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**DOMESTIC VIOLENCE AND CHILDREN'S RIGHTS:
AN ANALYSIS OF THE DUTIES TO GOOD
ADMINISTRATION OF JUSTICE AND TO
EFFECTIVE REMEDIES UNDER ARTICLES 41
AND 47 OF THE CHARTER OF FUNDAMENTAL
RIGHTS OF THE EUROPEAN UNION
AND THE ISTANBUL CONVENTION**

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SANDRA INÊS FEITOR*

SUMMARY: 1. Introduction; 2. Domestic violence dynamics and coercive control; 3. Fundamental right to family life; 4. Victim protection under the Istanbul Convention and the UNCRC; 5. Good administration of justice and effective remedies; 6. Case study – Tribunal da Relação de Lisboa Ruling of 11 January 2022 (TRL); 7. Conclusion.

ABSTRACT: Domestic violence constitutes a grave violation of human dignity and individual rights. Unfortunately, inadequate communication and coordination between criminal and family courts often hinder the effective implementation of the Istanbul Convention. Even when interaction occurs, family court decisions can sometimes conflict with criminal convictions, leaving victims and their children without adequate protection. A striking example is the ruling of the Tribunal da Relação de Lisboa (TRL)¹ of 11 January 2022,² where the Court ordered a shared residence arrangement for a child with the abusive parent. This decision fails to comply with the Istanbul Convention, as well as with Articles 9 and 18 of the United Nations Convention on the Rights of the Child (UNCRC), Article 8 of the European Convention on Human Rights (ECHR), and Articles 41 and 47 of the Charter of Fundamental Rights of the European Union (EU Charter), as it neglects to provide effective remedies and good administration of justice for the victims involved, once the child was also a witness victim of the aggressions against the mother.

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KEYWORDS: family; children; domestic violence; shared parenting; good administration of justice.

1. INTRODUCTION

Family life is a fundamental right; however, it is not absolute, as it must always prioritise the best interests of children – a concept that is undetermined and must be assessed on a case-by-case basis. In situations involving ill-treatment or victimisation due to domestic violence, it is crucial to ensure the protection of children, which necessitates a careful reflection on the meaning and realisation of children’s rights.

Children are no longer regarded as mere objects of the law; rather, they are recognised as rights-holders with specific entitlements. In 1924, the League of Nations adopted the Geneva Declaration,¹ a seminal document that, for the first time, acknowledged and affirmed the existence of rights specifically pertaining to children, alongside the corresponding responsibilities of adults. The Geneva Declaration sets out children’s rights across five articles. Article 1 states, “[t]he child must be given the means requisite for its normal development, both materially and spiritually,” while Article 4 asserts, “[t]he child must be put in a position to earn a livelihood, and must be protected against every form of exploitation”.

The Geneva Declaration marked the first formal recognition of the vulnerability of children and the need for their protection and distinct treatment. Although not a legally binding instrument, the signatories undertook to incorporate its principles into their national laws. Subsequently, the United Nations General Assembly adopted the Universal Declaration of Human Rights,² which emphasizes human dignity in its preamble and first article. Moreover, Article 25 affirms the right of children to social care and protection, stating that “[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

1 Available at <https://www.humanium.org/en/text-2/>

2 Available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

In 1959, the United Nations General Assembly adopted the Declaration of the Rights of the Child, which recognises various rights of children, including the rights to education, play, a supportive environment, and healthcare. Subsequently, in 1990, the United Nations General Assembly adopted the Convention on the Rights of the Child,³ which is widely regarded as a landmark achievement in human rights, as it affirms children's rights as fundamental human rights.

Between the initial recognition of children's rights and their practical implementation – *an ongoing endeavour to this day* – children were often regarded merely as “*working forces*.” Regrettably, this view persists in some countries where human rights, including children's rights, are neither recognised nor effectively enforced. In pre-industrial societies, traditional family structures typically consisted of extended families, including grandparents, parents, children, and sometimes other relatives, all living together under the authority of an elderly patriarch who wielded absolute power. During this period, children contributed labour, working in the fields to help support their families.⁴

Throughout history, children from lower social classes have often been regarded merely as labourers, deprived of the opportunity to experience a genuine childhood, with their right to such an experience rarely recognised.⁵ Both the Industrial Revolution and the French Revolution brought profound changes to the medieval family model. The French Revolution challenged the sacramental nature of marriage, reinterpreting it as a contractual arrangement, which contributed to the emergence of the secular or bourgeois family. Meanwhile, the Industrial Revolution heightened the demand for labour outside the home, leading to a diminished sense of family community, which was ultimately replaced by a proletarian lifestyle.

3 Available at <https://www.unicef.org/child-rights-convention/convention-text>

4 Pinheiro, Jorge Duarte, *Perspectivas de Evolução do Direito da Família em Portugal*, in *Textos de Direito da Família para Francisco Pereira Coelho*, [coord. Guilherme de Oliveira], Centro de Direito da Família da Faculdade de Direito da Universidade de Coimbra, Imprensa da Universidade de Coimbra, Coimbra, 2016, pp. 347-366.

5 Matoso, José, *História da Vida Privada em Portugal: Os Nossos Dias*, Temas e Debates Editora, Lisboa, Portugal, 2011, *passim*.

Therefore, the influence of Liberalism, which advocates for individual freedom and opposes restrictions on the free movement of goods, has, over time, contributed to the emergence of the contemporary nuclear family, typically defined as comprising parents and their children. This shift, alongside increased labour mobility, has disrupted the family structure, leading to a gradual erosion of the essential functions it once provided.⁶ In the modern context, the family increasingly prioritises affection and emotional bonds as fundamental elements of personal fulfilment,⁷ with parenting and family life serving as the foundational components of this emotional framework.⁸

Today's family dynamics reflect a reconfiguration of roles and a shared approach to parental responsibilities. The modern family is governed by the principle of affection, where emotional and affective bonds hold a privileged position over mere blood relations.⁹ The historical evolution of family and childhood has been accompanied by a growing social and legal recognition of children's needs for care and affection, as well as their unique place within the family structure.

Today, children's rights must be viewed in conjunction with child-friendly justice, regarded as both human rights and personal rights, anchored in human dignity. Over time, and with shifts in cultural norms, societal understandings of violence and victimisation have evolved. The recognition of children's rights has underscored their inherent vulnerability and the imperative for special protections, notably through acknowledging the child witness to domestic violence as a victim in their own right.

6 Proença, Gonçalves, *Manual de Direito da Família*, Universidade Lusíada Editora, Lisboa, Portugal, 2004, p. 19.

7 Cunha, Rodrigo da, *Princípios Fundamentais e Norteadores para a Organização Jurídica da Família*, Editora Del Rey, Florianópolis, Brasil, 2004.

8 Barreto, Luciano Silva, *Evolução Histórica e Legislativa da Família*, Série Aperfeiçoamento de Magistrados 13, 10 Anos do Código Civil - Aplicação, Acertos, Desacertos e Novos Rumos, Volume I, Brasil, 2010, pp. 205-214, [online], available at: http://www.emerj.tjrj.jus.br/serieaperfeiçoamentodemagistrados/paginas/series/13/volumeI/10anosdocodigocivil_205.pdf.

9 Campos, Maria Teresa, *Um Estudo Fenomenológico da Experiência de Rapto Parental*, Tese de Mestrado em Psicologia Clínica, ISPA, Lisboa, Portugal, 2012, p. 10. *My translation*.

2. DOMESTIC VIOLENCE DYNAMICS AND COERCIVE CONTROL

Domestic violence, though not a new phenomenon, only gained heightened public attention with the feminist movements of the 1960s.^{10/11} It extends beyond marriage to include de facto partnerships, regardless of gender, as well as dating relationships and familial settings involving children. Domestic violence fractures family structures, with children often affected as direct victims or as witnesses to abuse.

[C]hildren are victims of domestic violence, including as witnesses to familial violence, a serious violation of human rights..., hindering the fulfilment of the objectives of equality, development, and peace, and violating, hindering, or nullifying the full exercise of human rights and fundamental freedoms.¹²

Therefore, domestic violence constitutes a grave affront to the dignity, free development of personality, and personal fulfilment of family members. As defined by Article 3(b) of the Istanbul Convention,

“domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

Law No. 59/2007, of 4 September 2007, distinguishes the offence of ill-treatment from that of domestic violence. It establishes, under paragraph 1 of Article 152 of the Portuguese Penal Code, the following:

10 Pais, Elza, *Violência Doméstica – Perfil da Prevenção e da Intervenção em Portugal*, in *Polícia e Justiça, Revista do Instituto Superior de Polícia Judiciária e Ciências Criminais*, III Série, Número Especial temático, Coimbra Editora, Coimbra, 2004, *passim*.

11 beleza, Teresa, “*Clitemnestra Por Uma Noite*”: *A Condição Jurídica das Mulheres Portuguesas no Séc. XX*”, *Panorama da Cultura Portuguesa no séc. XX*, F. de Serralves e Porto 2001, *passim*.

12 Available at <http://plataformamulheres.org.pt/site/wp-content/ficheiros/2016/01/Plataforma-Accao-Pequim-PT.pdf>

If a person, whether repeatedly or not, inflicts physical or psychological abuse, including corporal punishment, false imprisonment, sexual misconduct, or denies access to or enjoyment of individual or joint financial and property resources:

- (a) against a spouse or former spouse;
- (b) against a person of either gender with whom the offender has or has had a relationship similar to that of spouses, regardless of cohabitation;
- (c) against a co-parent of a shared child in the first degree of kinship; or
- (d) against a person who is particularly vulnerable due to age, disability, illness, pregnancy, or economic dependence, and who resides with the offender;
- (e) against a minor who is a descendant of the offender or of one of the individuals referred to in paragraphs (a), (b) or (c), even if not cohabiting with the offender;

they shall be liable to a term of imprisonment between one and five years, unless a more severe penalty is applicable under another legal provision.

Paragraph 2 of the same provision states:

In the case set out in the preceding paragraph, if the offender:

- (a) *commits the act against a minor, in the presence of a minor, in the shared residence, or in the residence of the victim...*¹³

they shall be liable to a term of imprisonment between two and five years.

This paragraph clearly and unequivocally addresses the indirect victimisation of children. However, there is a common perception that this form of wrongful conduct, which aggravates the offence when committed “against a minor, in the presence of a minor, in the shared residence, or in the residence of the victim,” lacks the requisite elements to be considered a distinct criminal offence. This perception persists despite such circumstances increasing the severity of the offence outlined in paragraph 1.

Domestic violence is characterised by a tripartite cyclical pattern.¹⁴ The first phase involves escalating tension, which creates a hostile

13 My italics.

14 Walker, Lenore E., *The Battered Woman*, Harper and Row Publisher, New York, USA, 1979.

environment accompanied by victim-blaming. The second phase is marked by the act of violence itself, during which the victim may either passively endure the assault or attempt to defend themselves and stop it. This phase, characterised by the intensity or recurrence of the violence, often leads to conflicting emotions for the victim, torn between love for the aggressor and resentment for the abuse, along with feelings of guilt induced by the aggressor's manipulation. The third phase is a period of calm, often referred to as the 'honeymoon' phase, in which the aggressor expresses remorse and professes love. The victim, in turn, may relent, some semblance of affection and connection is restored, and the cycle begins anew.^{15/16}

As a result, victims of domestic violence may develop various psychological symptoms, including cognitive and memory impairments, cognitive dysfunctions such as flashbacks and nightmares, difficulties with attention and concentration, and mental confusion. They may also experience distorted self-beliefs, post-traumatic stress, regressive memories of traumatic events, depressive or avoidant behaviours, and anxiety disorders such as disorganization, hypervigilance, phobias and panic attacks. Victims may also internalise beliefs in myths surrounding domestic violence, including stereotypes about family roles and expectations within a marriage. This can lead to submission, feelings of personal and relational failure, and a distorted concept of love that fosters self-sacrifice and unhealthy dependency on their partner.^{17/18}

15 AAVV, *Manual Alcipe para o Atendimento de Mulheres Vítimas de Violência*, 2.ª edição revista e actualizada, APAV edição, Lisboa, 2010, pp. 27-28.

16 Paulino, Mauro; Rodrigues, Miguel, *Violência Doméstica - identificar, avaliar, intervir*, Prime Editora, 2016, pp. 43-45.

17 Manita, Celina, *Dinâmicas e Consequências da Violência Doméstica. o(s) Valor(es) da Liberdade e da Vida*, in Conferência Regional Paramentos Unidos contra a Violência Doméstica contra as Mulheres, Bragança, 2007, [online], available at http://app.parlamento.pt/violenciadomestica/conteudo/pdfs/apresentacoes/Celina_Manita.pdf.

18 Walker, Lenore E., *Battered Woman Syndrome*, Springer Publisher Company, 4th edition, USA, 2017, pp. 50-51.

3. FUNDAMENTAL RIGHT TO FAMILY LIFE

The person – and children are indeed people – is shaped through their actions, which in turn form their personality. Furthermore, an individual develops in relation to others,¹⁹ with respect for their autonomy being an unconditional value. The capacity for self-determination, rational thinking, and the recognition of one's inherent dignity form part of a continuous process of development that remains unfinished²⁰ and ever-evolving.²¹ In this sense, “development is a gradual, lifelong process, with the individual continually absorbing and interpreting the stimuli of their environment.”²² Through these interactions, especially within the family, children construct their sense of self and define themselves as individuals.

Family life is a cornerstone of family law, embedded within the public-private dichotomy that underpins this field, with particular emphasis on the protection of children's rights²³ and on the principle of human dignity. This focus signals a genuine re-personalization of children's rights. Family life is recognised as a fundamental right, as set out in Article 36, paragraphs 5 and 6 of the Portuguese Constitution, and must be understood in connection with the constitutional right to the free development of the personality in Article 26, paragraph 1, as well as the right to personal fulfilment in Article 67, paragraph 1.

The right to respect for private and family life, as enshrined in Article 8 of the ECHR, is subject to a dynamic and evolving interpretation by the ECtHR, which continually adapts its understanding of the concept of family life in accordance with contemporary developments in the family institution across societies.

19 Magalhães, V., Ser Pessoa, o Caminho de uma Definição, in *Bioética*, [coord. Luis Archer, Jorge Biscuais, Walter Osswald, Editora Verbo, Lisboa, 1996, pp. 63-64.

20 Kant, Immanuel, *Crítica da Razão Prática*, Editora Acropolis, Brasil, (sem ano), *passim*.

21 Beauchamp, Tom; Childress, James, *Principles of Biomedical Ethics*, Oxford University Press, England, 2001, pp. 57-70.

22 Nogueira, Jefferson M., *Considerações Sobre o Desenvolvimento Infantil*, in *Psicologia.pt*, Portugal 2020 [online], available at <https://www.psicologia.pt/artigos/textos/A1383.pdf>

23 Canotilho, Gomes; Moreira, Vital, *Constituição da República Anotada*, vol. I, 4.ª edição, Coimbra Editora, Coimbra, 2014, p. 870.

Under this dynamic interpretative approach,²⁴ the ECtHR maintains that the absence of cohabitation between a child's parents does not constitute a legitimate basis for their exclusion from family life.²⁵ On the contrary, the mere filiation between a child and a parent is, *ipso facto*, recognised as family life.²⁶ The ECtHR's concept of family life has evolved in an inclusive manner, extending beyond the narrow legal definition to embrace "a material or substantive concept of family, primarily focused on identifying the existence of affective and effective ties that bind the individuals involved."²⁷ This perspective is particularly significant in the context of parental relationships, where cohabitation is not required for the ECtHR to recognise a family bond. Such a bond is established solely through the act of filiation:²⁸ "there is always a family relationship between [a parent and a child] by the simple fact of birth, and only exceptional circumstances may determine otherwise."²⁹

It is important to clarify that a family tie is distinct from an emotional bond, the existence of which should be assessed on a case-by-case basis. The latter is independent of the former, and establishing the presence of an emotional bond between parent and child requires careful evaluation. While parental separation does not sever the family relationship between parents and children, the absence of an emotional bond may justify an exception to the principle that family life is a relationship existing from birth and is, generally, unbreakable. The ECtHR has emphasised that "what truly matters in recognising family life is the effectiveness of the real ties uniting the individuals concerned."^{30/31}

24 Almeida, Susana, *O Respeito pela Vida (privada e) Familiar na Jurisprudência do Tribunal Europeu dos Direitos do Homem: A Tutela das Novas Formas de Família*, Coimbra Editora, Coimbra, 2008, p. 66.

25 Case Berrehab v. The Netherlands, 21.06.1988, in Almeida, Susana, *O Respeito pela Vida (privada e) Familiar na Jurisprudência do Tribunal Europeu dos Direitos do Homem: A Tutela das Novas Formas de Família*, Coimbra Editora, Coimbra, 2008, p. 73.

26 *Ibidem*.

27 Gil, Ana Rita, A Convivência Familiar nos casos de regulação e exercício das responsabilidades parentais à luz da jurisprudência do Tribunal Europeu dos Direitos Humanos, in *Revista do Ministério Público*, n.º 153, Janeiro-Março 2018, pp. 61-91.

28 *Ibidem*.

29 *Ibidem*.

30 *Ibidem*.

31 Case Neves Caratão Pinto v. Portugal, complaint 28443/19, ECtHR Ruling of 13/07/2021, available at <https://hudoc.echr.coe.int/eng?i=001-211030>; Ruling of 26 May 1994, Keegan v. Ireland, complaint 16969/90, available at: <https://hudoc.echr.coe.int/eng?i=002-10447>; Ruling of

This reasoning, in conjunction with Articles 26, 35, 36 and 67 of the Portuguese Constitution, as well as Articles 7 and 24 of the EU Charter, supports the conclusion that the fundamental right to personal relationships between children and parents cannot be arbitrarily denied.

In the context of the fundamental right to family life enshrined in Article 8 of the ECHR, States bear a positive duty to take all necessary measures to restore family life. The unjustified denial of or interference with family life should not lead to the severance of the family bond.³² The ECtHR recognises a relative margin of appreciation afforded to national authorities, allowing them to balance competing interests.³³ Moreover, the domestic courts' inertia, which may lead to the breakdown of familial ties, must be taken into account.^{34/35} The failure of parents to cooperate and comply with judicial decisions aimed at restoring family relationships does not absolve States of their positive duties.³⁶ Furthermore, the Court makes it clear that leniency towards non-compliant parents is unwarranted, and the imposition of sanctions on parents should not be ruled out.³⁷

Consequently, family life is legally protected, reflecting both the objective and subjective dimensions of the re-personalization of family law under the Portuguese Constitution. In Constitutional Ruling No. 416/2011, it is stated that:

The right to coexistence among family members is a subjective extension of the protection of the family unit, an essential condition for the personal fulfilment of its members: parents, as parents; children in relation to their parents, as children; and children in their relationships with one another, as siblings.³⁸

27 October 1994, *Kroon et. al. v. The Netherlands*, complaint 18535/91, available at: <https://hudoc.echr.coe.int/eng?i=001-57904>

32 See ECtHR 22 June 1989 [*Eriksson v. Sweden*]; ECtHR 27 November 1992 [*Olsson v. Sweden*]

33 See ECtHR 16 February 2016 [*Soares de Melo v. Portugal*]

34 Case *Neves Caratão Pinto v. Portugal*, complaint 28443/19, ECtHR Ruling of 13 July 2021, available at: <https://hudoc.echr.coe.int/eng?i=001-211030>

35 See ECtHR 22 February 2022 [*Manteigas v. Portugal*]; ECtHR 22 May 2012 [*Santos Nunes v. Portugal*]

36 See ECtHR 22 November 2005 [*Reigado Ramos v. Portugal*]

37 See ECtHR 01 December 2009 [*Eberhard and M. v. Slovenia*]

38 See Case No. 753/2010, 3rd Chamber, Rapporteur Justice Maria Lúcia Amaral, available at <http://www.tribunalconstitucional.pt/tc/acordaos/20110416.html>

In a similar vein, Ruling No. 193/2006 also supports this interpretation.³⁹

It is evident that “growing up is a dynamic, biological, and relational phenomenon,” which profoundly entails for children a sense of belonging and integration. “To belong... is to develop as part of something that transcends being itself in order to be,” a process which is shaped and cultivated within the family. It is crucial to understand that “belonging is not part of learning as a process of cognitive elaboration..., it is a state of mind born from the coherence of a contingency of affections.”⁴⁰

This underscores why it is fundamental for the development of children’s being and the free evolution of their personality to experience family life with both parents, to preserve this connection, and to maintain its health, regardless of cohabitation. Article 8 of the ECHR imposes both negative and positive duties on Member States, further reinforced by Articles 7 and 24 of the EU Charter.

As children are recognised as subjects of law, a re-personalization of children’s rights emerges, emphasising that, alongside the fundamental right to personality development, children hold additional individual rights rooted in human dignity.⁴¹ Much of legal scholarship acknowledges a general personal right under Article 70 of the Portuguese Civil Code, which offers protection against any unlawful infringement or mere threat, encompassing an open category of personal rights.

It is recognised that this right applies equally within family law and children’s law, particularly in the exercise of parental rights and responsibilities, as well as in the context of parent-child relations. This is further supported by the provisions of Articles 1887-A and 1906, paragraphs 5 through 9 of the Civil Code, which establish an individual and reciprocal right to family life. Article 1887-A provides that “parents may not unjustifiably deprive children of contact with their siblings and direct ancestors,” while Article 1906, paragraph 5, stipulates that “the court shall determine the child’s residence

39 See Case No. 919/15, 2nd Chamber, Rapporteur Justice Pedro Machete, available at <http://www.tribunalconstitucional.pt/tc/acordaos/20160193.html>

40 AAVV, Crescer, Ser e Pertencer, in *Estudos de Homenagem a Rui Epifânio*, [coord. Paulo Guerra, Armando Leandro, Laborinho Lúcio], Almedina, Coimbra, 2010, p. 129.

41 Feitor, Sandra Inês, *Convivência Familiar e Alienação Parental sob a Perspectiva dos Direitos de Personalidade*, Atlântico Editora, Lisboa, 2023.

and visitation rights in accordance with the child's best interests, taking into account all relevant circumstances, including any parental agreement and each parent's willingness to promote regular contact between the child and the other parent."

As the majority of legal scholars suggest, and as case law from certain contracting states supports, the provisions of the ECHR are directly applicable within the legal systems of those States. In the case of Portugal, this means that the provisions of the ECHR have direct effect (i.e., they are self-executing)..., by virtue of the... automatic reception clause set out in Article 8, paragraph 2, of the Portuguese Constitution. This clause ensures the immediate incorporation of international treaties without the need for further legislative action. As a result, these provisions create rights and duties that individuals may invoke before public authorities to safeguard their interests. This holds true despite the infra-constitutional status of the ECHR, which is subject to constitutional scrutiny (or judicial review). Nevertheless, the ECHR takes precedence over ordinary legislation (i.e., statutory law) in order to uphold the automatic reception system and the principle of *pacta sunt servanda*.⁴²

Article 7 of the EU Charter of Fundamental Rights guarantees the right to respect for private and family life, while Article 24 reinforces this by affirming children's right to maintain regular personal relationships and direct contact with both parents, unless such contact is deemed contrary to their best interests. This aligns with Article 8 of the ECHR, which similarly protects the right to family life. Furthermore, Article 52, paragraph 3 of the Charter specifies that:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

⁴² Ramos, Rui Moura, A Convenção Europeia dos Direitos do Homem: Sua posição face ao Ordenamento Jurídico Português, in *BDDC*, n.º 5, 1981, pp. 95-193.

In this context, the Draft Charter of Fundamental Rights of the European Union explains that Article 24 is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all Member States.⁴³

4. VICTIM PROTECTION UNDER THE ISTANBUL CONVENTION AND THE UNCRC

Article 9, paragraph 3 of the UNCRC recognises family coexistence as a fundamental right, though it is not absolute. It stipulates that:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

If regular contact does not align with the child's best interest or places the child at risk, family life may be suspended or subject to supervision, in accordance with Article 19, paragraph 1, which states:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

In 2009, the Committee of Ministers of the Council of Europe adopted a recommendation containing guidelines (CM/Rec(2009)10).⁴⁴ This Recommendation reinforces States' positive duties to "integrate, as appropriate, in their legislation, policy and practice the principles, and implement, as appropriate, the actions set out in the Council of Europe Policy guidelines on integrated national strategies for the protection of children from violence, as they

43 Available at https://www.europarl.europa.eu/charter/pdf/04473_en.pdf

44 Available at <https://rm.coe.int/168046d3a0>

appear in Appendix 1 to this recommendation,” aiming to prevent violence against children and enhance their protection under the UNCRC. It also encourages the establishment of child-friendly services and mechanisms.

The Council of Europe Recommendation on an integrated strategy against violence (2009)¹⁰ defines violence

as including all forms of physical or mental violence, injury and abuse, neglect and negligent treatment, maltreatment or exploitation, including sexual abuse. This definition covers the exposure of children to violence in the home and elsewhere. Violence is understood to occur not only between adults and children but also between children.⁴⁵

This broad interpretation of violence under article 19 of the UNCRC includes not only direct exposure but also indirect exposure, such as a child witnessing violence. This issue is particularly significant, as not all Portuguese courts recognise a child witness of parental violence as a victim, a matter to be examined further.

This Recommendation, grounded in the UNCRC, affirms as a core principle that

All children have the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Protecting children is a positive duty for all Member States. In Portugal, Articles 7 and 8 of the Constitution mandate adherence to the rule of law and to all conventions and treaties ratified by the country. Protecting children from violence not only promotes their welfare and best interests but also ensures the implementation of the UNCRC at the national level.

The Recommendation recognises the multidimensional nature of violence against children and calls for a holistic understanding of its circumstances, advocating an integrated approach to address this issue.

⁴⁵ Available at <https://rm.coe.int/168046d3a0>

The guidelines support the promotion of a culture of respect for the rights of the child, based on an in-depth knowledge of the rights of the child and an understanding of children's vulnerabilities and capacities. The primary target group includes all relevant professionals in contact with children.

The guidelines' core recommendations call for the development of an integrated national strategy for the protection of children from violence. The strategy is understood as a multi-faceted and systematic framework fully integrated into a national policy for the promotion and protection of the rights of the child, with a specific timeframe, with realistic targets, co-ordinated and monitored by a single agency (where possible, and in conformity with national regulations), supported by adequate human and financial resources and based on current scientific knowledge.⁴⁶

Children's rights, as outlined in the UNCRC, the Recommendations of the Council of Europe, and child-friendly justice guidelines, must be aligned with the EU Charter of Fundamental Rights. Article 3 upholds respect for physical and mental integrity, while Article 24 affirms that "[c]hildren shall have the right to such protection and care as is necessary for their well-being."

Domestic violence became a distinct offence in Portugal in 2007. Prior to that, it was regarded as a form of ill-treatment, and until the mid-1970s domestic violence was largely overlooked by society as it was considered a private family matter. In 1982, the Penal Code made ill-treatment or neglect of minors and spouses a crime for the first time. Before this, any act of aggression by a husband against his wife was not classified as a crime, as such actions were justified under the notions of 'correction' and 'instruction,' which were traditionally applied to wives and children.⁴⁷

The original version of Article 153 of the Penal Code recognised violence only when it was recurring. However, in 2007, domestic violence was established as a separate offence under Article 152 of the Penal Code, encompassing

⁴⁶ Available at <https://rm.coe.int/168046d3a0>

⁴⁷ Nunes, Carlos Casimiro; Mota, Maria Raquel, O Crime de Violência Doméstica: a al. b) do n.º 1 do art. 152º do Código Penal, *Revista do Ministério Público*, Ano 31, abril-jun 2010, Número 122. p. 132.

both recurrent and isolated incidents of violence.^{48/49/50/51} Article 152, paragraph 2, as amended in the 2007 reform, defines a victim as not only the child directly assaulted but also the child who witnesses the violence, in line with contemporary interpretations of Article 3 of the Istanbul Convention.⁵² In this context, Portuguese law acknowledges the harm caused to a child who witnesses violence between parents, leading to an increase in the minimum sentence applicable to the perpetrator.

Law No. 112/2009, of 16 September 2009, sets out the legal provisions for the prevention of domestic violence, introduces protective and supportive measures for victims, and enhances the scope for the imposition of enforcement measures against offenders, including electronic monitoring.

The Istanbul Convention was incorporated into Portuguese law in 2013, with its entry into force in 2014, through Resolution No. 4/2013 of the Portuguese Parliament.⁵³ Today, domestic violence is recognised not only as a social disgust but also as a public health issue, necessitating a multi-sectoral response.

GREVIO⁵⁴ is responsible for monitoring the implementation of the Istanbul Convention and may issue recommendations on specific areas of the Convention. Meanwhile, the Committee of the Parties oversees GREVIO's reports and conclusions and makes recommendations to the relevant Parties. Following GREVIO's examination, the findings of the investigation are transmitted to the concerned party and, where appropriate, to the Committee of the Parties and the Committee of Ministers of the Council of Europe, along with any comments and recommendations.

48 Pais, Elza, *Violência Doméstica – Perfil da Prevenção e da Investigação em Portugal. Polícia e Justiça – Revista do Instituto Superior de Polícia Judiciária e Ciências Criminais.* – Fasc. N.º Especial Temático, 2004, p. 191.

49 Belezza, Teresa, *Violência Doméstica, Revista do CEJ*, N.º 8 (especial), (1.º Semestre 2008), p. 287.

50 Belezza, Teresa, *Jornadas sobre a revisão do Código Penal: Violência Doméstica.* Fórum Lisboa: setembro, 2007.

51 Brandão, Nuno, *A Tutela Penal Especial Reforçada da Violência Doméstica*, *Revista Julgar*, n.º 12 (especial), 2010, p. 10.

52 I have translated this Article above, on page 5.

53 A “Resolution” (Resolução) is a binding document; this type of document may be used, among other purposes, to incorporate international treaties.

54 Available at <https://www.coe.int/en/web/istanbul-convention/grevio>.

In 2019, GREVIO published a report with recommendations for Portugal, stating, in short, that:

Article 31, paragraph 1, of the Istanbul Convention aims to ensure that court orders on custody and visitation rights take into account incidents of violence against the caregiver as well as against the child himself. Paragraph 2 of this article also aims to prevent access and custody rights from jeopardizing the rights and safety of the victim and/or their children.⁵⁵

The report observes that, despite legislative changes introduced in 2017, Portuguese courts do not fully adhere to the Convention's requirements. Specifically, it finds that the courts do not adequately implement mechanisms intended to protect children within the family coexistence framework when they regulate or amend parental responsibilities under Article 1906-A of the Civil Code. The report highlights that:

In Portugal, the implementation of Article 31, paragraph 1, has been hampered by the lack of co-ordination between criminal courts, where cases of domestic violence are tried, and family courts, which determine the exercise of parental responsibility.

GREVIO urges Portuguese authorities to implement necessary measures, including legislative reforms, to ensure that family courts are required to consider all issues related to violence against women when determining custody and visitation rights, and to assess whether such violence justifies restrictions on these rights. The report further recommends that, where an abuser is involved, family visitation should be supervised or suspended as appropriate. It is important to note, however, that despite these guidelines, judicial practices still reveal instances of ineffective approaches and outdated beliefs, resulting in re-victimisation and trivialisation of violence in direct violation of current legislation and the Istanbul Convention. While these practices are not widespread, they require continued attention. In sum, GREVIO concludes that:

⁵⁵ Available at <https://rm.coe.int/grevio-reprt-on-portugal/168091f16f>, p. 46.

For many victims and their children, complying with contact orders can present a serious safety risk because it often means meeting the perpetrator face to face. Hence Article 31, paragraph 2, requires parties to take measure to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim and the victim's child/children.⁵⁶

There is a need to rethink the model of family coexistence in cases involving domestic violence, ensuring that such violence is not conflated with typical parental conflicts over child custody where the issue of denial of contact arises. Article 8 of the ECHR prohibits denying contact unjustifiably and mandates the restoration of family relationships. However, in cases of proven violence, protecting children necessitates removing them from the danger, in accordance with the Istanbul Convention.

Although the right to family coexistence is a fundamental and reciprocal right under Articles 36 and 67 of the Portuguese Constitution, Article 8 of the ECHR, Articles 9 and 18 of the UNCRC, and Articles 7 and 24 of the EU Charter of Human Rights, it is not an absolute right to be pursued at any cost. This right is fundamentally grounded in the dignity of the human being and the best interests of children, in direct conjunction with Article 152 of the Penal Code, Article 1906A of the Civil Code, and Articles 3(b) and (e), 26, 31 and 33 of the Istanbul Convention, as well as the Recommendation 2079 (2015) on the Exercise of Parental Responsibilities. These provisions categorically exclude shared residence and shared parenting in cases involving domestic violence.

Article 1906-A of the Civil Code stipulates that courts shall regulate parental responsibilities in accordance with children's best interests, taking into account all relevant circumstances. These include the conduct of each parent towards the child and towards each other, as well as their willingness to promote regular contact between the child and the other parent. Furthermore, Article 44-A of the General Framework for Civil Guardianship Proceedings requires that if a restraining order on parental contact is issued, another enforcement measure is imposed, or the rights and safety of victims of domestic or family violence, including child ill-treatment or

⁵⁶ Available at <https://rm.coe.int/grevio-reprt-on-portugal/168091f16f>, p. 48.

sexual abuse, are seriously at risk, the Public Prosecutor's Office must, within 48 hours of becoming aware of the situation, seek the establishment or modification of parental responsibilities. As noted in the 2023 questionnaire response submitted by Portugal to GREVIO:

Articles 1906 and 1906-A of the Civil Code ensure that custody with the non-violent parent is preferred over foster-care. As a result of the conjugation of both articles, it is stated that when the joint exercise of parental responsibilities regarding issues of particular importance to the child's life is deemed contrary to the child's interests, namely in situations where (i) a enforcement measure is decreed or an restraining orders issued by the courts, or (ii) the rights and safety of victims of domestic violence and other forms of violence in a family context, such as child maltreatment or sexual abuse, are at serious risk, the court must, by means of a reasoned decision, order that these responsibilities be exercised by one of the parents.⁵⁷

5. GOOD ADMINISTRATION OF JUSTICE AND EFFECTIVE REMEDIES

The EU Charter of Fundamental Rights, adopted in 2000, became law with the entry into force of the Treaty of Lisbon on December 1 2009. It consolidates a range of civil, political, social and economic rights for European citizens. The Charter is grounded in universal values such as

human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.⁵⁸

Article 41 of the EU Charter enshrines the right to good administration, stating that “[e]very person has the right to have his or her affairs handled

⁵⁷ Available at <https://rm.coe.int/report-submitted-by-portugal-pursuant-to-article-68-paragraph-4-of-the/1680ad1b31>

⁵⁸ Available at https://www.europarl.europa.eu/charter/pdf/text_en.pdf

impartially, fairly and within a reasonable time by the institutions and bodies of the Union.” Additionally, “[a]rticle 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined *inter alia* good administration as a general principle of law.”⁵⁹ This right imposes a duty on Member States to ensure that justice is administered with due diligence, promptness, efficiency and fairness. If these duties are properly discharged, no further remedial action is necessary. However, in the TRL ruling which will be examined shortly, none of these positive duties has been met.

The rights to good administration of justice and to effective judicial protection are fundamental rights enshrined in Articles 20 and 268 of the Portuguese Constitution.^{60/61/62} The right to effective judicial protection, as established in these provisions, ensures access to justice both in private legal disputes between individuals and in matters involving the State. This right is further bolstered by the principles of “respect for human rights, fundamental freedoms, and of the rule of law,” as outlined in Article 6 of the Treaty on European Union.⁶³

In this context, the principle of direct effect of European Union law plays a crucial role. It refers to the immediate enforceability of EU law provisions that establish rights, freedoms and guarantees, once that EU Charter bind in the same way as treaties, under article 6 of the Lisbon Treaty and article 7 and 8 of Portuguese Constitution. These provisions, once they are fundamental rights, also under articles 18, 20 and 268 of Portuguese Constitution may be directly

59 Official Journal of the European Union C 303/17 - 14.12.2007.

60 Santos, Maria Amália, O direito constitucionalmente garantido dos cidadãos à tutela jurisdicional efectiva, in *Revista Julgar*, novembro 2019, available at <https://julgar.pt/wp-content/uploads/2019/11/20191118-ARTIGO-JULGAR-O-Direito-%C3%A0-tutela-jurisdicional-efetiva-%C3%A0-luz-da-Constituição-%C3%A7%C3%A3o-Maria-Am%C3%A1lia-Santos.pdf>

61 Canotilho, Gomes; Moreira, Vital, *Constituição da República Portuguesa Anotada*, 3.^a edição, Coimbra Editora, p. 109.

62 Alexandrino, José de Melo, *Direitos Fundamentais, Introdução Geral*, Principia, 2007, pp. 20 e ss.

63 Santos, Maria Amália, O direito constitucionalmente garantido dos cidadãos à tutela jurisdicional efectiva, in *Revista Julgar*, novembro 2019, available at <https://julgar.pt/wp-content/uploads/2019/11/20191118-ARTIGO-JULGAR-O-Direito-%C3%A0-tutela-jurisdicional-efetiva-%C3%A0-luz-da-Constituição-%C3%A7%C3%A3o-Maria-Am%C3%A1lia-Santos.pdf>

invoked by individuals in national courts, and judges are required to fill any legal gaps that may arise in the application of Fundamental rights.⁶⁴ Fundamental rights are transversal to European Union as stated by Lisbon Treaty.

With regard to the right of access to the courts, which allows individuals to assert their legal rights, the Constitution expressly guarantees the right to due process and to a decision within a reasonable time. The right of action, or the right to initiate legal proceedings, must be effective, meaning it must be pursued through an equitable process. For a process to be considered equitable, it must encompass all essential rights: the right to bring an action, the right to a fair process, the right to a timely judgment, and the right to enforce the court's decision. This framework is consistent with the principles outlined in Article 6 of the ECHR, and is reflected

in Article 20, paragraphs 1 to 4 of the Portuguese Constitution, which in itself enshrines an inalienable guarantee of access to law and to the courts, and ensures the protection of legally recognised rights and interests; specifically, [Article 20] mandates that decisions be rendered within a reasonable time and in accordance with due process of law.⁶⁵

It is of paramount importance to ensure the effective realisation of the right to have disputes resolved. Disputes must be adjudicated within a reasonable time and in full compliance with the guarantees of impartiality and independence, through the proper application of adversarial procedures. This requires a procedurally appropriate framework that prevents delays in judicial proceedings, which could undermine the efficacy of legal protection. Justice can only be considered fair if it is delivered in a timely manner; accordingly, the legislature is obliged to establish a procedural framework that ensures the prompt rendering of judicial decisions.⁶⁶

⁶⁴ *Ibidem*.

⁶⁵ Monteiro, Maria João, A concretização tutelar do artigo 20.º n.º 5 da Constituição e os procedimentos judiciais, in *Revista Lusitana. Direito*, 23-23 (2020), pp. 221-259.

⁶⁶ Santos, Maria Amália, O direito constitucionalmente garantido dos cidadãos à tutela jurisdicional efectiva, in *Revista Julgar*, novembro 2019, available at <https://julgar.pt/wp-content/uploads/2019/11/20191118-ARTIGO-JULGAR-O-Direito-%C3%A0-tutela-jurisdicional-efetiva-%C3%A0-luz-da-Constituição-%C3%A7-%C3%A3o-Maria-Am%C3%A1lia-Santos.pdf>

It is the Constitution itself, in the concluding part of paragraph 5 of Article 20, that guarantees effective and timely protection against threats to, or violations of, rights, freedoms, and guarantees. In other words, protection is assured not only when rights have already been infringed, but also when there is a risk of such infringement. This includes the availability of urgent interim measures whenever there is a reasonable likelihood of a serious violation of a right, thus giving the proceedings an urgent nature. It is important to note that Article 20 of the Portuguese Constitution reflects the provisions of both Article 41 and Article 47 of the EU Charter of Fundamental Rights. This imposes a clear duty on both the judiciary and the public authorities.

Children are no longer viewed merely as objects of the law but are recognised as holders of legal rights. The UNCRC affirms that children's rights are rooted in human rights and dignity. It further states that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection."⁶⁷

The UNCRC expressly recognises the right to family life. Article 9, paragraph 1, stipulates: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine... that such separation is necessary for the best interests of the child." Paragraph 3 further provides: "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." However, these rights may be undermined by parental conflict and separation, a situation that warrants particular attention.

The right to family life is fundamental, as "[t]he mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even when the relationship between the parents has broken down."⁶⁸ This principle imposes a duty on national authorities to respect,

⁶⁷ Available at <https://www.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf>

⁶⁸ See *K. and T. v. Finland*, Grand Chamber judgment of 12 July 2001, no. 25702/94; *R.I. and Others v. Romania*, Committee Judgment of 4 December 2018, no. 57077/16, § 53.

protect and ensure the effective implementation of this right. Since child welfare proceedings fall under what is referred to in Portugal as ‘voluntary jurisdiction’,⁶⁹ as established in Article 986 of the Civil Procedural Code, Article 12 of the General Framework for Civil Guardianship Proceedings, and Article 100 of the Child and Youth Safeguarding Law, the implementation of children’s rights is managed on a case-by-case basis. Decisions are made according to principles of proportionality and suitability, guided by the best interests of the child in each individual case and with respect for the fundamental right to family life.

As noted,

[t]he adequacy of a measure is to be judged by the swiftness of its implementation. The passage of time can have irremediable consequences for relations between a child and a parent who do not cohabit. The duration of proceedings concerning children takes on a particular significance, because there is always a danger that any procedural delay will result in the *de facto* determination of the issues.⁷⁰

National authorities are thus bound by positive duties to protect family life and adopt effective measures to prevent *de facto situations* from arising. Judicial inertia and excessive delays are incompatible with the promotion of children's rights, as is any failure to uphold positive duties, even when parental non-cooperation or repeated non-compliance complicates proceedings.^{71/72}

Article 47 of the EU Charter of Fundamental Rights states that “[e]veryone whose rights and freedoms guaranteed by the law of the Union are

69 “Voluntary jurisdiction” refers to cases where courts are involved in matters without an actual dispute between parties—such as guardianship, probate, or certain family matters—where the court’s role is to oversee and ensure that rights are upheld, rather than to resolve a conflict.

70 See judgment of 11 February 2016, no. 42534/09, § 77; *R.I. and Others v. Romania*, judgment of 4 December 2018, no. 57077/16, § 56.

71 See *Hokkanen v. Finland*, judgment of 23 September 1994, no. 19823/92; *Mitrova and Savik v. ‘The Former Yugoslav Republic of Macedonia’*, judgment of 11 February 2016, no. 42534/09, § 77.

72 *Aire Center* (coord.), *Children and the European Court of Human Rights - An overview of the jurisprudence*. UK, 2019, available at <https://www.rolplatform.org/wp-content/uploads/2020/11/rol-children-eng.pdf>

violated has the right to an effective remedy before a tribunal....”⁷³ This is akin to Article 6 of the ECHR, which provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....” This principle is also reflected in Article 20 of the Portuguese Constitution.

The Committee on the Rights of the Child, in its General Comment No. 5 of 2003,⁷⁴ affirms that all children’s rights “must be regarded as justiciable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.” The Committee further states that, “[w]here rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration.” Despite this, twenty-one years later, the full realisation of children’s rights still requires better practices and implementation measures, as national authorities continue to fail to implement effective remedies.

Article 47 of the EU Charter can be linked to several other rights within the Charter, notably Articles 7 and 24, and must be read in conjunction with the UNCRC and the ECHR:

Pursuant to Article 52(3) of the Charter, the meaning and scope of the right to an effective remedy and to a fair trial guaranteed by Article 47 of the Charter must be the same, or more extensive, as the meaning and scope of the rights laid down in Articles 6(1) and 13 of the ECHR. This is determined by the text of the ECHR as well as the case-law of the European Court of Human Rights in the light of which Article 47 of the Charter is to be interpreted.⁷⁵

73 Official Journal of the European Union C 303/17 – 14 December 2007. Available at <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial>

74 Available at <https://www.refworld.org/legal/general/crc/2003/en/36435>

75 Gutman, Kathleen, *The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?*, in *German Law Journal* (2019), 20, pp. 884–903, available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/B52CC437EF039A8A478C901B29A51C59/S2071832219000671a.pdf/essence_of_the_fundamental_right_to_an_effective_remedy_and_to_a_fair_trial_in_the_caselaw_of_the_court_of_justice_of_the_european_union_the_best_is_yet_to_come.pdf

In this context, Article 47 cannot be viewed or interpreted without reference to Article 41, as the latter reinforces the right to good administration. Effective remedies require good administration of justice, including a fair trial, timely decisions, and enforcement to ensure the protection of rights. This means that courts must be efficient and diligent in applying remedies in a timely manner to restore violations of fundamental rights. Otherwise, justice will not be served, leading to *de facto situations* that result in irreparable harm to children:

The right to effective judicial protection, as expressed in Article 47 of the [Charter] has (...) acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own.⁷⁶

Article 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights jointly uphold the right to an effective remedy, a fundamental aspect of access to justice. While the specific form of the remedy is not strictly defined, states have some discretion in its implementation.⁷⁷ To qualify as effective, remedies must meet the positive duties established under Articles 7 and 24 of the EU Charter, Article 8 of the ECHR, and Articles 9 and 18 of the UNCRC, ensuring the full protection of fundamental rights.

In sum, the good administration of justice requires the timely application of effective remedies, requiring courts to make decisions, even provisional ones, in a manner that promptly restores the stability needed for regulating parental responsibilities and ensuring child welfare. This may involve facilitating coexistence or implementing protective measures. In cases of domestic violence, as discussed further below, safeguarding the child requires their removal from harmful situations, avoiding the common mistake in family courts of attempting reconciliation between the parties. Victimisation must

⁷⁶ Opinion of Advocate General Cruz Villalón at para. 39, Case C-69/10, Brahim Samba Diouf v. Ministre du Travail (Jul. 28, 2011), available at <http://curia.europa.eu/juris/recherche.jsf?language=en>

⁷⁷ European Council of Europe, Handbook on European law relating to access to justice, 2016. Available at https://www.echr.coe.int/documents/d/echr/handbook_access_justice_eng

be fully acknowledged, and victims adequately protected. All measures, whether temporary or final, must be implemented swiftly, grounded in a thorough case assessment and a multidisciplinary approach that integrates legal knowledge with insights from complementary fields.

If, from the outset, the courts undertake to conduct cases concerning children diligently and expeditiously, and take urgent measures, whether provisional or not, to establish parental and protective rules when necessary, they will already be applying effective remedies. Therefore, full compliance with Article 41 of the EU Charter of Fundamental Rights would eliminate the need for the application of Article 47. Effective remedies should not be viewed solely as sanctions, as the primary focus should be on preventing the need for such sanctions.

6. CASE STUDY — TRIBUNAL DA RELAÇÃO DE LISBOA RULING OF 11 JANUARY 2022 (TRL)

Portugal has enacted legislative reforms aligned with children's rights, child friendly-justice, and the Istanbul Convention. However, certain cases still fail to uphold essential standards for safeguarding children's welfare, particularly when family courts overlook criminal sanctions or convictions for domestic violence. Under Article 1906, paragraph 6, of the Civil Code, family courts may order shared residence arrangements even without parental agreement, yet in some instances disregard Article 1906-A of the Civil Code and Article 44 of the General Framework for Guardianship Proceedings, resulting in children being placed with an abusive parent.

A recent ruling from the TRL of 11 January 2022⁷⁸ misinterpreted the concept of parental alienation in a case involving a parent's conviction for domestic violence. While shared residence is generally endorsed in scientific literature and by the Council of Europe Recommendation

78 Case no. 20994/15.0T8SNT-E.L1-7, Appeal of 11 January 2022, available at <https://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497ecc/0ca6fa8b5c75d353802587d4002e93b9?OpenDocument>

2079 (2015) as the ideal arrangement for children of separated parents, it is unsuitable where protective orders or convictions for domestic violence exist, as mandated by the Istanbul Convention. The Convention clearly opposes shared residence or joint parental responsibility when a restraining order or conviction for domestic violence is in place, a principle enshrined in Article 152 of the Portuguese Penal Code, Article 1906-A of the Civil Code, and Article 40, paragraph 9, of the General Framework for Civil Guardianship Proceedings, as amended by Law No. 24/ 2017, of 24 May 2017, which aligns national law with the Istanbul Convention.

This case illustrates a failure by the national authorities to properly apply the relevant legal provisions. Given the circumstances, the Court was not lawfully entitled to order joint parental responsibility or shared residence. The Court's judgment not only overlooked these statutory protections but also misapplied the concept of parental alienation, mistakenly equating it with the notion of high parental conflict. However, where a restraining order is imposed or a conviction has been secured, current legislation—and the Istanbul Convention—mandates the imposition of interim protective measures for children. These measures may be modified or revoked once the judgment becomes final (*res judicata*). The doctrine of parental alienation is therefore inapplicable in cases such as the present one, as it does not extend to situations involving protective measures mandated by a restraining order and a separate criminal conviction.

Under Portuguese Law, what can be considered parental alienation is the unjustified denial of contact and family relations, as defined in Article 1887-A of the Civil Code and Article 249, paragraph 1, subparagraph c) of the Penal Code. However, the present case failed to provide evidence of such denial, nor was there any indication of intentional disruption of the parent-child relationship. As a result, the judgment in question merits particular scrutiny and criticism, as it is not an isolated case. This type of erroneous application of legal principles distorts the understanding of various legal concepts and their intersections, leading to significant misinterpretations.

The Court states in the summary of the case under discussion that

Articles 1906-A of the Civil Code and 40, paragraph 9, of the General Framework for Civil Guardianship Proceedings establish a “presumption that the joint exercise of parental responsibility is contrary to the interests of the child” if an enforcement measure or an ancillary penalty, such as a no-contact order, has been imposed on one parent. The parent may rebut this presumption by providing evidence to the contrary, demonstrating that, despite the imposition of the enforcement measure or ancillary penalty, other circumstances exist which indicate that joint parental responsibility is in the interests of the child.

This interpretation disregards fundamental principles of criminal law and due process. In this case, the child’s father had been subjected to a protective order and subsequently convicted of domestic violence. Nevertheless, the family court permitted him to rebut the abovementioned presumption and contend that, despite being the aggressor, he should still be regarded as a suitable and responsible parent. Such an approach is not only legally unsound but also profoundly concerning.

The Court’s approach in this case appears to be heavily biased, operating under the assumption that a shared residence order should be imposed as a preventive measure against parental alienation, despite the absence of any evidence to support it. The Court asserts that

it is not children who have to adapt to the idiosyncrasies, insecurities, and conflicts of the parents; on the contrary, it is the parents who have to reinvent themselves and overcome their limitations, refining their skills to meet the needs and safeguard the best interests of children.

While this statement is correct in principle, it overlooks the fact that maintaining a shared residence arrangement following a proven instance of domestic violence effectively requires the child to adapt to the idiosyncrasies, insecurities, and conflicts of her abusive father. Furthermore, as detailed in the judgment’s reasoning, the father, being particularly attentive to the routines

and care of his daughter, would likely be distressed if deprived of regular contact with the child, potentially triggering further violent outbursts. This constitutes a grave concern.

In summary, the facts of the judgment of the TRL are as follows:

- The parents divorced, and parental responsibilities, along with family arrangements, were regulated by agreement in 2015, with included a shared residence order.

- In 2017, a child protection case was initiated (the precise grounds for the case are not specified, but it appears to be related to a domestic violence situation, as one of the conditions imposed was to “maintain good communication between the parties, refrain from denigrating each other’s character, avoid the use of inappropriate language in the presence of the minor, and prevent any form of mistreatment, including physical, verbal, or other acts of violence, either between members of the respective households or in any form of communication, whether written or verbal.”)

- The protective measure also required the victim to undergo family therapy with the aggressor.

- In 2020, the court-appointed expert report stated that altering a shared residence arrangement would be detrimental, as it would heighten the tension and conflict between the parents. The report emphasised that “any change in the child’s living arrangements would intensify the emotional distress, specifically the exhaustion, pain, and fatigue experienced by both parents, particularly the father. Such a modification would likely escalate the level of acrimony between the parties, without promoting a more stable and cooperative parental relationship.”

- On 18 November 2020, the child protection case was dismissed, as the Court concluded that no danger to the child existed. In its report, the Court stated, in short, that “the likelihood of conflict between the parents, which appears to have sustained these child protection proceedings over the years due to the potential risk of causing some negative impact on the child in the future, currently appears to be low, as the functioning of each household is considered to fall within the average expectations for families deemed ‘non-abusive,’ and no harmful situation for the child has been recorded to date.”

- The report also recommended maintaining the shared residence arrangement.

- On 6 October 2020, the father was issued a restraining order prohibiting proximity to and contact with the victim in a criminal case concerning domestic violence.

- This order was not upheld by the Family Court, which did not alter the custody arrangement or the terms of parental responsibility.

- On 2 June 2021, the father was convicted of a domestic violence offence, with ancillary measures imposed, including a restraining order prohibiting contact and proximity to the victim.

- The Family Court failed to amend the parental responsibility arrangement, despite acknowledging these criminal convictions.

- The Court was aware of the written communications exchanged between the parents, as well as the father's correspondence with the school and technicians, which include threatening statements directed towards the mother.

- Subsequently, in the presence of the child, the father punched her uncle, believing that he was mocking him.

- The Family Court has decided on the maintenance of shared residence and joint parental responsibility, determining that neither parent is currently prepared to assume sole custody.

The Court bases its decision on the theoretical framework of parental alienation, determining that a shared residence order is the most suitable approach to address the ongoing parental conflict. It also references Article 1906-A of the Civil Code, which establishes a legal presumption that may be rebutted by contrary evidence. In other words, the Court accepts that it may be in the best interests of the child to maintain the current arrangements in cases involving a restraining order and a conviction for domestic violence. Consequently, the Court relies on this presumption to avoid applying the provisions of the Istanbul Convention, thereby circumventing its scope and application to the case at hand.

The Court provides a thorough defence of shared residence but fails to distinguish between parental conflict and conduct that amounts to criminal behaviour. While the Court relies on a range of precedents to support the

shared residence order, it does not reference any case law related to domestic violence or the application of the Istanbul Convention.

Furthermore, it is asserted that “MM is positively adjusted to the parental dynamics, exhibiting no signs of distress. Although MM is aware of the conflict between the parents, she appears to have adopted an avoidant stance.” This raises concerns that violence may be trivialised, as the child could become desensitised to violent conduct.

However, the most disturbing argument presented is that

changing the child’s residence to live with one of the parents... could contribute to exposing the child to future episodes of violence, subjecting her to further instances of indirect harm. This arises from the fact that the father, who is highly attentive to the routines and care of his daughter, might exacerbate the distress and strain he is already experiencing if deprived of more regular contact with her. Such deprivation could potentially lead to extreme behaviour, with the child’s mother becoming a likely target.

It should be noted that, even after his conviction, the father continued to expose his daughter to new episodes of physical violence. The shared residence arrangement, which had been implemented by mutual agreement in 2015, failed to serve as a safeguard against the father’s aggressive and violent behaviour. Nevertheless, the Court decided to maintain the shared residence, reasoning that “it is best left as is so as not to exacerbate the abuser’s already violent tendencies.” This decision appears to have significantly undermined the fundamental principles underpinning the concept of shared residence.

A clear example of best practice in accordance with the Istanbul Convention can be found in the Tribunal da Relação do Porto Ruling of 23 May 2022 (TRP).⁷⁹ In circumstances identical to those in the TRL case, involving a conviction for domestic violence, the Court held that neither shared custody nor residence with the abusive parent should be ordered. Instead, the Court

⁷⁹ Porto Court of Appeal, rapporteur Appellate judge Pedro Damião e Cunha, case no. 2003/17.7T8STS-D.P1, available at <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/e3c2a8b41dc567888025887000440727?OpenDocument&Highlight=0,aliena%C3%A7%C3%A3o,parental>

awarded sole residence and the exclusive exercise of parental responsibility to the victim. The Court states that,

in situations of domestic violence, the Court should categorically exclude the possibility of fixing the child's residence with the abusive parent. This will apply in cases where the child has been a direct victim of violence, for obvious reasons of individual protection, which are so self-evident that no further clarification is necessary.

The Court further explained that,

by exposing the child to violence and aggression, the abusive parent has departed from the secure attachment model, which is essential for the healthy development of a child. As such, he has failed to demonstrate the requisite qualities to be considered a suitable guardian. Consequently, he is not in a position to ensure the child's residence in an environment characterised by affection, sharing, protection and security.

In the event of a conviction or the imposition of any enforcement measures by the criminal jurisdiction, these must be respected by the family jurisdiction, in accordance with the Istanbul Convention, which requires the family jurisdiction to prioritise the protection and fulfilment of children's rights, as well as their best interests. While family life is a fundamental right, it must, however, be assessed on a case-by-case basis, with the child's best interests being the paramount consideration.

To effectively implement the Istanbul Convention and comply with the principles of child-friendly justice, as well as uphold the rule of law in matters concerning child victims and family life, it is essential to ensure close communication and mutual respect between the family and criminal jurisdictions. Both jurisdictions have a legal duty to protect victims of crime. The criminal jurisdiction must promptly apply enforcement measures, within 48 hours of a victim's complaint and risk assessment, in order to prevent the escalation of violence and avoid re-victimisation. Furthermore, the child victim must always be considered, even if they are merely a witness to the violence. Where

a conviction has been obtained, appropriate ancillary orders should be made to prevent further contact and re-victimisation between the perpetrator and the victims.

Although these cases are classified as urgent, they are not always decided in a timely manner. In child protection cases that are automatically initiated in parallel with criminal proceedings, family courts must promptly issue interim protection orders to ensure that any existing criminal interim orders are upheld. In instances where no protection orders have been issued, the family court is required to assess the nature of the violence, its impact, the dynamics of the incident, and the extent of victimisation. Depending on the characteristics of the violence, the court may impose supervised contact or, in certain circumstances, suspended contact altogether. Moreover, in accordance with the Council of Europe Recommendation 2079 (2015), the Istanbul Convention, and the Grevio Reports concerning Portugal (2019 and 2023), shared residence arrangements should not be made in such cases, nor should physical custody be awarded to the perpetrator.

On the other hand, pursuant to Article 1906-A the Civil Code and Article 14 of the General Framework for Civil Guardianship Proceedings, the Public Prosecutor is under a legal obligation to initiate proceedings for parental regulation within 10 days of the issuance of a protective order. In accordance with Article 27 of the General Framework for Civil Guardianship Proceedings, these parental regulations must be coordinated with any existing child protection measures that have been imposed. This responsibility lies with the courts. In the TRL case, however, the Court failed to meet this obligation by upholding the shared residence of the child with the abusive parent, who had been convicted in the criminal courts. This constitutes a breach of the child's rights, particularly those enshrined in the UNCRC:

Violence against children constitutes a violation of their rights, compromises their social development and affects their enjoyment of other rights. It often has devastating short- and long-term mental and physical health consequences, and furthermore it produces far-reaching costs for society. The Council of Europe has committed to step up its efforts in protecting children from violence, as required

by the UNCRC, the ECHR, the European Social Charter, the Lanzarote Convention and other Council of Europe conventions.⁸⁰

Moreover, family therapy or family mediation is inadmissible in such cases. Even if no criminal sanctions or interim orders have yet been imposed, it is not permissible to compel the parties to participate in voluntary processes such as mediation or family therapy. Courts must respect the right of the alleged victim to refuse such alternative dispute resolution methods. It is the duty of the court, in strict compliance with both domestic and supranational law in force, to adjudicate the matters brought before it. Judicial officers and court advisors must have specialised, multidisciplinary training that adheres to the high standards set by the Council of Europe. As the Council of Europe emphasises, it is imperative to

[a]ddress the attitudes and conduct of officials and professionals in the justice system and law enforcement towards children through training on the rights of the child and by promoting a zero-tolerance policy against violence, humiliating and degrading treatment of children and their discrimination in the justice system.⁸¹

Additionally, Directive (EU) 2024/1385 of the European Parliament and the Council, dated 14 May 2024, on combating violence against women and domestic violence, affirms the following:

Children who witness domestic violence within the family or domestic unit typically suffer direct psychological and emotional harm that impacts their development and run an increased risk of suffering from physical and mental physical and mental illness, both in the short and long term. The acknowledgment that children who have suffered harm caused directly by having witnessed domestic violence are themselves victims marks an important step in protecting those children suffering because of domestic violence.

80 Council of Europe, *Strategy for the Rights of the Child 2022-2027*, Strasbourg, France, 2022, available at <https://rm.coe.int/council-of-europe-strategy-for-the-rights-of-the-child-2022-2027-child/1680a5ef27>

81 *Ibidem*.

Delays in processing complaints of violence against women and domestic violence can create particular risks for victims thereof, given that they might still be in immediate danger and that offenders might often be close family members or spouses. Therefore, the competent authorities should be properly trained and have the adequate expertise and effective investigative tools to investigate and prosecute such acts, without having to set up specialised services or units.

Conduct that follows these provisions is both competent and timely, and would also uphold Article 6 of the Lisbon Treaty, which incorporates and implements the EU Charter of Fundamental Rights and the European Convention on Human Rights into the national laws of the Member States. These provisions mandate that courts apply domestic laws efficiently, effectively, and in a timely manner, as required under Articles 41 and 47 of the EU Charter and Articles 6 and 13 of the ECHR. The Directive further specifies that

Member States should take the necessary measures to ensure the availability of emergency barring orders, restraining orders and protection orders to ensure the effective protection of victims and dependants. (Recitals 44 to 47).

Recognising the need to enhance improved implementation of protective mechanisms for victims and children, whether as direct victims or witnesses, the European Parliament and the Council adopted Directive (EU) 2024/1385, of 14 May 2024, on combating violence against women and domestic violence.⁸² This Directive seeks to establish a comprehensive framework for the effective prevention and combatting of violence against women and domestic violence. As stated within the Directive,

domestic violence is a violation of fundamental rights such as the right to human dignity, the right to life and integrity of the person, the prohibition of inhuman or degrading treatment or punishment, the right to respect for private and family life, the right to liberty and security, the right to the protection of

82 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L_202401385

personal data, the right to non-discrimination, including on the grounds of sex, and the rights of the child, as enshrined in the Charter and the United Nations Convention on the Rights of the Child.

To clarify and reinforce the definitions within the Istanbul Convention, the Directive states, in Article 2(c), that

‘victim’ means any person, regardless of their gender, who has suffered harm directly caused by violence against women or domestic violence, including children who have suffered harm because they have witnessed domestic violence.

Article 19(1) further establishes the duty to act without undue delay and with diligence:

Member States shall ensure that, in situations of immediate danger for the victim’s or dependants’ health or safety, the competent authorities are granted the power to issue, without undue delay, orders addressed to an offender or suspect of an act of violence covered by this Directive ordering the offender or suspect to vacate the residence of the victim or dependants for a sufficient period of time and prohibiting the offender or suspect from entering, or coming closer than a prescribed distance from, that residence, from entering the victim’s workplace or from contacting the victim or dependants in any way.

Finally, Article 32(2) of the Directive addresses the protection of children, stating that:

Member States shall establish and maintain safe places which allow safe contact between a child and a holder of parental responsibility who is an offender or suspect of violence against women or domestic violence, to the extent that the holder of parental responsibility has rights of access. Member States shall ensure supervision, as appropriate, by trained professionals in the best interests of the child.

The directive is applicable within domestic legal systems as it entries in force in EU, and must be respected, implemented, and taken into account by

courts in every case, when ratified by national authorities (*as ruled by articles 7 and 8 of Portuguese Constitution*), and bind respecting to the goals that must achieve, within a transposition processes, as ruled by article 288.º of the Treaty of the Function of European Union.

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

This means that, the directives imposes to the member states to achieve concrete goals, having some margin to choose the means to get there and implement it.

The direct effect depends on the transposition to the national level ensuring its useful effect, what has to be done within the deadline indicated in the directive, which, as its article 49 is until 14 June 2027.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 June 2027. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

The Directive entries in force on the twentieth day following that of its publication in the Official Journal of the European Union, as stated in its article 50, and, even with some limitations, individual rights can be invoked by the citizen against the state. The directive generates an immediate obligation for the member state, as soon as it comes into effect at EU level. If the signatory member state required to carry out the transposition process does not do so within the indicated period, it creates a situation of non-compliance under article 258 of the Treaty for the Function of EU⁸³.

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

7. CONCLUSION

In the present case study, the child was not protected from exposure to violence. While the child was not a direct victim, she was a witness to the violence perpetrated by her father. The Court failed to recognise the distinction between domestic violence, a felony which breaches human dignity, and a mere parental dispute concerning child custody. The Court's decision and the reasoning it employed undermine the principles of shared parenting and shared residence as set out in the Council of Europe Recommendation 2079 (2015). It also neglected to protect the child from a harmful environment, contrary to the protections afforded under both the Istanbul Convention and the UNCRC, as the child remained exposed to the violence.

Furthermore, the European Parliament Resolution of 6 October 2021 on the impact of intimate partner violence and custody rights on women and children (2019/2166(INI)) states in Point U:

83 Henriques, Miguel Gorjão, *Tratado de Lisboa Anotado e Comentado*, [coord. Porto, Manuel Lopes; Anastácio, Gonçalo], Almedina, Coimbra, 2012, pp. 1029-1031.

according to the EDVAW Platform recommendation, accusations of parental alienation by abusive fathers against mothers must be considered as a continuation of power and control by state agencies and actors, including those deciding on child custody.⁸⁴

Thus, “consideration should also be given to situations where the child, while not a direct victim, has still been exposed to violence by witnessing acts of aggression committed by one parent against the other.” It is clear “that an abusive parent is unlikely to fulfil the role of a competent and responsible caregiver. It is imperative to dispel the notion that one can be aggressive towards a spouse but kind towards the children. Once the possibility of the child residing with the abusive parent is excluded due to domestic violence, the option of an alternating residence arrangement must also be removed.” In conclusion, “the shared residence model is manifestly unsuitable in situations involving negligent, unresponsive or abusive parents.”⁸⁵

Considering also that this “reasoning applies even in the cases where the child has not been directly exposed to incidents of domestic violence (e.g., where acts of aggression did not occur in their presence), it must be concluded that, under such circumstances (and while they persist), the abusive parent cannot be regarded as capable of ensuring the desired stability in the child’s living conditions, emotional relationships, or physical and environmental surroundings.”⁸⁶

Not only did the Court in the present case study fail to comply with the Istanbul Convention, but it also failed to act with due diligence by neglecting to ensure good administration of justice and to implement effective remedies. This amounted to a failure to provide effective judicial protection, as required under current national law.

Regarding this, and considering the paramount importance of children’s rights and their effective implementation, the case presented, although not reflective of typical court decisions in domestic violence cases, remains

84 Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IP0406>

85 Perquilhas, Maria, *Violência Doméstica - implicações sociológicas, psicológicas e jurídicas do fenómeno – Manual pluridisciplinar*, CEJ, 2021, available at http://www.cej.mj.pt/cej/recursos/ebooks/penal/eb_VD2ed.pdf

86 *Ibidem*.

significant enough to warrant attention. It underscores the urgent need to establish best practices, uphold the principle of good administration of justice, and ensure a more robust application of the Istanbul Convention and the UNCRC, interpreted in light of the EU Charter of Fundamental Rights. Children's rights are undeniably human rights and must be treated as such in every judicial context.

Family and Children's Courts, due to their conciliatory and non-punitive approach, sometimes adopt practices that may prove detrimental to victims of domestic violence. These courts may attempt to reconcile victims with their aggressors, a practice sometimes captured by the phrase "the best way out is always through." In some instances, they may seek to impose joint parental responsibility in matters of significant importance (e.g., the exercise of parental authority), which necessitates ongoing communication, as well as arrangements for shared residence.

Additionally, there are occasions when these courts adopt a position of hostility towards the victim, resulting in secondary victimisation. This can include claims that a victim's refusal to participate in mediation or family therapy with the aggressor, or resistance to the children spending extended periods living with or sharing residence with the aggressor, constitutes child alienation.

The case under analysis serves as a clear example of this, as no evidence of uncooperative behaviour or misconduct on the part of the mother was ever substantiated. Furthermore, no breach of her responsibilities was demonstrated. At times, the manner in which violence and victimisation are addressed by family courts appears to romanticise or trivialise the issue, rather than adopting a firm stance that properly reflects the seriousness of the situation.

Specialised training and high standards of rigour necessitate the ability to distinguish parental alienation from other situations that may overlap with domestic violence, ensuring that the two are not conflated, as one excludes the other. Furthermore, such training demands a comprehensive, systemic understanding of the trauma and psychological projections that underpin victimisation.

Such conduct, which clearly demonstrates poor judicial practice, subjects victims to secondary victimisation. This not only exacerbates the harm

suffered but also undermines the integrity of the very system that is meant to protect children and other victims. In other words, the issue is not a lack of legal provisions but rather the absence of appropriate practices. The current law already outlines the necessary steps and procedures; what is required is simply adherence to its stipulations and mandates. In the present case, the Court's biased stance, aimed at rigidly maintaining shared residence without legal justification, constitutes a form of corporatist legitimisation.

In this context, the establishment of effective communication and mutual respect between criminal and family jurisdictions is crucial. Courts must act promptly, applying urgent and effective protective measures for victims, including children, to prevent re-victimisation. This approach is vital for the full implementation of a good administration of justice and the application of effective remedies. As Nuala Mole aptly put it, the right to good administration is "one of the great gifts the Charter has given us, and if it were actually complied with, the other problems would 90% evaporate."⁸⁷ The right to good administration compels authorities to act with diligence, expedition, and in a timely, efficient, and fair manner. If this right were properly upheld, the need for additional remedies would be greatly diminished. Conversely, if this is not accomplished, children's rights, as well as their best interests and welfare, will neither be properly promoted nor respected.

The voluntary jurisdiction character of family and children's jurisdiction does not imply a field devoid of law. Although it allows for a broad margin of discretion by the courts, who decide based on criteria such as adequacy, proportionality, and opportunity, these decisions must still be constrained by adherence to legal standards regarding children's rights, as well as human and fundamental rights.

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87 Available at https://www.google.com/search?client=firefox-b-d&sca_esv=02097b259e5129ad&xsrf=ACQVn08nQi566_Y1S9fM9uF1zhYxboV_-A:1709633630922&q=nuala+mole&tbm=vid&source=lnms&sa=X&ved=2ahUKEwiQnpHK8dyEAxURVqQEHfqkDZ8Q0pQJegQIDRAB&biw=1408&bih=678&dpr=1.36#fpstate=ive&vld=cid:66c84c2e,vid:RjFj0PMGSPg,st:0