each other, but both the state and the Court shall take into account the Court's case law and the legal system of the state (including axiology), respectively, so that the Court's case law does not *de facto* and *de jure* replace or limit the role of state authority without legal basis, and the state authority protects the rights guaranteed by the Convention that it had voluntarily agreed to respect.

As part of the ECHR's case law, the key of a given line of jurisprudence is often to determine the scope of the so-called margin of appreciation. Depending on the determination of the scope of this freedom, the judgment of the Court stays in a greater or lesser relation to a given state's legal system, following the rule that the smaller the freedom, the greater the Court's intervention. Simultaneously, it should be noted that the ECHR's case law is not uniform and that individual judgments can—and even need to—be analyzed critically. In particular, theses of judgments issued in relation to other countries shall not be uncritically transferred.

40 Cf. ibid., p. 352.

41 For example, in Poland, the Convention entered into force on January 19, 1993. Interestingly, its norms were referred to by the Polish Constitutional Court to be an international standard before it entered into force in Poland. For example, in the judgment of January 30, 1991 file ref. no. K 11/90, publ. Z. U. 1991/29, OTK1986-1995 / t3 / 1991/29, the Constitutional Court referred to Art. 2 of the first Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

4. Subjective aspect

Parental responsibility is essentially based on a relationship where it is possible to distinguish between subjective and objective aspects. Therefore, first, it is necessary to determine to whom parental responsibility applies. The analysis of the ECHR's judgments in the above subjective aspect requires reference in the first place to the source of the law—in other words, to the Convention, pursuant to which decisions are made in matters of parental responsibility. It is therefore worth quoting Art. 12 of the Convention, according to which "*men and women of marriageable age have the right to marry and to found a family in accordance with the national law governing the exercise of this right.*" This article refers to the family model that is traditional in European legal culture, composed of a man and a woman and a child or children. It should be emphasized that this article was included in the original text of the Convention in 1950. However, the articulation of the right of men and women to found a family referred to in Art. 12 of the Convention was not, even at that time, a novelty in the field of international law.[42] Nevertheless, in the current case law of the Court, the interpretation of the text of the Convention is so dynamic[43] that the above notions—although lexically seemingly unambiguous—may be understood differently by the Court itself. For example, in some cases, the Court accepted that the right to consent to same-sex marriage belongs to individual states.[44]

In subjective terms, the wording of Art. 8 sec. 1 of the Convention, "*Everyone has the right to respect for his private and family life, his home and his correspondence*" is broader. This article was preceded in international space by the norm contained

42 This type of standard can be found in Art. 16 sec. 1 of the Universal Declaration of Human Rights of 10/12/1948 (New York), according to which "*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution*." Similar regulations can be found in other international acts of a universal nature. Cf. Art. 23 sec. 2 of the International Covenant on Civil and Political Rights of December 19, 1966 (New York). As regards acts of a regional nature, one can point to Art. 17 sec. 2 American Convention on Human Rights of November 22, 1969 (San José). However, in Art. 15 sec. 2 of the Additional Protocol to the American Convention on Human Rights of November 17, 1988 (San Salvador), the terms "men" and "women" were replaced with the term "everyone." Indirectly, one can point to Art. 6 sec. 1 of the European Convention on the Legal Status of a Child born out of wedlock of October 15, 1975 (Strasbourg), which indicates the father and mother of a child born out of wedlock. However, Art. 9 of the Charter of Fundamental Rights of the European Union of December 7, 2000 (Nice) includes no indication that a family can be founded by a man and a woman.

43 Cf. also Nowicki, 2021, pp. 352–355.

44 Cf. also the judgment of the ECHR of December 14, 2017, Orlandi and others v. Italy, applications nos. 26431/12, 26742/12, 44057/12, 60088/12, §§ 201-203. In this judgment, the Court noted the movement in European countries regarding the legal recognition of same-sex couples (as married or registered partnerships) and found that more than half of the countries of the Council of Europe have enacted provisions for such recognition (24 out of 47 as per the day of that judgment). A similar move, according to the Court, is to be observed in the Americas, Australia, and Oceania, Ibid., § 204.

in Art. 12 of the Universal Declaration of Human Rights of December 10, 1948.[45] In the case of this article, the Convention introduces the possibility of limiting this right.[46]

As far as the subject is concerned, it should be noted that both Art. 8 and Art. 12 of the Convention do not only apply to citizens; thus, parental responsibility also applies to persons without the nationality of a given state.[47] The Convention's protection is therefore broad in this respect, which corresponds to the broad protection of the rights enshrined in the Convention as human rights. However, in some cases, differences may exist between the laws on parental responsibility of nationals and other nationals—for example, in the context of the possibility of starting a family by adopting a child who has the citizenship of a given country. There is a relationship—albeit not an exclusive one—between articles of the Convention such as Art. 9 (concerning freedom of thought, conscience, and religion)[48]; Art. 14 of the Convention (concerning non-discrimination)[49]; as well as Art. 2 of Protocol No. 1 (concerning the right to education). In terms of subjects, these articles also contain general quantifiers that are not limited to citizens only.

Bearing the above standards in mind, it is possible to distinguish direct and indirect subjects in the field of parental responsibility. The first category explicitly includes parents and the child. It is worth adding that, in some legal orders, the subjectivity of the family itself is questionable.[50] However, in this relationship related to parental responsibility, other entities, such as public institutions or even

45 According to this article, "*no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks*." Similarly, among other acts of a universal nature, Art. 17 sec. 1 of the International Covenant on Civil and Political Rights of December 19, 1966 (New York) can be mentioned. In the case of the American region, a similar norm is contained in Art. 11 sec. 2 of the American Convention on Human Rights of November 22, 1969 (San José). In the case of Europe, it is worth mentioning Art. 7 of the Charter of Fundamental Rights of the European Union of December 7, 2000 (Nice) and Art. 16 part II of the European Social Charter of October 18, 1961 (Turin). Cf. also Banach-Gutierrez, 2005, pp. 69–84.

46 Pursuant to Art. 8 sec. 2 of the Convention, "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

47 See Cf. also the judgment of the ECHR of May 12, 2022, Sudita Keita v. Hungary, application no. 42321/15, §§ 21, 35-36. In this judgment, the Court proceeded in the context of the violation of Art. 8 of the Convention even though the party had the status of a stateless person. In other cases, such a status did not constitute an obstacle to proceeding also in the context of Art. 14 of the Convention. Cf. Judgment of the ECHR of April 26, 2018, Hoti v. Croatia, application no. 63311/14, §§ 3, 128.

48 Cf. also Abramowicz, 2006, pp. 227-244.

49 Regarding the withdrawal of parental rights owing to religion, the Court pointed to the conjunction of Art. 8 and Art. 14 of the Convention. Cf. also the judgment of the ECHR of June 23, 1993, Hoffman v. Austria, application no. 12875/87, §§ 30-36.

50 For example, the subjectivity of the family in administrative law is debatable. Cf. also Poniatowski, 2017, pp. 197-218.

nongovernmental organizations, may implicitly appear, for example acting in co-operation with the state. Furthermore, parental responsibility does not fulfill the concept of family life, which in terms of the subject (and also object) constitutes a larger collection. For example, according to the Court's case law, family life may concern—apart from parents and children—also grandparents. However, pursuant to that case law, the relationship between parents and children must be distinguished from the one that is between grandparents and grandchildren, which, in principle, requires less protection.[51]

Traditionally, parents are necessary to start a family. The Convention also indicates, in Art. 12, that it takes two persons to do so. It is worth noting that the assumption is one thing, and the functioning of the family is another thing. In the latter case, the family may, in some cases, consist of only one parent and a child or children. After all, it is not controversial to call a widow with children a family. In addition, the concept of parents in the traditional sense did not raise any major doubts. The classical presumption was already formulated in Roman law: *mater semper certa est, pater quem nuptiae demonstrant*. Of course, over the centuries, individual legal orders have differently addressed this presumption, *inter alia*, supplementing it with more detailed standards. In this case, the Court may examine particular legal systems.[52]

However, it is only the development of sciences that makes the classical presumption fail in seemingly obvious circumstances. For example, one can point to the issue of the so-called surrogates[53] or sperm donors, which have arisen extensive discussions not only among lawyers. In the first case, for example, the still valid question of whether the mother is the woman who gave birth or that from whom the egg was taken can be asked. Does the European standard apply in this respect? In the case law of the Court, one can find a position according to which states can determine the issue of the so-called foster parenting[54]; thus, adequately paraphrasing the classic presumption in light of the judgments of the ECHR, a woman who gave birth to a child is not always sure of parentage.

Moreover, the aforementioned presumption was of a dualistic nature, namely embracing a mother and a father. Even this dualism is contested in the case law of the Court. In the context of some Western European countries, the Court also considered a relationship of two people of the same sex to be a family.[55] Attention should be paid to a specific attempt to transmit this type of position to other legal systems using the case law of the Court, in particular through cases in which individuals

51 Cf. Judgment of the ECHR of April 16, 2015, Mitovi v. The Former Yugoslav Republic Of Macedonia, application no. 53565/13, § 58.

52 Cf. also the judgment of the ECHR of December 8, 2016, L.D. and P.K. v. Bulgaria, applications nos. 7949/11 and 45522/13.

53 Cf. also the judgment of the ECHR of July 16, 2020, D. v. France, application no. 11288/18.

54 Judgment of the ECtHR of June 26, 2014. Mennesson v. France, application no. 65192/11, § 79.

55 For example, in the case against Italy, such recognition by the Court allows for obtaining a residence permit for family purposes, cf. judgment of the ECHR of June 30, 2016, Taddeucci and McCall v. Italy, application no. 51362/09, § 83.

obtained such status in another country and demand, within the arguments relating to, *inter alia*, to prohibition of discrimination, to recognize this status in another state against its axiology and legal system.

Less controversial is the argument line of the ECHR' case law, in which, apart from the classic concept of family, there exists a tendency to broadly understand the family qualifying as such, for example, single mother with a child,[56] large families, and so on.[57] In families understood in this way, the issue of parental responsibility also appears, which—it is also worth adding—may undergo a subjective change, such as when a widow remarries.

In contrast to the concept of parents, it seems easier to define the concept of a born child,[58] although there may also be questions about whose child a given person is, which may be the case, for example, in the case of a surrogate child. The Convention itself does not define a child; however, such definitions can be found in other acts of international law.[59] Adopting the concept of a child as a person who has not yet reached adult age results in parental responsibility itself lasting, as a rule, until the child reaches the age of majority.[60] Although, in this study, the explanation of the concept of a child follows that of the concept of parents for chronological reasons, the analysis of international law, of which the Convention is an element, and the Court's case law itself lead to the conclusion that the protection of the child's best interests is fundamental owing to the child's essential nature; children have fewer

56 Judgment of the ECHR of December 13, 1979. Marckx v. Belgium, application no. 6833/74, § 12-13, 45. In the opinion of the Court, the protection of family life referred to in Art. 8 of the Convention imposes on the state an obligation to act, which enables the normal development of family ties, which is difficult if the child of the unmarried mother does not become a member of the family. According to the Court, a single mother enjoys the protection of family life in the context of recognition of adoption in another state. Cf. Judgment of the ECHR of June 28, 2007, Wagner and J.M.W.L. v. Luxembourg, application no. 76240/01.

57 It is worth pointing out that the Polish Constitutional Court has a similar position. Pursuant to the judgment of April 12, 2011, file ref. act SK 62/08, publ. Journal of Laws of 2011 No. 87, item 492, "*The provisions of the Constitution do not define the concept of the family, although the status of this basic and natural social unit is determined by a number of provisions of the Fundamental Act. […] In the light of the constitutional provisions, therefore, a "family" should be considered any long-lasting relationship of two or more people, consisting of at least one adult and a child, based on emotional and legal ties, and usually also on blood ties*."

58 The nature of the concept of a conceived child and the scope of its protection are highly complex and close to the axiological aspect.

59 In Art. 2 letter c) of the Council of Europe Convention on Contact with Children of 15.05.2003 (Strasbourg), a child is understood as a person under the age of 18, although contracting states may indicate this age differently in terms of contact. It is worth adding that, in some legal orders, full legal capacity may be granted to persons under 18 years of age—for example, in relation to women, in order for them to get married. This is the case, for example, in Art. 10 § 1 of the Act of February 25, 1964, the Family and Guardianship Code (consolidated text: Journal of Laws 2020, item 1359, as amended), according to which "*a person under the age of eighteen may not enter into marriage. However, for important reasons, the guardianship court may allow a woman who has reached the age of sixteen to contract a marriage, and the circumstances indicate that the marriage will be in accordance with the good of the established family.*"

60 Cf. Nowicki, 2021, p. 841.

opportunities to defend their rights or perform their duties than their parents. This does not mean, however, that the protection of the child's best interests takes *ex lege* precedence over the parents'.[61]

In the subjective aspect of parental responsibility, public institutions are also worth mentioning. In some cases, they may intervene and thus indirectly be the subject of these relationships. The essence of the intervention is a likelihood of their compulsory nature—for example, withdrawing parental authority in the event of a threat to the child's life. The position of the Court is that arbitrary or disproportionate interventions may be the basis for finding a violation of the Convention by the Court[62]; therefore, it should be postulated that the rights of the organs be interpreted narrowly. In addition to public institutions, this relationship may also include nongovernmental organizations that, for example, provide family counseling for charity. Their operation, unlike that of public institutions, is generally voluntary and requires parental consent.

At this point, it must be concluded that the notions of parents, family, and child are not interpreted uniformly by the Court, and the Convention contains no legal definitions in this respect. This does not mean, however, that appropriate definitions cannot be found in other international treaties and used to assist in the interpretation of the Convention. In general, a tendency toward a broad understanding of individual concepts can be noticed in the case law of the Court. Simultaneously, the values adopted by individual European societies may differ, which leads to differences among legal systems, which should be considered by the Court when interpreting subjective concepts in specific cases. The Court's task is to take these differences into account in an appropriate manner, preserving the essence of the Convention.

One can reach an additional conclusion that since individual concepts are not independent in the context of parental responsibility, they should be interpreted in relation to other concepts of a subjective nature, with particular emphasis on the directives of systemic and functional interpretation.

In the Court's case law, one can find a specific openness to the consequences of social changes in the field of parental responsibility.[63] An analysis of this case law in the subjective aspect leads to the conclusion that the Court adopts a broad interpretation and does not, in principle, protect the traditional family model as

61 Cf. also the judgment of the ECHR of February 26, 2002, Fretté v. France, application no. 36515/97. A similar position can be found in the doctrine. Cf. also Nowicki, 2021, pp. 839–840.

62 Cf. Judgment of the ECHR of January 5, 2010, Frasik v. Poland, § 90, application no. 22933/02. In this judgment, par. 88 indicates that contracting marriage is not completely free and is in the margin of appreciation.

63 These changes are also to be observed in the doctrine. In line with R. Reed, "*The new century has seen the proliferation of new family arrangements, and any distinction between married and unmarried fathers might I think be more difficult to justify. The age of criminal responsibility being set at 10 was already considered very low in the 1990s: whether it is acceptable today seems to me to be even more questionable. Understanding of the developmental psychology of children has also evolved further since then, and will be reflected in expectations as to how children are treated if detained in custody.*" https://newjurist.com/the-protection-of-childrens-rights-under-the-echr.html [Accessed: May 21, 2022]

a pan-European standard; in its opinion, no such standard exists. Simultaneously, However, there are currently no other family models that, in the Court's opinion, would constitute such a standard.

5. Objective aspect

The subjective aspect is not independent, and it is constitutively dependent on the objective aspect of parental responsibility; for example, a parent has no parental responsibility toward themselves. These two aspects constitute parental responsibility only when they are taken together at an appropriate level and are complementary to each other. As mentioned above, holders of parental responsibility have specific rights and obligations that are mutually related,[64] and the whole difficulty lies in properly arranging them in relation to each other in a specific case.

As the Convention does not contain an extensive catalog of rights and obligations, it is important to analyze the case law of the ECHR as the entity interpreting the norms of the Convention,[65] such as the right to start a family. In the Court's case law, one can also find a reference to the so-called fundamental elements of family life,[66] one of which is the mutual relationship of parents and children, even in the form of each other's company.[67] In the Court's case law, one can notice that the scope of parental responsibility is broad, and this responsibility may be of internal or external nature. In the first case, the parents may decide to raise the child directly in accordance with their religious beliefs. In this respect, parents have the right, for example, to pray together with their children in a private place (e.g., in their own apartment), exercising religious freedom referred to in Art. 9 of the Convention. Simultaneously, in this respect, conflict with a child's religious freedom may arise

64 Cf. also Barzó, 2021, pp. 315–322.

65 However, in many agreements of international law, such catalogs appear and are of an extensive nature. For example, parents have the right of priority in choosing the type of education for their children [Art. 26 sec. 3 of the Universal Declaration of Human Rights of 10/12/1948 (New York)]. Although, children have the right, for example, to be raised in a family environment, in an atmosphere of happiness, love, and understanding for the full and harmonious development of their personality [cf. preamble to the Convention on the Rights of the Child of December 20, 1989 (New York)]. Consequently, the creation of the abovementioned environment for children can be indicated as the parents' responsibility.

66 For example, pursuant to § 52 of the judgment of the ECHR of August 7, 1996, Johansen v. Norway, application no. 17383/90: "The Court recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (art. 8)".

67 Cf. ibid.

in certain situations.[68] Such conflicts have been and will be present, and they may be within the family (*ad intra*) or of external nature (*ad extra*). In the first case, the legislator often contains conflict-of-law rules (for example, hierarchical order). In the second case, the legislator does not explicitly contain such norms, and a complex interpretation is needed: linguistic, historical, systemic, and functional.

In the latter case, a greater number of judgments by the Court can be found, the first example of which is the aspect of religious freedom in the public forum. Parental responsibility was so broad that the child's mother could initiate proceedings that could result in the removal of religious symbols from the public space as a consequence of the Court's judgment.[69] This effect could, in practice, apply to all public schools and not just the one in which the conflict had arisen. In this case, the mother's intent coincided at least with the presumed will of the children she represented. It is worth noting that the final position in this case was taken by the Grand Chamber of the Court, which, weighing various values, indicated that such symbols can function in the public space. However, an individual could initiate such a procedure.[70]

Moreover, it can be noted, from a temporal perspective, that parental responsibility extends over the child's whole life; an example are the Court's judgments on the issue of parents' decisions to provide the child with medical treatment. In this case, it is important to note the juxtaposition of parental responsibility with the great value of the child's health. The health condition does not always result in the parents being unable to decide on the method of treating their child.[71] Although parental responsibility obviously relates to the period of the child's life, it is also worth mentioning that the parents have the right to decide on the child's funeral.[72]

From a "territorial" point of view, it is worth referring to the Court's case law in the field of family ties.[73] Many ECHR's judgments protected family ties and protected children against deportation (even of children who have committed a crime), and in

68 For example, in the dissenting opinion of Judge Sabato to the judgment of the ECHR of May 19, 2022, T.C. v. Italy, application no. 54032/18, one can find a position according to which: *"While the role of religion vis-à-vis family law and the plurality of family types in Europe has been widely investigated in recent years from a comparative perspective, including sociological aspects,* https://hudoc.echr.coe.int/eng – *_ftn5* […] *one strand of research has addressed the issue – very relevant in my view – of the child's own "right to religious freedom" in international law".*

69 Cf. Judgment of the ECHR of March 11, 2011, Lautsi and others v. Italy [Grand Chamber], application no. 30814/06.

70 Although Art. 8 was not the subject of the study in this case; however, it remains in a proper relation to Art. 9 of the Convention.

71 The situation becomes even more complicated when parents make decisions about their child's health based on grounds resulting from their religious beliefs.

72 In this case, attention should be paid to the relationship between the right to respect for private and family life. Pursuant to § 27 of the judgement of the ECHR of June 2, 2005, Znamenskaya v. Russia, application no. 77785/01, *"However, it has also been the Convention organs' traditional approach to accept that close relationships short of "family life" would generally fall within the scope of "private life"* […]."

73 Cf. Judgment of the ECHR of June 28, 2011, Nunez v. Norway, application 55597/09, §§ 68-70.

these cases, the Court weighed different values and related norms.[74] Such protection undoubtedly emphasizes the position of parental responsibility and related family ties to such an extent that even security issues were, in some cases, assessed as requiring less protection.

In the objective aspect, it can be noted that in the Court's case law with respect to some Western European countries, there is a position regarding the interpretation of legal provisions concerning parental responsibility and the right to custody irrespective of sexual orientation and in the interests of the child.[75] In the Court's opinion, the argument about a traditional Portuguese family was not sufficient to establish discrimination based on religious orientation. The Court's case law is not uniform in this respect and has recently undergone a change in this regard.[76]

In the Court's case law, one can find the opinion that the positive obligation of the state resulting from Art. 8 of the Convention applies, in particular, to the procedures to be implemented by states to protect family life. In particular, these procedures must ensure an appropriate time to consider cases so that the exercise of the rights guaranteed by the Convention is real and not illusory. Considering the above, it can be concluded that the ECHR adopts a broad interpretation in terms of both the objective and subjective aspects.

The analysis of the above case law leads to the conclusion that the objective aspect requires, in the first place, to determine the individual rights and obligations of the child and parents (or the parent), assess their mutual relationship, and use an appropriate balance. It is worth adding that it is not always possible to weigh the individual rights of the parties to this relation as these rights can essentially complement each other.

74 In line with the above judgment of the Court, "*the Court recalls that, while the essential object of this provision is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation* […]." Ibid. § 68. The positive obligations under Art. 8 of the Convention were also pointed out by the Court in the judgment of October 30, 2001, Pannullo and Forte v. France, application no. 37794/97, § 35: "*The Court points out that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life*."

75 Cf. also judgement of ECHR of December 21, 1999, Salgueiro Da Silva Mouta v. Portugal, application no. 33290/96.

76 Cf. also judgement of ECHR of June 24, 2010, Schalk and Kopf v. Austria, application no. 30141/04, § 96. Pursuant to § 99 thereof: "*While the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship*." The change in the Court's case-law after this judgment was emphasized in the judgment of the ECHR of December 14, 2017, Orlandi and others v. Italy.

In the objective aspect, one can also find judgments in which the Court examines the so-called the margin of appreciation of individual states. The Court emphasizes not only the obligation to protect family life against unjustified interference but also the obligation to issue positive norms serving this protection. Contrary to the legal orders of individual states, which try to regulate the issues of parental responsibility in a comprehensive manner, the Court's case law is not of this nature. In its essence, it relates to decisions in specific cases, which results in its casuistic nature. It is clearly visible in the objective aspect of religious responsibility. On the one hand, precedent judgments in this regard can be expected, and Simultaneously, the existing case law may also be subject to appropriate changes, as illustrated in the above-presented argumentation.

6. Final conclusions

Bearing the above in mind, several final conclusions can be drawn. The starting point before issuing any specific Court's judgment should be, as a rule, the axiological aspect at the level of a given state, which allows to adopt an appropriate approach to assessing a possible violation of the Convention's norms in relation to a given state's legal order.

Owing to quite convergent historical experiences—and in particular, owing to the totalitarian experience of the twentieth century—the countries of Central and Eastern have quite similar constitutional axiologies. This similarity also results from the earlier relations of these states within the Christian community. This does not mean, however, that this axiology is the same, which translates into differences in the regulations on parental responsibility. It is visible, in particular, when comparing the legal systems of Central and Eastern European countries with those of Western Europe in the aspect of parental responsibility—even in its subjective aspect. There are different rules of parental responsibility across Europe, which should protect the pluralism of legal solutions. In the case law of the ECHR, there is a position that since social changes occur in different countries, this may lead to the establishment of European standards in the field of parental responsibility. On the other hand, in the same case law, the family in its traditional understanding is repeatedly contested; nevertheless, no pan-European standard exists for the exclusive determination of parental responsibility.

Parental responsibility itself is a complex concept and consists of both subjective and objective aspects that are closely interrelated. In both aspects, the Court' case law shows a broad approach that has been subject to changes.

The case law of the Court in the area of parental responsibility is not permanent and uniform in nature and is variable not only in one direction; however, owing to the lack of pan-European standards, the Court leaves the margin of appreciation to

individual states in the area of parental responsibility, which leads to the maintenance of the existing pluralism of legal solutions in this area. Within this margin, according to the Court's case law, states have both obligations of a negative nature, consisting in the protection of family life against unjustified interference and, supplementarily, those of a positive nature, consisting in implementing the protection of this life.

In addition, parental responsibility may, in some situations, conflict with a child's rights or obligations, which is reflected in many constitutional and international norms in the context of a child's religious freedom.

The countries of Central and Eastern Europe can promote their own axiologies and the legal solutions adopted based thereon. The legitimization in this regard results, among others, from the experience of those countries having seen a period of lack of sovereignty and being able to relate to the issue of parental responsibility in terms of its actual protection.

Bibliography

Abramowicz, A. M. (2006) 'Podmioty prawa do wolności myśli, sumienia i religii w normach prawa międzynarodowego i wspólnotowego', *Studia z Prawa Wyznaniowego,* 9, pp. 227-244.

Andrzejewski, M. (2021) 'Legal Protection of the Family: Essential Polish Provisions Regarding International Legal Standards and Social Change' in Barzó T., Lenkovics B. (eds.) *Family Protection From a Legal Perspective. Analysis on Certain Central European Countries*, Budapest – Miskolc: CEA Publishing, pp. 151-189. https://doi.org/10.54237/profnet.2021.tbblfl_5.

Banach-Gutierrez, J. (2005) 'Polityka Unii Europejskiej w zakresie ochrony praw człowieka' in Sitek B., Dammacco G., Sitek M., Szczerbowski J. J. (eds.) *Prawo do życia a jakość życia w wielokulturowej Europie. Diritto alla vita e qualità della vita nel Europa multiculturale*, vol. 2, Materiały V Międzynarodowej Konferencji Praw Człowieka. Olsztyn, 30-31 maja 2005. Atti della V Conferenza Internazionale dei Diritti dell'Uomo. Olsztyn, 30-31 maggio 2005, pp. 69-84.

Barzó, T. (2021) 'Family Protection in Central European Countries' in Barzó T., Lenkovics B. (eds.) *Family Protection From a Legal Perspective. Analysis on Certain Central European Countries*, Budapest – Miskolc: CEA Publishing, pp. 287-322. https://doi.org/10.54237/profnet.2021.tbblfl_9.

Gadacz, T. (1988) 'Państwo a religia w filozofii G.W.F. Hegla', *Analecta Cracoviensa* XX pp. 3-14. https://doi.org/10.15633/acr.3054.

Garayová, L. (2021) 'The Protection of Families in the Slovak Legal System' in Barzó T., Lenkovics B. (eds.) *Family Protection From a Legal Perspective. Analysis on Certain Central European Countries*, Budapest – Miskolc: CEA Publishing, pp. 221-254. https://doi.org/10.54237/profnet.2021.tbblfl_7.

Graovac, A. (2021) 'Family Protection in Croatia' in Barzó T., Lenkovics B. (eds.) *Family Protection From a Legal Perspective. Analysis on Certain Central European Countries*, Budapest – Miskolc: CEA Publishing, pp. 37-73. https://doi.org/10.54237/profnet.2021.tbblfl_2.

Iwasiński, Ł. (2015) 'Esencjalistyczna koncepcja człowieka u młodego Karola Marksa (w świetle interpretacji Leszka Kołakowskiego)', „*Edukacja Filozoficzna*" 59, pp. 153-166.

Králíčková, Z. (2021) 'On the Family and Family Law in the Czech Republic' in Barzó T., Lenkovics B. (eds.) *Family Protection From a Legal Perspective. Analysis on Certain Central European Countries*, Budapest – Miskolc: CEA Publishing, pp. 77-109. https://doi.org/10.54237/profnet.2021.tbblfl_3.

Kraljić, S. (2021) 'Family Protection in Slovenia' in Barzó T., Lenkovics B. (eds.) *Family Protection From a Legal Perspective. Analysis on Certain Central European Countries*, Budapest – Miskolc: CEA Publishing, pp. 255-287. https://doi.org/10.54237/profnet.2021.tbblfl_8.

Lenkovics, B. (2021) 'The Protection of the Family' in Barzó T., Lenkovics B. (eds.) *Family Protection From a Legal Perspective. Analysis on Certain Central European Countries*, Budapest – Miskolc: CEA Publishing, pp. 9-36. https://doi.org/10.54237/profnet.2021.tbblfl_1.

Mostowik, P. (2014), *Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym*, Cracow, Wydawnictwo Jak.

Nowicki, M. A. (2021) *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warsaw: Wolters Kluwer.

Paździor, S. (2013) 'Prawo małżeńskie' in Guz, T., Głuchowski, J., Pałubska, M. R. (eds.) *Synteza prawa polskiego. 1918-1939*, Warsaw: Wydawnictwo C. H. Beck, pp. 522-565.

Poniatowski, M. (2017) ‘The Family as an Entity in the Polish Legal Order’ in Pastwa, A. (ed.) *Philosophy and Canon Law. Vol. 3. Church and State: Promotion of Economic, Social, and Cultural Rights of the Human Person*, Katowice, pp. 197-218.

Stanić, G. (2021) ‘Marriage and Family in Serbian Law: A Contemporary Perspective’ in Barzó T., Lenkovics B. (eds.), *Family Protection From a Legal Perspective. Analysis on Certain Central European Countries*, Budapest – Miskolc: CEA Publishing, pp. 191-220. https://doi.org/10.54237/profnet.2021.tbblfl_6.