

**BRATISLAVA INTERNATIONAL SCHOOL OF LIBERAL ARTS**

**Splitting the Child: Custody Hearings in Slovakia and the Child-Centered  
Approach**

**(Bachelor Thesis)**

**February 2016**

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### **Declaration of Originality**

I declared that this bachelor thesis is my own work and has been published in part or in whole elsewhere. All used literature and other sources are attributed and cited in references.

Bratislava, 22 February 2016

Lucia Uhrinová,

Signed: \_\_\_\_\_

# Splitting the Child: Custody Hearings in Slovakia and the Child-Centered Approach

## Splitting the Child: Custody Hearings in Slovakia and the Child-Centered Approach

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### Abstract

The main purpose of this study is to analyze the cruxes – mainly in the Slovak legal system - when it comes to maintenance and protection of child's rights (under 5 years of age because of the specific vulnerability), needs, and interests. Personal experience of inadequate court practice considering custody hearings made me understand the gravity of the issue as well as made me realize that the courts dealing with the custodial arrangements in the Slovak legal system immensely lack the knowledge about child's needs and best interest.

The work is mainly based on the child-centered approach, which considers child's capabilities and needs. The emphasis is also put on human dignity, human rights, and freedoms, which are among others also indicators of the quality of democracy. The theory is complemented with qualitative interviews with specialists from the legal and psychological sphere as well as with divorced parents.

The research shows that the Slovak legal system is inadequate when it comes to custody hearings. In many cases, custodial arrangements do not correspond with developmental needs of the child. This might pose a serious problem and thus deleteriously impact the child's future.

# Splitting the Child: Custody Hearings in Slovakia and the Child-Centered Approach

Ako rozpoliť dieťa: práva dieťaťa a súdne spory o zverení do opatery na Slovensku

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**Kľúčové slová:** ľudská dôstojnosť, ľudské práva, prístup so zameraním výslovne na dieťa, najlepšie záujmy dieťaťa, teória nadväzovania väzby, stabilita, nedostatočná znalosť

## Abstrakt

Cieľom tejto práce je analýza nedostatkov – hlavne v legálnom systéme Slovenskej republiky – týkajúcich sa údržby a ochrany práv detí (do päť rokov, vzhľadom na zraniteľnosť v tomto veku), ich potrieb a záujmov. Osobná skúsenosť neadekvátneho súdneho procesu, či postupu, vo veci zverenia dieťaťa do starostlivosti jedného z rodičov mi umožnila porozumieť závažnosť danej záležitosti a rovnako mi dopomohla uvedomiť si, že slovenský legálny systém nedisponuje dostatočnou mierou znalosti o detských potrebách či záujmoch aj napriek tomu, že pojednáva o vytýčení typu rodičovskej starostlivosti.

Práca sa predovšetkým zakladá na princípe centrovanej výlučne na dieťa, ktorý zohľadňuje všetky schopnosti a potreby dieťaťa. Dôraz sa v tejto práci nepochybne kladie aj na ľudskú dôstojnosť, práva a slobody, ktoré sú taktiež súčasťou celku ukazovateľov kvality demokracie. Teória sa navzájom dopĺňa s kvalitatívnymi rozhovormi. Tie boli vedené s rôznymi odborníkmi z právnej a psychologickkej praxe, a taktiež s rodičmi, ktorí podstúpili rozvodové konanie a spor o zverení dieťaťa do starostlivosti jedného z nich.

Výskum preukázal, že slovenská právna prax či celkovo legálny systém je neadekvátny, a to hlavne ak sa jedná o súdne procesy pojednávajúce o zverení dieťaťa do starostlivosti. V mnohých prípadoch, typy či zostavenia rodičovskej starostlivosti nekorešpondujú so základnými vývinovými potrebami malého dieťaťa. Takýto defekt v systéme môže u dieťaťa zapríčiniť vážny problém, lepšia povedané, negatívne ovplyvniť jeho budúcnosť.

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## Introduction

I bet anyone knows the emotions which emerge if one is looking at some point of a situation in which the staring person is completely baffled. Even though you would wish to help, it seems there is no way. However, I found the way how to ease the burden I have on my back, due to the circumstances I have described at the beginning and try to help somehow. This is how I was inspired to choose this topic for my bachelor thesis. I saw the baby, the little girl, crying a lot. It was not common and usual cry of the babies. It sounded like she pleaded to stay at home with her mother. What annoys you most in this situation is that the paper/settlement granted by the court is of a bigger weight and importance, whatever the circumstances are. The only person who could resolve the situation would be the father of the mentioned very young girl. Unfortunately, conflict among those parents, possibly in combination with other factors has been much more influential and meaningful than the welfare of the own child. If the mother did not give the baby to the father during his days of visitation, the police would be called in and despite of the baby's evident need, she would have to go with her father.

Imagine to be in the child's position, she thinks that nobody is listening to her messages and looking at her gestures. Basically, it seems that nobody understands her. Nobody can come and take her back home if she is sad or crying without the primary caregiver's presence even throughout the night since she is only 5 months old. From the child's perspective it has to look like: "Who cares about your needs? You will stop crying once and will get used to that."

This situation was caused primarily by the parents of the child and it was supported by the court decision. The decision about the custody was – when the child was 5 months old – that a primary caregiver is a mother but a child will be under the father's care 48 hours a week but separate. After the practice of this custody arrangement, the child started to show unpleasant marks in behavior, which have not been in accordance with a smooth development of a personality. However, the court decision was not changed until the child was two and half years old. However, the older the child was, the bigger problems came as she started to talk and she was resisting and much more stronger.

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Many times, when it comes to divorce, parents are the last people who could possibly arrange the best custody for their child. Couple may be in a constant conflict which could overshadow their judgment. Even without a conflict among them, they may unconsciously prefer their needs under those of a child. A child is then a figure, which will suffer the most. It results in the necessity to enhance the third party, which could decide upon adequately in the best interests of the child.

If this is only one of the cases in Slovakia, the question emerges: Is the Slovak legal system adequate considering the rights and needs of the child? Or is a child only a marginal member of a court proceeding who just get used to any decision?

The thesis focuses primarily on children under five years of age, which are especially vulnerable during the process of divorce and custody hearings mainly, because it is a critical period and attachment forming occurs (McLeod, 2009). “If an attachment has not developed during this period, then the child will suffer from irreversible developmental consequences, such as reduced intelligence and increased aggression“ (McLeod, 2009). The current approach in the Slovak legislation and the court practice towards the rights and needs of children at custody hearings is inadequate. This thesis seeks to explore current legal deficiencies and provide potential solutions for better practice in line with a broader development in the field of human rights theory and practice worldwide. The main concept of the bachelor thesis is *the child-centered approach*. Findings showed that a child-centered approach is, unfortunately, a term quite alien to Slovak legislation. That is the reason to highlight this concept and make it known in our country to help the most vulnerable members of our society. After all we know, there is not a lack of the concept in theory = as it is embodied in international as well as domestic laws, but the practice and implementation seem to be deficient.

## Methodology

To examine the rights of one group of people (in this case, children under 5 years of age) and its implementation, investigation needs to be done from the foundation of human rights culture in general. Institutionalized democracy belongs to the very roots of this topic because its basic variable is human rights. Human rights are perceived as a tool for the practice of institutionalized democracy as well as its aim by the means of establishment of institutions, delegation/decentralization of power and implementation of a new legislation (laws related to the protection, promotion, and fulfillment of human rights and hence of human dignity). Thus, by studying of a theoretical background of institutionalized democracy - its principles and rules - we build a firm grounding for the following specialization, namely, the rights of the child.

The first chapter examines democracy as such and focuses on the most important factor for the thesis – human rights and human dignity. The chapter gets to the specific object of the democratic measurement of the country besides of all others – freedom. It explains the substantial traits of established democratic countries. It reveals the importance of the legislative approach the country adopts. Capability approach plays an important role in this chapter and illustrates also the reason of the Slovak legal deficiency. Finalizing the chapter, the responsibilities and obligations of a state are highlighted and investigated.

Chapter two begins with the main concept and a keystone of the thesis which is the child-centered approach. In order to explain the purpose of the approach properly in the context of the thesis, emphasis has been put on the developmental needs of the child in the early childhood (under five years of age). Attachment formation and stability have been the objects of examination and create the core of the work within the second chapter. Last but not least, types of custodial arrangements are described which are evaluated from the child-centered approach perspective and then also from the point of view of various experts. The pros and cons of presented custodial arrangements are summarized. Chapter finishes with formal enactments in international as well as domestic law.

To support the selection from both legal and psychological theory,) it is necessary to include the empirical part. It consists of the facts of the main case study and of

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qualitative interviews. The interviews were conducted with specialists and professions in the field - psychologists, lawyers, and social. Parents who experienced divorce or dealt with the child custody proceedings got the space to express their view on the court proceedings as well as on the welfare of the child. Specialists have been selected on the basis of their focus in the field, which means, I asked for interview psychologists whose primary interest is psychology of children. Then lawyers who have dealt with the family law or have an experience with family cases from the past. Social workers as also other mentioned respondents come from the Southwestern part and from the Southern part of Slovakia. I was careful to avoid any specialists who have been in touch with the mentioned case study in order to sustain objectivity. Otherwise, it could have an impact on their answers. All interviews had been done anonymously, thus the names I use in the work are all fictional. The age of respondents was slightly adjusted (plus minus 10 years) in order to keep the anonymity of respondents. Any interview had been made during the bachelor thesis' period approximately since December.

The main case study comes from my close environment. That is the reason I chose to investigate topic, because it became my own interest. I felt and saw all the problems which a child has had during such a process. It has been a really tough situation in which the couple could not make any rational solution and negotiate the custody without the court's intervention. Then, I understood that there has to be a third person who would help to resolve the situation according to general and specific needs of the child. However, this is not the way how the legal system works. Thus, after rethinking, I'm sure it is necessary to examine it as the youngest are in a danger and the consequences will carry into the future. Investigation based on the case study mainly which has happened in my close surrounding became the best way how to examine a specific problem because of the full access to information, and all the more, personal experience broadens your horizons and gives you clear path to focus on. It provides you with certainty that this research is really valuable and needed to find better solutions.

Slovakia does not adequately consider the needs of the child when it comes to custody hearings. Child custody hearings and practice of family law during the divorce proceedings in Slovakia revolve primarily around the interests and the rights of the

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parents. The Slovak legal system inadequately and insufficiently protects the rights of the child. This state of affairs is conditioned by:

- a) insufficient voice for the child – due to lacking knowledge of the child-centered approach,
- b) inadequate education of social workers, lawyers, judges on the child-centered approach,
- c) inadequate working conditions of social workers,
- d) prevalent idea to resolve any case only by the means of the court proceedings.

## CHAPTER 1: The Essence of Democracy

Democracy is not a new political system. Contrary, it emerged in the era before Christ. However, as anything, democracy has evolved in its meaning and understanding. Currently, democracy is approached differently, in an individual-centered manner, as it was supposed to be since its inception: the rule of people. It is already understood that individuals have the right to fulfill their potential according to their capabilities and that they should be provided with necessary means to practice their rights fully. Therefore, a child-centered approach has been designed specifically to equip institutional and legal system with a method that would offer the life in dignity for children in the same way as for all other individuals in a society.

In order to solve various problems in a democratic society, the starting point is rooted in human rights. Considering any kind of deficiency in a democracy, human rights should be the object of observation and investigation as they are the essence of the system. Referring to the hypothesis and its main concept, the rights of the child, their implementation and protection, human rights are again the point which is necessary to begin with.

### *1.1 Human rights and freedoms as a measurement of a country's development*

Human rights are both a democratic tool and a goal. Considering human rights in a theory of the state and their anchoring in legislation, we can deduce the nature of the regime of the given state. Democratization and liberalization endow people with rights, which influence their lives in every detail. Most countries of the current world are formally democratic. As democracy is connected with human rights, it is also highly related to capitalism, too. Capitalism is mentioned here because it becomes a force which at times clashes and triumphs over crucial social values, needs and rights as well. It is the cause why human rights are diminished in many situations. For example, in the case of child custody, psychological reports are not required also on the basis of its costs. Nothing in a capitalist society is for free thus nothing is taken for granted. It needs approval of some competent body and of course a supply of finances. Evidently, capitalism plays a role of an obstacle in just legal investigation.

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Financial shortage may cause lack of information the court needs in order to make an adequate decision about custody. Not to speak about corruption, and so on.

Economic prosperity is the driving force of a modern society. Considering the concept of development of a country, growth of GDP, financial resources, technology, education, health, etc., are perceived as the essential measurements of development (Sen, 1999, p. 3). However, freedom should also be included among tools for measurement of the development of countries in the current world. Freedoms enable people to exercise their rights and fulfill their responsibilities they possess in a society. Freedoms also depend on the above mentioned economic factors. Financial deficiencies could easily remove abilities to satisfy people's needs, thus they can represent an obstacle in exercising of human rights. The most jeopardous violation of freedom comes from authoritarian or totalitarian regimes, where civil and political liberties are denied (Sen, 1999, p. 4). Among others they are primarily those of e.g. speech and religion. Any individual in a society should be guaranteed to express own thoughts emerging in one's mind as well as each individual should be allowed to exercise own religious beliefs (Garrett, 2008).

“What people can positively achieve is influenced by opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives“ (Sen, 1999, p. 5). Freedoms are interconnected with other domains of a society. They have an impact on each other. Sen describes also other freedoms - instrumental freedoms - needed for attaining the development of freedom in general. Instrumental freedoms are freedoms in various domains which contribute to the fact you are free in a society in general. He refers to these freedoms in particular: political freedom (freedom to choose from various choices and vote for them), economic facilities (freedom to choose your job according to your criteria), social opportunities, transparency guarantees, and protective security (Sen, 2001, p. 10). Without financial resources for the basic needs and political freedoms especially, nobody can enjoy and exercise her or his rights, they would not be capable of doing so. Individuals have different capabilities to fulfill their given rights. This was investigated by Martha Nussbaum in her work *Human Rights and Human Capabilities*. The work reveals a new approach towards the definition and the purpose of a democratic society, namely, the capability approach.

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By means of human rights we can indicate and measure the quality of democracy. There are international organizations which accumulate information and quantify that quality through all kinds of indexes in terms of various freedoms (of the press, of association (i.e. Freedom House)), of good governance (The Corruption Perception Index (Transparency International), Good Governance Index (World Bank), etc., and last but not least, through the concept of human development, inspired by Sen, which uses economic prosperity, access to education, and healthcare..

These international organizations using indexes to measure freedoms have been inspired by the international organization on the highest level in fostering governance worldwide – the United Nations. Focus is put on the basic principles, values and norms in societies rather than on a specific political system. The preference is on the side of values which promote gender equality and the life free from discrimination regardless of any human traits and characteristics. Democracy is the system that is most supportive to those non-discriminative values. Thus, its strengthening takes place even though the democracy may differ in some traits, depending on the country where they are implemented. “Democracy, and democratic governance in particular, means that people’s human rights and fundamental freedoms are respected, promoted and fulfilled, allowing them to live with dignity“ (United Nations, n.d.).

### *1.2 Capability approach is the essence of human rights implementation*

Living with dignity means to be able to live in accordance with your capabilities and wishes. In other words, your capability results from your physical as well as mental health or from the stage of your development, etc. It means anyone is capable of doing something and of being someone he or she values. Thus, one should have ensured the opportunities for doing so and for being so. This is a foundation for the below mentioned dignitarian society where “nobodies” do not exist since anybody is still somebody. Capability approach allows that. It enables the existence of a dignitarian society (explained in the subchapter 1.5.) which is based on dignity. It follows that anybody has the opportunity to realize themselves in such a society. The object of measurement of quality of democracy then is exactly the opportunities provided and ensured by the state rather than material tools of well-being (Robeyns, 2011).

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Capability approach is the main concept in the work written by Amartya Sen, importantly developed also by Martha Nussbaum, and others. It studies the maintenance of instrumental freedoms and facilities, which enable the practice of given rights. This approach should be the most fundamental one within a state in order to create conditions for a smooth democratic operation. For example, when in financial need, there is insufficient participation in political life and possibility of escalation of social problems (e.g. marginalization, exclusion of minorities, etc.). People or groups calling for more financial resources are often accused of greediness. To evaluate such demands, however, we must consider their intended purpose, the needs they are intended to meet.

"If we have reasons to want more wealth, we have to ask: What precisely are these reasons, how do they work, on what are they contingent and what are the things we can "do" with more wealth? In fact, we generally have excellent reasons for wanting more income or wealth. This is not because income and wealth are desirable for their own sake, but because, typically, they are admirable general-purpose means for having more freedom to lead the kind of lives, we have reason to value" (Sen, 1999, p. 14). Unfortunately, current society works in a way in which the more money you have, the more of your freedoms you can exercise. It could be concluded that for a country to be democratic, human rights legislation, establishment of institutions, and decentralization of power still do not ensure that the country's system is really democratic in consequences. It needs to be implemented through an approach which facilitates the exercise of human rights for all individuals according their capabilities. This will be of special importance when it comes to the rights of children, who are legally limited in the pursuit of their rights, which are entrusted to their guardians and various institutions.

As Nussbaum explains, capability approach provides specific view, in different words look at each individual in particular. This approach drives awareness that each person in a society is able to do something and to be somebody according her or his capabilities (Garrett, 2008).

Democracy and human rights are the articulation of ethics, not purely of positive legal rights (Sen, 2004, p. 320). As such, capability approach is definitely the approach which countries should strive for and incorporate into their systems. By means of a

certain approach, a country can ensure fundamental civil rights to be effectively used in practice, not only on paper, and in theory. The substantial aim of democracy has to be the removal of all unfreedoms (all possible and potential obstacles to human rights' fulfillment), which inhabitants may suffer from, by equal treatment in accordance with basic human rights and civil liberties, considering their capabilities. Then it could be proclaimed that the goal of a democracy was achieved and that society provides freedom and human rights security to its citizens equally.

### *1.3 Dignity and its importance*

Equal treatment of all citizens is one of the resources providing the possibility to live with dignity. That is the life where nobody has a right to invade other's personality in any sense. One is born with dignity, with this abstract and moral/ethical principle which imposes the right to be respected and his or her life to be valued. A democratic state is then responsible to maintain and protect this principle. "[W]hen human rights are constitutionally established and effectively implemented, democracy can be theoretically and practically justified as a political means to guarantee human dignity" (Valdés, 2009, p. 253). Dignity is the foundation as well as the effect of established and implemented human rights and justifiable democratic system. State has the power and legitimacy to intervene when a human dignity is violated. Dignity implies that the subject is a living being, thus needs to be treated in humane manner.

### *1.4 Relationship of human rights, dignity and democracy*

The relationship of human rights, dignity, and democracy is highly interlinked. They have an impact on each other. If human rights are not implemented effectively, dignity is violated and democracy is lacking. Considering the inadequate protection and implementation of the rights of the child and treatment of children at custody hearings in Slovak court practice leads to violation of dignity and raises doubts about the Slovak democratic system, since the legal system does not protect the dignity of children efficiently. Respect towards the weaker members of a society is greatly lacking due to the inability to understand them or rather due to the lack of the endeavor to listen to them because, as it is usually proclaimed, they are not able of adequate expression of their own needs.

### *1.5 Dignitarian society as the future vision of a democratic society*

In a pure democracy, inequalities do not have a place. People are not ranked, pigeon-holed because of some differences when it comes to the implementation of fundamental civil rights and liberties. Robert Fuller describes a society, which functions as such, a *dignitarian* society (Fuller, 2006). It is founded on the concept of human dignity, as described above. In a dignitarian society, equality, respect, and tolerance are the highest values, which are anchored in human rights and stem from them. When they are implemented effectively, members of a society are not evaluated on the basis of their position in the hierarchical stratification of a community. It means there do not exist “nobodies”, just “somebodies”, as everybody’s dignity is safeguarded. People who are not given respect in a society, their dignity is violated, and then they feel like a nobody, not equal and important as some other members of it.

A dignitarian society would promote the child-centered approach in areas where children’s rights are concerned, which aims to sustain a child’s voice at important occasions affecting the child’s life. It promotes the necessary approach to them, which does not harm their dignity, and where their equality is maintained despite their age, which in turn teaches them to behave towards others in the same way.

### *1.6 Where the rights are, responsibilities emerge*

As human rights outline capabilities, they also determine the corresponding responsibilities for their implementation. A considerable responsibility is to respect the rights of others. This applies not only to individuals, but, and most importantly, to states as well. All member states of the UN, which have adopted human rights treaties and covenants are obliged to respect, protect, and fulfill human rights. The obligations of states are important especially in respect to those people who are marginalized the most in a society. For example, people with disabilities, ethnic or religious minorities, seniors, women, children, and others are potentially marginalized groups, as their access to decision-making is for various reasons limited.

UN specifies three levels of human rights implementation into practice by governments – to *respect*, to *protect*, and to *fulfill* human rights. Respecting human

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rights means that the state does not interfere into the enjoyment of human rights. The obligation to fulfill them is one of the most practical ones. This obligation (to fulfill) states the necessary actions to be carried out in order to provide easier and full realization of the rights. “*The obligation to fulfill* – States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights” (United Nations). Protecting rights represents the state’s responsibility to protect rights from the abuse by third parties, e.g. employers, doctors, teachers, neighbors, or any other possible offenders. Each obligation serves as a tool for restricting any intervention into human rights while respecting them.. The first level – respect of human rights – is the responsibility for the state itself. Although the state forms the executive, legislative and judiciary bodies, it does not have the right to violate human rights of any person. The state is obliged to respect human rights as any other subject of a society. The second level of obligations – to protect – is the responsibility of a state to prevent subjects before the intervention of their human rights by third parties. And the last one – to fulfill – is the responsibility of a state to make an environment suitable for the full implementation of the human rights and thereafter their smooth realization.

Bringing this to the question of position of children in a society, the state is obliged to realize that children have specific rights as well, and regardless of their stage of development and young age, they have a right to be respected and valued and listened to. On behalf of the protection and fulfillment of their specific rights, a state must design the legal system enabling the practice of those obligations.

## **CHAPTER 2: Children's Needs at the Core: A Child-Centered Approach**

Taking state's responsibilities stemming from human rights-based and capability approaches into account, we get to the child-centered approach to safeguard child's rights during custody hearings. A child-centered approach is a system where children and their needs represent the center of attention of legislators as well as practitioners. It means the processes are directed to meet mainly the child's needs and interests. Focusing on young children under five years of age, the needs and interests correspond with children's developmental needs. In order for a child to be mentally as well as physically healthy, he or she needs a primary caregiver and a stable environment, in which the child lives.

The child-centered approach highlights the necessity to allow children to engage in their own life more effectively. Adults have to understand that children are also human beings with rights which have to be respected, protected and fulfilled, even more so due to the child's vulnerability. A child-centered approach insists on listening to the child's voice. It must be listened to regardless of age. A child in any age is able of expression of opinion and preferences. To understand very young children, we need to have experience with how to listen to such expressions, usually entailing psychological education and training. Psychologists with the main interest in children can read and translate even a very young child's language into the verbal, understandable language. It follows, that a psychological observation of a child when it comes to divorce of his or her parents is necessary and should be strongly required.

The right of a child to express his or her wishes is explained in the fourth principle of the document named the Principles for Child Centered Practice published by Australian Capital Territory (ACT) Government's Community Services: "Children and young people, in contact with the care and protection system, should be provided with direct and indirect opportunities to express their feelings and wishes; in this they can be greatly assisted by an adult (other than their carer) whom they trust, who provides regular emotional and practical support and who is likely to have continuous involvement with them" (p.4). Regarding person who should assist when a child is

questioned, it was agreed in the Slovak legislation in September 2015 that the Commissioner for Children will be designated to monitor fulfillment of the rights of the child. He or she will be the person to whom a child could express wishes and eventually complaints (Mančíková, 2015). Commissioner would represent an objective advisor and supporter of the child's rights and needs.

The child-centered approach should ensure that children are treated in a safe and respectful manner (Rood, 2004). Thus, international organizations have created guidelines, and in accordance with them, the Convention on the Rights of the Child has been passed and in turn ratified to protect the rights of the child in social practice. The Institute of Child Protection Studies of the Australian Capital Territory Government lists a set of principles, which are, or at least, should be a necessary condition for all legal procedures, which concern a child. The knowledge "about the welfare of children and young people" (Institute of Child Protection Studies, p. 5) is the very fundamental principle of all of them. The Principles for Child-Centered Practice provide the explanation of what could be the consequences of ignorance of such an approach, namely, a negative impact on the welfare and the interests of the child if such approach is not incorporated. It seeks to define basic principles according to which the child centeredness can be measured (p.1). "Taking into account the developmental needs of children and young people in all interventions" (p.1) is one of the essential points in child centered approach. Philosophy of this approach is "child in family" focus rather than either a child or family focus (p.6). This is the issue which will be broadened in the last chapter of the thesis within the context of the Slovak Republic. There are factors which have caused that the attention is turned away from the children and the focus is put mainly on the parents and their needs.

### *2.1 The best interests of the child corresponds with the developmental needs in the early childhood*

A crucial component of the child-centered approach is the best interest of the child. Best interests denotes the necessary conditions, which are believed to secure the child's welfare (p. 8). However, specific interests may vary from one child to another, thus they are not stated generally. Interests depend on the individual situation. "While the term 'best interests' broadly describes the well-being of a child, it is not possible

to give a conclusive definition of what is in the best interests of the child, as this depends on a variety of individual circumstances, such as the age and the level of maturity of the child, the presence or absence of parents, the child's environment, etc." (United Nations, n.d.). The child-centered approach is an adequate form of the child's rights treatment as it designs responsibilities for a state and family to maintain children's needs at the center in any case. If the interests are the needs, which have to be met for a healthy development and welfare of the child, they correspond with the brain development, especially in very young children. The principles of the child-centered approach emphasize the times, which are specifically vulnerable and important in the formation of personality. "...the development of neuronal connections, which occurs rapidly, particularly in the first three years of life, including prior to birth", "neurons are connected and pruned or sculpted in the early development of the brain they argued that there are sensitive periods for development during which children's brains need appropriate stimulation and nutrition to establish neural pathways" (p.11). In recognizing the critical time frame, formation of attachment is underlined. Good Practice for Placement Planning also emphasizes need of stability (Institute of Child Protection Studies). Thus, formation of attachment and stability are elements, which are sought to be preserved at that critical time in the child's development.

### *2.2 Attachment formation as the first good step to the future social life*

Good start presupposes a better end. Child's personality is shaped from the birth throughout their whole life. The intensity of the development is the element which probably differentiates one child from another. The intensity of the forming of a personality is very high at the beginning when we enter this world. Character of caretaking in childhood definitely affects future lives and this fact should not be underestimated. Behavior of people is shaped by social interactions. Social interactions are mediated mainly through the primary caregiver, which is usually the mother (Bretheron, 1992, p. 20). The attachment forming is human capability, predisposition people are born with. It helps us in the process of socialization. We could say it enables that process, though it is dependent on the environment a child exists in. Attachment can be very easily insecure, if necessary conditions are absent. Among required conditions, the one which is the most valuable and is a must while

talking about the attachment forming, is a presence of the person who primarily takes care of the child. Without a principal figure in this position, attachment forming takes unnatural and divergent path. The consequence is called insecure attachment, resulting in various traits of adverse behavior. As one experiment showed, “[s]ecurely attached infants cried little and seemed content to explore in the presence of mother; insecurely attached infants cried frequently, even when held by their mothers, and explored little“ (Bretheron, 1992, p. 15). While primary object figure is present, secure attachment is acquired. Cause of the secure attachment creation rests in the way the caregiver answers the signals transmitted by a child. That security impacts further self-perception of a child. “If the attachment figure has acknowledged the infant’s needs for comfort and protection while simultaneously respecting the infant’s need for independent exploration of the environment, the child is likely to develop an internal working model of self as valued and reliable” (Bretheron, 1992, p. 23). A child needs to feel respected from birth as well, since by giving respect, people are taught to be respectful to others. The same is valid forgiving little independence in one’s decisions and actions. Children meet the possibility to rely on themselves in certain situations, e.g. to let a baby go to take a bottle despite you knowing the bottle is too heavy for the child to hold it, just giving him or her a little trust in their own actions. The outcome is positive as a child is able to develop a sense of self-worth, which buttresses healthy development of personality. Secure attachment enables a child’s brain to focus on environment and its exploration. Examining the environment is the way of learning at the very early stage of life. “Once attached, locomotor infants (infants already able to move from one place to another) are able to use the attachment figure as a secure base for exploration of the environment and as a safe haven to which to return for reassurance” (Bretheron, 1992, p. 20). It follows, that an insecure attachment does not allow the brain to fully learn, as it revolves around seeking remedy for the insecure attachment.

### *2.3 It is not a gender-biased theory*

Attachment forming theories from various authors are many times criticized for being biased because of mother-preference. John Bowlby, the author who first started emphasizing the attachment forming in the first half of the twentieth century, did not articulate the preference of the attachment object or figure. He explicitly describes

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how the attachment is formed and why it plays such an important role in one's life and development regardless of the figure's gender in this process. In his attachment theory, there is no mention of a preferred gender in object figure role. A mother is only used as an example, because it happens to be mostly the mother who becomes a primary object figure, since she answers to the child's stimuli the most intensely and frequently due to her constant presence near the child. However, the theory is not preoccupied with gender and it applies to men in the role of fathers as well as to grandparents or even siblings. The theory is critiqued mainly through the claim that an attachment primarily depends on the certainty of physiological satisfaction (like providing food) from the primary caregiver. Nevertheless, research has shown how a person was attached to a figure, who was not the object of physiological needs'. Even the same-age children could be attached to each other when profiting only from the company of each other. This happens for example among children imprisoned in a concentration camp. Children were not providing physiological needs, however, they were in the primary company of each other and they were permanent figures in the very close and stable environment. Thus, the attachment figure becomes a buddy/peer (Bowlby, 1982, p. 183).

Mentioned above, the intensity of the attachment relies on interaction. Approach of a person, a figure of attachment, contributes to or takes away from the attachment success. Considering the knowledge that physiological needs are not the dominant and initial issue in attachment forming, it sheds the light on emotions and their irreplaceable role in this very early human development. Among fundamental feelings or emotions in early childhood is the need of stability and love. Stability creates feelings of security and love ensures better and easier attachment forming, since mutual love assures sensitive and frequent answers to the child's stimuli.

Even when a child is a little bit distant from the caregiver, he or she feels calm, secure and gratified while being sure of caregiver's proximity. Otherwise a child could manifest unusual behavior (Bowlby, 1982, p. 177). One of the "symptoms" when it comes to caregiver's separation, a child could try to compensate for this deficiency by sucking their thumb or overeating (Bowlby, 1982, p. 185).

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Considering infants and subsequently toddlers, or in general children in a pre-school age, caregiver's proximity matters especially during the night time. There is a lack of research in relation to very young children's overnight stays and on the overall impact of overnight stays at nonresidential caregivers (this does not necessarily mean joint physical custody but there are sole custodies with very frequent visitation patterns including overnights, too). There have been assumptions of deleterious effects on children's development due to such a lack of attachment figure's proximity being even more severe when it comes to nighttime separation. Samantha Tornello, a psychologist focusing on the issue, has however been criticized and accused of preoccupation with the mother and insufficient research, while not including opposite cases where a child does not visit the nonresidential caregiver during the nights often. In the light of previous findings based on scientific research dealing with attachment forming, an overnight custody cannot be beneficial to brain development in vulnerable pre-school age. Even though there is a shortage of significant results which would confirm Tornello's hypothesis that frequent overnight stays with secondary caregiver make attachment insecure, it does not exclude the possibility that it might be associated with greater attachment insecurity among infants (Tornello, Emery, & Rowen, 2013, p. 882). Such a high probability needs to be tested in practice due to irrefutable evidence of susceptibility of children in the stage of early brain development (Newman). Another subsidiary element affecting brain development is "mutually attuned synchronized interactions" (Tornello, Emery, & Rowen, 2013, p. 2). Again referring to psychological investigations, truly synchronized interactions occur among a child and attachment figure whose responses are immediate and many times unconscious and spontaneous. This kind of interaction has no analogy, its role is irreplaceable. Thus, during separation, a really synchronized interaction is lacking, which leads to obstacles in the smooth early brain development. Subsequently, the attachment figure separation needs to be eliminated if the goal is a secure attachment, promoting healthy brain development, neurobiological functioning, emotional regulation and adaptation to stress (Newman, p. 3). Disorganization of attachment can even cause a deficit in empathy (Newman, p. 4). This lack could lead to serious problems mainly in social interactions, which is one of the most significant segments in human life at any age. Each healthy member of a society should possess empathy. A person without empathy is a mentally disturbed person who can have serious problems with functioning in a society. For example: "the brains of psychopaths have

been found to have weak connections among the components of the brain's emotional systems. These disconnects are responsible for the psychopath's inability to feel emotions deeply" (Hirstein, 2013, p. 4).

### *2.4 Process of attachment development*

Proximity-securing is a part of the attachment behavior during the first year of life (Bowlby, 1982, p. 187). This period is perceived as the most vulnerable one. In the first year of life, a preferred person is selected who has the majority of the attention of the child. As Bowlby explains, in advanced period of the first year, around eight months of age, a baby starts to perceive also other persons in their environment. As a baby grows, his stimuli, answers and feelings strengthen, too, thus strangers pose a bigger fear to children at the end of the first year. It follows that it becomes considerably more difficult, almost impossible for a child to be attached to a new figure in this period. The preference of once chosen figure remains also after the separation (Bowlby, 1982, p. 187).

The attachment behavior is quite discriminating with various objects of attention through the whole process. It has four phases as Bowlby describes:

1. Orientation and Signals with Limited Discrimination of Figure – in this period, a child differentiates among persons according to voices and smell,
2. Orientation and Signals Directed towards One (or More) Discriminated Figure(s) – in this stage there is a preferred figure already,
3. Maintenance of Proximity to a Discriminated Figure by means of Locomotion as well as Signals – following of selected primary figure, attempt to stay in a close distance,
- 4: Formation of a Goal-corrected Partnership – understanding of figure's feelings, forming of a strong relationship (Bowlby, 1982, p. 219).

To conclude, the very first stage of attachment behavior seems to correspond more to the concept of dependence rather than attachment. Attachment forming is a process which develops gradually. Infants are completely dependent on their caregivers. When growing up, mutuality or reciprocity among two subjects usually increases as well and then it transforms into attachment. Connotations of both phenomena vary from each other. To be dependent person is not a cherished state. Contrary, be attached while being a member of a family or any community is highly desirable status (Bowlby, 1982, p. 192).

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Attachment represents an essential component of the process of brain development since it has irreplaceable functions. Firstly, its elementary function is the “protection from predator” (Bowlby, 1982, p. 191). In the case where a child feels endangered, he or she tries to find the quickest way to get to his preferred figure. There has been research made with other mammals. In the animal world, predators usually appear at nights. It is also the reason why the attachment at nighttime is especially important and due to which a primary caregiver’s presence nearby is needed. Another function facilitates for people to be able to live in a society and have a better life - learning. Close relationship enables that a child has a possibility to observe a figure’s activities and then, he or she endeavors to repeat various acts.

### *2.5 Stability in life and development of a stable personality*

To support the attachment forming, stability should be maintained. This means stability of caregiver, stability of the environment, stability in life, in other words stability of the usual flow of one’s everyday life. Children are very simply used to a particular system they have in their daily routines. That is why they can feel insecure when it comes to its interruption of any kind. This happens when parents are divorcing or if a family moves very often. The family’s instability or residential instability is the main violators of one’s stability. If it occurs in early childhood, this easily leads to mental diseases and problems with language skills. “For infants, changes in child care arrangements can lead to poor attachment with providers and problem behaviors. For preschoolers, early care and education settings support the development of foundational school readiness skills; changes in care settings can disrupt the continuity of learning” (Sandstrom & Huerta, 2013, p. 2). Basically one’s life process, progress is invaded and can end in regress or late progress. The Slovak state focuses on financial aid and providing housing arrangements when it comes to families with low income. However, the residential instability and instability of out-of-home context (happening also due to inadequate custody arrangements designed by the state) is not touched upon. Rather, it is treated from the financial need perspective and the necessity to move from one place to another due to financial problems. This has probably been one of the reasons why a child-centered approach in relation to legislative systems is quite recent. The legislative adjustment, which seeks better living conditions for children, “to promote children’s safety, stability and

development across the child and family services system” (Papageorgiou & Peake, 2007, p. 1) is exactly in line with the child-centered approach. Essential ingredient of the approach is prediction of the effects of current decisions on the future lives of children. Anything conducted in the early childhood can have impact in the future. Stability and attachment have had substantial effects.

“Central to promoting stability is the child’s developmental timeframes and needs” (Papageorgiou & Peake, 2007, p. 4). The quote describes the necessity to consider child’s age and his or her needs congruent to this age. Legislative systems and practice thus should be adapted to these needs according to the age of a child. “Age and stage of life are significant factors given children’s developmental needs and sense of time (Papageorgiou & Peake, 2007, p. 4).

### *2.6 Custodial arrangements*

Family and its separation is a very difficult topic when it comes to their resolution since each case is very individual. Many factors affect the process of divorce. It rests on the relationship of the parents, a child-parent relations, on a community a child lives in. Even though every case differs, while considering very young children (under five years of age), there are some needs which every child has. Love, stability and avoidance of stressful situations are the needs which help to provide a smooth mental development.

There are various custodial arrangements which determine who has the right of the decision-making about the child after the divorce or separation of the family. Physical custody means that a parent has the right to have a child living with her or him, to have a child physically at home (Guillen, n.d.). This can be divided into two types: sole/primary physical custody, when the other parent will be awarded with particular visitation/parenting time, or a joint physical custody, when a child lives in two households, usually alternated after one week, month or even yearly, when parents live far away, in different states or so (Guillen).

Legal custody means which parent has the right over decision-making of any kind about the child. In joint legal custody, both parents have to participate in decision-

making and both possess the right to do so. Then, ignoring the other parent's requirements is illegal and can be prosecuted (Guillen). This arrangement is really difficult in practice, as parents' visions about the child's life after the divorce are usually different. If two people/ parents have different notions, it is easier to narrow the gap in opinions while living together. Immediately after separation, their opinions are even more distinct and disharmonized.

### *2.7 Look at the custodial arrangements from the child-centered approach's perspective*

In terms of the child-centered approach and considering especially the needs of the children under five years of age, sole custodies, whether legal or physical would be more suitable, since they are more beneficial and compatible with children's needs in this early age. Maybe the joint legal custody could be adequate even in the child-centered system, however there is a risk of neglecting the best interests of the child due to potential disagreements and arguing among the parents. Joint physical custody actually contradicts the child-centered approach because of the permanent interruption of the residential stability and attachment forming with the primary attachment figure. The consequence is a risk of deleterious effect on the future life and development of a child which has to be avoided when the child-centered approach is instituted.

To sum up, sole physical as well as legal custodies are much more advantageous and supportive to the needs of children in their early childhood, where the stability sustains the uninterrupted development of attachment.

### *2.8 Joint physical custody possible without the agreement of both parents: Slovak advantage?*

Slovakia allows parents to agree upon a joint physical custody even since the child's birth. The most shocking fact is that the younger the child is, the more frequently he or she alternates among the parents (Rodinné poradenské centrum, n.d.). Here, it seems, basic developmental needs go aside and remain sidestepped and ignored. Another unfortunate thing is that the joint physical custody can be awarded even without the agreement of both parents (Rodinné poradenské centrum, n.d.). It means,

it is sufficient when only one parent wants and requires the joint physical custody. Even worse, such option is seen as an advantage in the Slovak legislation as was mentioned by the Family Advisory Centre cited above. If a joint physical custody is awarded, a child spends enough time with both parents, including the one who opposed or did not agree to this type of custody. There is a high risk then that a child will suffer from insufficient attention and care while being with the parent, who was opposed to the joint custody arrangement. The reason of refusing joint custody could be that a parent prefers sole custody but also that he or she does not want to spend time with the child and then, the joint custody can have a negative impact on the child.

### *2.9 Various views on custodies*

Since the custodial arrangements are quite a sensitive issue, many authors already formulated a few proposals, evaluations and recommendations. Joan Kelly summarizes various views and practices of custody arrangements and caretaking, where she describes the old feminist concept – of a primary caregiver – the term considered by majority of other authors to be gender neutral. However, the feminist perspective differs from this thesis' perspective in the point that feminists tend towards maternal preference when it comes to the concept of a primary caregiver (Kelly, 1994, p. 130). It means that they do not consider the concept of a primary caregiver to be gender neutral. Feminist notion is that the healthy development of the attachment can be achieved only if the primary caregiver is the mother (Kelly, 1994, p. 130). However, with the exception of feminist maternal preference, the feminist perspective on the issue of custody arrangements seems to be similar to the main idea of this work. The fundamental criteria for both views, feminist as well as the view of this work, is the stability of the primary caregiver at a child's young age, since it helps in the process of the creation of attachment.

It is necessary to take a look also at the different visions of custodial arrangements after divorce. The opposite notion to the perspective of this thesis about the custodial arrangement, that the most important criteria is the stability of the environment in which a child lives with a stable/custodial primary caregiver, is posed by Yuri Joakimidis in the work *Back to the Best Interests of the Child: Towards a rebuttable*

*presumption of joint residence*. One of the conclusions of his work is that “Children’s attachment bonds to both parents are essential for healthy development, and those bonds should be protected by the Family Court” (Joakimidis, 1993, p. 5). He maintains that protection of those bonds should and can be maintained by the judicial practice through the custodial arrangement -shared or joint physical custody. This arrangement supports the child’s contact with both parents frequently also after the divorce. His idea of preserving child-parents bonds is secured only through this type of custodial arrangement.

Edward Kruk formulates an argument for opposing arrangement, which fosters the view presented in the thesis, that the courts are frequently preoccupied with mother’s or father’s rights and interests rather than the child’s. Because of this phenomenon, there is little attention paid to child’s needs which are, as he said: “...separate from (although related to) the rights of their parents“ (Kruk, 2008, p. 5). Thus there is a need to differentiate among them, while considering both. Parents are in an emotionally vulnerable situation and can be inclined to manipulate with the child in order to heal or to harm the other party.

That is why the family court’s responsibility is to consider more factors while making the final decision about the custody arrangement. Those factors are: “the age of the child, the health, the emotional ties between the parents and the child, the ability of the parents to care for the child, any history of family violence or substance abuse, and the child’s ties to school, home, and his or her community” (California Courts, 2016). Nevertheless, two questions emerge here: who evaluates, controls, and gives reports about the mentioned factors necessary for the court to consider? How much voice does a child have in the process that decides of his or her future? These questions are analyzed and answers are sought in the third chapter.

### ***2.10 Formal enactment of the rights of the child in international and domestic law***

The Convention on the Rights of the Child came to being in 1989. This has been the highest international covenant which serves as a formal protection of the rights of the child so far. Also, it is necessary to mention that the convention has met with the most

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widespread consensus among the countries in the United Nations. There are only three exceptions, which have not ratified the Convention, and those are the US, Somalia, and South Sudan (Humanium, n.d.). The document stresses the importance of children being specially protected under the human rights mechanisms because of their vulnerability. The Slovak Constitution also discusses the protection of the family and children, but only marginally, and the basic perspective is about the rights of children and about caretaking, in other words about parental responsibilities (Národná rada Slovenskej republiky, 1992). The Family Law deals with the issue deeper, but it revolves around the rights of parents/spouses primarily and around their obligations. The rights of children are not numerous and it seems that children have more obligations (to respect their parents, to cooperate with them, etc.) than rights. Rights which are the most valid are: interests of the child are primary for consideration in the decision-making process regarding the child (Article 1, n.5) and that a child has the right to be heard, which is somewhat opposed in the following sentence about the credibility of the child's expression according to the age and mental maturity (§ 43) (Národná rada Slovenskej republiky, 2015). The Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms discuss the protection and respect of the family and equality among spouses however, do not emphasize the rights of the child separately. Consequently, the only document which fully discusses and handles the rights of the child and the protection of their needs is the Convention ratified by Czechoslovakia in September 1990.

## **CHAPTER 3: Views and Points of Specialists in a Role of Supportive Beams**

The personal experience I have been inspired by, mentioned in the introduction, was evidently a process which does not coincide with the child-centered approach examined in the theoretical part of this thesis. Following that, few interviews were conducted to confirm the court practice in relation to child custodies in Slovakia. After the survey of international documents and specific policies, it seems that the Slovak system is definitely deficient. The aim of the interviews was to map the parallels between particular answers of lawyers and psychologists to the described legislative shortcomings in the children's protection. Interviews were also made with parents, who experienced divorce while having children in the early childhood age, targeted to assess the shortcomings from the parental point of view as well as. It was also intended to demonstrate urgency of the presence of a third party's objective perspective and knowledge when it comes to find the suitable and adequate custody arrangement to the child's personality development.

### ***3.1. The error at the very beginning: the error in the education?***

Suitable custody arrangement requires decent educational background of social workers, lawyers and judges. Failure of the Slovak legislative system in family and family separation matters seems to be resting in the very foundation of a society – education. Jurisprudence as such demands people with strictly factual insight, which is led by specific laws of a given country in particular. Fields of law differ from each other substantially, and need distinct knowledge, e.g. in-depth knowledge of the different codes of law. Family law is not an exception. However, it seems the attitude of several Slovak specialists (lawyers, judges, even the state officials as they are in charge of approving the educational syllabuses) does not correspond with respective approach and knowledge necessary for the issue. The knowledge of the family law is a prerequisite, though is not sufficient, unless all participants (also those who are not direct participants because they are impacted by the proceeding too and in the case of custody hearings even more than the direct participants - parents) in the legal

proceeding are adults fully able to understand each other through verbal communication and verbal self-expression. In this case, however, knowledge of diametrically opposed field to the judicial one (the socio-psychological) should be also officially and legally anchored in a requirement of participation of professionals who represent participants (young children) incapable of self-expression in the proceeding. Little knowledge and education is demanded from legal representatives of children before the court, even though the children are the most impacted party by the divorce of their parents. Labor Office, specifically a curator is present from the beginning of the legislative process till its end and throughout the whole process is responsible for the objective and accurate verification and evaluation of the case or situation (Ústredie práce, sociálnych vecí a rodiny, p. 4). Curator's statement is quite valuable and worthy for the court to decide on the case (Ústredie práce, sociálnych vecí a rodiny, p. 5). This implies that fields like social work and law - as officially required since the year 2005 (Ústredie práce, sociálnych vecí a rodiny) - should not be satisfactory. When dealing with young children of a preschool age, many times yet incapable of verbal expression, only the sufficient knowledge of psychology might be relevant. Psychological education has also been one of the options for potential curators though - not a must or requisition - since 2005. Otherwise – if the social workers acquired education except the psychological one (the juridical or education in the social work) – process of custody hearings might need a reform requiring also psychologist's presence during the whole proceeding, since its beginning.

### *3.1.2 Any position for psychologists in the custody proceeding?*

During the interviews with the lawyers it has been found that the psychologist's presence or psychological report - as both respondents from the juridical field proclaimed – is/is not:

“... [I]f parents are arguing about the custody of the child, *a psychological report is usually required, however, it is not the basis for the court's decision*, it is only a factor which helps the court which of the parents it will consider more relevant. Thus, the psychological report is not expressly needed in any case.”<sup>1</sup>

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<sup>1</sup> Mary, 50 years old, lawyer from the Southern part of Slovakia, Original language: Slovak, translated by: Lucia Uhrinová

... *It is not a legal and official obligation of the court while deciding on custody, it means it depends on the specific situation...*<sup>2</sup>

It is not legally anchored in any code of law that in some cases (and in which ones) the psychologists should be called in. All depends on the judge's perception and judgment on the issue/case. It is his or her decision or the decision of the opposing parties to require psychological expertise in order to broaden the evidence and by that objectivity, too.

In some answers of the lawyers, it was evident that in this field, the psychological education and broad education on principles of democracy and its essential component - human rights - are lacking. The notion that a psychological report is not necessary in any case because if the judge has a long-standing experience in Family Law and family cases, he may be skilled enough to decide adequately (Mary) sheds the light on the unsuitable knowledge or a rather narrow-minded perspective on the issue. Skilled judge may be skilled in affairs of the law, however, he or she is not the judge of the only this type of proceedings, which may have an impact on his thinking. A judge has various cases, which he or she needs to decide on, while oftentimes avoiding empathy in order to be objective. Indeed, in family cases, when it comes to child custodies, an empathic feeling and sensibility should be required to decide on the child's interests. If the judge thinks he or she does not need the advice of a professional from psychological sphere, he or she should at least have a basic psychological education to meet the child's needs. Otherwise, a psychologist should be *legally* obliged to participate, to be involved in any child custody proceeding, whether parents are able to meet the consensus or not, and whether a judge seems to be skilled in the sphere of law and court proceedings.

### *3.1.3 Incapability of law to resolve such a problem*

Stephany, a psychologist, expresses her view on the capability of the court to resolve family issues primarily by its own, without help of other institutions or specialists:

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<sup>2</sup> Daniel, 65 years old, lawyer from the Southern part of Slovakia, Original language: Slovak, translated by: Lucia Uhrinová

“... [I]n my view, it is a big problem and maybe the whole approach which claims that these cases can be resolved only before the court, simply by means of law only, ...this practice seems to me as a wrong path to walk on. Courts are quite unable to solve family conflicts of this type (child custody) because from one side, it is often impossible to grasp by the laws and another thing is that workers in the field of law do not dispose of such a sensitive character which would be needed when dealing with family problems. Judges deal with custodial as well as executive issues, thus, they would need to completely switch mentally and that is really difficult and almost impossible to reorient their thinking -- that this is a human being, a child, and not a television or reality. Thus, I think, the whole approach is a wrong one. That is why it requires a comprehensive reform. A small change would not be sufficient”<sup>3</sup>

As the most rampant proof of the law’s inability to grasp family conflicts and particularly the child custodies is the fact that the law revolves around the facts. Facts are its tool, as well as the ultimate goal – the evidence. While deciding about the child custody when it comes to young children under five years of age and their needs, those are too abstract, untouchable and sensitive. It is the feelings which are centrally involved in the case. Feeling of safety, reflected by the environmental and caregiver’s stability, followed by love and trust are the foundation stones which should be central to arbitrating in custody hearings. One question emerges here: Do the emotions correspond to the facts the Law needs and uses in order to resolve the problem, injustice or conflict? Through responses, light is shed again on the necessity of a legal obligation of presence of psychologists in the proceedings or a legal requirement of accompanying psychological reports which would consist of a longer observation of the child’s behavior within the family.

### *3.1.4 Insufficient voice for the child: proof that the current approach is distant from a child-centered one*

One of the usual answers which have been recorded in my interviews with lawyers is that a very young child cannot be heard, because of their inability to express own

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<sup>3</sup>Stephany, 45 years old, psychologist from the Bratislava region, Original language: Slovak, translated by: Lucia Uhrinová

feelings, wishes and notions (Mary). A child, even in the age of an infant, is expressing herself or himself all the time, as mature individuals are. The only difference rests in the way of that expression and exactly due to the need of a distinctive style of interpretation, a child psychologist needs to be involved in the process. It is comparable to the case when a foreigner is a participant in the court proceeding and a translator is called in. Speech of babies and young children also needs translation, which is only possible through specialists. Initial opinion about the incapability of children to be heard may lie again in the insufficient or inadequate knowledge of professionals from the juridical branch as well as from the country's lack of a human rights culture.

It does have a reason that the interviewed psychologists were speaking basically about the child-centered approach elements and the lawyers did not. It should be taken into consideration. Specifically, all psychologists assumed the voice of the child and they urged giving enough space and respect for the child's needs from the side of the parents, too. It means that psychologists are those who are closer to the knowledge and practice of the child-centered approach than the lawyers are. It is not to blame the lawyers, they are not guilty. The system, which does not provide lawyers and other social workers with an adequate education, does not legally require necessary education, and the constant presence of any other specialists during custody proceedings (unless the judge decides to call in some) is guilty.

### *3.2 Necessity to adjust the approach to the age of the child*

“Parents during the ultimate crisis of their relationship reorient their interests and focus only on the child. Often they fight for the rights they possess as parents rather than for the child.”<sup>4</sup>

This may pose another stimulus to take a moment to think why professional opinion should be required in any case of the custody hearing. This was the case of all answers of psychologist respondents to the question whether the legal approach should be adjusted to the age of the child, especially when it comes to young children (under five years

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<sup>4</sup> Stephany, 45 years old, psychologist from the Bratislava region, Original language: Slovak, translated by: Lucia Uhrinová

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of age). All of them confirmed the necessity to adjust the approach and not only of the legislative one, but also in other domains of the Slovak system.

Modern era brought the current “trend” in child custodies due to fathers who have incomparably greater interest in caretaking than in the past. They are now awarded frequent visitation rights with the child. “It is still mothers who are dominant caregivers however, if fathers are interested in caretaking of the child, the father-child contact is adjusted. It can be few times a week what then almost corresponds with the joint custody (Mary).”<sup>5</sup> Also since January 1, 2016, part of the family law was reformed and the rights of the grandparents have been enhanced, which means that under specific circumstances, they can require adjustment of the contact with the grandchild, demand visitation patterns or even custody (Puškár, 2015). It seems any rights except those of the children are in the process of enhancement. The result then contradicts with the needs of the young children and their welfare in general, since the most fundamental needs of the child are constantly disrupted. Basic needs of young children correlate with the developmental ones, which actuate essential developmental ingredient – attachment forming. Respondents agreed on necessary “substances” when we speak about the healthy development of a personality: security, love and trust, all driven by residential stability and presence of a primary caregiver. “Unless a child has not formed attachment to both parents, and a conflict among parents is not serious, the child should experience a period in which a secure attachment with the non-custodial parent is established and after that, sharing may occur (Kate).”<sup>6</sup> Otherwise, separation from the primary caregiver in the early childhood, mainly frequent and nighttime separation, might have deviant consequences on the behavior of the child.

The father from my case study did not live with the mother from the fourth month of her pregnancy. After the birth of the child, they started living together and have been in one household for two to three months. After that the parents again separated. Court proceeding occurred when the child was five months old. The attachment with the father was on a minimal level due to his non-participation in caring and only a

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<sup>5</sup> Mary, 50 years old, lawyer from the Southern part of Slovakia, Original language: Slovak, translated by: Lucia Uhrinová

<sup>6</sup> Kate, 55 years old, psychologist from the Bratislava region, Original language: Slovak, translated by: Lucia Uhrinová

limited time spent with the child. The settlement the parents agreed upon in front of the court was accepted despite of the real situation and evident animosity among the parents. The baby had to spend two days and nights a week separate from the custodial parent – mother. This decision became valid when the child was six months old. The case is an example of parental inability to make an adequate and objective decision about child custody. They were focused on the crisis of their relationship and in a combination with the lack of knowledge about developmental needs of the child, they made inappropriate settlement. It follows that the third party should possess all necessary information from the reports of professionals who should be obliged to deal with the case more than once and get an objective view from the observations. Consequently after the settlement agreed on by parents, a child started to show unpleasant behavior, she has been aggressive, not respectful enough, she has refused friendly communication and play with the peers, even it has had an impact on physiological needs as well, followed by nervousness, pain, etc.

### *3.2.1 Working conditions of social staff need to correspond with the child-centered approach*

It would not be fair and objective to criticize only staff of an unprofessional approach and insufficient skills in their sphere of interest. The state is responsible not only for the education, but also for the environment and conditions in which those professionals work. Their accomplishment and success of given obligations rests in the tools they were provided for the fulfillment of their duties. “Ensuring that staff have the skills and the tools to engage effectively with children and young people when seeking to find out what is concerning them and how best to help and support them” (The Scottish Government, 2010). This is what makes a difference when the child-centered and also family-centered approach is implemented properly and functions in practice.

First and most important question in the interviews which have been made with the curators was the question concerning the education they acquired. The answers of both were quite shocking to me. Horticulture and Landscape Engineering Faculty and Economy have not been the domains which would provide students with the knowledge deemed sufficient to possess while dealing with young children. One of

the questions which respondents were asked was whether there is a possibility to get to know the child's situation better through the visitations they do. It is a question of a quite great weight since curators are the participants of the court processes in order to protect the child's interests. Both respondents put forth affirmative answers, that they can get to know the situation better, however, it contradicts with their statements that visitations could be done even once, if the case does not require more visitations. Therefore, it seems frivolous, when they both claim they could know the child and the situation personally through even one visit.

In the Slovak system, social workers do not have conditions to do their job effectively. For example, they usually do not have a car at their disposal, which makes the compulsory visitation difficult if the family lives in a village not so easily accessible. Respondents proclaimed and affirmed they do not have necessary working conditions for practicing their work fully and that in the case they do not have a car to do the visitation, they need the help of the police or other institutions.

Also they would need further training. Clean environment, completely full refrigerator, and a cooked meal are the current objects which are monitored by these professionals through the visits. "Using training and supervision to reinforce the importance of a child and family centered approach" (The Scottish Government, 2010) belongs to the ingredients and results of good implementation of the approach and this again misses in the Slovak system.

### *3.3 Parents see it differently*

Divorcing parents perceive the process from a different point of view. Many times they emphasize more their own needs than those of the child. The interviews have been conducted also with the parents who have experienced separation, thus, they had to undergo the court process in order to deal with the child custody. In one case, parents were quite calm and peaceful among themselves. In another case, parents were in a constant conflict. What both couples have in common was that they agreed on the type of custody and visitation patterns. The first couple did their decision, which has proven as an effective one, however, the youngest child was already five years old. The child of the second couple started to display deleterious traits in

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behavior. Therefore, a question arises here, are the parents competent to take such a serious decision individually, which may affect the child's development substantially? Is not an opinion of a specialist still needed if we want to avoid complications?

From the interview with Stephen (the guy in a calm divorce process where they both agreed on custody arrangement they set together), I felt confidence and composure. There is no sign of anger or conflict among the parents. Almost in each answer, agreement is highlighted, thus it may pose the impression of the right choice for their children. On the other hand, while answering the factual question (According to you, what is most necessary and important for the child in such a young age?) he proposed "equal time spent with both parents". This response quite contradicts with the answer on the first question, where the parent was supposed to say what should the court consider the most in such cases according to him. The answer was: "the safety of the child". If the safety of the child should be the most important factor for the court, why it should not be for the parents? The core of both question is the same, just firstly addressed to the court and secondly, to the parents.

Even though a conflict within the "calm couple" has not been present, focus on and knowledge about the child's needs lacked.

The emphasis of the second couple, which has been in a constant conflict, did not even touch upon the true child's needs at first. They have been too obsessed with the conflict among themselves. Later on, when they agreed on an arrangement which proved to be completely inadequate to the child's mental health, the mother realized the real threat and was attempting to change the arrangement till it finally happened. However, it took two years and six months approximately to reach the change in visitation patterns.

What one gives to the relationship, one gets back later. It is valid for the child-parent relationship too. By respecting the child's needs in the very early childhood, healthy personality is developing and those learnt values the child was given since the birth, he or she will use through their whole life.

*3.4 Lacking human rights culture in general*

Slovak Republic was under the Communist control, under a regime which has left some baggage on the whole functioning of the country even today. Although the Slovak legislative system lies on the theoretical foundation of human rights since the regime of the country is democratic and adheres to a broad range of international covenants and domestic laws, the implementation of human rights as well as the approaches which would ease the process of implementation generally lack in quality and understanding. Even unconsciously, in various spheres within the institutional framework in Slovakia, the focus is put on anything other rather than on humans, their rights and needs. Therefore, the attempt to expand the rights of the vulnerable could pose an even greater challenge for this country.

## Conclusion

Slovak legal approach and court practice towards the rights of the child, needs and interests was the object of this investigation. The presumption was that the child custody hearings revolve too much around the rights and needs of the parents and it produces side effect, which is the insufficient and inadequate protection of the rights of the child.

The assumption was confirmed by the research and it can be safely proclaimed that the Slovak court practice does not work efficiently when it comes to the protection of the youngest members of our society – children under five years of age. It is a very delicate issue, since in such a young age, the most important processes in human brain occur.

Psycho-sociological views are the most valuable and relevant notions when it comes to those individuals/members of a society, who are not able to express precisely what their needs are and contrary, what are the harms they feel. In this specific topic of a child's needs from birth till five years of age, their very needs are those, which have to be necessarily met in order to achieve healthy development of personality. Researching the psycho-sociological theory helped to formulate the answer on the needs of the child. It is a stable environment and primary caregiver which have a fundamental role for healthy development of the child. Attachment forming is the result of the two mentioned elements and this is in the process primarily since infancy till five years of age. When the process of attachment is interrupted and the attachment disturbances occur, it could have deleterious impact on the development of a personality. The interrupted sequence of the healthy development of the attachment can cause serious problems in the future life of the child. For example, problems in the formation of relationships, growth of an aggression, even an impact on the child's intelligence. The socialization process - the most important process people go through in order to be able to live a fruitful life with other people in a society – could be aggravated.

The civilized world of the 20<sup>th</sup> as well as the 21<sup>st</sup> century has been still more and more focused on human rights and on the fulfillment of human dignity. However,

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somehow, the rights of children, older people, or people with disability are treated only as marginal in Slovakia.

There are few recommendations in order to improve the current situation. The definition of the best interests of the child could be determined generally for all children under five years of age according to their needs, as they are related to the mental development of a personality in this period, as is the common practice in some countries cited in this work. A definition that the best interests of the child depend only on the individual situation and on the individual itself seems inadequate.

Reform in the education or, reform in the requirements for the qualification of professionals in positions of social workers and other officials representing young children and dealing with young children as well as with the family law, are also suggested. Today, the presence of a child psychologist is not legally required in all custody hearings. But psychologists are more than essential to participate in the proceedings since it begins until its end. Curators represent crucial figures in these proceedings (and outside of them), thus requirements on their education and knowledge have to be radically amplified in order to become effective and really helpful in this position.

Creation of a firm institutional framework filled with knowledgeable staff has to be enhanced by providing adequate and appropriate working conditions and regular training about possible amendments as well as continuous training in skills related to the assessment of the needs of the child.

Last but not least, there is a high support for the implementation of Cochem model when it comes to custody proceedings. This model ensures the communication among all institutions which are integrated into the process (courts, police, experts providing the expertise/ giving reports, Labor Office – curators, and others who participate somehow in the process) (Fialho, 2012). Misunderstanding, due to the lack of communication among all mentioned institutions and subjects results in unfavorable and inconvenient legal system towards the young children. As one of the respondents - namely Stephany - said, this issue requires a comprehensive institutional reform and not just the change of one individual problem in the whole.

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This work can serve as a footbridge for further research on the topic of the needs and rights of a child in the child custody proceedings, which is highly recommended, as there was not enough space for a broader investigation in this bachelor thesis. In Slovakia, there is a significant lack of knowledge of children's needs and interests, and of human rights principles and practice in general. The approach of the Slovak legal system should be adjusted according to the specific needs of children under five years of age.

## Resumé

Tento výskum slúžil na vedecké utvrdenie osobnej skúsenosti. Lepšie povedané, osobná skúsenosť právneho postupu, no neskôr tak povediac, celkového legálneho systému na Slovensku, vo mne vyvolala pocit nespravodlivosti. Tento pocit bol znásobený o to viac, že sa jednalo a stále jedná o tých najzraniteľnejších v spoločnosti, a to sú deti, ktoré by mali mať po správnosti od štátu garantovanú ochranu a podporu v najväčšej miere. Avšak, na Slovensku vám legálny systém preukázaný pri súdnom procese, v ktorom sa pojednáva o zverení dieťaťa do starostlivosti, privodí pocit zúfalosti a hnevu.

Z úvodných viet vyplýva, že výskum sa zamerlal na to, aby slúžil ako dôkazový materiál o neadekvátnom slovenskom legálnom prístupe voči malým deťom. Najmä voči deťom v rozmedzí od narodenia do veku piatich rokov. Spomínaná osobná skúsenosť ma priviedla k myšlienke, že slovenská súdna prax nedostatočne zohľadňuje potreby malého dieťaťa, a teda primárnym cieľom výskumu bolo prísť na koreň problémov, ktoré zapríčiňujú najväčšie nezrovnalosti v súdnych rozhodnutiach o zverení starostlivosti dieťaťa s jeho vývinovými potrebami. V prvom rade, a teraz začínam od konca práce, Slovensko disponuje, ak vôbec, s nesmierne nízkou mierou kultúry ľudských práv vo všeobecnosti. Tým chcem povedať, neznalosť slovenskej praxe implementovať a naplno využívať či zohľadňovať ľudské práva v každej veci pojednávajúcej o členoch spoločnosti, spôsobila existenciu takeého, už spomínaného, legálneho defektu, ktorý napokon najnegatívnejšie postihuje malé deti, teda budúcnosť celého slovenského národa, keďže práve oni sú subjektmi jej tvorby. Dá sa povedať, že práve tento generálny nedostatok v kultúre ľudských práv je v úlohe koreňa najhlbšie v podzemí celkového rozkvitnutého problému.

Ďalšie, to najväčšie, zistenie tkvie vo vzdelaní, hlavne vo vzdelávacom systéme tejto krajiny. Podstatnú časť danej diery v legálnom systéme vytvorila nevzdelanosť, no lepšie povedané, nedostatočný či neadekvátny druh znalostí, ktorými odborníci, priamo sociálni pracovníci, rodinní právnici a sudcovia, (ne)disponujú. Zistilo sa, že ak sa jedná o malé deti do veku piatich rokov, psychologické vzdelanie je viac než žiaduce a v akomkoľvek prípade či situácií by mal byť psychológ pribratý do súdneho procesu zo zákona od začatia konania. V opačnom prípade, ako to je aj v súčasnosti

v praxi zaužívané, psychológ sa môže naďalej priberať podľa závažnosti situácie a náročnosti vydať vhodný a adekvátny rozsudok, avšak kolízny opatrovník by mal mať v takomto prípade dostatočné psychologické vzdelanie, keďže je účastníkom konania od počiatku až do konca, jeho povinnosťou je zastupovať záujmy dieťaťa a jeho slovo tvorí dôležitú súčasť a z veľkej časti ovplyvňuje rozhodnutie sudcu. Kolízny opatrovník s psychologickým vzdelaním a v pracovných podmienkach, ktoré túto prácu vyžadujú, by na základe povinne odvedených početných návštev domácností, poznal lepšie tie faktory, ktoré sú v daných prípadoch naozaj podstatné, a ktoré majú byť objektom jeho skúmania a pozorovania. Za takýchto podmienok by pravdepodobne správa kolízneho opatrovníka nahradila vedomosti a prínos psychológa, ktorého prítomnosť na súdnych pojednávaniach a ani jeho správa pri každom prípade pojednávajúcom o malom dieťati, podľa slovenského štátu, nie je nevyhnutná.

Nasledovné odporúčanie, ktoré sa z výskumu vyvinulo znie, že sudcovia by mali byť rozlíšení podľa odboru zamerania, aby nenastal problém zložitosti preorientovania vecného zmýšľania na zmýšľanie založené viac na emočnej a empatickej báze, ktoré si práve jednanie o deťoch vyžaduje. Tak isto by znalosť psychológie nemala absentovať v okruhu rodinného práva. Rodinné právo si vyžaduje prístup právnikov aj sudcov, ktorý môže byť dosiahnutý výlučne len prostredníctvom znalostí z psychológie a oveľa väčšou znalosťou ľudských práv, dôstojnosti a slobôd, než ktorou súčasní právnici (ne)disponujú.

Avšak za najväčšie zlyhanie slovenskej legislatívy a teda právneho prístupu k malým deťom sa považuje jej neschopnosť implementovať už odsúhlasené, podpísané a ratifikované. Totiž najsmutnejším faktom je, že za základom dobrej praxe sa skrýva dobrá teória, dobrý návod, a práve ten my, ako Slovenská republika, už z časti máme – menom Dohovor o právach dieťaťa - no bohužiaľ, ako sa zdá, slúži iba ako ďalší byrokratický doplnok, a nie ako recept na správne fungovanie štátu voči najzraniteľnejším, no zároveň veľmi dôležitým členom spoločnosti. Dohovor vytyčuje a hovorí to tom, aké sú práva dieťaťa s ohľadom na ich aj vývinové potreby, z pomedzi všetkých ostatných, a tak predostiera štátu úspešný návod na vhodné správanie sa a postoj voči deťom, ktoré sa často stanú nepriamymi účastníkmi súdneho konania, a aj bez ich vlastného previnenia sú týmto konaním postihnuté najviac negatívne. Tak ako aj spomínaný medzinárodný dokument zdôrazňuje tvorbu

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väzby s primárnym opatrovníkom a celkovú stabilitu v živote nepľnoletého jednotlivca, tak sa aj ja opieram o tieto abstraktné, no najdôležitejšie potreby hlavne malých detí, ktoré však ústia do ďalších fundamentálnych emócií ako je láska a dôvera, a tie sú nezastupiteľnými pocitmi aj u starších jedincov.

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