Rejection of protection of natural (biological) family as a source of systemic violations of international guarantees of the respect for family life in the practice of Norwegian childcare law (*Lov om barneverntjenester*).

1. Position of natural (biological) family in the international human rights system

The principle of primacy of natural (biological) family in the process of raising a child is one of the basic principles of the universal system of human rights and is confirmed in Article 16 of the Universal Declaration of Human Rights[1], the UN Declaration of the Rights of the Child[2] and the Convention on the Rights of the Child[3]. These acts of international law confirm the character of family as a natural and fundamental unit of society – protected against arbitrary actions of public authorities, whose task is to protect biological family and to support it in the implementation of its natural upbringing functions while respecting the principle of subsidiarity of the state and the autonomy of parents deciding about raising their children in accordance with their beliefs[4].

The right of the child to be brought up by the parents and to remain under their care, guaranteed directly in Article 7 of the Convention on the Rights of the Child, strengthened with the prohibition of separating a child from the parents entailed in Article 9 of the Convention, has been repeatedly confirmed – as being in itself a manifestation of the child's welfare – in documents of international organizations protecting human rights[5]. Broader right to respect for family life, guaranteed in Article 16 of the Convention, is interpreted extensively in the General Comment No. 14/2013 of the UN Committee on the Rights of the Children on "the right of the child to have his or her best interests taken as a primary consideration (article 3 para. 1)"[6].

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[1] Article 16 para. 3 of the Universal Declaration of Human Rights: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[2] Principles 1, 6 and 7 of the 1959 UN Declaration of the Rights of the Child point to family as natural and optimum environment for child's development.

[3] Preamble to the Convention on the Rights of the Child expresses the view 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 and assistance" and "the child, for the full and harmonious development of his or her personality, should grow up in a family environment".

[4] Article 26 para. 3 of the Universal Declaration of Human Rights guarantees the parents *a prior right to choose the kind of education that shall be given to their children*, whereas article 14 para. 1 and 2 of the Convention on the Rights of the Child grants the parents the right to provide direction to the child within the area of the child's rights such as the freedom of conscience or religion.

[5] In accordance with item 274 b) of the Report of the Fourth World Conference on Women in Beijing in 1995, the obligation of the governments to take measures in order to ensure that a child has the right to know and be cared for by his or her parents is a tool aimed at eliminating all forms of discrimination of girls. The 2002 Special Session on Children of the General Assembly confirmed in item 18 of its Plan of Action that "the family has the primary responsibility for the nurturing and protection of children from infancy to adolescence". Confirmation of that principle may also be found in the Preamble to the UN Human Rights Council Resolution of 3.07.2015 No. 29/22, which contests that "the family has the primary responsibility for the nurturing and protection of children" and that "in order to ensure full and harmonious development of their personality, children should grow up in a family environment".

[6] General Comment No. 14/2013 of the UN Committee on the Rights of the Children on "the right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1)", item 60: *preventing family separation*

Moreover, in the light of the standards of international law, the family gives the best guarantee of raising the child in the spirit of national traditions and cultural values, which promotes child protection and harmonious development[7]. The importance of the right to upbringing in biological family is greater if the child comes from an ethnic, religious or linguistic minority[8].

The rules mentioned above co-shape the content of the standard contained in article 8 of the European Convention on Human Rights, confirming the right to respect for private and family life. According to the uniform case law of the ECtHR, the Convention must be applied in line with the general principles of international law, in particular with the principles that apply to the international protection of human rights[9].

2. The evolution of Norwegian law and rejection of *bilogiske prinsipp*

Growing number of media reports concerning mostly families of migrant workers affected by the proceedings conducted by the Norwegian Authority for the Protection of Children (Barnevernet) is a stimulus to undertake an analysis of the system of national provisions in force in Norway, their practical application and compliance of such outlined system with international guarantees of human rights, in particular with the European Convention on Human Rights and the Convention on the Rights of the Child and other international obligations of Norway.

The Norwegian Official Report of 2000 (*Norges offentlige utredninger* - NOU 2000:12), commissioned by the government and prepared by a committee of experts stressed the importance of biological kinship and continuity of contacts with biological parents as circumstances of child's welfare (*bilogiske prinsipp)*. The report pointed to the close relationship between the importance of biological kinship and due implementation of the requirement of respect for family life stemming from the Convention. Experts stressed that the task of social welfare services after placing a child in foster care is to carry out continuous assessment of the situation of biological parents, including verification of whether the circumstances resulting in termination of custody are still valid. The task of social care is to support biological parents in the process of assuming full responsibility and care for their children[10].

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and preserving family unity are important components of the child protection system, (…) the child who is separated from one or both parents is entitled "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 (Article 9, para. 3), item 70: Preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment (…)

[7] cf: Preamble to the Convention on the Rights of the Child

[8] Article 30 of the Convention on the Rights of the Child: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language".

[9] Ruling of the European Court of Human Rights, 39051/03, Emonet et al. v. Switzerland.

[10] Chapter 12:4 of the report entitled *Norges offentlige utredninger* NOU (2000:12), https://www.regjeringen.no/no/dokumenter/nou-2000-12/id117351/

Interpretation of the current provisions of the 1992 Child Welfare Act (*Lov om barneverntjenester*) changed as a result of publication of another Norwegian Official Report in 2012 entitled "Better protection of children's development – report of the committee of experts on the principle of biological kinship in social childcare"[11]. In the presented opinion of government experts, the value of the principle of biological kinship *(bilogiske prinsipp*) was limited to the value stemming from the bond and strong relationship between the child and his or her biological parents. End of this relationship would lead to a loss of importance of biological kinship between parents and children for determination of the "child welfare". As a consequence, the Report, followed by common practice of the office for child protection, rank as first a new principle – called "the principle of the developmentally most beneficial relationship" ("*Utviklings-fremmende tilknytning*"). According to this principle, "child welfare" should be assessed without taking into consideration biological kinship of the child, based on assessment of development benefits that may stem from a stable relationship of the child with various caregivers, whereby no presumed developmental benefits are related to the child staying in the care of his or her biological parents[12].

Rejection of the importance of biological kinship of carers for the welfare of the child is accompanied by a tendency to rule two, four or six parent-child contacts a year. Each contact lasts no more than a couple of hours. The right to contacts is perceived as a burden, especially if the child is placed in long-term foster care, because contacts with parents can make it difficult to build relationships with new caregivers. The aim of these contacts is not considered to be retention of an emotional bond with the biological parents, but the child's right to knowledge about his or her parentage.[13] According to the NOU report (2012:5), contacts of biological parents with the child should be more and more limited with time in order to create space for establishing primary relationship between the child and the foster carers.[14]

Infrequent contacts lead to weakening of emotional ties, and consequently – in line with the "principle of the developmentally most beneficial relationship" ("*Utviklings-fremmende tilknytning*") – to the court finding the child's return to his or her biological parents groundless, even if the latter already tackled their behavioural defects identified previously. This was the sequence of events in the case Terje Pedersen et al. v. Norway pending before the ECtHR, in which the Norwegian Supreme Court permitted deprivation of parental rights and adoption of a child, pointing to the superiority of a

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[11] *Norges offentlige utredninger* NOU (2012:5), *Bedre beskyttelse av barns utvikling— Ekspertutvalgets utredning om det biologiske prinsipp i barnevernet, https://www.regjeringen.no/no/dokumenter/nou-2012-5/id671400/sec1*

[12] Chapter 2.2.2. NOU (2012:5), *Bedre beskyttelse av barns utvikling— Ekspertutvalgets utredning om det biologiske prinsipp i barnevernet, https://www.regjeringen.no/no/dokumenter/nou-2012-5/id671400/sec1; similar in item 1.1.1.6. of procedural guideline for Barnevernet, https://www.bufdir.no/Barnevern/Fagstotte/saksbehandlingsrundskrivet/*, accessed on: 27.08.2017 r.

[13] Aurélie Picot , Out-of-Home Placements and Notions of Family in Norway and in France, Sosiologi i Dag, no. 3-4/2012, pp. 13-35.

[14] NOU (2012:5), pp. 111-112

stable emotional relationship with foster parents (applying for adoption) over the value of relations with biological parents demanding to get custody back[15].

Superiority of attachment to the foster parents over the biological bond is reflected in article 4-21 of the Child Welfare Act of 1992 (*Lov om barneverntjenester*), according to which "the municipal social welfare council will revoke the foster care order when it finds high probability of exercising proper care by the parents. The order, however, will not be revoked if the child is so attached to the person or environment in which he or she stayed that revoking it could lead to serious problems for the child". At the same time article 4-8 of the Act introduces the presumption that after two years of alternative care the attachment of the child to the person or environment in which he or she was staying is such that its revocation could lead to serious problems for the child.

From the perspective of opinions and guidance contained in the Norwegian Official Report of 2012:5, it is justified both to limit contacts between parents and children and to exclude the child's contacts with grandparents (if the parents are alive), or to admit separation of siblings in the course of searching for the "developmentally most beneficial relationship" with new carers for each of them. Such activities violate, however, international guarantees of respect for family life.

3. Violated human rights guarantees

The stated direction of development of the Norwegian law and its practice is clearly in contradiction to international human rights standards, including the right to respect for family life. According to the jurisprudence of the European Court of Human Rights "*the mutual enjoyment of each other's company by the parent and the child constitutes a fundamental element of family life"*[16]*.* In A. Schultz and M. Schultz v. Poland, the Court stated that "*mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention.*"[17]. The Monory v. Romania and Hungary ruling emphasised– apart from the obligation of non-interference of public authorities in private and family life - the existence of positive obligations of the state to ensure the implementation of the fundamental right to contacts between parents and children. At the same time, the principle of "the developmentally most beneficial relationship", promoted in the Norwegian Official Report 2012:5, which marginalizes the value of natural, biological family ties, preferring the assessment of developmental benefits of the child, has already been – albeit in a

[15] In ECtHR case no. 39710/15 (Terje Pedersen et al. v. Norway), the Norwegian Appellate Court stated that the parents do not lack sufficient parenting skills, yet deep integration of the child with the foster family made it impossible to transfer the child under parental care without negative impact on the child's development.
[16] Ruling of 8.07.1987 in B. v. Great Britain, cited i.a. in the ruling of 5.04.2005 in Monory v. Romania and Hungary.
[17] A. Schultz and M. Schultz v. Poland, ECtHR decision of 8 January 2002, LEX no. 50239

different form - the subject of criticism of the European Court of Human Rights in K. and A. v. Finland[18].

The Norwegian Government also recognizes the problem of setting too rare contacts weakening the child's emotional bonds with biological parents and, subsequently, leading to decisions – taken in the name of the "principle of the developmentally most beneficial relationship" – to keep the child in a foster family. A new government report of the NOU expert committee (2016:16) "The new social childcare law - ensuring the rights of the child to care and protection"[19] pointed to the area of potential conflict between the applicable law and the norm entailed in Article 8 of the European Convention on Human Rights. The reason behind this incompatibility was supposed to be insufficient – in order to maintain family relationship – number of contacts granted to biological parents and children in foster care, and the lack of grounds for ruling contacts with other members of biological family, including grandparents. The first change in the Norwegian legislation on children's contact with their parents postulated by the Committee is the introduction of a general principle of the right of the child in foster care to contacts with biological parents, siblings and other close relatives[20]. The Committee justifies the need for such a change among others citing the decision of the Norwegian Supreme Court, which examined the case law relating to contacts and stated that "the number of visits in the case of long-term foster care varied between three and six a year"[21].

Following the opinion of the committee, doubts regarding compatibility of the law and its practical application with the right to respect for family life stemming from the Convention were also emphasized by Christian Børge Sørensen – chairman of the NOU expert committee (2016: 16)[22]. A similar position was presented by the Minister for Children and Equality Solveig Horne, who did not rule out the need to change the Norwegian law and its practical application along the lines of the European Convention on Human Rights[23]. Marius Emberland, lawyer of the office of Attorney General of Norway representing Norway before the European Court of Human Rights, called the decision of the European Court of Human Rights to hear a series of cases against Barnevernet a cause for concern. Supporting the line of defence of Norway, which points to the conflict of the rights of the child to protection and the rights of the child's relatives to respect for family life, Marius Emberland notes that until now Norwegian courts had

[18] Ruling of ECtHR of 14.01.2003 in K. and T. v. Finland, para. 92
[19] Report *Norges offentlige utredninger* NOU (2016:16) published on 29.09.2016 "Ny barnevernslov — Sikring av barnets rett til omsorg og beskyttelse",
[20] Report of NOU (2016:16),chapter 13:1: "*Gjøre flere materielle endringer i reglene om kontakt. Utvalgets forslag innebærer at: – Det skal gjelde en hovedregel om at barn har rett til kontakt med foreldre, søsken og andre nærstående*"
[21] Ruling in publication Rt. 2012, p. 1832, sections 36 and 39
[22] Article in Dagblet of 17.10.2016, https://www.dagbladet.no/nyheter/horne-vil-endre-barnevernets-praksis---jeg-onsker-at-barna-skal-fa-komme-tilbake-til-foreldrene-sine/63963739, last accessed on: 24.08.2017
[23] As above

not given the deserved status to guarantees of human rights arising from the European Convention on Human Rights[24].

Proposed changes, the effect of which would be an approximation of the Norwegian law to the standard of respect for family life entailed in the Convention, have not yet been adopted.

Limiting contact with biological parents has obvious consequences in the form of violation of the child's right "in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language" (Article 30 of the Convention on the Rights of the Child). An overview of the practice shows, however, that children from ethnic and religious minorities are sent only to foster care of Norwegian families.

4. Criticism from civic society

In 2015, a group of more than 200 psychologists, educators and lawyers published an open letter addressed to the Minister for Children, Equality and Inclusion, which called for immediate reform of Barnevernet. The signatories pointed primarily to the fact that numerous psychological expert opinions of Barnevernet were based on insufficient evidence and research, emphasised speculative language characteristic of these opinions, incompatibility of observations made with final conclusions. At the same time the letter expressed concern with the fact that the same experts of Barnevernet participate both in passing the decision on taking children away from their parents, as well as in verification of these decisions at the level of municipal councils for child welfare and social affairs (Fylkesnemnda) and district courts, which employ Barnevernet psychologists to be members of adjudicating panels as jurors-experts. Authors of the letter included well-known Norwegian psychologist Einer Salvesen and Gro Thune Hillestadt – former judge of the European Court of Human Rights.

5. Summary

As a result of application of the legal standards described above and their practical interpretation, Norwegian mechanism of foster care systematically violates the right to respect for family life guaranteed, among others, in article 8 of the European Convention on Human Rights and related international guarantees of the rights of the child. The adopted solutions are aimed at extinguishing children's emotional attachment to their biological parents, siblings and relatives and shaping new relationships with foster carers instead.

[24] Marius Emberland, "Det norske barnevernet under lupen", LOV OG RETT, vol. 55, 6, 2016, pp. 329–330