



YEARBOOK

HUMAN RIGHTS PROTECTION

**PROVINCIAL PROTECTOR
OF CITIZENS - OMBUDSMAN**

PROTECTION OF THE RIGHTS OF THE CHILD
"30 YEARS AFTER THE ADOPTION OF THE CONVENTION
ON THE RIGHTS OF THE CHILD"

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Republic of Serbia
Autonomous Province of Vojvodina
Provincial Protector of Citizens – Ombudsman

Institute of Criminological and
Sociological Research



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FOREWORD

Yearbook Human Rights Protection is conceived as an annual publication (to be issued at least once a year), dedicated to topics of importance for the protection of human rights, in particular those that the Provincial Protector of Citizens – Ombudsman recognizes in his work as top-priority.

Child abuse and neglect is a phenomenon that is clearly noticeable throughout human history. Specifics of early social organizations, gender and intergenerational inequality, seeing force as a suitable and permissible means of education and a way to control events within the family, certainly represent factors that can be mentioned in the context of understanding the survival of this phenomenon through the ages.

Nevertheless, with the beginning of the XX and XXI centuries, the development of society, the promotion of the values of democracy, as well as the increasing commitment to respect for the universality of human rights, also carried significant expectations regarding the fuller respect for the rights of the child.

Such expectations have been substantially met by the adoption of UN's Convention on the Rights of the Child, on which peoples of the United Nations agreed in 1989, previously bearing in mind that they reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and recalling that the United Nations has proclaimed that childhood is entitled to special care and assistance, as it is written in its preamble.

Our country has ratified the Convention, thereby committing itself to taking care of its implementation, that is, to protect the rights of the child and to promote the status of children. However, it is not only the responsibility of the state and its institutions, but also of the individual, who can show that they recognize and respect the rights that children have.

Therefore, this publication is intended not only for the scientific community but also for experts working with children and for children, such as judges, lawyers, health care professionals, teachers, social workers, journalists and many others including

representatives of the civil society whose work in field of children rights should be especially appreciated. And last but not least, it is intended for ombudsman - human rights defenders, regardless of local, national or regional level they operate in.

In this way we also fulfill the obligation assumed by the Convention: *to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.*

Provincial Protector of Citizens – Ombudsman

Academician Vlado Kambovski*

OPEN QUESTIONS OF BUILDING A NEW CONCEPT OF JUSTICE FOR CHILDREN

Celebration of the 30th anniversary of the adoption of the UN Convention on the Rights of the Child (1989) is a good reason for critically considering the achievement of one of its primary goals: the creation and implementation of a new concept of justice for children, which will mark the beginning of one of the most profound reforms of the modern criminal justice system - drawing children out of the embrace of classical criminal law and retributive reactions to their conflicts with the laws.

Reforms already implemented in contemporary legislation, including states in our region, through the adoption of special laws on children's justice are in line with the core commitments of the Convention and international documents containing standards on the new concept of justice for children (Havana, Beijing, Riyadh and other rules and guidelines). But, the early beginnings of the creation of an integrated concept of justice for children have been faced with numerous challenges. The first is a clear definition of its basic postulates, which must correspond to the priority of the rights of the child in conflict with the law, and to the principles of legality and procedural guarantee, which should be at a higher level than the rights of defendants in criminal proceedings. The laws that have been adopted in our region still contain insufficiently consistent solutions on: defining the concept of a child in conflict with the law, as well as the concept of a child at risk, retaining the category of “criminally responsible” child above a certain age, application of the general criminal procedure regime, which applies to adult perpetrators of criminal offenses and the application of penalties and other sanctions provided for adult offenders.

All these weaknesses require further improvement of the children's justice system as a well-integrated system through codification of regulations in a comprehensive codex.

Keywords: *Convention on the rights of the child, international standards, weaknesses of national systems children's justice, codification*

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1. Modern society and the problem of combating child delinquency

Today, crime is one of the greatest threats to the quality of human life, and its new form of terrorism, crime of violence, organized crime, cybercrime and other forms put the capacities of modern criminal justice and prevention systems under serious test. The answers to all the challenges of crime, which are contextualized by the basic postulates of contemporary criminal policy, have almost harmonized forms through which the neoclassical concept of criminal law was developed, based on a categorical system composed of three elements: crime, guilt, punishment.

This categorical system, as well as its criminal-political basis, does not provide adequate answers to the challenge of suppressing child delinquency: a child who is considered a "delinquent" is not a criminal in "small"; it is a problematic finding of guilt, from the aspect of her classical concept (mental capacity, intent or negligence, awareness of the prohibition of acts), even less can one expect that the classical repertoire of criminal sanctions, based on the idea of retributive justice, will have any preventive effects. Hence, the prevention of child delinquency cannot be equated with the prevention and repression of adult crime (*Walter*, 2011: 28). Three key factors have made a strong contribution to such a reversal of criminal policy in relation to combating child crime. First, criminological research in the field of crime phenomenology and etiology has identified with a high degree of scientific argumentation of several basic features and patterns: general crime is increasing, but there is an even greater increase in child delinquency, a greater increase in child recidivism than adults, the age limit the entry into the zone of socio-pathological phenomena and crime is declining, the participation of children in organized crime and other serious acts, especially violent ones, is increasing and the chances of a returnee at an older age are increased. came into conflict with the law (see *Arnaudovski*, 1984: 15; *Jasovic*, 1983: 188; *Vasilijevic*, 1964: 145). Another factor is victimological research, which opens a new approach to considering the position of children as a "vulnerable category" that easily moves from the category of victim of crime and violence to the category of perpetrators of illicit acts. The third factor is the changes in contemporary criminal law, in particular the strengthening of the principle of re-socialization and special prevention in relation to the treatment of criminals, and the latest trends towards the idea of "bifurcation" - stricter treatment for recidivists and perpetrators of serious crimes, which rests on the idea retribution, intimidation and neutralization through rigorous imprisonment, and milder treatment of first offenders, negligent and lighter offenders, inspired by the idea of restorative justice and expressed through the use of lenient punishments and alternative measures.

All these factors have contributed to the gradual formation of a consensual stance on contemporary criminal policy, as well as criminal law theory and practice on the special nature of child crime and the need to distance its legislative framework from the rigid criminal regime of adult criminal offenders. The idea that the retributive approach loses meaning in the increasingly obvious realization that a child offender is not a “criminal in a small”, and that his behavior conflicts with the laws set by adults and applies to them as a result of the cross-cutting effect of numerous factors affecting his socialization process, is received its first legislative forms as late as the 19th century (Illinois Family Courts Act 1899, *Kambovski*, 1972: 388).

2. The concept of child delinquency and the legislative framework of children`s justice

The development of a new, “juvenile criminal law” in modern law has gone into two tracks: from the substantive-legal aspect - narrower or broader definition of the central category of the special system of children's justice - the concept of child delinquency, and from the legislative aspect - the adoption of different legal models of special regulation in criminal codes or specific laws.

Although in the 20th century the general topos of criminal law became the concept of child delinquency, the distinction between its restrictive and extensive designation was not overcome. First, it refers only to the behavior of children who are envisaged as criminal offenses in criminal law. This means that there is no difference with the assessment of an action taken by a child in terms of its evaluation as a prohibited behavior; only further treatment in terms of legal consequences (sanctions, etc.) is largely separated from the treatment of adult perpetrators. This approach has been accepted in most modern criminal legislations, and its main support is the argument of the principle of legality. It is not irrelevant to note that, in addition to the admissibility of the argument in principle, equating the concept of a crime with the concept of child delinquency is not principled, since the general concept of the crime is defined in an objective-subjective sense: unlawfulness, but also guilt (which is a presumption of punishment). The principle of legality in relation to the offending character of the conduct of children conflicts with the criminal-law principle of guilt, because the notion of guilt has strict content (mental capacity, intent or negligence, awareness of unlawfulness). The requirement that a child's behavior be “guilty” is illusory from the point of view of all these elements of subjective criminal responsibility. An additional problem is the acceptance of this condition, when, however, an older child (over 16 years) can be punished if a guilty plea is found (a solution accepted in most criminal codes), which is contrary to the starting principles of special

treatment for child delinquency, which mean abandoning the controversial “*malitia suplaet etatem*” rule.

A broader, more extensive notion of child delinquency has led to the breakthrough of the idea of educating and raising children as a guiding idea for their treatment and the emergence of educational measures as special sanctions. Emphasizing the purpose of educational treatment has expanded the scope of behavior of children who have not only a prohibitive character as a punishable offense, but also a broader character of indications of a special condition in a child seeking intervention by society in the direction of its protection and proper development. This broader approach is nowadays accepted in modern criminological and criminal thinking. In addition to behaviors that represent acts of commission of criminal offenses prescribed by law, social maladaptation and socially unacceptable behavior of children are the subject of special scientific interest and justification of special legal treatment (Jasovic, 1983: 30; Carić, 1968: 94). The concept of child delinquency extends to certain “pre-delic” states of the child’s personality, and it completely naturally iterates the status of the child- victim of crime, violence, or any situation that threatens his or her personality and proper development. In addition to a child whose conduct is delinquent in the strict sense (acts that are incriminating as criminal offenses), the central figures of the categorical system of children’s justice become both the “child at risk” and the “child- victim” of the criminal act or any violence. The broader approach creates some difficulty in incorporating the idea of upbringing, assistance and protection of the child as his priority interest in an appropriate concept that has a more solid legal and institutional form and content. The categorical system, which should cover three categories of children - in conflict with the law, at risk and victims of crime and violence, requires a single and complementary legal framework. Its inherent coherence is assured by the agreement that the distinction between these three categories is more formal rather than essential, since a child who has any problem with his / her immediate environment is always in a position to be a victim of his / her influences and has in relation to all challenges the position of the requesting subject help and protection. For each of these situations, it is important to state that measures and activities should be undertaken aimed at the child, his or her family or the wider environment, which mean their protection, proper socialization and upbringing, which is more important than the reasons for undertaking them. On these principles, the modern concept of children’s justice was developed on the idea of prevention, care and protection, as opposed to the concept of adult justice, which is dominated by the idea of retribution and the fair alignment of the act done with the punishment imposed on the offender.

The change in the paradigm of child delinquency and its gradual replacement by the paradigm of children's justice is progressively implemented with legislative reforms. Creating a separate system of justice for children became one of the most dynamic areas of criminal policy and penal reform during the twentieth century, by adopting specific laws on children or introducing solutions for their separation from the sanctions system and certain general institutes for adult offenders, with different combinations (so the 1962 Swedish Penal Code which provides for a system of sanctions or conditions for their application that is governed by special laws in the field of social security, child protection, etc.). In several European legislations in the second half of the last century, special laws on children's justice or on the courts for children (Germany, France, Austria, etc.) were enacted. Contrary to this tendency, in the countries of real socialism the concept of retaining the treatment of children as "criminals in the minor" in the criminal codes, with a special system of criminal sanctions (educational measures), and with the retention of the concept of "discernment" as a criterion of criminal responsibility, prevailed for a long time (Kambovski, 2002: 322). In recent decades, with legal reforms in the period of transition, the concept of a special system of justice for children contained in a separate law, has been breaking even in the countries of our region, first in Croatia, with the adoption of the Youth Courts Act 1997 (a new law was adopted in 2011). The following are the laws of other countries: the Serbian Law on Juvenile Offenders and on the Protection of Juveniles, 2005, the Macedonian Juvenile Justice Act 2007, the B/H Law on the Protection and Treatment of Children and Juveniles in Criminal Procedure 2014, the Montenegrin Law on the treatment of juveniles in criminal proceedings 2011, etc. Comparative analysis of these laws indicates that there are several important differences in basic conception: the narrowest approach is one that focuses on child offenders, while the broadest conception is adopted in laws that include children at risk as well as children-victims of crime (so the Macedonian Law for Children Justice 2013).

The summary of the contemporary development of the concept of justice provides the basis for several general findings (compare Cavadino / Dignan, 1997: 248). First, the legacy of the concept of delinquent children as "criminals in the small" continues to influence new legislative models. Most legislation has adopted a middle (mixed) solution, which largely boils down to radical reform of child sanctions, based on the idea of prevention, assistance and protection. Second, regardless of whether the child justice system is shaped as a stand-alone legislative model, it is still burdened with the internal opposition of the idea of prevention, protection and remedy, and the idea of retribution and fair retaliation for the act done. The confirmation of this statement (this is also known in the Macedonian Law on Children's Rights) is to withhold penalties for children in

conflict with the law if it involves committing more serious acts of the children older than 16 years. Third, the internal conflict between the welfare model (*parens patriae* theory), which influences as much as possible the institutional and formal intervention of the court and other institutions (centers for social work, public prosecutors, etc.) in solving children’s problems and “a protective” model of protecting the rights of the child, which leads to a restriction on the repressive competences of the state. The concept of children’s justice in this sense is at a crossroads: to continue to develop in the direction of the increasing “protective” role of institutions (the state), or to go in this direction without compromising the integrity of the child as a person with the same freedoms and rights as any adult. This dilemma is overcome by a complementary approach that satisfies the postulates of justice and guarantee for the freedoms and rights of the child, on the one hand, and on the other, the principle of his protection, assistance and treatment in his interest (Newman, in: *Juvenile Delinquency*, 1958: 47). The existence of the “double track” has been overcome by an optimal integrative approach that combines the legal basis with the guarantees and assistance and protection of the child (see Kaufmann, 1974: 898). Such is the “four-D” model (diversion, dejuridisation, deinstitutionalization, due process): alternatives to formal court proceedings, extrajudicial settlement, agreement and reconciliation, avoidance of institutional treatment and procedural guarantees of a fair trial.

3. International Framework

The new orientation of methods and means for preventing child delinquency and treating children at social risk is sublimated by international documents on the rights of the child, which have been increasing in recent decades (see Kambovski et al., 2019: 21). They are a response to new forms of endangerment, such as the widespread occurrence of child drug addiction, child trafficking, pornography, exploitation or domestic violence and other violence against children, which are taking on a planetary dimension, increasing the pressure to raise levels of international regulation and to design effective instruments for its implementation. Therefore, their affirmation is of particular importance in shaping national conceptions of children’s justice, far greater than the general implications of the human rights corpus as a “third dimension” of criminal law.

Of the numerous conventions, the 1989 UN Convention on the Rights of the Child has played the most significant role in building and improving the modern justice system for children. According to the Convention, a child is any human being who has not attained the age of eighteen, unless, according to the law applicable to the child, the age of majority is reached early (Article 1). It emphasizes the interest of the child as primary in all

activities undertaken by public or private institutions, courts or other authorities; the state has an obligation to protect and care for the child and its development, respecting the rights of parents and other persons legally responsible for it. States Parties shall respect and safeguard the rights enshrined in the Convention of every child under their jurisdiction, without any discrimination (Articles 2 and 3). These principles are crucial to the model of justice for children: in the area of crime suppression, which undoubtedly dominates the public interest in protecting society against crime, the priority of the child's interest over accepting methods and means of reaction inspired solely by the need for help and protecting him from recidivism.

In addition to a detailed list of the special rights of the child, the Convention contains a “set” of standards upon which the national justice system for children should be based. The Convention prescribes special treatment for a child deprived of his liberty, who must be treated with respect for human dignity and with respect for the needs arising from his age. Every child deprived of his or her liberty is separated from the adults in prison unless it is concluded that contact with adults may be in his or her interest. The child has the right to regularly contact the family through letters and visits (contact is forbidden only in exceptional cases). It is particularly important that the Convention insists on strict adherence to the principle of legality: a child must not be unjustifiably accused of violating criminal law for an act which was not prohibited by national or international law at the time it was committed. This explicit reference to the principle of legality clarifies the issue of the concept of delinquency: in contrast to the broader, sociological-pedagogical approach to this notion, it insists on the criminal law notion. This principle is complemented by other guarantees: the presumption of innocence, the right to trial before an independent and impartial tribunal, the right to a defense, the right to a fair trial, the right to respect for privacy at all stages of the proceedings, and other procedural guarantees regarding the defendant's position in the criminal but raised at an even higher level of commitment. Also important is the principle provision of the Convention on the model of sanctions (Article 40): to ensure that children are treated in the best interests of the circumstances and the act committed, national law should provide for different options such as care, counseling, supervision, legal representation, probation, educational and professional guidance programs and other institutional care options.

The Convention on the Rights of the Child has launched a very dynamic activity internationally in establishing special rights, modeling sanctions and procedural guarantees. In 2000, the UN adopted two protocols to the Convention on the Rights of the Child: the Protocol on the Participation of Children in Armed Conflict and the Protocol on Trafficking in Children, Child Prostitution and Child Pornography, and the

2000 Protocol to the Transnational Organized Crime Convention (Palermo) on the prevention, suppression and punishment of trafficking in human beings, especially women and children.

In addition to the provisions of the Convention on the Rights of the Child and other international conventions, which are binding and apply directly or indirectly in national law, international documents containing guidelines, standard rules or recommendations establishing its legal framework play a major role in shaping the children's justice system, its goals, and content. In the form of “rules”, “principles” and “guidelines”, they have no direct binding effect and do not imply an obligation on the part of the State to transpose them into national law. As acts of the UN General Assembly or other bodies (Security Council, ECOSOC, etc.), they have a predominantly political significance in defining a universal legal and institutional framework for combating certain forms of crime and other deviant phenomena and respect and protection of human rights. Over the last decades, the importance of these instruments has grown and their nature is changing, so they evolve from political to legal documents containing strict rules in the form of imperative norms.

Setting international standards for child justice aims to bridge, if not eliminate, the still existing differences in national law, as well as the conflict between the two main positions on the position of the child (“*parens patriae*” and “models of justice”; see Dünkel 1998: 347). In this regard, the UN Standard Minimum Rules for the Rights of the Child (“Beijing Rules”), adopted in 1985, emphasize in their clear principles (1.5) that children's justice should be seen as an integral part of each country's national development process and thus contribute to the protection of young people and the maintenance of peace and social order. While maintaining that the principle of legality must be respected in determining the terms of child delinquency, the rules leave the regulation of age, lower and upper, to each penal system, respecting the economic, social, political and cultural specificities of each state. The rules also apply to the application of certain principles laid down in other procedures for children, where the reason for such action is conduct that is not punishable, so they also apply to the broader concept of delinquency, which also includes children at risk (3.2.).

The rules relating to the criminal aspects of the system (Rule 5-9) prioritize the well-being of the child and the principle of proportionality, according to which it must always be assured that the action taken against the child will be consistent with the circumstances in which the offense was committed and his or her personal circumstances. The principle of proportionality, unlike adults, does not imply a merit penalty corresponding to the

gravity of the act committed, but an individualized measure for which the gravity of the act has the function of an irrevocable upper limit, but under which the question of choosing a measure depends solely on the condition of the child's personality. On the other hand, this rule implies greater discretionary power for the court at all stages of the proceedings, which presupposes their specialized training and education, as well as the control of discretionary decisions to prevent any abuse (rule 6). This nature of proceedings against children further enhances the meaning of their procedural safeguards (Rule 7): basic procedural rights, such as the presumption of innocence, the right to be informed of the reasons for the indictment, the right to remain silent, the right to legal representation, the right to parental presence. or guardian, the right to confront and cross-examine a witness and the right to appeal to a higher court should be guaranteed at all stages of the proceedings. The procedure should also protect the child from the public in order to avoid the potential adverse effects that the child may have on labeling and other negative consequences (Rule 8). They are particularly important for the orientation of the child justice system and its further development of rules concerning the “diversion” of criminal proceedings to another proceeding (Rule 11): where circumstances permit, a child in conflict with the law may be treated without the use of formal court proceedings; efforts to implement community programs such as temporary supervision and counseling, social reintegration and victim compensation need to be made to facilitate the child's discretion. Pre-trial detention rules are very restrictive, as a last resort, unless there are conditions for alternative measures, such as strict supervision or placement in a family or educational institution. The rules also regulate court proceedings and the sanctions system, which excludes the death penalty and sets the principle of exceptional use of imprisonment only for a serious act of violence, restitution or if it results from the implementation of educational measures. The Court has broad powers to avoid the placement of children in institutions and in the choice of measures, such as care, counseling and supervision, probation, community service etc.

The 1990 UN Rules for the Protection of children deprived of liberty (Havana Rules) are based on the principle of the exceptional and limited application of detention and imprisonment. In cases of deprivation of liberty, UN norms and standards for the treatment of persons deprived of their liberty generally apply, but these rules also contain specific standards that need to be elaborated in national regulations on the application of sanctions. The rules also regulate the basic issues of the institutional regime of children deprived of their liberty (expedited procedure, free legal aid, classification, etc.).

The 1990 UN Juvenile Delinquency Prevention Rules (“Riyadh Rules”) cover the preventive phase of dealing with children who are not in conflict with the law but are in

a state of “social risk” requiring early preventive and protective intervention aimed at family, education and educating children, the community and the media. They cover various situations of risk in terms of raising, educating, educating and protecting children, such as drug abuse, child abuse, family break-up, etc. In that sense, they are an organic whole with rules and standards that apply to the children’s justice system.

On the same line of building a new approach to the treatment of children in conflict with the law and children at risk are the Council of Europe documents: The Social Response to Child Delinquency of 1987 (SE R (87) 20); The Social Response to Child Delinquency in 1989 Young Migrant Families (SEP (88) 6); and the European Rules on Sanctions and Community Measures of 1992 (SEP (92) 16). These documents are a further elaboration of the norms and standards contained in the UN conventions and rules and their adaptation to the specific situations of the countries of the Council of Europe. Of particular note is the Council of Europe Recommendation of 2003 on New Pathways to the Treatment of Child Delinquency (Rec (2003) 23, which expresses new postulates in search of a response to the rapid growth of delinquency, and in particular the rise its violent forms. The recommendation contains several new principles: the response to child delinquency should be prompt and consistent; responsibility for delinquent behavior should extend to parents; victim compensation measures should be applied whenever possible; measures should target delinquent behavior. The recommendation also contains a set of justice policy, legislation and practice standards that address all key institutions in child socialization: family, school, workplace and local community. Likewise, in 2008, the Council of Europe adopted Recommendation CM / Rec (2008) 11 on European rules for offenders subject to sanctions or measures, covering the basic principles of the sanctions system, alternative sanctions and community measures and other measures.

Unified solutions affecting national systems of children’s justice have begun to take root in EU law, especially after the Lisbon Reform Treaty. Thus, Directive 2012/29 / EU of 2012 on minimum standards for the rights, assistance and protection of victims of crime, and Directive (EC) 2016/800 of 2016 on procedural guarantees for children of defendants in criminal proceedings. The Directive elaborates in detail the basic procedural safeguards provided in the ECHR and other international human rights instruments: the right to information about criminal proceedings, defense, information to parents, restrictions on deprivation of liberty, etc. The importance of the directive as a legal act requiring the harmonization of the domestic laws of the EU Member States is that it directly affects raising the child's procedural rights to a higher level than general standards in the single space of “freedom, security and justice of the EU”.

4. Comparative overview of the application of international standards

Comparative analysis of modern legislation shows that there are still major differences in the application of universal norms and standards of justice for children. Differences in legislative techniques - special criminal treatment of children as part of the CC and CCP or as a separate system of justice for children (Law on Courts of Youth, etc.), but even more - differences in age, sanctions, institutional treatment, engagement of social services, - these are just some of the “critical points” of the modern, internationally under-harmonized model. The comparison between the “welfare concept” and the “justice concept” in nine European countries (Belgium, Denmark, Germany, England, France, Italy, Ireland, the Netherlands and Scotland, see Walgrave/Mehlbye, s.a.:4) illustrates the big ones differences in determining the lower age limit to include children in the system of justice. Also, despite the general acceptance of specialized child courts in European countries (except Denmark and Scotland), there are some differences in their position and jurisdiction: while in Belgium, France, Italy and the Netherlands, courts are also empowered to impose civil protection measures (in family relations), in Germany and England and Wales, the jurisdiction to prosecute child offenders is strictly separate from interventions that are highly protective and are subject to the jurisdiction of family and guardianship courts.

The reach of universal standards on sanctions and measures is, in modern legislation, largely determined in advance by the chosen model of specific legislation: repressive, which is accepted in the majority and where the sanctions system is an integral part of the general criminal law, with certain specificities; and preventive, which removes children from the general criminal law and develops an autonomous system of measures of protection (see Pradel, 1995: 659). The criminal concept combines classic penalties and security measures with educational measures, with the most repressive systems equating older children (over 16 years of age) with full-time offenders (USA), while the other model allows for the imposition of mitigated sentences (England). The general tendency is the breakthrough of alternative measures in the area of child justice, strengthening of legal, especially procedural guarantees, and introducing various forms of “turning the proceedings” and resolving the case into an informal procedure (Bohm / Feuerhelm, 2004: 134).

5. Macedonian children`s justice system

The reform of the Macedonian criminal law has long circumvented the demand for acceptance of new tendencies in the development of an autonomous legal-institutional system of justice for children. During several years of continuous aerial discussions, in close cooperation with UNICEF in Macedonia, the first Law on Juvenile Justice was finally adopted in 2007, which regulates the treatment of children at risk and children in conflict with the law for behaviors defined by law as punishable. parts and conditions for the application of assistance and protection measures, educational and alternative measures and the punishment of children over the age of 16, the position, role and responsibilities of authorities involved in the treatment of children at risk and in conflict with the law. The law also stipulates measures for the protection of children who are victims of criminal offenses and preventive activities for the prevention of child crime.

The new Law on Children`s Justice of 2013 (Official Gazette of the Republic of Macedonia No. 148/2013) completes a system based on the previous law, in line with international norms and standards on child justice. In particular, the treatment of children at risk, an informal procedure in the application of protection and assistance measures, has been innovated, and the court procedure for children in conflict with the law has been harmonized with the Law on criminal procedure adopted in the meantime (2011). The position of child victims of crime and the system of general measures for the prevention of child delinquency have been strengthened. The law broadens the scope of alternatives to litigation, specifying the conditions for dejuridification and flexibility in dealing with competent authorities, in line with their orientation to the priority interests of the child. The system of measures for children in the new concept relies on the idea of restorative justice, which, unlike retributive justice that comes down to the relationship between the state and the offender, establishes a three-way relationship between the child, the victim and the state, seeking justice for all in that relationship in which is a state mediator between the offender and the victim (see Valter, 2011: 760). The most explicit expression of the idea of restorative justice in the Law is the institute of mediation: the judge or public prosecutor does not decide or sanction, but mediates in a dispute between the child and his family and the injured party, seeking the best possible solution that satisfies the interests of all parties.

Accepting the idea of restorative justice as the guiding principle of child justice faces reasonable warnings about respect for basic state legal guarantees (see Jessberger / Kress, 2001: 846): the child justice system must be consistent with the rule of law, the children`s rights, and the need for effective protection of society against crime. This apparent

contradiction, which is eventually settled on the basis of the principle of priority interest of the child, is particularly reflected in the system of sanctions. The main sanctions are educational measures, and only exceptionally for a serious crime can a child be punished or an alternative measure imposed. The law provides (Art. 50): imprisonment for children, fine, ban on driving a motor vehicle and expulsion of an alien from the country, who are pronounced to a “criminally responsible” child over 16 years of age only if due to the grave consequences of the crime committed and the high degree of criminal responsibility is not justified in imposing an educational measure (according to Article 51, the condition for imprisonment is “high level of criminal responsibility”). These solutions are a remnant of the concept of "criminals in the small," and create confusion that affects the dual nature of punishment: both the repair and the just retribution of the act done. Most authors, especially those who prefer treatment rather than punishment, believe that this dualism of irreconcilable ideas should be overcome by abandoning punishment, which damages the personality of the child and is usually the main cause of recidivism (Heuyer, 1969: 274). The issue of the “criminal liability” of a child over the age of 16 is also problematic because it leaves open questions, such as whether the court should determine the existence of guilt when it comes to serious acts, while for light acts it does not need to be determined, which allows for the possibility that the child's offense was not committed with intent or negligence.

Procedures for determining the existence of circumstances relevant to the imposition of intended measures on a child at risk or in conflict with the law shall be regulated in accordance with the basic principles invoked by international instruments on the rights of the child: procedural guarantees, defense and representation, specialization of competent authorities, shorter duration of institutional measures which include deprivation of liberty of a child as a last resort, etc. The court proceedings are governed by a number of specifics, in accordance with these standards, but also by reference to the CCP in relation to procedural actions and decisions not regulated by the Law on Children's Justice. The question of primary importance is whether the court proceedings against children can only be a copy of the criminal proceedings according to the adult effects of the crimes, since, after the adoption of the new CCP (2011), this procedure is arranged according to the Anglo-Saxon model of the adversarial procedure (whose central role is phase main trial). The goals of the children` justice system are radically different from the goals of criminal proceedings. The main objective is the proper treatment of a child in conflict with the law, inspired by the child`s need for protection, upbringing and repair as the highest interest, which combines the activities of all parties involved in the proceedings (court, prosecutor and defense). The accusatory principle and the opposing position of the

prosecutor and the defense, as well as the passive role of the court, do not correspond to the character of the court proceedings against children. Reconciling these specifics with the postulate of respecting the interests of the child as a primary objective requires the regulation of a procedure that differs from criminal proceedings against adult offenders, which is a challenge for the revision of the Children's Justice Act.

In addition to referring to the CC and the CCP, the Law on Children's Justice also refers to the application of other laws: on misdemeanors, mediation, language use, witness protection, free legal aid, social protection, family and the enforcement of sanctions. Such a diffuse legislative framework leaves wide room for coordination, especially in the implementation of measures of upbringing, protection and assistance (which are the responsibility of various authorities and institutions). This apparent weakness, which creates difficulties in law enforcement, requires improving the legislative framework of the system, by codifying all provisions on dealing with children at risk, in conflict with the law and the victim of criminal offenses in one Children's Justice Code, in the next phase of reform of this system.

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**CHILDREN’S RIGHTS: BETWEEN UN CONVENTION ON
THE CHILDREN’S RIGHTS AND ECHR. TOWARDS A NEW
INTERNATIONAL COURT?**

In the context of increasing importance and influence of the European Court of Human Rights (ECtHR), UN Convention on the Children’s Rights constitutes an important brick to design a new pathway towards a better protection of the children’s rights. Despite its age, the UN Convention on the Children’s Rights is surpassing general and specific tools used to safeguard the best interest of the child. In the present article, the author aims to introduce a novel idea, trying to argue in favor of creating a new international court of human rights with competency circumscribed solely in the area of the rights of the children.

The future will demonstrate if the author was a visionary proposing a Court of Children’s Rights or if this courageous idea would remain simply a proposal whose purpose is to emphasize the necessity of a specialization of the ECtHR judges who are to decide on the violation of a child’s rights.

Keywords: *children’s rights, ECHR, UN Convention on the Children’s Rights, international court, best interest of the child*

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1. UN Convention on the Children’s Rights and ECHR

The UN Convention on the Rights of the Child (UN Convention on the Children’s Rights or UNCRC) is a human rights treaty setting out the civil, political, economic, social, health and cultural rights of children. The Convention defines children as any human being under the age of eighteen, unless the of adulthood is attained earlier under national legislation. The UN General Assembly adopted the Convention and opened it for signature on 20 November 1989 and it came into force on 2 September 1990, after it was ratified by the required number of nations. Currently, 196 countries are party to it, including every member of the United Nations, with the exception of U.S.

According to the UNCRC, "nations that ratify it are bound to it by international law". Ratifying states must act in the best interest of the child. Safeguarding in all procedures the children’s basic rights, including the right to life, the right to their own name and identity, the right to be raised by their parents within a family or cultural community, and the right to have a relationship with both parents, even if they are separated.

This Convention impose to states to allow parents to exercise their parental responsibilities and acknowledges that children have the right to express their opinions and to have those opinions heard and acted upon when appropriate, to be protected from abuse or exploitation, and to have their privacy protected, and it requires that their lives not be subject to excessive interference.

A very important provision of UNCRC is, in our opinion, that the signatory States must provide separate legal representation for a child in any judicial dispute concerning their care and asks that the child's viewpoint be heard in such cases.

The European Convention on Human Rights and Fundamental Liberties (ECHR) has referred to the Convention when interpreting the ECHR provisions in in cases where children were involved (Sutherland, 2003, p. 488). The Council of Europe protects and promotes the human rights of everyone, including children, 150 million children being estimated to live in Europe.

2. ECHR Caselaw on the children’s rights

According to Art. 1 (obligation to respect human rights) ECHR, “the High Contracting Parties shall secure to everyone – a.n. including children - within their jurisdiction the rights and freedoms defined in (...) this Convention”. In one of its decisions, namely

Sahin v. Germany (Application no.30943/96, Judgment 8 July 2003), ECtHR has stated that the human rights of children and the standards to which all governments must aspire in realizing these rights for all children are set out in the Convention on the Rights of the Children. The UN Convention sets the basic human rights that children all over the world, without discrimination have: the right to survival, the right to develop to the fullest, the right to be protected from harmful influences, abuse and exploitation, the right to fully participate in family, cultural and social life. It further protects children's rights by setting standards in health care, education and legal, civil and social services. States parties to the convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child (Article 3 UNCRC). Moreover, States parties have to ensure that a child is not separated from his or her parents against their will unless such separation is necessary for the best interests of the child and respect the right of a 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 (Article 9 UNRC).

ECtHR caselaw abounds in decisions which ECtHR tackles the rights of the children as they spring from the provisions of ECHR.

For example, in *case Stagno v. Belgium* (Application no.1062/07, Judgment 7 July 2009), ECtHR held that there had been a violation of Article 6 § 1 (right to a fair trial – access to court) of the European Convention on Human Rights, noting in particular that, by holding that the limitation period also ran against minors, the Belgian courts had put the interests of the insurance companies first. However, it had been practically impossible for the applicants to defend their property rights against the company before reaching their majority, and by the time they did come of age, their claim against the company had become time-barred. The strict application of a statutory limitation period, without taking into account the particular circumstances of the case, had thus prevented the applicants from using a remedy that in principle was available to them.

In other decisions ECtHR had verified if there had been a violation of art. 8 (the right to respect family and private life):

In *case Chbidi Loudouni and others v. Belgium* (Application no.52265/10, Judgment 16 December 2014), ECtHR tackled the issue of adoption stating that there had been no violation of Article 8 (right to respect for private and family life) of the Convention concerning the refusal to grant the adoption, and no violation of Article 8 (right to respect for private and family life) concerning the child's residence status. It found in particular

that the refusal to grant adoption was based on a law which sought to ensure, in accordance with the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, that international adoptions took place in the best interests of the child and with respect for the child’s private and family life, and that the Belgian authorities could legitimately consider that such a refusal was in the child’s best interests, by ensuring the maintaining of a single parent-child relationship in both Morocco and Belgium (i.e. the legal parent-child relationship with the genetic parents). In addition, reiterating that the Convention did not guarantee a right to a particular residence status, the Court observed that the only real obstacle encountered by the girl had been her inability to take part in a school trip. That difficulty, owing to the absence of a residence permit between May 2010 and February 2011, did not suffice for Belgium to be required to grant her unlimited leave to remain in order to protect her private life.

In *case Zaiet v. Romania* (Application no. 44958/05, Judgment 24 March 2015) the Court had to consider for the first time, the annulment of an adoption order in a context where the adoptive parent was dead and the adopted child had long reached adulthood. In the applicant’s case, the Court, finding that the annulment decision was vague and lacking in justification for the taking of such a radical measure, concluded that the interference in her family life had not been supported by relevant and sufficient reasons, in violation of Article 8 (right to respect for private and family life) of the Convention. The Court noted in particular that, in any event, the annulment of an adoption should not even be envisaged as a measure against an adopted child and underlined that in legal provisions and decisions on adoption matters, the interests of the child had to remain paramount. The Court also held that there had been a violation of Article 1 of Protocol No. 1 (protection of property) to the Convention, on the account of the disproportionate interference with the applicant’s property right over the disputed land.

Case Berisha v. Switzerland (Application no. 948/12, Judgment 30 July 2013) concerned the Swiss authorities’ refusal to grant residence permits to the applicants’ three children, who were born in Kosovo and entered Switzerland illegally, and the authorities’ decision to expel the children to Kosovo. The Court held that there had been no violation of Article 8 (right to respect of family life) of the Convention, considering in particular that the applicants were living in Switzerland because of their conscious decision to settle there, rather than in Kosovo, and that their three children had not lived in Switzerland for long enough to have completely lost their ties with their country of birth, where they grew up and were educated for many years. Moreover, the children still had family ties in Kosovo, the older two children, 17 and 19 years old, were of an age that they could be supported

at a distance, and there was nothing to prevent the applicants traveling to, or staying with the youngest child, 10 years old, in Kosovo to safeguard her best interests as a child. Also taking into account the at times untruthful conduct of the applicants in the domestic proceedings, the Court concluded that the Swiss authorities had not overstepped their margin of appreciation under Article 8 of the Convention in refusing to grant residence permits to their children.

Other caselaw concerned legal recognition for children born as a result of surrogacy treatment. In *case Menesson and others v. France* (Application no. 65192/11, Judgment 26 June 2014) the national courts refused to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment. The applicants complained in particular of the fact that, to the detriment of the children’s best interests, they were unable to obtain recognition in France of parent-child relationships that had been legally established abroad. In this case ECtHR held that there had been no violation of Article 8 (right to respect for private and family life) of the Convention concerning the applicants’ right to respect for their family life. It further held in both cases that there had been a violation of Article 8 concerning the children’s right to respect for their private life. The Court observed that the French authorities, despite being aware that the children had been identified in the United States as the children of Mr and Mrs Menesson and Mr and Mrs Labassee, had nevertheless denied them that status under French law. It considered that this contradiction undermined the children’s identity within French society. The Court further noted that the case-law completely precluded the establishment of a legal relationship between children born as a result of – lawful – surrogacy treatment abroad and their biological father. This overstepped the wide margin of appreciation left to States in the sphere of decisions relating to surrogacy.

The right to know one’s origins was also approached by ECtHR in a number of decisions such *Mikulic v. Croatia* (Application no. 53176/99, Judgment 7 February 2002), *Odievre v. France* (Application no. 42326/98, Judgment 13 February 2003), *Jäggi v. Switzerland* (Application no. 58757/00, Judgment 13 July 2006) and *A.M.M. v. Romania* (Application no. 2151/2010, Judgment 14 February 2012). In the last case, *A.M.M. v. Romania*, the Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention, finding that the domestic courts did not strike a fair balance between the child’s right to have his interests safeguarded in the proceedings and the right of his putative father not to undergo a paternity test or take part in the proceedings.

3. Best interest of the Child: reality or myth?

The best interest of the child is a child rights principle, which derives from Article 3 of the UN Convention on the Rights of the Child, which says that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. Assessing the best interests of a child means to evaluate and balance “all the elements necessary to make a decision in a specific situation for a specific individual child or group of children”.

The concept of the “child’s best interests” pre-dates the UNCRC and ECHR and was already enshrined in the 1959 Declaration of the Rights of the Child (par. 2), the Convention on the Elimination of All Forms of Discrimination against Women (arts. 5 lett. (b) and art. 16, par. 1 lett. (d)), as well as in regional instruments and many national and international laws.

Several aspects are relevant regarding the principle of the best interest of the child: child’s views and aspirations; identity of the child, including age and gender, personal history and background; care, protection and safety of the child; child’s well-being; family environment, family relations and contact; social contacts of the child with peers and adults; situations of vulnerability; risks that the child is facing and the sources of protection, resiliency and empowerment; child’s skills and evolving capacities; rights and needs with regard to health and education; future development of the child; *and* any other specific needs of the child (Committee on the Rights of the Children, 2013, General Comment No. 14, Chapter V.A.1; par. 44).

The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity (Committee on the Rights of the Children, 2013, General Comment No. 14, art. 3 par. 1 and paras. 4-5).

Child’s best interests concept allows a a threefold approach (Committee on the Rights of the Children, 2013, General Comment No. 14, art. 3 par. 6):

- (a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

- (b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

- (c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.

Viewing the best interests of the child as “primary” requires a consciousness about the place that children’s interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned (Committee on the Rights of the Children, 2013, General Comment No. 14, par. 40).

Benefits of the best interest of the child standard: Most aspects of the law involve a tension between rules and discretion, and between objectivity, predictability, and ease of administration versus individualization and flexibility (Warshak, 2011, p. 96). The “best interest of the child” standard is more than a statement of the primary criterion for decision or the factors to be considered; it is an expression of the court’s special responsibility to safeguard the interests of the child at the center of a custody dispute because the child cannot be presumed to be protected by the adversarial process. “[The

Chancellor] acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a ‘wise, affectionate, and careful parent’ and make provision for the child accordingly. (...) He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights ‘as between a parent and a child,’ or as between one parent and another (...). Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.” (Judge Cardozo, *Kinsella v. Kinsella*, 696 A.2d 556, 577–78 (N.J. 1996).

Beyond the emphasis on children’s welfare trumping other concerns, defenders of the best-interest standard regard its indeterminacy as ensuring two benefits: flexibility and adaptability (Warshak, 2011, p. 98).

The open-ended best-interest standard frees courts to craft decisions on a case-by-case basis, drawing on a comprehensive inquiry into each child’s needs and the extent to which various outcomes can be expected to meet these needs. In so doing, it avoids elevating one factor above all others and, at least formally, avoids relying on stereotypes. The best-interest standard allows courts to consider such protective factors and to apply knowledge from psychological research to the specifics of each case (Warshak, 2011, pp. 99-100).

Critics to the best interest of the child standard (Warshak, 2011, pp. 102-106):

- a) The best-interest standard “is too subjective to produce predictable results”
- b) Because the best-interest standard does not focus exclusively on one factor as the basis for decisions or identify which factors will carry the most weight in the court’s decision, the parties may believe that the way to prevail is to engage in broad character assassinations.
- c) The best-interest standard provides courts with broad discretion and no guidance or objective basis to decide.
- d) Because the best-interest standard invites an in-depth inquiry, critics believe it encourages courts to appoint and depend too heavily on mental health professionals who conduct evaluations and offer recommendations: “the positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the responsible authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child.

After a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited” (Case *K.A. v. Finland*, Application no. 27751/95, Judgment 14 January 2003, par.138).

In case *T.P. and K.M. v. the United Kingdom* (Application no. 28945/95, Judgment of 10 May 2001, par. 80), the Court held that “there may be instances where disclosure of a child’s statements may place that child at risk. There can be no absolute right by a parent to view, for example, the videos of interviews conducted by medical professionals”. Furthermore, procedural protections do not give parents a discrediting right to sue any official that make decisions that are unfavorable to family reunification. Also, in *M.B. and G.B. v. the United Kingdom* (Application no. 35724/97, 23 October 2001), the Court determined that the applicant did not have a right to sue a psychologist for negligence in determining that his child had been sexually abused, rejecting the application as “manifestly ill-founded within the meaning of Article 35 § 3 of the ECHR”.

In case *Sahin v. Germany* (Application no. 30943/96, Judgment 8 July 2003) consideration of what is in the best interests of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court’s task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (par. 64).

The applicant, Mr. Sahin was a Turkish national at the time of the events complained of and subsequently obtained German nationality. He lived together with Ms. D. for almost three years (1987-1990), resulting the child G., who was two years old when they separated, in 1990. After that, the mother of the child refused his access to the child, prohibiting any contact between the applicant and the child. Thus, the applicant applied to the Wiesbaden District Court for a decision granting him a right of access to his daughter. All the German courts had dismissed his application acting “in the child’s best interest”: “The Court is convinced that the petitioner’s wish for G. to visit him is motivated by attachment to his child and genuine affection for her. It nonetheless takes the view that personal contact with her father is not in the child’s best interests, since her mother dislikes her father so deeply and opposes all contact so fiercely that any visits

ordered by the court would take place in a tense, emotionally charged atmosphere which would probably be extremely harmful to the child” (par. 16).

The applicant sustained that the German courts’ decisions dismissing his request for a right of access to his child, born out of wedlock, amounted to a breach of Article 8 of the Convention, the relevant parts of which provide: “1. Everyone has the right to respect for his (...) family life (...). 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others.”

All German courts based their decisions on the conclusions of an expert who evaluated the psychological impact of such visits on the child future development: “the expert noted that she had visited the applicant's family in June 1992 and again heard the applicant, the child’s mother and the child on several occasions between November 1992 and February 1993. As regards her meetings with G., the expert explained that in the course of various games she had explored her feelings concerning persons and situations and concerning the applicant. They had also looked at a family photo album and G. had avoided looking at the more recent photographs. This reaction showed that G. had repressed the memories of her father” (paras. 21-23). The expert reached the conclusion that a right of access without prior conversations to overcome the conflicts between the parents was not in the child's interests. By a letter of 8 March 1993, the Regional Court, noting that the District Court had omitted to hear the child, enquired of the expert whether hearing the child in court on the issue of her relationship with her father would place a psychological strain on her. In her reply of 13 March 1993, the expert indicated that she had not directly asked the child about her father. She had expected that G. would react spontaneously in the course of the meetings and express her feelings towards him. In the expert’s view, the fact that G. had not mentioned her father was certainly relevant. The expert further referred to the last meeting, when they had glanced through a family photo album and she had asked G. about whether she still knew her father. On both occasions, she had appeared to repress her memories concerning him. The risk inherent in questioning her about whether she wished to see her father was that, in this conflict between the parents, the child might have the impression that her statements were decisive. Such a situation could provoke serious feelings of guilt.

ECtHR noted that the child was about three years and ten months old when the appeal proceedings started, and five years and two months at the time of the Regional Court’s decision. The expert reached her conclusion, namely that a right of access without prior

contact to overcome the conflicts between the parents was not in the child's interests, after several meetings with the child, her mother and the applicant father. Consulted on the question of hearing the child in court, she plausibly explained that the very process of questioning entailed a risk for the child. Such a risk could not be avoided by special arrangements in court.

But ECtHR has made a very interesting affirmation: *“considering the methods applied by the expert when meeting the child and her cautious approach in analyzing the child's attitude towards her parents, the Court is of the opinion that the Regional Court did not overstep its margin of appreciation when relying on her findings, even in the absence of direct questions on the child's relationship to the applicant.”* In our opinion this is a hazardous and very dangerous statement of the ECtHR. The ECtHR judges have no expertise in the field of psychology and, therefore, could not make appreciative or depreciative assertions on the activity of an expert in psychology who denied the hearing of the child by the German courts during the trial. Is this attitude meeting the best interest of the child standard? Let us not forget that a father was denied the contact with his own child because, in the end, the mother had stopped loving him. There was no evidence of abusive or violent behavior in this case, but only the experts concerned that the conflictual status between the parents could have affected the child's development.

The Court observed that, in the course of the proceedings before the German Regional Court, the applicant unsuccessfully challenged the expert for bias and criticized her scientific approach pursuing these arguments in ECtHR proceedings, but the Court had no cause to doubt the professional competence of the expert or the manner in which she conducted her interviews with all concerned. Therefore there has been no violation of Article 8 of the Convention.

We express our concerns regarding the understanding and interpretation by the ECtHR of the principal of the Child's best interest because, in our opinion, ECtHR has overpassed its competence in appreciating the work of an expert in a field where non of the ECtHR judges have expertise.

Other authors have noticed the hesitation of ECtHR to find a violation of the art. 8 ECHR in cases where the domestic authorities made an analysis of the best interest of the child principle, proving “a crucial inconsistency” in its caselaw (Merckx, 2018). Given the fact that the outcome of such cases depends largely on the interpretation of the best interest of the child which is vague concept, by the domestic judge, the child's right to be heard in Court should be correctly enforced as a guarantee that it will not be invoked to safeguard

other interests. “To safeguard children’s rights, children should be adequately informed about the proceedings at hand and supported to develop their own opinion about what they think is in their best interests. Overruling this opinion should only occur in exceptional circumstances and the domestic judge should provide coherent and relevant reasons to justify this” (Merckx, 2018).

In *case Mandet v. France* (Application no. 30955/12, Judgment 14 January 2016), ECtHR held, by a majority, that there had been: no violation of Article 8 ECHR. The Court noted that the reasoning in the domestic courts’ decisions showed that the child’s best interests had been duly placed at the heart of their considerations. In taking this approach, they had found that, although the child considered that Jacques Mandet was his father, his interests lay primarily in knowing the truth about his origins. These decisions did not amount to unduly favoring the biological father’s interests over those of the child, but in holding that the interests of the child and of the biological father partly overlapped.

It was also to be noted that, having conferred parental responsibility to the mother, the domestic courts’ decisions had not prevented the child from continuing to live as part of the Mandet family, in accordance with his wishes.

The Court noted that it was not correct that the domestic courts had taken the child’s refusal to submit to the tests as a factor confirming their conclusions as to the untruthfulness of the formal recognition of paternity. The Versailles Court of Appeal’s judgment indicated that what they had taken into account in this connection was the refusal by Mr. and Ms. Mandet to undergo this test, and their refusal to take the child – aged under ten when it was ordered – to see the expert. The finding of a parent-child relationship between the child and Mr Glouzmann had not been based on this refusal, but on a calculation of the legal period of conception and an assessment of the evidence submitted in adversarial argument by the parties. On this basis, the court of appeal had found that Mr. and Ms. Mandet had not proved that they were living together or had maintained a sexual relationship during the period the child was conceived and that, by contrast, it had been established that Mr. Glouzmann had been in a sexual relationship with Florence Mandet and lived with her, not only at the time of conception but also after the birth, and that the child had been known as their common child.

The Court then noted that the domestic courts had done what could be expected of them to involve the child in the decision-making process. It noted that the Nanterre *tribunal de grande instance* had appointed an *ad hoc* guardian to represent the child’s interests in the proceedings, but that she had been unable to meet him because Mr. and Mrs. Mandet, and

the child, had left France. Moreover, the Court of Cassation had examined the question of the child’s right to be heard in the proceedings and had held that this right had been respected. It had noted that the child had been informed of the proceedings and knew that his paternity was being challenged, and that he had sent letters to the judges in which he expressed his wish not to change his surname and to retain his legal parent-child relationship with Jacques Mandet, without, however, asking to be heard.

In addition, the Court noted that the reasoning in the domestic courts’ decisions showed that the child’s best interests had been duly placed at the heart of their considerations. In taking this approach, they had found that, although the child considered that Jacques Mandet was his father, his interests lay primarily in knowing the truth about his origins.

It appeared to the Court that the domestic courts had not failed to attach decisive importance to the child’s best interests, but instead had held that those interests did not necessarily lie where the child perceived them – in maintaining the parent-child relationship as established and in preserving emotional stability – but rather in ascertaining his real paternity. The courts’ decisions did not amount to unduly favoring Mr. Glouzman’s interests over those of the child, but in holding that their interests partly overlapped. By acting in this way, the domestic courts had not overstepped the discretion (“margin of appreciation”) enjoyed by them.

Lastly, it was to be noted that by conferring parental responsibility to the mother, the domestic courts’ decisions had not prevented the child from continuing to live as part of the Mandet family, in accordance with his wishes.

Consequently, the Court held that there had been no violation of Article 8.

Thus, in this case the paternity of a legal father was withdrawn in favor of the biological father, despite the eleven-years-old child’s opposition to having his paternity changed which became evident from the letters addressed to the domestic judge. Subsequently, the domestic judge remarked that the child’s best interests “*ne se trouvait pas tant là où le troisième requérant le voyait*” (“*did not lie where the child saw them himself*”). The judge figured that the child should know the truth about his origins.

In another case, *Fröhlich v. Germany* (Application no. 16112/15, Final Judgment 26 October 2018), a similar factual context existed, but in this case, the child was informed about the fact that a man started proceedings for contact and information rights, but not that this claim originated in his belief that he was her biological father. In the end, the

domestic judge dismissed the request of the father on the grounds that the child’s best interests were endangered because the marriage between her legal parents could fall apart if the biological paternity of Fröhlich were to be established.

The applicant, Mr. Fröhlich alleged that he conceived a child with a married woman who already lived with her husband with whom she had six other children and continued to do so. She ended her relationship with Fröhlich shortly after she gave birth to her seventh child. Fröhlich attempted to maintain contact with the child but was hindered by both legal parents who also did not consent to paternity testing.

In the proceedings before the domestic courts, Fröhlich was not granted contact and information rights, because his biological paternity could not be established. In that regard, the domestic courts found that ordering a paternity test would jeopardize the child’s best interests because the results of such a test might cause her nuclear family to break up. A statement of the legal father had revealed that he knew of the extramarital affair and that he would not agree to contact between Fröhlich and the child, because Fröhlich had caused the family considerable suffering and should bear the consequences of his behavior. Everyone in the family knew that Fröhlich believed that he was the father, except the six-year-old child herself who was appointed a guardian *ad litem*. The guardian also concluded that contact with Fröhlich would be detrimental to the child’s well-being at her age. Eventually, despite opposition from the guardian, the child was heard by the Court of Appeal. However, she was not informed in these proceedings as to the real reasons why Fröhlich had instigated contact proceedings. According to the minutes, the child was aware of the fact that her parents were in dispute with Fröhlich, who wanted to visit her but without knowing the real reasons.

Fröhlich’s request for an expert opinion regarding contact rights and to inform the child about his application during a new hearing was dismissed by the Court of Appeal. The Court of Appeal argued that establishing paternity of Fröhlich through a paternity test, which German family law made necessary to order contact and information rights, was contrary to the child’s best interests. The German Court was “convinced that the family union would be destroyed, if the applicant’s paternity were established and contact rights ordered”. The child was well-integrated in her family, felt protected and secure, and there existed no indications that her legal father did not assume his role as a father towards her.

The Court of Appeal heard not only the applicant, but also the child and the child’s legal parents. Furthermore, in taking its decision to refuse contact, the Court of Appeal had regard to the entire family situation and relied on an extensive written statement by the

child’s guardian ad litem, an experienced psychologist. There is therefore no indication that the judges of the Court of Appeal had based their findings on standardized arguments in favor of social families. Moreover, while it is true that the Court of Appeal refused the applicant’s request to establish his paternity, the Court also finds it true that a court could refrain from ordering a paternity test in cases where the further conditions for contact were not met . The Court was therefore satisfied that the Court of Appeal’s procedural approach was, in that regard, reasonable (par.43) and that the domestic courts adduced sufficient reasons for their decision to refuse the applicant contact rights and provided the applicant with the requisite protection of his interests (par. 45). In ECtHR view, Court of Appeal was aware of the importance the question of paternity might have for the child in the future, when it would start to ask about her origin, but held that for the time being, it was not in the best interest of the six-year-old child to be confronted with the paternity issue (par.64).

As regards the decision-making process the Court noted in particular that the Court of Appeal specifically decided to orally hear the child against the opinion of the child’s guardian ad litem. Furthermore, even if the latter in her written statement had only addressed the question of compatibility of contact rights with the child’s well-being, the Court of Appeal could extract relevant general information as regards the family in which the child grew up (par. 65).

Court of Appeal heard the six-year-old child in the presence of her guardian ad litem only. According to the minutes, the child was aware – *without knowing the real reasons* – that her parents were in dispute with the applicant, who wanted to visit her or wanted her to visit him, but that neither her parents nor herself agreed to this (par.17).

It becomes almost certain that the ECtHR refuses to take a stand as to how domestic courts should balance competing interests in paternity-cases and how the child’s best interests should be evaluated. Even though this in itself is not problematic, taking into account the principle of subsidiarity, the consequences it has on the rights of the children involved is.

The existence of paternalistic and hypothetical judgments in children’s rights has long been an issue children’s rights scholars struggle with. Regrettably, even in the proceedings of the ECtHR, this kind of reasoning thrives, due to the combination of the subsidiarity principle and the vague understanding of a child’s best interests. The only safeguard that exists to tackle this real risk, albeit not completely, is a correct use of the right of the child to be heard. However, this does not seem to be a priority of Members

States, nor of the Court. Under the guise of the child’s best interests, the interests of a parent, and in the proceedings before the ECtHR the interests of the Member State, are being guaranteed at the expense of the child (Merckx, 2018).

4. Conclusions: Towards a Court of Children’s Rights?

It is obvious that ECtHR chooses to act safe in confronting national decisions based on the analysis of the best interest of the child principle. And several times, it even undergoes its competency in interpreting conclusions of experts which constituted the main argument for the decisions of national courts. We managed to make several observations:

ECtHR judges do not have any expertise in psychology and the truth is that they could not make a proper analysis of reports provided by experts in national trials.

ECtHR does not hear the children and, therefore cannot provide an accurate view on each specific case. Every case is filtered by the reasoning of the national courts, national governments and of the applicants. The only direct contact of ECtHR judges is with national Government representatives and the applicant even if another man character of the proceedings in such cases is, in fact, the child.

The best interest of the child principle is, as shown in the literature, a “subjective” notion, whose interpretation is conditioned by a sum of factors and has an important dose of subjectivity, even if the objectiveness standard of court decision is present in every national legislation.

The ECtHR judgment, no matter if admits or not a violation of Art. 8 ECHR, finally affects the life of the child involved in the procedure, while the child was never presented before the Court.

Last, but not least, ECtHR was not preoccupied in circumscribing in its caselaw the meaning of the expression “child’s best interest” or establishing tests in verifying the observance by the national courts of those principles and rules, same it did in the case of other very important principles, terms and notions provided by national and European law (like “criminal matter”, “criminal sanction”, “agent provocateur” etc.) and we cannot but ask ourselves why? “Child’s best interest” is a very important but delicate principle which is NOT provided by ECHR but by UN Convention on the Rights of the Children. Could this be the answer to our question?

Having in mind all these arguments, we place in favor of creating a parallel Children’s Rights Court, which could overcome all these obstacles and could provide better judgments which could observe all the factors involved in each case, safeguarding the rights of the children as the most important outcome of the decisions.

Maybe this proposal is premature but, still, it is worth to be considered in the light of decisional context we described in the present study.

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THE RIGHT OF THE CHILD TO PARTICIPATE - LEGAL ASPECTS

The Convention on the Rights of the Child is based on 4 broad groups of rights that relate to: child safety in all conditions and circumstances; realization of the child's potential, education, culture, etc; providing basic and key conditions for a good life of a child, survival and basic (existential) needs, as well as the right of the child to participate (in proces of decision –making).

The right of the child to participate includes the right of the child to express his / her opinion in matters that directly or indirectly relate to him/ her and to have his /her views respected, considered and accepted as appropriate. This is extremely important for strengthening all other groups of children's rights and preparing them for entering the adult world by attaining the age of 18. It is also important for strengthening children's identity, for making their relationship with the environment, and for learning them how to represent their own interests. Children who grow up in an environment that respects their opinion, have the opportunity to communicate and can fully realize their full intellectual and every other potential, and can grow into an independent, responsible persons who can be an example to others.

The paper will outline examples of positive legislation pertaining to the rights group relating to child participation in accordance with the 1989 United Nations Convention on the Rights of the Child, as well as strong recommendation for improving the above.

Keywords: *child, participation, legal aspect*

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1. Introductory notes

We often find in literature that “the character of society of adults is a direct consequence of the way their children are raised and vice versa, that the way they are (children) raised and educated directly affects the values and priorities of the adult society. “(Dejanović,1999: 9). In this model of society, children were seen as objects in their own process of growing up and socialization - adults were the only agents of change and activity. Admitted to the decisions and will of adults, the child is the adult’s responsibility until he/she reaches maturity and is fast introduced to the adults’ world - to be able to earn and benefit the family in which he or she is.

Publicly shown care for the children and their well-being were in fact a paravane for the child’s accelerated departure into the adults’ world. The child’s age is also often perceived as an aggravating circumstance- the child cannot do something because of his/her age. Such a cruel concept of childhood was dominant, as some authors claim, until the Enlightenment and Romantic period, when the child began to be seen as innocent, spontaneous and unprotected, and when the need to extend the childhood and period of carelessness as much as possible was constituted. (Dejanović, 12). By then, the child was introduced only as another mouth in family that must be fed and another pair of hands that would be able to work as soon as possible. At the same time as the need for prolonging childhood, appears the formal education and the process of learning, which, as it becomes more formal, gets an increasingly important role in the socialization and preparation of the child for the adults’ world. The education of the child is no longer only a concern of the parents, but becomes concern of the whole society and the state.

In the 18th century, children began to be seen as a separate social group, as “future citizens“ and “*future change makers*” (Verheelen E, 2015:45). Children become more protected category of the population. Adults have more in mind their physical, mental and general health and especially their true eligibility to participate in some adults’ activities and to understand the world around them.

But it took only one step from recognizing a kind of social identity of children to turning their position even worse. Very soon from the “future change makers“, they have become generations of “*not yet*” - those who are *not yet* mature enough or able to make decisions for themselves, who still *do not know enough*, and are *not yet* human beings but only “human cubs“ (Verheelen,ibid). Protecting them from possible bad effects of their own surrounding and actions has become a restriction and retardation of their own development.

To further strengthen the power and control of adults over children, systems around the world established mechanisms of adult responsibility on children's activities of varying degrees and in different ages of the child for his or her actions, and made adults responsible for making decisions on behalf and for the sake of the children. They bring those young future change-makers further down and reduce their role in their own lives. The concept of “not yet” is reinforced because children are not “*capable*” enough to do much alone or without parental consent. At the same time, adults become burdened with institutionalized forms of compulsory childcare and control by the institutions as they carry out their task of caring for children and educating them, which only leads to the widening of the generational gap between adults and children. (Dejanović, 13) and to the loss of children's identities. Some authors say that it is great, that we have given children the right on childhood as a certain period of peace of mind and time for play. On the other hand, by depriving children of the responsibility for their actions and decisions and shifting the focus of these things solely and exclusively to adults, we have actually done more harm than when they were in age of 5 or 6 years and have already been introduced to various craft or agricultural activities by adults (Verheelen, 44). In one case, we abolished their carelessness and right to play and placed a heavy burden on their shoulders and forced them to enter the (adults') life as soon as possible, and in the other case, by overprotecting them, we denied children the opportunity to learn to lead a life on their own and to allow them independence. Lengran's opinion is related to this: “The child is subordinate to the adult world, which is personified for him in his parents and school authorities. It cannot just decide alone by him/herself; he can neither choose what he likes nor reject what he neither desire nor have inclination for” (Lengran: 1971, 42). The child's world and the attitudes and values he or she has been building since the beginning of life are limited by the attitudes and values of a primarily family and later of the peer environment. Deciding against parental wishes often leads to rejection by parents or deprivation of peers, which is why, even in the 21st century, many children are still not, quite expectedly, brave enough.

“Children are not and should not be passive absorbers of other people's experiences, but should make an active contribution to their development” (Dejanovic, 15). Children are and should be even more active participants in their lives than just supporting actors. Therefore, the modern concept of the rights of the child, which speaks equally about the rights and freedoms of the child, and at the same time about the gradual introduction of the child to life and learning them to take responsibility in certain situations for himself and his actions, is the most significant step forward in observing the position of the child in general.

In the following, before explaining the importance of child participation in the context of the Convention on the Rights of the Child, we will briefly dwell on the concepts of child and participation, because of all the theoretical and practical controversies that accompany the definition and application of the definitions of these two terms.

About the Concept of a Child

Although they dealt with the child as their main subject, even two declarations - the Declaration of the Rights of the Child from 1924¹ and the Declaration of the Rights of the Child from 1959.² - have omitted the definition of a child. “We justifiably conclude that the creator of the First Declaration (Society of Nations) considered the child to be the most important part of humanity, the originator of everything in the world. From the Child onwards people emerge - the capitalization of the term denotes the poetic and metaphysical significance of the child as a being.

For all the merits he will do for his life and in his life and for the humanity in whole, adults owe him special protection, especially in situations of crisis and especially protection from any exploitation, they owe him food, clothing, education” (Ćorić: 2019,33). The child is a father / mother / the parent of humanity; in order to achieve this role, he/she must be provided with all of the above.

In the 1959 Declaration of the Rights of the Child, we have a kind of confirmation of the aforementioned “not yet” status of the child (that he is not adult enough, able, etc.):

“BECAUSE the child’s physical and mental immaturity require special care and protection, including appropriate legal protection, before and after birth,”

where emphasizing the child’s physical and mental immaturity is part of the definition of the child (regardless of his/her specific age). Instead of perceiving the child’s age and corresponding child’s psychophysical status as an advantage and a condition for the gradual introduction into the rights, obligations and responsibilities of the adult world,

¹ Geneva Declaration of the Rights of the Child , adopted 26 September, 1924, League of Nations, available on : <http://www.un-documents.net/gdrc1924.htm>, seen on site: september 2019.

² DECLARATION OF THE RIGHTS OF THE CHILD , [Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959., <http://www.cirp.org/library/ethics/UN-declaration/>. Seen on site: september 2019.

the age of a child is perceived as a factor of rejection of a child’s right to express his/ her opinion at any early age about matters that directly or indirectly affect him / her.

The Draft Law on the Rights of the Child and the Protector of the Rights of the Child of the Republic of Serbia³ (whose adoption is expected by the end of 2019) defines in Article 2 a child as „every human being under the age of 18“. Even when a person under the age of 18 acquires certain rights and obligations – he/she remains a child. The legal age, and therefore full responsibility for decision-making and all procedures, has been set in 18 years in most countries of the world, which is the criterion for defining a child in accordance with the definition of a child in the UN Convention on the Rights of the Child, 20. November 1989⁴:

Article 1.

For the purposes of this Convention, a child is any human being who has not attained the age of eighteen years, unless, under the law applicable to the child, legal age is attained earlier.

Restricting the meaning of the term “for the purposes of this Convention“ gives the possibility for another convention or declaration of an international character to define the child in a different way (Ćorić: 2019, 33) or to terminate the status of the child in an earlier age in certain country, because the Convention on the rights of the child allow it.

For the purposes of our work, we remain in the definition of a child as under the age of 18, which is consistent with the UN Convention on the Rights of the Child and with our positive legislation, in general.

The Meaning of Participation

What does participation really mean? Some authors imply “*a process in which subjects (children and adults) express their opinions, listen to one another, and respect others’ opinions, in order to make a decision that concerns them, whether it will be content that concerns them personally or content that is relevant to the environment, to the community that surrounds them*” (Dejanovic, 31). Others, by participation, see “***actively listening to***

³ Available on: <https://www.paragraf.rs/dnevne-vesti/070619/070619-vest15.html>, seen on site: september 2019.

⁴ Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, „Sl. list SFRJ - Međunarodni ugovori“, br. 15/90 i „Sl. list SRJ - Međunarodni ugovori“, br. 4/96 i 2/97)

children what they have to say about themselves and their needs, and that everything that children say in this context must be taken completely seriously” (Lansdown: 1995, 5). Thus, adults can perceive a particular situation through the eyes of a child - which they may have once had, but the world of adults, who we often fervently wish to walk in, made them forget or at least suppress within themselves that kind of perspective. Children have a completely different way of seeing the world around them, which often conflicts with seeing the same world from the adults’ side (Simmons, 1995: 5-12; Janjić-Komar, Panov, 2000; 104-109, 177). That is why talking and getting acquainted with the different “maps” of the world of participants in the exchange of opinions is very important, because only such equal communication will lead to the right decision, satisfactory for both parties. Lansdown also believes that children are quite interested in participation in making decisions that affect them or their environment for a variety of reasons:

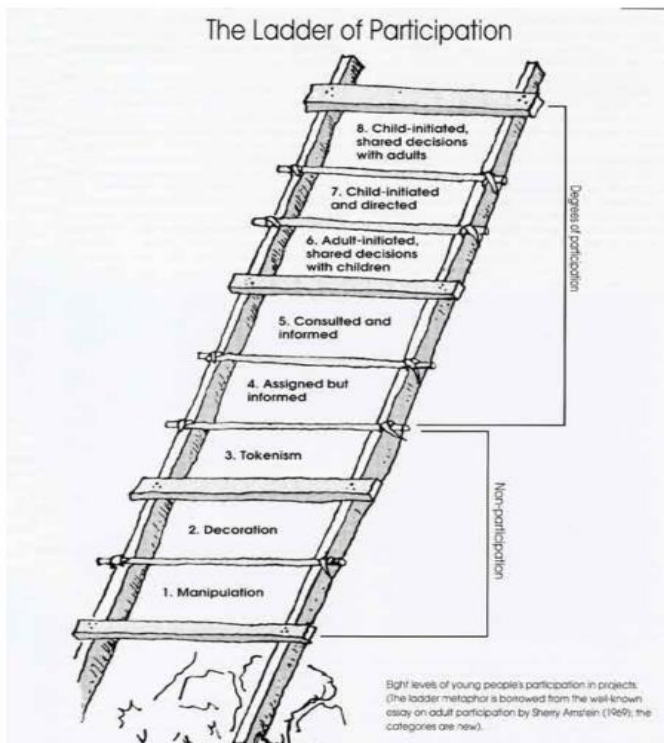
- they acquire new knowledge and skills that they can use throughout their lives
- it helps them build their confidence and independence;
- adults often do not understand them or misunderstand them, and therefore their participation is very important because they give adults their views on things and bring them closer to the decision that will be most favorable to them (because in the end, all these decisions will concern them);
- -participation encourages them to recognize the forms of violation of their rights and to gain confidence in reporting those violations and fighting for their own recognition;
- -gives them the opportunity to meet other peers, with similar or different experiences that they will accept rather than the experiences of adults who are separated from them by generation gap. Peers are often even the first in influence of all the *Significant Others*⁵ to whom children are surrounded (Lansdown, 8).

„Participation is a process, a way of working together that equally engages children and young people in matters that concern them individually or collectively. The process

⁵ *Significant Other* is concept known in psychology: those are persons in nearby surrounding of a person which have the biggest possible influence on a person’s behavior, thinking and values, as well as the influence on the process of decision making of a person. More about it at: Haller, A. & Woelfel, J. (1972) Significant others and their expectations: Concepts and instruments to measure interpersonal influence on status aspirations Rural Sociology, 37(4), 591-622

respects the dignity of the child and the young person who participates in it and the contribution they make in the process, based on their experience and their perspective,” say experts from Ireland (in the publication of the Ministry of Children and Youth of the Republic of Ireland: Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People, 2014-2020: 2014,6). By giving the child the opportunity to participate in making decisions that affect his/ her future, we actually affirm his/her status as a being, individual and significant part of our society.

We also find that participation is “*a process of sharing (responsibility) in the decision-making process between at least two parties (children and adults in this context)*” (Hart, 1992, 6). Hart also constructed a ***ladder of participation***, which relies on adults’ attitudes toward children’s participation in the decision-making process that applies to them themselves (Figure 1) (Hart, 8-20).



Hart distinguishes three levels of non-participation and five levels of participation. Each level of participation in which the child's greater involvement in the process of exchanging opinions and information, and thus a higher degree of autonomy in decision-making, is more positioned on this scale. *The levels of non-participation* are:

1. *manipulation* - children do what adults require of them and children's ideas are used in disguise as adults' ideas, without the children being informed that their idea has been respected in any part.
2. *decoration* - children are asked to participate in an event without explaining what they should do there and what the significance of their presence is.
3. *Tokenism* - children were invited to attend an event but were not able to participate in the choice of topic or mode of communication, nor would they be given the opportunity to express their views during the event.

Levels of participation according to the Hart scale include the following features of child participation (numbering according to the original scale):

4. *Obligated as well as informed participants*, children participate in an event or procedure, they are informed in advance what their role⁶ is and what they are expected to do
5. *consulted and informed*. Children officially “work“ as consultants in certain situations when adults ask them to do so. They have been explained their role, and the importance of the opinions they give⁷

⁶ For example, when celebrating the 165th anniversary of the Museum of Vojvodina, children who previously participated in special museum creative workshops were given the task of being curators-guides to guests on the day of the ceremony. Everyone was obliged to tell a piece of history in the museum section where they were located or to tell the story behind one of the exhibits. Thus, the children were presented as a new generation of curators, they were explained the importance of their role and all the responsibilities that arose from that were easily fulfilled by the children.

⁷ Company Nickelodeon often consults children as direct consumers of its program (cartoons for children) for its next projects and appreciates their suggestions for new or existing projects (Hart, 12).

6. ***adults initiate the project and share decisions with the children.*** Children are involved here in the decision-making process, but the decision-making process is nevertheless initiated by adults⁸.
7. ***children initiate and lead (procedure or event)*** – these are often examples of organizing humanitarian action by children for their severely ill peers⁹.
8. ***children initiate projects and jointly decide with adults.*** Here the children propose the topic of conversation and work equally on the realization of certain ideas with adults. Adults, therefore, are needed as direct implementers of these children’s ideas and projects¹⁰, because the adults are formally „decision makers”¹¹.

For the purposes of the Convention on the Rights of the Child, participation is defined as follows in Article 12:

1. *Member States shall ensure that a child who is able to form his own opinion has the right to express that opinion freely on all matters affecting the child, with due regard for the child’s opinion in accordance with the age and maturity of the child.*
2. *To this end, the child shall in particular be given the opportunity to be heard in all judicial and administrative proceedings concerning him or her, either directly or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.*

⁸ For example, while working on a campaign against peer violence in the City of Novi Sad in 2017, initiated by decision makers (Mayor and City Council), a team of people who worked on the campaign consulted children on the content of short play forms/ videos in order to instruct that peer violence is unacceptable and should be reported and that bullies should be punished. The children’s proposals were almost completely accepted.

⁹ The latest example of a still individual case is the activity of 16-year-old activist Greta Turnberg from Sweden, who started her own „school strike on Friday against climate change“. Because of her activities, she took a year off from school and crossed the Atlantic Ocean in a non-fueled boat, participating in the World Leaders Forum in the US. With her initiative and the campaign she (officially) runs, she has led adults to hear her voice in a way they have not so far. Another equally good example of this individual engagement of children is the engagement of Malala Jusufsai, the youngest winner of the Nobel Peace Prize, for the education of women and girls.

¹⁰ Just the example of Malala Jusufsai’s engagement is also an example of an action that was her unique idea and over time she has received adult support for implementing the same.

¹¹ Meaning : state and government bodies.

Following the guidelines underlined in the definition of participation in the Convention on the Rights of the Child, in 2007, Laura Lundi created the so-called *The Lundi Participation Model* (Lundi, 2007: 10), which includes four important criteria:

1. *space*, an area in which the child can participate by expressing his/her opinion (education, safety, combating peer violence, etc.);
2. *the voice*, that is the opinion of the child, which represents the set of all intentions, hopes, expectations and aspirations of the child which he/ she represents as his/her own;
3. *the audience*, or to whom the message or opinion is being sent, who is the other party to the decision-making process, who has an obligation to listen to the child and his/her opinion (usually state bodies, as a special form of organizing adults);
4. *impact* - the importance that a child's involvement in a decision-making process has, even with regard to day-to-day decisions, is how much the child's opinion is taken into account in the final decision.

In Lundi's view, it is very important to give children the opportunity to express their views and opinions on things that directly or indirectly affect them in a supportive environment that will listen to them as equal participants in the process and act in accordance with the child's expressed opinion as much as possible, all with the aim of achieving the highest possible well-being for the children. The existence of all four elements, with the addition of active listening to the audience and increased understanding of the child's perspective, makes the process of participation “alive”.

Some authors think that the right of a child to participate, in addition to what is described in Article 12 of the Convention on the Rights of the Child, also includes the rights in Articles 13-17 (freedom of expression; freedom of thought, conscience and religion; freedom of association; protection of privacy; and access to relevant information), because these rights specify and complete the mechanisms of participation - ie. how the child or children can participate in decision-making in matters affecting them. These rights are in fact a framework, a space spoken by Lundy - areas where the child must be heard and his / her opinion taken as a serious and crucial factor in making a decision, and we believe that it is absolutely right to place these rights under the right to participate.

But there is one more important thing we must keep in mind. All these rights and the very concept of participation are constructed from the perspective of adults, as adults see it, and where they feel it is important for children to participate and express their own opinions. A survey conducted by the Yugoslav Center for the Rights of the Child in 1999, showed that children required participation regarding some issues and situations that adults did not think are matter to children at all. Thus, child respondents considered the participation of children in jury trials as essential, especially when the victim or perpetrator is a minor because it would provide adult members of jury with greater insight into the psyche and understanding of the child in the process; then in humanitarian action procedures where funds should be raised for a child who has been left without parents or to help abandoned animals, and similarly. In this research, the children did not mention the issue of religion, nor did they think about joining together to gain political or other influence, which are areas that are important to us adults and we consider them equally important to our children. Thus, their attitudes and needs for participation differed greatly from what their adults- parents wished them and felt they needed, and determined in which areas children should participate. The conclusion of this research is that adults have a *paternalistic-untrustworthy attitude towards children and that*, because of their good intentions to protect children from harmful influences and other challenges, in fact leads to overprotection of children, and to confirmation of their immaturity.

International conventions and declarations speak of the child’s “*less mental and physical development*“, which is why he/she needs greater and better protection by adults. However, we allow those under the age of 18 to find a job and write a will at the age of 15, to get married at the age of 16, and we also require that they must have an identity card at the age of 16. Its seems that by acknowledging all these rights to children, but also the obligations under the age of 18, that we think that they are more mentally and physically developed than the international documents from the 20th century say.

Participation in positive law of the Republic of Serbia and in practice

The overlap of definitions of a child in domestic positive law in the part relating to persons between the ages of 15 and 18 rises to confusion as to whether those persons are children, and should accordingly be treated in the manner provided for in our legislation for children or young people who are not strictly defined neither as adults, nor as minors, nor as mixed categories of persons, which leads to the question, what regulations then should apply to these “young people”¹² and whether they are young or children. However, some

¹² Zakon o mladima, čl.3.stav 1, Sl. glasnik RS“, br. 50/2011

authors believe that the early participation of a child and the support of his/ her opinion in matters and situations that directly or indirectly concern him / her *“fosters a sense of collective awareness and responsibility*, as well as learning how to solve problems with the full cooperation of others from their environment; at the same time, children develop confidence in themselves and their ability to influence others through their thinking and learn to create the conditions of their own lives in the way they want it to look like” (Horgan, D et alia: 2015, 11). Therefore, it is desirable to actually increase the level of obligations and responsibilities in terms of the law for a child over the age of 15, with a view to its independence.

What does participation look like in the positive law of the Republic of Serbia?

1. The participation of the child in the family law area is defined in Art. 60 paragraph 4 of the Family Law¹³:

A child who has reached the age of 15 and is able to reason can decide which parent to live with.

We also find in the Family Law important determinants of children’s participation in the fields of their education and health care, as follows:

Article 62

(2) A child who has reached the age of 15 and who is capable of reasoning may give consent to undertake a medical intervention.

Article 63

(1) The child has the right to education in accordance with his / her abilities, desires and inclinations.

(2) A child who has reached the age of 15 and who is capable of reasoning may decide which high school to attend.

Also, a beneficiary of social protection who is over the age of 15 has the right to access the case- files related to his / her use of services and exercise of social protection rights¹⁴, as well as the right to participate in decision-making, in assessing to his/ her needs and in deciding whether to accept the service, and to receive in a timely manner all notices

¹³ “Sl. glasnik RS”, br. 18/2005, 72/2011 - dr. zakon i 6/2015

¹⁴ čl.34. stav 2 Zakona o socijalnoj zaštiti, “Sl. glasnik RS”, br. 24/2011

necessary for it, including the description, purpose and benefit of the proposed service, as well as notices of available alternative services and other notices relevant to the provision of the service¹⁵. A special right is also guaranteed to a child, therefore under the age of 15, „to participate, according to age and maturity, and to express his or her opinion freely in all proceedings in which his rights are decided.“¹⁶ We do not know the statistics that would indicate the degree of realization of these participation rights, because they are not public because of the protection of minors and their interests.

2. The most significant form of child participation is provided in the Law on Foundations of the Educational System¹⁷ in the form of a *Student Parliament*. Children spend a significant amount of time in school during the day, so they need to work together with adults to create the most supportive environment for themselves, their learning and personal development.

Article 88

In the last two grades of elementary school and in high school, a Student Parliament (hereinafter: Parliament) is organized to:

- 1) give opinions and suggestions to professional bodies, school board, parents' council and principal about: rules of conduct in school, measures of student safety, annual work plan, school development plan, school program, way of arranging school space, choice of textbooks, free activities, participation at sports and other competitions and the organization of all manifestations of students in and out of school and other issues relevant to their education ;*
- 2) consider the relationship and cooperation of students and teachers, educators or professional associates and the atmosphere in the school ;*
- 3) inform students about issues of particular importance for their education and about the activities of the Student Parliament;*
- 4) have active participation in the school development planning process and in the self-evaluation of the school;*

¹⁵ Art.35.1 Zakona o socijalnoj zaštiti

¹⁶ Art.35 . 3 Zakona o socijalnoj zaštiti

¹⁷ “Sl. glasnik RS“, br. 88/2017, 27/2018 - dr. zakoni i 10/2019

- 5) *propose members of the Professional Development Planning Asset and the Student Violence Prevention Team.*

Parliament is composed of two representatives of each seventh- and eighth-grade classes in elementary school, or each high school class, and in art schools, three each in each grade or year.

Members of Parliament are elected by the students of the ward community each school year. Members of parliament elect a president.

Parliament elects two student representatives who participate in the work of the school board, in accordance with Article 119 of this law.

The Student Parliament has rules of procedure.

Parliament's work program is an integral part of the school's annual work plan.

Students' parliaments can join the community of student parliaments, as well as cooperate with associations and organizations concerned with the protection and promotion of students' rights¹⁸.

Student Parliaments, as consultative bodies in schools, are formally constituted at the beginning of each school year. Under the auspices of the Coordination Body for Student Safety in Primary and Secondary Schools of the City of Novi Sad, in accordance with this law, the Association of Student Parliaments of all primary and secondary schools will be carried out for the first time, from the territory of the City of Novi Sad, until the end of 2019.

3. Independent state bodies dealing with the protection of citizens' rights in the Republic of Serbia - the Commissioner for the Protection of Equality and the Ombudsman of the Republic of Serbia, have for years maintained a great tradition associated with the participation of children in decision-making processes. Namely, both independent bodies have established *panels of young advisers*, in which they receive periodically, as their advisors in the issues of protection of the rights of children, namely children aged 13 to

¹⁸ The NGO „Educational adviser” has already organized with students parliaments from the territory of the City of Novi Sad, who expressed their wish to participate in it, thematic discussions and debates on topics that the students themselves raised, inviting guest lecturers who were asked by the students themselves. Following topics were covered : peer violence, student involvement in school work, and school improvement as a supportive environment, and suicide.

18 years. Panels typically accommodate up to 30 children, with respect for regional and age representation, national and other child identities, and of course, especially given the gender of the child¹⁹. For many years now, with the support of UNICEF, children have been useful to these bodies as allies and advisers in the fight against discrimination, poor communication with peers, peer violence, any other form of violation of the rights of the child, and in active work to improve the position of children in the Republic of Serbia. What distinguishes these Panels in particular is that their children - members “are given the opportunity to express their opinions on issues of discrimination and tolerance, especially within the family, school and their community“ (downloaded from the Equality Ombudsman’s website²⁰), to make their views truly heard, they respect and form on the basis of them the formal opinions of these independent bodies in matters of protection of the rights of the child.

Instead of a conclusion

With new opportunities for growth and development using modern technologies, we have lost something in the 21st century. The life we knew in the 20th century no longer exists, and new generations of children, the “millennials”, face challenges and dangers that their peers in the 20th century could never have imagined. The struggle for their rights and recognition of their identity in a turbulent time and social and political circumstances actually separates them from adults, from their family environment and leads them to grow up in an even more uncompromising world than the one from which their parents originated. Participation sometimes takes its second form - a form of rebellion against adults, as the culmination of all those centuries when children were seen as a problem rather than a solution.

The solutions to the problems that children today offer are better, more practical, more effective than those that adults are prepared to commit. As a result, the generation gap grows into a specific class gap, and the conflict of generations becomes a clash of classes of “young” and “old”. Often none of the parties to this conflict wants to give in, the solution escapes realization, and the problem that needed to be solved is only magnified.

The right of children to participate becomes a new force and energy for children to prove themselves and their abilities, to prove their evolution from ‘not-yets’ to *‘already mature’*

¹⁹https://www.pravadeteta.com/index.php?option=com_content&view=category&layout=blog&id=48&Itemid=59

²⁰ <http://ravnopravnost.gov.rs/rs/mladi-isterivaci-diskriminacije-ulaganje-u-buducnost/>

(already mature and capable of life and decisions about it). Because they are - already “mature” - more than adults themselves. Legislation around the world can only see in a timely manner this advantage and the new perspective that new 21st-century children bring and even more involve them in decision-making processes, not only those decisions that directly affect children themselves - but also the survival of humanity itself.

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YEARBOOK
HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHTS OF THE CHILD
“30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”

Laws and Conventions:

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Ranka Vujović*

ACHIEVING THE PRINCIPLE OF URGENCY IN LAWSUITS FROM THE RELATIONSHIPS BETWEEN CHILDREN AND PARENTS

The State guarantees to every person that, in order to determine or protect their rights and obligations of a civil-legal nature, a lawfully established and impartial court will examine their case, fairly and publicly within a reasonable time period. In the domain of family relations, if the subject of proceedings relates to a child or parent exercising parental rights, the State's obligations related to the effective administration of justice are expressed through the requirement for urgent action. The idea of special efficiency when it comes to protection of children's and parental rights, is reflected in certain court procedures, including procedures for deprivation of parental rights, for the protection of children's rights, for financial support and protection against family violence, through the prescription of a special principle – special urgency of the procedure. Since family-legal matters do not represent typical civil law matters, the need to provide special process principles for such disputes is imposed by the very nature of the substantive legal relationship and the nature of the right that is protected in the proceedings, as well as their significance. The purpose of this paper is to consider the relationship of the said principles, i.e. the aspects of the same law, to investigate what the case-law considers to be a “reasonable time” in the light of the requirement for (particularly) urgent proceedings, which process instruments apply in its implementation when resolving these family disputes and whether the rules relating to much shorter deadlines for certain court litigation actions contribute to the shorter duration of proceedings in litigations for which special urgency is prescribed as a special procedural principle.

Keywords: Children and parents, lawsuit, reasonable time period, urgency, special urgency.

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1. Trial within a reasonable time - law, standard and legal principle

The right to a trial within a reasonable time is a fundamental human right guaranteed by the most important domestic and international legal acts. The Constitution of the Republic of Serbia stipulates that everyone is entitled to a fair and public hearing and decision, ¹*within a reasonable time*, in deciding on their rights and obligations, the grounds for suspicion that led to the initiation of proceedings, as well as on the charges against them, by an independent and impartial tribunal established by law. The right to a trial within a reasonable time is set out in the first paragraph of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: “Everyone has the right to a fair and public hearing in the determination of their civil rights and obligations or of a criminal charge against them, *within a reasonable time* before an independent and impartial tribunal established by law.”²

In addition to the constitutional and international guarantees, the party’s right to have their claims and proposals ruled by the court within a reasonable time is also prescribed as a general procedural rule in the Civil Procedure Law, ³ as well as in other domestic procedural laws.⁴

The right to a trial within a reasonable time, from the perspective of a human rights catalogue, is part of a broader right - the right to a fair trial.⁵ Observance of the right to a

¹ Article 32, Paragraph 1. Constitution of the Republic of Serbia.

² *The European Convention on Human Rights* (ECHR), adopted in Rome, on 4th November 1950. Text of the Convention in Serbian language, modified in accordance with Protocol no. 11, together with the decrees and laws ratifying other protocols to the Convention - Protocol no. 4, which guarantees certain rights and freedoms not covered by the Convention and the First Protocol thereto, Protocol no. 6 on the abolition of the capital punishment, Protocol no. 7 which provides for protection in the process of expulsion of aliens, Protocol no. 12 on the general prohibition of discrimination, Protocol no. 13 on the abolition of the capital punishment under all circumstances, Protocol no. 14 on the modification of the control system and Protocol no. 15 on amendments to the Convention, published in the *Official Journal of Serbia and Montenegro - Annex to the International Treaties*, no. 9/03, 5/05 and 7/05 and the *Official Gazette of the RS - International Treaties*, no. 12/10 and 10/15.

³ Article 10, paragraph 1 of the Civil Procedure Law, *Official Gazette of the RS* no. 72/11, 49/13- Constitutional Court (CC), 74/13-CC, 2013 / 14, and 87/18, reads: “The parties are entitled to have their claims and proposals ruled by the court within reasonable time.”

⁴ See Article 17 of the Law on Enforcement and Security, *Official Gazette of the RS* no. 106/15, 106/16 – authentic interpretation and 113/17 – authentic interpretation; Article 14 of the Criminal Procedure Code, *Official Gazette of the RS* no. 72 / 11, 101/11, 121/12, 32/13, 45/13 and 55/14 Article 2 of the Law on Administrative Disputes, *Official Gazette of the RS*, no. 111/09.

⁵ Procedural guarantees, i.e. procedural rights and powers in the civil court proceeding cases, under the title: “*The right to a fair trial*”, is set out in the Article 6 of the ECHR mentioned above. Due to the great importance of the Article, and particularly due to the fact that the petitions' applicants have, so far, referred to the Article the most, an extensive practice has been developed before the European Court of Human Rights (ECHR) regarding its interpretation, as well as new principles based on its interpretations which have not been in the

trial within a reasonable time demonstrates the efficiency of the judiciary, and the principle of efficiency as one of the elementary procedural principles contributes to legal certainty and enhances citizens' confidence in the judicial system.

The core of the right to a trial within a reasonable time is reflected in the state's guarantee to every person not just to have their case examined, i.e. their rights and obligations ruled fairly and publicly (according to the basic standards of fair trial), by impartial tribunal established by law, but also *within a reasonable time*. Reasonable time is the time that is optimally necessary to meritoriously complete the proceeding, taking into account relevant aspects, such as the circumstances of the particular case, its complexity, the importance of the subject matter of the dispute to the parties, their conduct during the proceedings, etc.

The reasonable time standard is set by case - law. In practice, the question is often asked what period of time is considered a reasonable time. Claims, we hear occasionally, are that two years in litigation, one year in criminal matters, or three years in the court of first instance and two in the second instance court, and the like, are not acceptable (Manojlović-Andrić et al., 2018: 9), because each case is a “story in itself”, and for each other standards of fair trial must be observed as well,⁶ and the decision should be based on properly and fully determined decisive facts. Decisions prescribed in the Law on Courts partially contribute to this, according to them the judge is obliged to inform the court president why the first instance proceedings have not been completed within one year and then inform them every three months about the further development of the proceedings, and the court president has the duty to submit such notice to the president of the immediately superior court in respect of proceedings which have taken two years before the court of first instance.⁷

The rules referring to time limits, which would allow to determine precisely the length of a court proceedings to be considered completed within a reasonable time, have never been defined in this way even in the practice of the ECHR. The court was always of the view that the reasonableness of the length of proceedings must be assessed *in concreto*,

original text of the Article 6 but are implicitly provided in the text, and are of great importance for exercising the right to a fair trial.

⁶ Constitutional guarantees of the right to fair trial, including the right to legal remedy, may jeopardize other constitutional evaluations, primarily, the right to a trial within a reasonable time. (In details: Keča, Knežević, 2017: 1259-1260).

⁷ See Article 28 Paragraphs 1 and 3 of The Law on Courts, Official Gazette of the RS no. 116/08, 58/09 - Constitutional Court, 104/09, 101/10, 8/12 - CC, 121/12, 124/12- CC, 101/13, 111/14 - CC, 117/14, 40/15, 63/15 - CC, 106/15, 63/16 - CC and 47/17.

respecting the established criteria for its evaluation, regardless of the fact that in some concrete cases, the length of time may seem unreasonable. The assessment is done by applying a cumulative test consisted of three main criteria: the nature and complexity of the case, the conduct of the applicants and of the court.⁸ However, it is clear from the ECHR practice that two years before one court instance could be considered a time limit, which if exceeded would be considered disputable from the point of view of violation of the right to a trial within a reasonable time (Manojlović-Andrić et al., 2018: 13).⁹

In some proceedings, however, the legislature requires the court to act particularly efficiently, by prescribing a special rule - concerning *the urgency* of the procedure. These special court proceedings include child-parent litigation. According to the Family Law, which in its Tenth part regulates the specifics of court proceedings in family law matters, the procedure concerning family relations *is urgent* if it concerns a child or a parent exercising parental right.¹⁰ For certain procedures, namely those in litigations for the protection of the rights of the child, for deprivation of parental rights, for support and for protection against domestic violence, specific rules are laid down - on *the special urgency* of the procedure.¹¹

The principle of urgency, that is, special urgency as an expression of the realization of the idea of an effective judiciary in child-parent litigation, whose features are discussed below, are of particular importance and are guaranteed by a series of procedural instruments aimed at effectively providing legal protection of subjective civil rights in this delicate matter.

⁸ The ECHR has formulated the mentioned criteria in the case *Preto and others v. Italy*, App. No. 7984/77, Judgement of 8th December 1982, pp. 30-37.

⁹ The shortest length of proceedings for which the ECHR found a violation of the right to a reasonable time was two years and four months in the two - stage jurisdiction case (complex case), relating to a claim for compensation for damages to an applicant who was infected with HIV (*X v. France*, App. No. 18020/91, 31st March 1992).

¹⁰ Article 204, Paragraph 1 of The Family Law – FL, the Official Gazette of RS no. 18/05, 72/11 - amending law and 6/15.

¹¹ See Article 269, 280 and 285 of the FL.

2. The principle of urgency and the standard of reasonable length in litigations concerning child - parent relationships *de lege lata*

2.1. Urgency and special urgency

The specificity of family disputes is that they require special attention to be paid to these disputes, since they are about the regulation of delicate relationships, relationships of a personal nature, which, as a rule, require not only the actors of the family relationship to participate personally and directly in the proceedings, but also to include in the proceedings, in particular if it concerns a child, various experts who will assist the court in shedding light on decisive facts and making a decision which will, to the greatest extent, satisfy the principle of the best interests of the child.¹² In that sense, it takes a certain amount of time for the court to define all these requirements, determined by law as separate rules, ie. rules of special litigation, and apply and fulfil them. On the other hand, in all court cases involving children or parents exercising parental right, it is essential that they take place and end quickly. Therefore, the standard of reasonable time in child - parent litigation must be viewed in the context of both of these requirements, including the special prism - the prism of the child.

The perception of time and the time factor in a child's life and in an adult's life do not have the same effect. Changes in the life of a child inevitably brought about by growing, happen in very short time intervals and must be taken into consideration when decisions regarding their family life are made. This is not about the time perspective of the child (Vranješević, 2008: 114-115), although it is not insignificant, but about the factor of time as an objective fact - the fact that the child grows up, that their basic needs change as they grow up, and that, if it took a bit more time between the assessment of their best interests and the time when the court decision was rendered, the decision made may be

¹² See Article 266 Paragraph 1 of the FL. The best interests of the child is one of the four basic principles of the Convention on the Rights of the Child - CRC, *Official journal of the SFRY - Appendix International Treaties*, no. 15/90 and 2/97, but at the same time it is both a concept and a principle and a legal standard and a means of interpreting children's rights, and one of the fundamental values of the CRC. In addition to representing the right of the child "per se", the best interest of the child is the basis for the interpretation and implementation of all other rights of the child. In addition to the material interest, the best interest of the child also has its procedural dimension through which the outcomes of court proceedings are considered, ie. the effects and reach of decisions in family disputes concerning children. In this sense, the court is required to justify each such decision, so that this reasoning can determine how and by what criteria the child's best interest was evaluated in the evidentiary proceedings and how the results of that assessment were taken into account in relation to the other established interests and factors of the possible positive and negative impact of the decision on the child and their future life.

substantially to the detriment of the child, regardless of the fact that all the prescribed procedures have been applied in the procedure itself.¹³

The reasonable time standard in these litigations, apart from procedural instruments aimed at ensuring the urgency of the proceedings, which will be discussed in the following text, is also defined by specific procedural requirements and rules, such as the prohibition of the issuance of default judgements, the impossibility of concluding court settlement, the primacy of the investigative principle, organizational rules on the adjudication by a panel of judges, on judicial official authority, in some litigation, and the obligation to conduct court-annexed mediation, the obligation to obtain findings and expert opinion from the guardianship authority, family counseling center or other institution specialized in mediation in family relations, etc., which inevitably introduces a larger number of actors into these litigations, requires specific evidence, and sometimes to conduct adhesion procedures *ex officio* as well, all of which requires time. In addition, the court has a special obligation to facilitate the participation of the child in the very proceedings, to ensure that they are properly represented, that they receive in due time all the information they need in the exercise of their procedural rights, and in particular the right to express an opinion.¹⁴

In these and such circumstances, the court is obliged to carry out the proceedings and reach a decision urgently, ie. specially urgently, that is, for a reasonable period of time considering the circumstances, at a maximum of two hearings and respecting the maximum time allowed for their preparation and holding.¹⁵ In other words, it is obliged to act reasonably urgently.

In order to achieve these principles, the FL provides for several specific rules. The normative method used to regulate these specific rules does not, in principle, derogate

¹³According to Dynamic self - determinism model, created by John Eekelaar, an English lawyer of South African descent, when making decision about children, one must have in mind that the legal standard of "best interests of the child" has a dynamic content that changes according to psychophysical development of the child, which is why the decision should provide the best environment for the child, that is, the environment in which the child will be able to develop as a person.

The decision must be realistic and *timely*. The term "dynamic" means that adults cannot always determine precisely which is the best solution for a child, so the best interest of the child as a criterion for assessment changes depending on how the child grows, while the term "self-determination" implies that the child may (must) have influence on decision outcomes.

(In details: Eeckelaar, 1994: 52-54).

¹⁴ See Article 65, item 6 and Article 266 of the FL

¹⁵ See Article 204 pp. 3, 4. and 5, Article 269 pp. 2 and 3, Article 280 , pp. 2. and 3 and Article 285 pp. 2 and 3 of the FL

from the regular one. Firstly, a rule on subsidiary application of the law governing civil procedure is prescribed,¹⁶ then rules that are common to all proceedings concerning family relations, which are a derogation from the general rules of civil procedure,¹⁷ and then, special rules for alimony litigations and for some newly drafted litigations in family matters¹⁸ have been created.

The first “common” rule, which derogates from the general rules of the civil procedure law, and closely relates to the effectiveness of the trial, concerns the exclusion of the obligation to serve a complaint upon the defendant for response¹⁹ – in a family relations proceeding, the lawsuit is not to be served on the defendant for response.²⁰ Consequently, this means that the derogation was also made from the rule on compulsory written response to a complaint.²¹

The second "common" rule concerns the limitation of the number of hearings - *as a rule, the court will conduct proceedings at a maximum of two hearings.*²²

With regard to other common rules the purpose of which is to achieve the principle of urgency of the proceedings, they relate to the time limits for the civil court's litigations in respect to the administration of the proceedings and for individual court actions. Thus, in all civil proceedings relating to family relations involving a child or parent exercising parental right, the court of first instance is obliged to schedule the first hearing so that it takes place within 15 days from the date the initial procedural act (complaint , proposal)

¹⁶ Article 202 of the FL.

¹⁷ Articles 204-208 of the FL.

¹⁸ In addition to the usual special litigation in family law matters, such as those in matrimonial, alimony, maternity and paternity litigations, by means of the FL new special litigations are also created, namely:

1) proceedings in the dispute for the protection of the rights of the child and in the dispute for the exercise or deprivation of parental rights, 2) proceedings in the dispute for annulment of adoption, 3) proceedings in the dispute for protection against domestic violence.

The proceedings in the child protection dispute and in the case for the exercise or deprivation of parental rights were created as an "omnibus" procedure, with rules common to the conduct of the proceedings in all three litigations (in the FL, in the part that regulates the civil proceedings in family law matters, instead of the correct term "litigation", the technical term "dispute" is used (Stankovic, 2006:481-498).

¹⁹ Obligation to serve a complaint on the defendant for response is one of the main rules of the general civil procedure. Pursuant to Articles 296 and 297 of the CPL the court shall within 15 days of the day the court has received it, serve the complaint together with the appendices to the defendant for response. The court is obliged to warn the defendant about the consequences of failing to submit response to the complaint.

²⁰ Article 204, Paragraph 2 of the FL

²¹ According to the CPL rules, the defendant is obliged to submit to the court their response to the complaint, within 30 days of receipt of the complaint with the appendices (Article 297 Paragraph 1).

²²Article 204, Paragraph 3 of the FL.

was received in court, and the court of second instance - to render a decision on the appeal within 30 days from the date of its submission.²³

According to special rules, in litigation for deprivation of parental rights, for protection of the rights of the child, for support and for protection against domestic violence, in which the principle of *special urgency* applies, twice as short deadlines apply - acting first instance court is obliged to schedule the first hearing so that it be held within eight days of the day the complaint was received in court and the court of second instance to decide on the appeal within 15 days of receipt of the appeal.²⁴

The difference in the implementation of these two principles concerning the urgency of the proceedings practically comes down to the length of the time for scheduling and holding the first hearing and the time for deciding on the appeal. And there would be no particular problems in interpreting and applying the law if the FL did not derogate from some other general procedural principles, such as the key functional principles - the principle of disposition and the principle of officiality. Namely, the FL prescribes certain exceptions from the principle that litigation is initiated by filing a complaint (*Nemo iudex sine actore, ne procedat iudex ex officio*) and that the court in these proceedings decides only within the limits of the claims highlighted in the procedure (*Ne eat iudex ultra et extra petita partium*). According to the FL, in addition to persons with active procedural legitimacy, proceedings for the exercise of parental rights, for deprivation of parental rights and proceedings for protection against domestic violence may, as an adhesion procedure, be initiated by the court itself, *ex officio*. The court of its own motion may initiate the aforementioned adhesion procedures along with the procedures in other family relations litigation, thus: in the litigation for the protection of the rights of the child, it may also decide on the exercise or deprivation of parental rights; in a litigation for the exercise of parental rights may also decide on the total or partial deprivation of parental rights; in a litigation for the protection of the rights of the child and in a litigation for the exercise or deprivation of parental rights may determine one or more measures of protection against domestic violence; in a maternity and paternity litigation, it may also decide on the total or partial deprivation of parental rights or on protection against domestic violence. Finally, in a matrimonial litigation, in addition to having to decide on the exercise of parental rights, the court may also *ex officio* decide on the total or partial deprivation of parental rights or order one or more measures of protection against domestic violence.²⁵ As a different rule on the time limit for the second instance court to

²³ Article 204 Paragraphs 4 and 5 of the FL

²⁴ Article 269, pp. 2 and 3, Article 280 pp. 2 and 3 of the FL.

²⁵ See Articles 226, 260 and 273 of the FL.

act on the appeal has been set out for the mentioned procedures, the question arises as to the deadline for the second instance court to decide, for example, on the appeal against a judgement given in a litigation for the exercise of parental rights, which, upon a complaint, decided on the independent exercise of parental rights of one parent, and *ex officio* on the deprivation of parental rights of the other parent - if the appeal of the other parent attacks both aspects of the first instance decision? Considering the different possibilities of using the official powers of the court when it comes to initiating and conducting adhesion litigation, there are also several variations on the subject of the question raised - what is the time-limit for deciding on an appeal that the court of second instance is bound to respect? The matter is not innocuous, because despite the fact that the FL did not prescribe a direct sanction for derogation from the deadlines set out by the law, the court's failure to act within the time frame (which would have to be consistent with the prescribed deadlines), under the CPL, provides a reason for initiating disciplinary proceedings against the judge.²⁶

The second question is how, or whether, the prescribing of different time limits manifests itself in the length of the proceedings in these litigation, which will be discussed in more details below.

2.2. Reasonable time limit

Since the Law on Acceleration of Civil Procedure before Regular Courts was adopted, in domestic civil procedural law the efforts have continuously been made for the new legal solutions to provide faster and more efficient legal protection - to provide legal and fair legal protection with less time, resources and labour. (Keča, 2012: 107-120). The idea of a faster, more efficient and thus cheaper provision of legal protection in the applicable CPL is realized through prescribing the average procedural principle of a trial within a “reasonable time”. It is undisputed that both litigation subject to the urgency principle and litigation subject to the special urgency principle are bound by the court to respect the parties' right to a trial within a reasonable time, since this is a general right of the parties established by the CPL. In truth, at the time of the enactment of the FL, that right was not prescribed in the then-current constitution or the then-existing law on civil procedure, but, given the earlier ratified ECHR, it was nevertheless an integral part of the domestic legal order.

²⁶ See Art. 10 and 102 of the CPL and Articles 25 Paragraph 2, Article 62 and Articles 90-92 of the Law on Administrative Disputes (LAD)

The remedies protecting the mentioned right and the criteria for assessing whether it has been violated, are stipulated by the *Law on Protection of the Right to a Trial within a Reasonable Time*.²⁷ That law, which comprehensively regulates the issue of exercising and protecting the right to a trial within a reasonable time, prescribes specific remedies, the purpose of which is primarily to speed up the proceedings (an objection to expedite the proceedings) and then to determine appropriate compensation as a form of satisfaction for excessive court delays in the administration of justice (appeal and request for just satisfaction). In addition, a special right to an action for compensation for property damage caused by a violation of the right to a trial within a reasonable time has been prescribed.²⁸ Prescriptive remedies are a kind of mechanism for preventing excessive length of those proceedings which are recognized as having the risk of long duration and can only be filed for the duration of the proceedings: “In a situation where the proceedings have been finalized before a court, the petitioner can no longer seek court to establish that their right to a trial within a reasonable time has been violated, or compensation for the violation of that right, because such a claim is not allowed.”²⁹

The duration of the proceedings, in order to assess whether the trial is completed within a reasonable time, as stated above, is not timed. Instead, standards for evaluation have been defined, in line with standards developed by the ECHR and Council of Europe Committee of Ministers' Recommendations Rec (2010) 3.³⁰ When deciding on the remedies protecting the right to a trial within a reasonable time, all the circumstances of the subject matter of the trial shall be taken into account, above all: the complexity of the factual and legal issues, the overall duration of the proceedings and the proceedings of the court, public prosecutor's office or other state authority, the nature and type of the subject matter of the trial, the importance of the subject matter of the trial for the parties,

²⁷ Law on Protection of the Right to a Trial within a Reasonable Time, *Official Gazette of the RS*, number 40/15, was adopted on 7 May 2015 and entered into force on 1 January 2016. The Institute for the Protection of the Right to a Trial within a reasonable time had been introduced into our legal system two years earlier. Namely, until 1 January 2014, in domestic regulations, the only remedy to protect the right to a trial within a reasonable time was a constitutional complaint. By means of the Law on Amendments to the Law on the Organization of Courts, published in the *Official Gazette of the RS* no. 101/13 of 20 November 2013, the implementation of which began on 1 January 2014, for the first time a request to protect the right to a trial within a reasonable time was prescribed, even though obscure - in only three articles (Art. 8a-8v) as a new legal institute.

²⁸ Article 31 of the Law on the Protection of the Right to a Trial within a Reasonable Time.

²⁹ A part of the Sentence of the Supreme Court of Cassation Decision R4 r 163/2015 of 21 October 2015, established on 30 May 2016 at a meeting of the Department for the Protection of the Right to a Trial within a Reasonable Time.

³⁰ Recommendation of the Council of Europe Committee of Ministers Rec (2010)3 on effective remedies for excessive length of proceedings of 24 February 2010 https://vm.ee/sites/default/files/content-editors/Rec_2010_3%20_2_eng.pdf, 14. February 2019.

the conduct of the parties during the proceedings, in particular compliance with the procedural rights and obligations, then adherence to the order of resolving the cases, and legal deadlines for scheduling hearings and main hearings and making decisions.³¹ All of these rules apply, in principle, to child - parent litigation.

3. Process instruments for achieving the principle of urgency and special urgency

The basic process instrument in domestic civil procedure law for the realisation of the principle of trial within a reasonable time, is a time frame. The time frame is a preliminary plan for oral argument, which consists of determining the number and days of holding of hearings and the schedule of actions at hearings within the main hearing stage, but it also partly relates to written actions, because it also involves setting of court deadlines (Rakić-Vodinelić, 2011: 517).

3.1. Time frame determination and elements

The time frame is determined by the court. The decision on determining the time frame is made at the first hearing, and the elements of that decision are prescribed by the Civil Procedure Law (CPL), as follows: (1) number of hearings, (2) time of holding of the hearings, (3) schedule of presentation of evidence at hearings and taking other procedural actions (4) court deadlines, (5) total duration of the main hearing.³² In accordance with the time frame, the judge determines the time limits for actions of both the court and the parties and other participants in the proceeding, except for the deadlines stipulated by the law itself.³³

Making decisions on the time frame is preceded by the performance of several important civil court actions. The court must first determine what facts are disputed between the parties, then assess whether the generally known facts are relevant to deciding on a

³¹ See Article 4 of the Law on Protection of the Right to Trial within a Reasonable Time. The manner in which this provision applies has been established in the case - law: “Proper application of the legal standard of trial within a reasonable time involves determining a set of facts (complexity of the case, conduct of the claimant and state authorities, etc.) among which the fact concerning the length of the court proceedings is of decisive importance. When it is established that the court proceedings last for a long period of time, determination of yet another fact that concern the complexity of the case, the conduct of the claimant, the state authorities, etc. is initiated in order to determine who is guilty for the unreasonably long trial and whether the claimant's right to a trial within a reasonable time has been violated.” (from the rationale of the Decision of the Supreme Court of Cassation Rž g 141/2014 of 5 November 2014).

³² Article 308, Paragraph 4 of the CPL

³³ Article 102 of the CPL

particular matter (in which cases it does not adduce evidence), assess which legal issues need to be discussed, and decide on the evidence it deems relevant and will present at the main hearing.³⁴ At the same time, the court will refuse to present evidence it deems irrelevant.

Although the time frame is a mandatory element of the procedure, the court does not, however, establish a time frame upon its own initiative, but upon the motion of the parties - it is the party who, upon the subpoena, has an obligation to propose a time frame at the first hearing.³⁵ The opposing interests of the parties to the litigation also affect their own interests, when it comes to the length of the proceeding - as a rule, it is in the prosecutor's interest that the proceeding be as short as possible, while the defendant will, as a rule, insist on a longer evidentiary procedure. This inevitably gives rise to a new dispute - a dispute over a time frame. Therefore, such a statutory solution, which does not allow the court to decide discretionally on the trial time frame, imposes on the court the obligation to mediate between the parties, in order to arrive at an appropriate decision on the time frame.

The situation is even more complicated if the parties do not come up with a time frame proposal at all. The legislator did not perceive this procedural situation. It remains for the judge either to sanction such conduct by the parties, as contempt of procedural discipline or to set a time frame himself - for which the decision does not have a stronghold in the general procedure law.

The issue of determining a time frame is, in essence, a very complex procedural law issue, since the legal nature of the institute is not quite clear, so it can be debated whether it is a special process instrument (multi- party litigation action) or perhaps, this is the case of a proceeding management action (purely litigation action). Whether or not the decision on determining the time frame can be challenged by an appeal or not, also depends on the answer to the aforementioned question, because the legislator did not answer that question either.

³⁴ Article 308, paragraph 3 of the CPL uses an inappropriate formulation in a legal and technical sense: "At the hearing referred to in paragraph 1 of this Article, the court shall decide what *means of evidence to present* at the main hearing." In fact, the means of evidence are *used* and the evidence is *presented* (at the main hearing).

³⁵ See Article 303, paragraph 1 and Article 308, paragraph 1 of the CPL

3.2. Time frame in lawsuits from the relationships between children and parents

The issue of time frame is particularly delicate when it comes to parent-child relation litigation, precisely because of their subject matter and the required urgency, i.e. especially the urgency of the proceeding, but also because of the numerous official powers that the court has in these litigations and the fact that it can use most of its powers only during or after the evidence presented, or only after it comes to the possession of certain findings, and as a rule, that means only at an advanced stage of the proceeding.

The court also determines all deadlines and hearings based on the established time frame, even in these litigations,³⁶ and sets the time frame at the first hearing, which, as a rule, should be held within 15 or eight days from the receipt of the complaint. The criteria that determine the time frame are not prescribed by law, as such and should therefore start from those prescribed as elements of assessment in proceedings upon legal remedies that protect the right to a trial within a reasonable time, but also from generally accepted theoretical views and the established international standards developed by the case-law, as well as the recommendations, general comments and guidelines of the authorities, responsible for supervising the enforcement of the rights of the ECHR and the harmonisation of case-law in the Member States.³⁷ This means that the time needed to carry out the proceeding and make a decision should be assessed on the basis of the particular circumstances of the case and having regard to the complexity of the case, the conduct of the parties and other participants in the proceeding, as well as which child and parent's right are threatened in the case itself.

In all child-parent relation litigations, the number of hearings is limited by law - the court is obliged, as a rule, to conduct proceedings at a maximum of two hearings. This limitation is, however, of a relative nature (“as a rule”) and depends on the circumstances of the particular case. Practically, that rule indicates that the court should, during the course of the proceeding, endeavour, at the first hearing, to make parties plead to the claim, possibly to raise objections that prevent further conduct of the proceeding, and to state all the facts and adduce all the evidence they deem relevant. The summons to the main hearing³⁸, reminds the parties of the duty to present all the facts and to adduce

³⁶ Article 102, 105, 108, 199 and 233 of the CPL

³⁷ See *supra* fn. 34

³⁸ Pursuant to Article 302 of the CPL, a preparatory hearing is held before the main hearing and is mandatory unless the court, upon the receipt of the response to the complaint, determines that there are no contested facts between the parties, that is, if the dispute is simple, urgent or if it stipulated by law. Since the FL stipulates that all proceedings concerning family relations pertaining to a child or parent exercising parental right are urgent and some even especially urgent, no preparatory hearing is held in these litigations.

evidence to substantiate those facts, as well as of the duty to propose a time frame and they are enjoined to bring to the hearing all documents serving them as evidence and objects which should be examined before the court. The court is obliged in the summons to alert the parties to the duty to inform the court of any change of address. According to the CPL, the court is obliged to take care and order timely obtainment of the files, documents or objects kept by the court or other state body, authority of the autonomous province or local self-government unit, the person entrusted with the exercise of public authority or another legal entity.

When it comes to summoning, it should be noted that there is a certain inconsistency of the law in terms of deadlines. Namely, according to the CPL, the summons for a preparatory (first) hearing is delivered no later than eight days before the day of the hearing,³⁹ and according to the FL, in litigation for the deprivation of parental rights, for the protection of the rights of the child, for support and for protection against domestic violence (in which the principle of special urgency applies), the adjudicating first instance court is obliged to schedule the first hearing, so that it takes place within eight days from the day the complaint is received by court.⁴⁰ This means that the summons for the first hearing in these litigations should be submitted no later than the same day the complaint is received by court. This requirement, given the court's duties related to the preliminary examination of the complaint and other preparatory actions for the scheduling of the first hearing, is practically difficult to comply with, as evidenced by the case-law research, which will be discussed below.

The party is obliged to present at the first hearing (at the latest), all the facts necessary to substantiate its motions, to present evidence to support the stated facts, to respond to the allegations and offered evidence of the opposing party, as well as to propose a time frame for conducting the proceeding. On the other hand, the court should determine at the first hearing which facts are indisputable, that is, generally known and which facts are disputed and which legal issues should be discussed. At the same time, it should decide what means of evidence he will present at the main hearing and determine the time frame for conducting the proceeding.

A second hearing is reserved for the presentation of evidence and the decision-making. Although not specifically prescribed by the FL, the interval between the two hearings

³⁹ Article 303 of the CPL

⁴⁰ Article 269, paragraph 2, Article 280, paragraph 2 and Article 285, paragraph 2 of the FL

should not be longer than the usual time (reasonably) required to prepare for the presentation of evidence (Vujović, 2012: 142).

It is certain that the timetable is *preliminary and arbitrary* because, depending on the particular development of the litigation, it may change. For example, in the event of an objective amendment of the complaint, a new timetable is adopted (Rakić-Vodinelić, 2011: 517). The court would also have to determine a new time frame, even when deciding *ex officio* to initiate some of the proceedings, as adhesion proceeding, in a family-relations litigation, with which it is possible to conduct adhesion proceedings *ex officio*.

It is implied from the court's duty to proceed without delay, that the civil actions taken by the court, and in particular the time limits it sets for the presentation of certain evidence, in particular for the submission of findings and the expert opinion of the custodial authority and other institutions, specialised in mediation in family relations, should be directed to the overall course of the proceedings and its "reasonable" duration. The court can (has to) manage the proceeding in such a way as to provide maximum urgency and shorten the time required for its implementation, by taking a series of civil actions, such as by limiting the time of expert examination to the urgent need, fining for non-compliance with court deadlines, repeating the order (urgency), putting up the notice on the court notice board, sending the summons by court summoner or via information-communication means and other process instruments at its disposal.⁴¹ Well-timed court deadlines contribute in a sense that the necessary actions in the proceedings are carried out with the least possible amount of time spent. In addition, the substantially narrowed principle of disposition and the prohibition on making contumacious decisions in these litigations, implies that, even when the prosecutor and the defendant are unjustifiably

⁴¹ In the case of *V.A.M. vs. Serbia*, petition No. 39177/05, judgement of 13 March 2007, the ECHR found that the proceeding involved dissolution of marriage, the exercise of parental rights over the child and the child support and, as such, was relatively complex in nature, that the issues covered by the proceeding were particularly significant to both the applicant and the child, that the applicant had made every reasonable effort to expedite the proceeding and could only be held responsible for delaying one hearing, that she had made an effort to provide the court with the defendant's address, even though she was not legally obliged to do so, and that the first instance court failed to use the process means available to it in the domestic legal order and to formally provide the defendant with all the notifications, which would allow the proceeding in question to continue. In particular, even with the assumption that the statutory requirements for the appointment of a temporary representative were not met, as alleged by the State, the first instance court "could and must have resorted to other means at its disposal, including, but not limited to putting up of summonses and other notifications, addressed to the defendant, on its own notice board." Therefore, the court found that the length of the proceeding did not meet the reasonable time requirements (see para. 104-111 of the judgement).

absent from the main hearing or refuse to argue, the court has the official authority to continue the proceeding.

4. Achieving the principle of urgency and special urgency in case-law

The legislator created the principles of urgency and special urgency of proceedings in child-parent relations litigations, striving to emphasise the importance of timely resolution of disputes in those relationships, that are of particular social importance and, undoubtedly, to prevent the length of these proceedings. However, the normative enthusiasm expressed through the reformation of the legal text, is not in itself sufficient to ensure the realisation of the stated principle, because that law should also be applied (Rakić-Vodinić, 2011: 516).

The ECHR’s practice also indicates that special attention has to be paid to family disputes, and that particular urgency is required in proceedings concerning custody of children, the way of creating contact between parents and children, as well as in cases concerning child support (Manojlović Andrić et al., 2018: 25). In its judgements concerning the Republic of Serbia, the ECHR has repeatedly stated that the length of the proceedings in child-parent relations litigations “in itself constitutes a separate violation of Article 8. of the Convention”⁴²

A study on the position of the child in civil court proceedings in the Republic of Serbia, carried out within the framework of the project titled “Towards a Child-Friendly Justice”, in the period from July 2013 to July 2014, showed that the proceedings in family law matters in the Republic of Serbia last for two months (which was the time needed to complete one of them, in which they decided on the child support), up to five years (including the review process). The arithmetic mean gives an average of about two and a half years, but cannot be taken as a real image of the duration of these proceedings. Child support litigations last up to six months, on average, while those for the exercise of parental rights and protection against domestic violence, typically take about one to one and a half years. When the second instance court vacates the judgement and remits the case for retrial, the proceeding lasts up to two and a half years in total. According to the aforementioned study, it takes between three and six months from the moment of the conclusion of the main hearing in the first instance until the passing of the second instance decision. The aforementioned period includes the preparation of the first instance verdict

⁴² See cases: *Jevremović vs. Serbia*, petition No. 3150/05, judgement of 17 July 2007, paragraph 84 -86; *Zdravković vs. Serbia*, petition No. 28181/11, judgement of 20 September 2016, paragraph 56-57.

in writing and its delivery to the parties, the filing of the appeal and the passing of the decision on the appeal. The aforementioned time does not include the delivery of the written second instance decision to the first instance court and the parties, while the time from the receipt of the appeal until the adoption of the second instance decision is not separately recorded (Petrović et al., 2015)

Another case-law study, which covered only court proceedings in legal matters regarding the deprivation of parental rights, completed from 1 July 2005 to 1 July 2013, also showed that there were no major discrepancies regarding the length of proceedings in litigations regarding the deprivation of parental rights. In the analysed cases, the first instance proceedings lasted an average of 14 months, in three cases the first instance court rendered its decision in only two months, but the longest first instance proceedings lasted for the total of four years. When it comes to deciding on an appeal, the prescribed deadline of 15 days from the day the appeal was delivered to the second instance court, was not respected in any of the analysed cases. The shortest duration of the second instance proceeding was one month and was recorded in only one case. The average duration of appeal proceedings against a first instance verdict that decided on a claim for deprivation of parental rights, was about four months, while the review proceeding lasted for almost twice as long, on average- seven and a half months. The shortest review proceeding lasted three months and the longest year and eight months (Vujović, 2017: 175)

Although the court is required to conduct proceedings, as a rule, at a maximum of two hearings, the practice shows that the usual number of hearings is five to seven. The time that passes from the filing of a complaint until the scheduling of the first hearing, ranges from one month to up to three to four months (Petrović et al., 2015: 50). The reason for this is the established practice of seeking the opinion of the custodial authority⁴³ before the first hearing is scheduled. This practice, introduced with a view to shortening the length of the proceedings, is inconsistent with the rule that the first hearing is scheduled to be held within eight or 15 days from the day the complaint is received by court, and even more is inconsistent with the rule that the subject matter of the expertise, i.e. the facts and circumstances on which evidence is adduced by expert witness (and the custodial authority in the specified litigations has the position of a specific expert

⁴³ Reasons for the courts' reliance on the reports of the custodial authority (although the FL abandoned the application of the long-established principle of exclusivity of the custodial authority's opinion and enabled the finding and expert opinion, except in the case of domestic violence, to be obtained from a family counselling centre or other institution specialised in mediation in family relations), should be sought in tradition, in a greater degree of trust of the courts in its experts, but also in the underdevelopment of these services in the community, without disregarding the impact of financial effects or costs that would cause the courts to act differently.

witness), are determined by the court, having regard to the circumstances of the particular case, referred to by the case file.⁴⁴ In the absence of other procedural material, the facts and circumstances, based on which evidence is adduced by expertise of the complaint and the appendices, are not easy to determine, so in most cases court orders are insufficiently specified and individualised, i.e. they do not contain elaborated elements in the best interests of the child, which the custodial authority should evaluate in its findings within the opinion (Vujović, 2017: 264).

The court leaves expert witnesses with a relatively long period of time to carry out the expert evaluation (from a specific deadline of 30 days from the receipt of the court order until - “within the statutory deadlines”), even when it comes to proceedings in which there is a request for provisional measures (Petrović et.al., 2015: 51). Although the general deadline for submitting expert witness findings and opinions to the court is 60 days, the waiting time for a report with the findings and opinions of the custodial authority is much longer and ranges from three to six months, and in one case it was eight months (Petrović et al., 2015: 50). The court mainly uses the institute of urgency as a measure to speed up proceedings before the custodial authority - a repeated order requesting urgent action. In 5% of cases, what was also recorded was a warning about a fine, addressed to the custodial authority for violation of procedural discipline - obstruction of litigation and failure to provide the requested notifications or documents. On the other hand, the conduct of the parties was not recorded as the cause of the extension of the proceeding duration (Vujović, 2017: 175,176). The parties generally respond duly to the summons, and the same applies to witnesses, although the summoning of witnesses is rarely and almost exclusively in proceedings in which evidence is presented concerning the existence of domestic violence.⁴⁵

5. Conclusion

The principle of urgency in child- parent relation litigations and the special urgency principle prescribed for acting in litigations for the exercise and deprivation of parental rights, for the protection of the rights of the child, for support and protection against domestic violence, apart from limiting the number of hearings, are characterised by particularly short deadlines for scheduling and holding of the first hearing in the first

⁴⁴ See Article 269 of the CPL

⁴⁵ The focus on the urgency of proceedings in legal matters about domestic violence is also indicated in numerous provisions of the Law on Prevention of Domestic Violence, *Official Gazette of the RS, No. 94/16*, which stipulates short deadlines for the procedure of certain bodies of proceeding. See: Stevanović, Subošić, Kekić, 2018: 158).

instance and adjudicating the appeal in the second instance. In the latter, as stated above, twice as short deadlines apply. However, when it comes to aspects of the duration of the proceeding in the child-parent relation litigations, in general, as well as in those whose case is confined to the deprivation of parental rights, the results of the case-law study overlap to a large extent, so that it can be concluded that the sole legal creation of the principle of special urgency does not have a significant effect on the shorter duration of proceedings in those litigations for which it is prescribed.

An exception is alimony litigation, the length of which is the shortest in case-law, but it generally does not observe the deadlines prescribed by law, although in most of these litigation, the length of the proceedings can be considered as a reasonable time.

The conclusion that can be drawn from this is that the provisions of the FL, which introduce special rules of special urgency for certain proceedings within the child-parent relation litigation with the principle of urgency, attempt to end the proceedings in these legal matters as soon as possible, in order for the rendered decision to really serve the purpose of satisfying the best interests of the child, but that these solutions do not produce the expected results in practice. The length of the proceedings in certain child-parent relation litigations, for which special urgency has been prescribed, does not differ significantly from the duration of the proceedings in other family relations litigation, and in many cases, the duration of the proceedings cannot even be considered as the reasonable time standard.

It is obvious that, although instructive, the time limits prescribed by the FL for certain civil actions are not quite realistically measured, and the consequences of not respecting them are not harmless. However, it is undoubtedly true that the courts are still not sufficiently utilising all the instruments at their disposal to provide an efficient concentrated process, with a predictable time frame, in which the benefits of modern technologies would begin to be used, such as audio and optical recordings of hearings, investigations and / or testimonies, delivering of summonses, other notifications and decisions, via email or other electronic message carriers and a variety of other process instruments, that contribute to the more efficient delivery of justice in child- parent relation litigations.

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THE RIGHT TO INNOCENCE

In this paper authors will try to prove importance of preservation of child's personality not only of potentially dangerous and disturbing content, but also such content that, by exceeding developmental level of the child's personality could potentially lead to the misuse of the Freedom of choice in the future. The main viewpoint supported in this work is that "every child has a right not to be aware of or be (physically or mentally) exposed to such content that could potentially harm its future use of the Free will and the Freedom of choice". Authors will try to explain why the correct use of the Free will and Freedom of choice on the adult stage of personal development demand specific prerequisites on the developmental stage of the child, namely innocence. The paper is separated on three parts, first dealing with the specification of the notion of innocence, second, dealing with the explanation of the prerequisites needed for the correct use of the Free Will and freedom of choice, and in the conclusion arguments for the establishing of the Right to Innocence has been given.

Keywords: *Innocence, Right, children, Free Will, moral development*

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The definition of Innocence

One could ask: “Which are the reasons to interfere (basically an indefinable concept like) innocence, with such important and indispensable phenomenon for the existence of the human society like justice? Why it is important to legally recognize and protect innocence?”. To be able to answer these questions, it is necessary to clarify the rightful use of the concept of “innocence”. The authors would like to start its explanation with the meaning “knowing nothing of evil or wrong” as it is given in the Oxford’s dictionary.¹ In this manner it corresponds to the Serbian word “безазлност”. Why this definition of “innocence” is important to us?

First, we need to consider some facts concerning fragility of the child’s personality. It is well known that certain phenomena could make serious trauma to the child. Physical violence and mental abuse both demand legal protection. Exposure to violence (through media, video games, etc.) could make significant malevolent impact on the functioning of a child’s personality and is legally restricted to certain age.² So, why even the awareness of malevolent and disturbing content could harm the child? It is important to understand that child’s reasoning lacks the full capacity of abstract thinking and logical concluding, and that child’s functioning mainly relates to its feelings.³ The emotional response forms a child’s basic attitude and creates stances through emotional likeness or rejection of some experiences. On the other side, child’s adaptability and its capacity to accept certain phenomena as normal is directly connected with these irrational factors. If a child’s personality is exposed to certain phenomena, the child could develop not only the ability to adopt them, but also likeness and acceptance of something that is generally unacceptable.⁴ So, it is well known and psychologically proven, that, if we want a happy and fulfilled adult human person, it is imperative to proactively act now towards the child with love and understanding.

On the other side, we rarely ask the question: “Which are the necessary prerequisites for the right moral development of the child?” One of the main reasons for our present lack

¹ Hornsby, Gate, Wakefield, 1971: 508

² “Experimental studies conducted by Anderson and Bushman (2001:357-358) show that high video-game violence is definitely associated with heightened aggression in males and females, in children and adults, and in experimental and nonexperimental settings. Other findings show that violent video games cause at least a temporary decrease in prosocial behaviour, thus, exposure to violent video games is negatively correlated with helping in the real world” Sălceanu, 2014: 838

³ Выготский, 1984: 369

⁴ Using of children for a mean of warfare and as the war crime perpetrators by the terroristic organisations of Islamic State and Boco Haram

of capacities to answer it is a moral relativism as the main ethical paradigm of the contemporary dominating Western Civilization.⁵

Important thing is, that we could answer this question without taking any moral stance as such. As in the case of mental and emotional development, it would be enough to recognize and analyze natural moral capacities lying in the soul of the child which are inseparably connected to the capacities to observe, learn, act and feel. It is obvious that these main capacities need certain prerequisites for their proper development and that lack of these prerequisites could damage development of the child's personality as such. And which of these prerequisites are necessary for the development of the moral capacity?

First, we must for a moment look upon moral like a social phenomenon. Which are the reasons for the existence of moral? Which indispensable social function is obtained by moral? It is well known that moral, as consensus about vital social values, enables prerogatives for functioning of the society (community).⁶ Every member of society is respectively seen as somebody that shares general values, and participates in common good. On the base of general acceptance of moral values, society becomes the communion. Without moral communion society dissolves. So, we could understand moral as a basic factor of a society functioning as a communion. We must ask, which are the prerequisites that enable acceptance of general values as a necessary condition for creating of society? Where do the capacities that make human a sociable being lie, and when do they start to appear?

If we look carefully we can conclude, that the basic attitude, that differs moral capacity of a child from an adult is the *innocence*, as non-awareness of evil and wrong, which include strong belief that everything is good, safe and possible to make. On one side it is an irrational belief, and on the other, that attitude has a direct influence on the way that child's personality behaves. Could the attitude, which exists only in the childhood, be also seen as an ethical category, important for the future moral development? Or should innocence be understood as something like prejudice and wiped out as soon as possible by the truth of educational enlightenment?⁷ Opinion of the authors of this paper is, that the innocence represents ethical category of importance, that it directly enables

⁵ See Mackie J. L. Ethics Inventing Right and Wrong, McIntyre A. After Virtue etc.

⁶ Aristotel, Politika

⁷ “This aestheticization of violence allowed for “reconciling” the suffering caused by punishment with the premise of “child-appropriate” education and for belittling corporal punishment, which in practice culminated in telling the children that they should thankfully accept such violent behaviour as “loving punishment”” Heinze, 2013: 65

prerequisites for future moral development of the child, and that its disturbance directly endangers moral functioning of the person as adult.

So, why the child's personality in the state of innocence preserves vital capabilities for future moral development intact? Innocence creates a base for the future communion, enabling through feeling of love and expectance of good state of being assurance to child that everything is good, giving it feeling of freedom and proactive attitude toward personal aims and self-perception. In a good-mannered state of mind, child creates proactive and benevolent attitude toward other people, seeing them like natural friends deserving love. This creates basic prerequisite for the acceptance of social inclusion in the future.

Breaking the innocence as attitude, threatens child's personality putting it into position to become endangered with conditions that it cannot bear, causing paralysation of creativity, appearance of perpetual fear, disturbing questions with lack of capability to answer, withdrawal etc. From that point, we could conclude that the attitude of innocence on the child-stage is one of basic prerequisites for development, not only future good human being in the moral sense, but a fulfilled personality as well.

We could now answer the question “Why the innocence is so important for the moral development?”. For it is inevitably connected to the functioning of child's potentials to make decisions and directly affects the future development of Free Will. Although innocence is not a scientific term, in a proper sense of the word,⁸ in philosophical, especially ethical sense it has considerable weight. It means inability of doing something evil or wrong. In that sense of the word it precedes capability of making moral decisions, putting children in a special, ethically unmistakable position. Innocence, in the ethical sense of the word, must be taken as moral purity caused by non-awareness of evilness, meaning that it precedes deliberate choice of evil and good, not as morally indifferent, but as morally prior position, in some manner similar to the sanctity. So, why attitude of innocence, as moral, is prior to and directly influences the capability of moral choice? Because without harming it keeps all substantial prerequisites for correct use of the Free will in the future, creating emotional base for the future rational moral decisions. We will now try to discuss relation between these two concepts.

⁸ <https://www.oxfordbibliographies.com/view/document/obo-9780199791231/obo-9780199791231-0161.xml> accessed (29. 08. 2019)

Innocence and the proper use of the Free Will

Every legal document presupposes use of the Freedom of Will. Legal documents create boundaries defining its proper use for each case. Without Freedom of Will there can be no legal responsibility, so, this unconditionally ethical category has a special importance in the Law. If we take the famous clause "Everything which is not forbidden is allowed" as one of main axioms of the use of Law, we could directly transfer it to the sentence "We are obliged to limit our use of the Free Will to the legally proclaimed boundaries under the threat of the publicly defined punishment of the authorized and legitimate institutions". As an ethical statement it would be much shorter: "We are obliged to deliberately limit our use of the Free Will to the legally proclaimed boundaries". This ethical obligation has no other boundaries except our own decision of use of the Free Will as such, so it precedes its Legal formulation. There is much debate between inner and outer, ethical and judicial obligation in the philosophy.⁹ What is important for our topic is to highlight that ethical use, which includes the act of making deliberate decisions (immediate use of the capacity of the Free Will) is directly connected not with a fear of judicial punishment but with our decision to obey the rules for the sake of the improvement of our own personal moral capacity. We can conclude then, that our genuine use of the capacity of the Free Will is connected with the ethical dimension of autonomy of making decisions, and that a fear of legal punishment as a condition only has a mediate role of forceful restraining. The fear of punishment as inseparable companion of the judicial obligation has indirect influence, because the foundation of the use of the Free Will is its autonomy regardless of the other influences. We can choose to obey the Law without any influence of fear of punishment, because we take a standpoint that it has to be like that, because it is right and moral.

What influence has innocence, as ethical category on the development of the Free Will in building of our morality? It is quite obvious that ethical dimension of the autonomy of the Free Will lies out of reach of the legal measures. Someone can deliberately break the boundaries of the Law in spite of judicially prescribed punishment. It is possible to terrify someone in a manner that they always subjugate to the Law suspending their Free Will, but, as many sad examples show, it brings many grave consequences at the end.¹⁰ The reason why such programming of the human, by suspension of their Freedom of choice, made it by fear, pleasure, or some other means is so dangerous, because by that

⁹ Imanuel Kant, *Metafizika Morala*

¹⁰ Stevanović, 2017: 111

suspension we nullify the possibility of genuine development of someone’s personal aims and purposes - making them just a means for someone else’s aims.

If we understand a human as a being with purpose, which by creating its own aims and purposes realise its own substantial capacity, we must admit that it is of utmost importance to allow unrestrained use of their own Free Will. Certain exceptions must be made – in the case where by their Free Will they endanger (directly or indirectly) themselves or someone else. In that case, we must restrain, advise, educate, or put them under the moral condemnation or force of the Law. In any other circumstances we are obliged to allow development of the use of the Free Will without restraint.

It is of utter importance to understand that moral development of the human rely directly (like in the case of abstract thinking) on the proper use of the capacities of the child, and that it is not possible to have proper use of the Free Will on the adult stage if it was not properly developed on the stage of the child. Examples of addicts, violent types of character and other social deviations show in many cases direct connection between former discrimination of the development of the Free Will and the later state.

What place innocence, as “knowing nothing of evil or wrong” has in the proper development of the future Free Will. It is quite obvious that the feeling of threat and danger is very important for the proper development of the child’s person. Without clear knowledge of real threat and dangers child could harm itself or others. And it is of significant importance to make child to be aware of such phenomena. But we are not dealing with fear of something threatening and dangerous in this case. “Knowing nothing of evil or wrong” directs to the not-awareness of the willful malevolence. There is strong difference between awareness of natural threat (electricity, wild animal, poisonous mushrooms, for example) and awareness of malicious attitude toward Free will of others.

That kind of awareness has no sensible reason for a child. Natural threats are positioned in the space and accessible to child’s reasoning and explanations. But reason to be evil and make something wrong by its own will is out of possibility to be explained. That explanatory gap puts a child in a sense of a contradiction to its own Will and personality without possibility to explain why, making it vulnerable to the irrational fear and sense of endangerment. On the other side, the child becomes directly aware of evilness as phenomenon of conscious use of the Will making him vulnerable to the moral perversion of making evil deeds by its own. That kind of conscious use of Will on the developmental stage of a child (by destruction, torturing etc.) could impose direct consequences on its future use of the Free Will as such. Knowing evilness as phenomenon on premature

developmental stage could bring child to the perverted feeling of joyful and willful accommodation to it. And that is the reason why innocence as “Knowing nothing of evil or wrong” on a certain stage directly allows future proper use of the capacity of the Free Will.

How to make Innocence Right?

Is it possible to make innocence defined as “Knowing nothing of evil or wrong” a child’s right? Is it possible to put it into an form necessary to become a Right? Last part of this work would try to examine that idea.

First we must admit that Convention on the Rights of the Child (1989) has 54 articles considering different aspects.¹¹ Articles 12 – 19 and 28 – 31 mainly consider Rights directed to enable prerequisites for the proper personal development of the Child. In this case especially, interesting are article 12, considering Respect for children`s view and article 14 considering Freedom of thought and Religion. If article 12 basically covers respect for children`s opinion providing proper representation in the court, article 14 covering Freedom of thought, conscience and religion can be included into sphere that obtains proper moral development of the child. Let us see for a moment content of that article:

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

First of these three clauses generally admits the right of a child to be respected in a Freedom of thought, existing of conscience and right to have religion and beliefs. Second

¹¹ References on the Convention on the Rights of the Child are taken from the text accessible through site: <https://www.unicef.org/sites/default/files/2019-04/UN-Convention-Rights-Child-text.pdf>

respects the rights and duties of parents and legal guardians in upbringing of the child, and third is connected with the rights and boundaries in manifestation of religious beliefs.

We will now try to analyze content of the first part of the article 14. It makes legal framework for protecting of the freedom of thought, conscience and religion. It is very debatable about what kind of Freedom of thought we can discuss on the developmental stage of a child. Such Freedom of thought is directly dependent on the circumstances that can not be obtained by that legal framework, because children do not possess capacities to have Freedom of thought or Freedom of choice, in the same manner that they can not have capacity for abstract thinking. Freedom of thought demands developed capacities that children has only rudimentary. In that case, we can not legally protect Freedom of thought or consciousness, and especially religious beliefs, because some of them demand special cognitive capabilities. We can legally protect only capacities for future development of these capacities. And if we look deeper into content of Freedom of thought and existence of conscience and beliefs we can easily conclude that necessary condition for their development is namely innocence, as precondition for future proper use of Free Will and Freedom of choice. Considering irreplaceable role of innocence in preparation of child's person for future developmentally safe awareness of evilness, which exists as wilful malevolent act we can connect it with origin of conscience also and if we take religion from a moral standpoint like wilful choice of good instead of evil we must take innocence as its necessary precondition as well. In that case would it be more proper to change first clause of the Article 14 of the Convention on the Rights of the Child to be:

States Parties shall respect the genuine right of innocence of the child, as necessary precondition for the future development of the freedom of thought, conscience and religion?

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CHILDREN AS SECONDARY VICTIMS OF DOMESTIC VIOLENCE

Exposure to domestic and intimate partner violence is a great burden on children across developmental stages and these poor outcomes are noted among children from a range of different cultural and socioeconomic backgrounds across the world. Although domestic violence affects all who are exposed: perpetrators, victims, and the children, analysis of violence effects are usually focused on primary victim. Secondary victims – children – witnesses of domestic violence are far too often neglected as victims of the psychological consequences of such violence, as possible future victims and as elements of a chain of violence who could help identify potentially violent situations and avoid new violence in the future.

Keywords: children, domestic violence, intimate partner violence, victim, legislative

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Introduction

Witnessing domestic violence¹ suggests that a child may not be a just physical victim of the violence; it also suggests that the child is actually present when the violent incident or behavior occurs (Hester et al., 2000). However, children can witness domestic violence in many other ways that extend beyond being physically present (Hester et al, 2000). Witnessing domestic violence can include direct observation of the violence and indirect awareness of the violence through overhearing the behavior or witnessing the physical and/or emotional manifestations of the violence in the form of injuries, fear and intimidation (Jaffe et al., 1990). Majority of children directly witnessed their mother being slapped, punched, kicked and hit with objects, often on a regular basis (McGee, 2000). In fact, a number of children felt that hearing the violence was more distressing than actually seeing it, in terms of feelings of powerlessness (Hogan, O’Reilly, 2007).

Although domestic violence affects all who are exposed: perpetrators, victims, and the children, analysis of violence effects are usually focused on primary victim. In majority of literature, recognition of great impact of witnessing domestic violence is often neglected.

Child maltreatment include exposure to intimate partner violence, abuse and neglect of someone under age of 18 years by any person in a custodial role (Hovdestad et al., 2015). Maltreatment types commonly co-occur, and consequently assessment of multiple types of maltreatment is important for understanding which forms of maltreatment co-occur and how different forms of maltreatment, and their co-occurrence, are risk factors for later health outcomes (Finkelhor, Ormrod, & Turner, 2007). Beyond the psychological effects, children who witness domestic abuse often are physically abused (Antle et al., 2010).

Children as “silent” victims have a substantial amount of domestic violence. Effect of witnessing makes a secondary victim – a child, who live in home where partner abuse occurs. Child maltreatment is recognized as a serious problem around the world. Witnessing or exposure to domestic violence has massive impact on children. According to some researches, 275 million children in the world and more than 10 million children in USA witness domestic violence (Sullivan, Egan, & Gooch, 2004). Official data of

¹ Domestic violence intersects with the criminal justice system in the form of a number of criminal behaviors: assault and battery, harassment, breaking and entering, telephone misuse, violation of an *ex parte* or protection order, malicious destruction of property, sexual assault, and stalking as well as a number of other offenses that may not be immediately recognizable as domestic in origin (such as arson, fraud, or embezzlement) (Haley et al., 1998: 2).

domestic violence in Serbia from 2013, showed that in 76,5 % cases of intimate partner violence children witnesses violence against the mother (Ministry of Labor, Employment, Veterans' and Social Affairs, 2013). Some researches, showed that children in Serbia are exposed to violence as witnesses of violence against their mother in three quarters of domestic violence cases. In half of the cases father aggression was directed to child during the violence event (Ignjatovic, 2015).

Exposure to domestic and intimate partner violence is a great burden on children across developmental stages and these problematic outcomes are noted among children from a range of cultural and socioeconomic backgrounds across the world. Interestingly, the concerning consequences of witnessing domestic violence and intimate partner violence appear to place children at a similar burden of risk across countries, with evidence of psychological, physical, and social ramifications in disparate regions from Palestine to the Netherlands. The effects can be seen prenatally and continue through adolescence, with adjustment and mental health challenges documented as early as infancy (Howell, 2016). Despite of that international perspective, inclusion criteria may have resulted in selection of material constructed around concerns held predominantly by Western societies and policy makers (Hovdestad et al., 2015).

Impact of witnessing domestic violence on child development

Impact of witnessing domestic violence affects children in different phases of development and has various consequences on developmental success. The findings show that children's exposure to domestic violence and intimate partner violence is extremely prevalent and those children are considered at a higher risk for problems in holistic development². These children are at great risk for internalized behaviors such as fighting, bullying, lying, or cheating. They are also more disobedient at home and at school, and

² Kitzmann et al. (2003) examined 118 studies (84 journal articles, 5 book chapters, and 29 theses or dissertations) published between 1978 and 2000. The selected studies allowed outcome comparisons for: (a) child witnesses of interparental violence and non-witnesses; (b) child witnesses of interparental violence and child witnesses (only) of interparental verbal aggression; (c) child witnesses of interparental violence and children who had been physically abused; and (d) child witnesses of interparental violence and physically abused children, along with a systematic comparison of the reported outcomes of correlation studies of exposure to the four conditions described above. All 118 selected studies yielded a significant association between exposure to interparental aggression and/or violence and to physical abuse and poor child outcomes. Witnessing interparental violence creates a notable risk, one that is at least as problematic as direct abuse at the hands of one's parents (Artz et al., 2014).

are more likely to have social competence problems, such as poor school performance and difficulty in relationships with others³.

The problem starts already in pregnancy. Children’s functioning is indirectly impacted by intimate partner violence exposure prenatally, in part because of the mental health consequences experienced by their mothers. Mother’s level of distress during pregnancy affects parental warmth, care giving and the development of healthy attachment patterns (Zeanah, 1999; Levendosky et al. 2011).

Problem continues with basic children needs such as safety and modeling for self regulation and their look to caregiver. Attachment relationships with mother are disturbed and associated with child’s disorganized attachment style (insecurely attached). The threat that IPV poses to primary caregiving relationships and social development during infancy is serious and linked with prolonged difficulties across childhood (Zeanah, 1999). The relationship of a caregiver has traditionally been one of love, support, and nurturance, unfortunately the effects of domestic violence can interrupt that bond, and damage the relationship.

Child witnesses of domestic violence are more likely to experience health problems (Chamberlain, 2001)⁴. Previous studies have shown general behavioral, cognitive, and emotional implications when children are exposed to DV or IPV including; irritability, sleep problems, fear of being alone, immaturity, language development, poor concentration, aggressiveness, antisocial behaviors, anxiety, depression, violence behaviors, low frustration tolerance, eating problems, and being passive or withdrawn (McGee, 2000; Elderson, 1999; Holt, 2015). Infants tend to also have sleeping and feeding disorders which can lead to poor weight gain (McFarlane et al., 2003).

Especially children in the preschool-age range have one of the highest rates of exposure to IPV connected with needs such as safety and emotion regulation to rely on parents and

³ National Domestic Violence Hotline; National Resource Center of Domestic Violence; Family Violence Prevention Fund; American Medical Association; American Academy of Pediatrics; American Academy of Family Physicians; Minnesota Center Against Violence and Abuse (according to Stiles, 2002).

⁴ For instance, study finds a robust and consistent association between DV and asthma prevalence in India. Specifically, women who are victims of DV had a higher probability of being reported as having asthma. Furthermore, compared with DV-free households, living in households where women experience DV increased the risk of reported asthma for all individuals in the households, including children and adult men. Finally, the association between household exposure to DV and asthma was largely consistent across the different age-strata, with stronger effects observed in age groups under 5, 15–24 and 25–44 years. These findings are consistent with the few studies that have examined the links between violence and asthma in the and Australia (Subramanian, Ackerson, Subramanyam, Wright, 2007).

primary caregivers. Children exposed to violence at home have been linked to appraisals of self-blame which begins in the age of 4-6, children appraisals of self-blame increases over time, and there was a trend for girls to report more self-blame than boys did (Miller, Howell, Graham-Bermann, 2013). Understanding the meaning of protective factors in both domains (home and daycare) is important for their connection. Decreased competence in one domain may result in decreased competences in another. That highlights the need for dimensional and interactional approach to understanding preschooler's functioning after exposure to IPV (Anthony et al., 2005).

When children reach preschool age, and are witnessing domestic violence, they commonly show withdrawn social behaviors, have heightened anxiety and are more fearful (Hornor, 2005). One primary social implication of IPV exposure is their impact on educational abilities (Hornor, 2005) and developing attitudes that accept violence as a viable means of conflict resolution (Lichter, McCloskey, 2004).

Among boys, the effects of witnessing domestic violence can be seen through externalized behaviors such as aggressiveness or disobedience, while girls tend to show more internalized behaviors such as anxiety and depression (Meltzer et al., 2009)⁵.

When children reach school-age, the effects of witnessing domestic violence can impact their educational abilities (Hornor, 2005). Children academic progress has negative correlation with exposure to DM and IPV.

Legal system response

Historically, the legal system has not been responding adequately to domestic violence and intimate partner violence (it was considered as private problem behind closed doors). But in the past decades, courts and law enforcement agencies have increasingly acknowledged the seriousness of domestic violence and have developed responses to it. In US, since 1980s domestic violence has been an issue in significant number of cases in almost every part of the court system: criminal, family law, juvenile, probate, and generally civil courts (Lemon, 1999). As a result of these dramatic changes, police and

⁵ Some researches evaluated attitudes about violence according to gender of preparation. Results indicated that for girls, both mother - and father-perpetrated IPV was associated with increased psychological and physical dating violence perpetration, whereas only mother-perpetrated IPV was associated with physical dating violence for boys. Further, these relationships were fully mediated by attitudes that were accepting of female violence (for girls) and male violence (for boys). Both of these studies highlight the important role that attitudes surrounding violence play in perpetration of later IPV, especially important for the different forms of girls and boys further perpetration of violence (Temple, et al., 2013).

prosecutors have enhanced their investigation and the vigour by which these matters are pursued in court. The courts have responded to this change in perception and attitude with more severe sentences or mandated intervention for perpetrators (Jaffe, et al., 2003). The issue of whether or not arresting perpetrators is an effective intervention has been a primary focus of domestic violence research (Sherman et al., 1992; Mears, et al., 2001)⁶.

However, optimistic view from the beginning, have been replaced by new approaches who considered more complex questions regarding domestic violence. A “one-size-fits-all” approach to batterer intervention cannot accommodate the diverse population of batterers entering the criminal justice system (Healey, Smith, & O’Sullivan, 1998).

Despite of that improvement, legal system has been slow to recognize the impact of children witnessing domestic violence and intimate partner violence compeering with other form of child maltreatment. Children witnessing domestic violence has elements witch include several types of child maltreatment. For instance, child witnessing most often is meant to encompass the many ways in which a child is involved in a domestic violence incident. Witnessing may refer to a child’s visual or auditory witnessing of a violent act or acts perpetrated by the batterer against the child’s mother. Witnessing may also include incidents when a child is in her mother's arms when the assault takes place. Older youth may intervene to protect their mothers. When a child is directly assaulted during the mother's assault, these situations most often fall under child abuse statutes and are not usually defined as “child witnessing.” The terms “exposed” to, “affected” by and children who “experience” domestic violence are also used to describe, “witnessing” (Fitzgerald et al., 2004).

a) Civil and Criminal responses to children witnessing of domestic violence in USA

A number of states have responded to the disturbing realities of child witnessing domestic violence by increasing the criminal penalties for perpetrators of domestic violence in the presence of a child. Some states created a new crime of child abuse when domestic violence is committed in the presence of a child and other states enhanced penalties for domestic violence offenses when children are present (Fitzgerald et al., 2004: 4). The definition of "presence" has a significant impact in the breadth of these criminal statutes.

⁶ Sherman shows different impact of compulsory arrest according domestic violence among class and race. That compulsory arrest reduces violence against middle-class women at the expense of those (often black) who are poor. He calls for more flexible policies—such as "community policing"—that more adequately reflect the diversity of American society (Sherman et al., 1992).

Legal recognition of the harm to victims of domestic violence has now been extended to child witnesses as secondary victims of this violence (Weithorn, 2001). Prior to legislative changes, prosecutors were able to recognize the plight of children only as an aggravating factor in sentencing (Jaffe et al., 2003). This discretionary intervention on the part of more diligent prosecutors has been formalized with changes to some states' legislation. In California, for example, children's exposure to domestic violence is a factor to be considered by judges in determining an appropriate sentence, and in Idaho domestic violence in the presence of children may double the criminal sentence (ibid). Some authors have advocated that children's exposure to violence should be a separate criminal offence to ensure batterers accountability, to avoid revictimizing abused women with allegations of "failure to protect" in the child protection system Other laws criminally punish parents for endangering a child's welfare by failing to care properly for, protect, or support the child. In other states, laws penalize adults who act in a manner that is likely to be injurious to the physical, mental, or moral welfare of a child (Stone, Fialk, 1997).

In fact, several states have implemented laws that reflect this view. Separate Crime for Child Witnessing in USA give some illustration criminal response to children witnessing domestic violence. In Georgia Georgia's statute at O.C.G.A. Sec. 16-5-70 is entitled Cruelty to Children and states in relevant part: (c) Any person commits the offense of cruelty to children in the second degree when: (1) Such person, who is the primary aggressor, intentionally allows a child under the age of 18 to witness the commission of a forcible felony, battery, or family violence battery; or (2) Such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery or family violence battery. (e) A person convicted of the offense of cruelty to children in the second degree shall be punished as for a misdemeanor upon the first or second conviction (Fitzgerald et al., 2004).

In Utah's statute at UT ST § 76-5-109.1 states in relevant part that: (2) A person is guilty of child abuse if he: (a) commits or attempts to commit criminal homicide ... against a cohabitant in the presence of a child [third degree felony]; or (b) intentionally causes serious bodily injury to a cohabitant or uses a dangerous weapon ... or other means of force likely to produce death or serious bodily injury against a cohabitant in the presence of a child; or (c)... commits an act of domestic violence in the presence of a child [class B misdemeanor] The statute defines in the presence of a child as: "in the physical presence... Or having knowledge that a child is present and may see and hear an act of domestic violence." UT ST § 76-5- 109.1 (1) (b). Also the statute specifies that a charge under the section is separate and distinct from, and is in addition to, a charge of domestic violence where the victim is the cohabitant (Fitzgerald et al., 2004).

In Delaware’s statute at Title 11 § 1102 states in relevant part: that a person is guilty of endangering the welfare of a child when: ... (4) the person commits any violent felony, or reckless endangering second degree, assault third degree, terroristic threatening, or unlawful imprisonment second degree against a victim, knowing that such a felony or misdemeanor was witnessed by a child less than 18 years of age who is a member of the person’s family or the victim’s family. Hawaii’s statute at Section 706-6-6.4 provides that it is an aggravating factor in determining the particular sentence to be imposed if: (a) the defendant has been convicted of committing or attempting to commit an offense involving abuse of a family or household member; (b) the defendant is or has been a family or household member of either a minor referred to in (c) or the victim of the offense; and (d) the offense contemporaneously occurred in the presence of a minor. “Offenses” are defined as assaults in first and second degree, sexual assaults in first, second or third degree and abuse of family or household members. “Presence” is defined by statute to mean in the actual physical presence of a child or knowing that a child is present and may hear or see the offense. There are no reported cases citing this statute (Fitzgerald et al., 2004).

New legislative reforms in US initiated debates about new laws effects. Positive impact of that new legal response was message to the public how is exposure to domestic violence harmful to children. This initiated new social norm against children maltreatment. Obviously, the real intent was not to bring more people before the courts, but rather to change historic attitudes and patterns of behavior and educate the community. Other anticipated benefits included the education of front-line professionals (such as police officers) to give special notice to the plight of these children and improved access to resources (Jaffe et al., 2003: 5).

Unfortunately, side effects made some confusion and controversy in court practice. Some of the most significant negative consequences are similar to pro-arrest policies in cases of domestic violence and could lead to criminalization of domestic violence developed more quickly than the training of police, prosecutors, and judges (Jaffe et al., 2003). This gap between legislation and the practical implementation of the new laws created expectations on the part of victims and victim advocates that exceeded the capacity and ability of the criminal justice system (*Ibid.*). In addition to the unintended side effects on adult domestic violence victims, new laws criminalizing exposure to violence may create a host of dilemmas for child witnesses.

Laws criminalizing domestic violence in the presence of a child will create another barrier to reporting as mothers will fear that their children will be compelled to testify and will

be placed in foster care. Some parents will fear being charged if they bring the criminal behavior to the attention of the authorities. Batterers may not be educated as to the effects of domestic violence on children: Although these criminal statutes may temporarily end the child’s exposure to violence, the criminal charge alone will not educate the batterer as to the effect of this behavior. A broader perspective is urged in order to end the cycle of violence (*Ibid.*). These factors may converge to create a climate where domestic violence victims and their children are hesitant to disclose the violence, because of their role as court witnesses and all of the consequences that may prevail from the criminal justice system (Jaffe, et al., 2003).

b) Civil and Criminal responses to children witnessing of domestic violence in UE

The effective protection of the rights of the child, in both domestic policies and external action, is one of the European Union’s priorities for action, as can be seen in its strategies, plans, measures and regulations. In 2006 the European Commission adopted the Communication “Towards a European Union strategy on the Rights of the Child” , which developed a common basis for the Member States to achieve them. The protection of children is, in fact, a political mandate established in the Charter of Fundamental Rights of the European Union, 2007. The most important for the issue of domestic violence is Right to life, survival and development (CRC Article 6).

Taking into account that the situation of gender-based domestic violence affects the overall development of children, states will have to do everything within their reach to protect children who have lived through this plight and provide them with specific care, taking positive measures to support their recovery and, at the same time, avoiding their stigmatization because of the violence they have suffered.

Despite significant achievements made in the field of children’s rights at all political levels, more specific action is required with regard to children who witness domestic violence. They are far too often neglected as victims of the psychological consequences of such violence, as possible future victims and as elements of a chain of violence who could help identify potentially violent situations and avoid new violence in the future.

The Assembly⁷ therefore calls on national parliaments of Council of Europe member states to: provide the children concerned with a veritable status of “secondary victims” in order to consider appropriately the impact that domestic violence can have on them;

⁷ Report of The Social, Health and Family Affairs Committee, on March, 2010 (Doc.12111;Doc.12155;Recommendation 1905/2010) Parliamentary Assembly

provide for specific gender-mainstreamed measures in order to deal with the specific consequences of domestic violence for girls and boys in their lives as children and adults; continue to raise awareness on the situation of children witnessing domestic violence and take the issue into consideration in the context of national legislation and policies in an interdisciplinary approach integrating gender mainstreaming, aimed specifically at the protection of children especially, the punishment of crimes involving domestic violence or the provision of financial compensation for witnesses of violence as victims of its psychological consequences include in their legislation the right of children to an education based on mutual respect and non-violence; strengthen the special consideration in legal and administrative procedures for children having witnessed domestic violence, for example by: creating special conditions for hearing children as witnesses of violence in order to avoid the repetition of testimony and unwarranted or humiliating questioning, and to lessen the traumatizing effects of legal and institutional proceedings; providing the children concerned with physical protection during relevant proceedings and through custody and contact rights following situations of domestic violence; providing the children concerned with protection and support, not only in women’s shelters as it is often the case, but also outside such institutions; providing the relevant actors of social and other services with the knowledge required for dealing with children having witnessed domestic violence (training of police forces and teachers); taking into account the best interest of the child who has witnessed domestic violence when ruling on parental authority and contact of the author of domestic violence with the child concerned; promote the issue of children who witness domestic violence through integrated approaches, with the aim of avoiding severe psychological traumas for children, and through educational programs for families aimed at preventing the transgenerational transmission of violence, and thus future situations of domestic violence.

c) Civil and Criminal responses to children witnessing of domestic violence in Serbia

Domestic violence is considered a “long-lasting phenomenon” and as a socio-pathological one has become almost a part of daily lives in Serbia. Model and patterns of its existence and survival are part of patriarchal or traditional perceptions of gender relations, gender patterns and family relationships (Petrušić, Žunić, Vilić, 2008). Such cultural patterns, social norms and traditional bonding models of family (domestic violence as a social acceptable behavior) are accompanied with transition process and problems (decline of the individual and social material standard, process of pauperization, social insecurity, increasing social distance, increase number of unemployed persons, and also re-traditionalization and re-patriarchalisation) (Milić, 2002; Blagojević, 2002).

Accordingly, domestic violence is defined as the continuous application of physical and psychological force to family members, with endangering and violating the domains of security and trust and manifestation control and power over family members, whether or not this behavior is in current legislation envisaged as a criminal offense and whether the perpetrator of the violence was reported bodies of persecution (Konstantinović-Vilić, Nikolić-Ristanović, 2003; Lukić, 2003 according to Petrušić, Žunić, Vilić, 2008).

Studies on violence against children in Serbia show the widespread prevalence of that violence in various forms. It appears as direct, interpersonal, physical, psychological, and/or sexual abuse, and also as negligence that denies needs and impedes child development. Violence against child has also distal causes and complex manifestation as structural violence – child marriage, child work and different forms of exploitation or social exclusion (UNICEF, 2017).

The relevant policy context is marked by significant efforts to enhance the system's response to violence towards children. Since the mid 2000s in Serbia, prevention and suppression of violence against children and protection of children from violence is one of the important priorities of national policies. A general framework for child-related policies in the period 2004-2015 is defined in the National Plan of Action for Children. As part of this framework, the Republic of Serbia adopted the General Protocol for the Protection of Children against Abuse and Neglect. The goal of adopting this protocol was to provide a framework for establishing an effective, operational, cross-sectoral networks to protect children from abuse, neglect, exploitation and violence. Next to the General Protocol, specific sectoral protocols were adopted, which defined specific roles and procedures in protecting children from abuse and neglect for each of the relevant sectors within the protection system - social security, education, police, health and justice systems. In 2008, the Government of the Republic of Serbia adopted the National Strategy for the Prevention and Protection of Children violence, and during 2010 an Action Plan for its implementation. In July 2016, Serbia opened Chapter 23 in the Euro-integration process and, as part of its commitments areas, the implementation of the Chapter 237 Action Plan is expected to be one of the priorities of the Government. This one the plan envisages the creation of a new "Multi - annual Strategic Framework for the Prevention

and Protection of Children from Violence" in 2017 and the revision of “soft” legal regulations (General and Special Protocols)⁸.

Children are considered victims of violence in the family not only when they experience it directly, but also when they are exposed to acts of violence that one family member performs against another family member as a witnesses. General protocol finds that: witnessing and exposure to violence traumatizes children, regardless of whether they watch the violence directly, or hear sounds, thumps or screams from a close range, when they know that violence is occurring or can occur, or when they subsequently see the consequences of violence among family members. This is why it is necessary to ensure that children’s rights and needs are taken in consideration when providing services and assistance to victims of domestic violence when they are witnesses of violence. The term “child witness” does not only relate to children who witness the act of domestic violence directly, but also to the children exposed to violence indirectly. In these cases it is necessary to apply complementarily the General Protocol on the Protection of Children from Abuse and Neglect. When giving assistance to victims of domestic violence with vulnerable members as violence witnesses, it is necessary to take measures of protection that meet the needs of these persons, considering that they are not in the situation to protect themselves without the help of others. All services to children witnesses of domestic violence and other vulnerable family members need to be provided in accordance with their best interests (General Protocol for Action and Cooperation of Institutions, Bodies and Organizations in the Situations of Violence against Women within the Family and in Intimate Partner Relationship Children).

Despite the awareness that not only women are victims of domestic and intimate partner violence - children in the family are victims to the same extent as women, even 11 years after the adoption of the General and Special Protocols for the Protection of Children from Abuse and Neglect, the child protection system does not function fully. In the practice, the children witnessing domestic or intimate partner violence against their parents and other family members were not treated as victims of abuse and neglect, and protection measures were not taken accordingly. The guardianship authority was not notified of the knowledge or suspicion about the presence of children during the act of

⁸ Official Gazette of RS, No. 122/2008. Official Gazette of RS, No. 15/10. 7 Available: <http://www.mpravde.gov.rs/tekst/9849/final-version-of-the-action-plan-to-negotiate-chapter-23-which-agreed-with-the-last-recommendations-and-confirmed-by-the-european-commission-in-brussels-.php>

domestic or intimate partner violence against their parents or other family members (The Special Report of the Protector of Citizens, 2016: 38)⁹.

Children are not provided with protection from exposure to domestic or intimate partner violence against a parent or other close family member, of from parental instrumentalization, parental abduction, separation from parents, prevention of quality personal relations with parents and other forms of child abuse and neglect that cause serious and severe, sometimes irreparable, harm to the child’s growth and development¹⁰. Even so, the existing regulations and their implementation do not provide women with immediate protection in any situation of violence. The existing penal policy, with a high rate of postponement of criminal prosecution and imposition of conditional sentences, does not contribute to the prevention and elimination of violence against women, in the circumstances of widespread violence against women in Serbia, which was established by the 2014 (*Ibid.*)¹¹.

Conclusion

Children witnessing domestic and intimate partner violence are secondary victims of violence at home. Impact of domestic violence has tremendous consequences for child’s psychological development and social behavior. In comparison with the past few decades, problem of children witnessing domestic violence is much more recognized, especially

⁹ Protection of Women from Domestic and Intimate Partner Violence-Selected Recommendations of the Protector of Citizens (Ed., Stevanović, 2016).

¹⁰ The Special Report of the Protector of Citizens on the Implementation of the General and Special Protocols on Protection of Women against Violence is available at: http://www.protector.rs/attachments/3710_Special%20Report%20Protector%20city%20of%20application%20General%20and%20special%20protocol%20for%20protection%20women%20of%20violence.doc, accessed on 10/10/2016. ”

¹¹ In a number of cases, the police officers gave assessments of reported incidents, without qualifying them as violence but rather as “family disagreements”, “verbal conflict”, “disturbed family relationships”, „bad marital relationships”, although prior to giving such assessments they did not perform activities to establish these facts - except for taking statements from the reporting person and the reported person. In accordance with such assessments the police officers were choosing the way of further action - most often they used the police power of warning but in some cases the police did not take any measure. Such assessments of reported incidents, along with insufficient data collected, influenced the way in which the police officers presented these incidents to the deputy public prosecutor on duty and, consequently, the public prosecutor’s decision. The public prosecutors usually considered that there were no elements of a criminal offence for which the perpetrators were prosecuted *ex officio*. The public prosecutors were instructing the police to file criminal charges only after several reports of violence against the same person and in cases where serious bodily injuries were recorded. Denial of violence by the victim and her mental state were the reasons why the police officers did not undertake measures and actions to establish the facts even when violence was repeatedly reported and the victim had visible injuries; in one case the head of police station neither took any measure nor did he inform the police officers of his own knowledge that the victim’s partner had threatened the victim (The Special Report of the Protector of Citizens, 2016).

in USA and EU states. Despite of that improvement, legal and civil responses have match controversy and ambivalent outcomes.

In Serbia, enforcement of Child rights has significant legislative response, although in practice, chain of support doesn't work in accordance with legislative improvement. Causes are multiple and complex. Meaning of legislative response is part of multilevel process of changing social, cultural, and family patterns and signalize that violent relationship in home are not acceptable and allowable way of family communication because of the great destructive potential which affects children the most.

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YEARBOOK
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Milana Ljubičić*

POVERTY AND CHILDREN'S RIGHT IN SERBIA TODAY

This paper addresses the question of whether children, depending on the social status of the family and the development of the local surroundings, can equally enjoy the rights bestowed on them by international legal instruments and domestic legal system. Our initial thesis is that not all children have equal access to employment of children's rights and that poverty (both at the micro-local and macro levels) is the most significant limiting factor. To prove this hypothesis, we analyzed the contextual factors - characteristics of the local and family environment - and their relation to indicators that directly describe the extent to which children's rights such as child labor or involvement in the educational process are being employed. We relied on the available statistics to describe the position of children in different social contexts, with emphases placed on to the situation in our Republic. Based on the analysis, we have developed a discourse that has led us to draw a pessimistic conclusion: the socioeconomic position of the family significantly influences the prospect that children will enjoy their rights.

Keywords: children's rights, poverty, family, local environment

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Introduction

The hope that civilization progress, expected to bring, among other things, the decline of poverty, discrimination, and social excursion, would follow the technological growth and development, will probably be betrayed. The end of the XX century, the so-called decade of the market economy, did not result in poverty reduction (Minujin et al., 2005: 3). In both developed and underdeveloped societies, living in misery, or at risk of it, is becoming a daily existence for an increasing number of people (Brikner, 2013: 15). Almost one-quarter of the world's population lives below the poverty line (Milosavljevic, Jugovic, 2009: 63), and according to the World Bank, 600 million people in the world have no roof over their heads, while 1.4 billion live without water and sanitation (Brikner, 2010: 15). Even in rich economies such as Britain¹ or the US, the number of poverty-stricken is rising. Brikner (2010: 13) thus states that in the 1990s substantial misery became a reality for one million Britons, and Vandenhole (2014: 610) notifies that the number of families in the United States descending into the category of the poor and those at risk of poverty, climbed from 40 to 45% in just 5 years (2006-2011). In EU members states inequalities are increasing despite efforts to reduce impoverishment (Bejaković, 2005: 82).

Yet, a particular concern is that the majority of the poor, both in the wealthy and in developing countries, are children² (Minujin et al., 2005: 4). There are estimates that in the modern world, close to 570 million children are deprived of basic goods and services (https://resourcecentre.savethechildren.net/node/9684/pdf/child_poverty_report_4web_0.pdf, 2016). In developing countries, more than half of children are exposed to some form of poverty-related deprivation. In southern Asia and sub-Saharan Africa, 80% of children live in misery, and those living in rural areas are particularly at risk (Minujin et al., 2005: 19).

Alike life troubles affect children in developed economies as well. For example, about 16 million children in the United States live in absolute poverty (Vandenhole, 2014: 610). As a rule, these are children belonging to the Hispanic, Aboriginal and Native American populations. Poverty is also a reality for millions of children in European countries (*Child Poverty and Social Exclusion in Europe*, 2014: 3). It remains one of the largest, if not the largest, challenges in the European Union. Although in 2006. the Council of Europe

¹ Although at the same time GDP (Gross Domestic Product) increased by 20%

² It should be emphasized that child poverty differs from adult poverty. Specifically, children are far more vulnerable to the effects of poverty (https://resourcecentre.savethechildren.net/node/9684/pdf/child_poverty_report_4web_0.pdf, 2016: 10).

emphasized that it is necessary to significantly reduce child poverty, not much has been done since then. In fact, the situation has worsened in most Member States (*A child rights approach to child poverty - discussion paper*, 2007). Thus, in the period between 2008. and 2012. which was marked by the economic and financial crisis, the number of children at risk of poverty and social exclusion climbed to 27 million, with an increase of 500,000 over one year (2011-2012.) (*Child Poverty and Social Exclusion in Europe*, 2014: 6- 9). In 2012., children in Bulgaria (52%), Greece, Hungary and Latvia (35-41%) were at highest risk of poverty, while the lowest risk (between 12 and 19%) was recorded in the Nordic countries (Norway, Sweden, Denmark, Finland and Iceland), Slovenia, Germany, the Netherlands, Switzerland and the Czech Republic. The findings of a British *Millennium Cohort Study*, based on a representative sample of Britons born in 2001., also implies a pessimistic conclusion: about half of the respondents (47%) experienced relative poverty once or several times between the ages of 9 months and 11 years, with 9% living in persistent misery (Wickham et al, 2016: 760).

It has also been established that the gap between rich and poor in these societies is growing acutely. Factors which are increasing risk of poverty are low levels of parental education, migrant backgrounds, as well as life in an economically and culturally deprived local environment (*Child Poverty and Social Exclusion in Europe*, 2014).

1. Poverty and children’s rights: a review of foreign study’s findings

The data presented raise the question: can poor children enjoy the rights guaranteed to them by international documents and national legal system? A number of foreign experts and scholars have accepted the thesis that poverty limits, and even undoes children's rights (*Child Poverty and Exclusion in Europe*, 2014: 24-25; Wandenhole, 2014: 611). That is, it is not in their best interest: unequal life chances lead to discrimination, endangers the right to development, health, education, social security, the right to a standard of living in accordance with psychological, mental, spiritual, moral and other needs, and - in itself is a form of violence³ (Wandenhole, 2014: 611-612).

On the other hand, since the connection between children's rights and poverty in conceptual and research terms is not a frequent subject of empirical verification (Wickham et al., 2016: 610), Doz Costa (2008: 82), practitioners in the field of

³ Wandenhole (2014: 611) therefore criticizes *the Convention on the Rights of the Child* because it does not explicitly mention poverty. Van Bueren (according to Wandenhole, 2014: 611), on the other hand, takes a different view - she believes that the issue is addressed by *the Convention* in the section on the economic and social rights of children since it is a set of answers that specifically address their poverty.

international law face vagueness around the thesis that poverty is a violation of human rights⁴. Rather no consensus exists on the definition of poverty⁵ and the processing of its dimensions, which leaves the issue open.

One of the endeavors to offer conceptually and methodologically solid answers is actualized in a children's rights-based approach. Judging by this approach, a child is in a situation of poverty or comparative deprivation if any of their rights are denied (*A child rights approach to child poverty - discussion paper*, 2007: 3).

It is also accented that the nature of poverty is multidimensional, that it leads to serious vulnerability regarding the ability to meet basic human needs (food, clean drinking water, sanitation), health, housing, education and information⁶, caused by the structural factors: unfavorable social circumstances, and system constraints such as inadequate functioning of the social services system and unequal access to social resources (Harland-Scott, 2016: 10). In the context of children's rights, this approach emphasizes that the governments of the *Convention*⁷ signatory states are to assist families suffering from deprivation. That is, the *Convention* states that children, through their guardians or directly, are entitled to state assistance if they are poor (Article 26), while Article 27 assigns children the right to such living conditions that will provide for their physical and mental needs to be met.

On the other hand, the question remains how to set indicators and measure poverty in the context of children's rights. To be more precise, a number of answers have been offered (see Gordon et al., 2003; *A child rights approach to child poverty - discussion paper*, 2007; Vandenhoe, 2014; Harland-Scott, 2016: 14-17). In some authors view (Gordon et al., 2003: 3-4) the existing methods of measuring poverty adopted by international

⁴ This raises further questions: does such an attitude constitute a purely moral standpoint, or is it legally binding, should states and decision-makers bear the consequences of poverty of their population, can denial of certain rights be described as poverty, etc.?

⁵ The effort to define poverty is at least two centuries old (Doz Costa, 2008: 83). The definitions are very different. According to one number of authors, poverty can be defined by income (both absolute and relative), others see it as capability deprivation, and the third as social exclusion (see: *Child Poverty and Social Exclusion in Europe*, 2014).

⁶ *Save the Children* takes the view that poverty threatens the four key principles of *the Convention*. These are 1. the right to life, survival and development, 2. nondiscrimination, 3. the best interests of the child, and 4. respect for his or her opinion (Harland-Scott, 2016: 10). A number of critically disposed authors concerning the ability to practice the rights offers a slightly different typology (see: Forin, 2009).

⁷ *The Convention* has been ratified by almost all States (Harland-Scott, 2016: 13). It is rightly pointed out that *the Convention* has contributed to the improvement of the status of children worldwide (O'Kane et al., 2019).

organizations are not good enough. As the commitment to this subject matter is above the aim of our work, we will hereafter provide a summary account of foreign research findings⁸ that directly link poverty and the perspective of children's rights. The conclusions reached by the researchers addressing this topic⁹ could be summarized as follows:

1. children born in economically and socially deprived regions or communities, in single parents or multi-member families, then children with disabilities, migrant or minority origin, are at higher risk of poverty. Children's rights are particularly threatened in poor countries where institutions are underdeveloped and/or war is ongoing. Also, it has been noted that poverty is oncoming from the least developed countries to moderate income countries;
2. although poor children are at increased risk of becoming ill with chronic disease and developing the symptoms of certain mental disorders, the likelihood of encountering a violation of the right to health care, even when available to all, is high. Children of different socioeconomic status have also been found to have unequal access to education. The poor, and children living in socially deprived areas, leave school early. In addition, they are more likely to encounter discrimination, victimization, lack of support from professors, and lack of parental supervision. The authors also agree that the girls are at higher risk of violation of the right to education than boys;
3. it has also been noted that there is a correlation between child poverty and their social exclusion. Children whose families are poor are less likely to participate in entertainment and cultural activities, unlike their financially better-off peers, and in terms of these rights, those from remote (rural) backgrounds, migrants and those with health problems face even more disadvantages;

⁸The findings of the studies of the following authors are presented: Gordon et al. (2003); Minujin et al. (2005), *A child rights approach to child poverty - discussion paper* (2007); Vandenhole (2014); Harland-Scott (2016); Wickham et al. (2016).

⁹In the studies we refer to, poverty has been measured across a range of indicators ranging from monetary, such as GDP, monthly household income and work intensity of parents, parental education and backgrounds, family structure, quality of community services, children's health care status, education and other indicators.

4. the right of poor children to live with their parents is violated quite often, despite the prescriptive commitment that poverty cannot be a reason for separation from the family.

When it comes to the broader social context, the findings that researchers have come up with are extremely valuable. Namely, government interventions in the area of the labor market and social transfers have a significant impact on the poverty rate of children and their ability to enjoy their rights. In EU Member States where the percentage of children living in poverty is relatively low, it has been found that social transfers are designed to affect directly child poverty patterns. For example, countries with the lowest levels of child poverty promote social housing, the statutory minimum wage, as well as some privileges for the unemployed, equal access to early childhood education and care. Other indications have also been that, when some restrictions were established in this regard, the rate of children at risk of poverty increased (*Child poverty and social exclusion in Europe. A matter of children's rights*, 2014).

Finally, a number of authors particularly point out that social wealth is not significantly related to child poverty. That is, even in those countries where the gross domestic product is growing, the poverty of children does not decrease unless social transfers are distributed in such a way that the deprived benefit from it. Vandenhole (2014: 611) points out that child welfare is not related to GDP but to practical policies, and emphasizes that there are differences along ethnic lines, which raises issues of a different kind (marginalization and discrimination, among others).

2. The methodological framework for the analysis of the position of children in the Republic of Serbia

What is the status of children in our country, and are the poor deprived of the rights conferred on them by the *Convention*, are the questions we will attempt to answer in the pages that follow. These are two goals of our study. To answer the first task, we did a desk analysis of the available statistical indicators of the status of children in our country, while in the next step we went further and, with the empirical findings in mind, opened a discussion about the current state and some practices picturing the regard for children rights in our country from a critical, sociological perspective.

The desk analysis was conducted on the basis of the following documents: *The Third National Report on Social Inclusion and Poverty Reduction in the Republic of Serbia. Survey and Situation of Social Exclusion and Poverty 2014-2017 with priorities for the*

coming period (2018, hereinafter referred to as *The Third National Report*), the report of the SeConS Development Initiative Group (Babović, Cvejić, Stefanović, 2017) and the findings of the Network of Organizations for Children of Serbia on the progress made in the field of child rights in the Republic of Serbia (http://zadecu.org/wp-content/uploads/2018/04/Deca_u_Izvestaju_o_napretku_Srbije_2018.pdf) (hereinafter MODS), the *Research of Multiple Indicators of the Position of Women and Children in Serbia 2014* and *Research Multiple Indicators of the Position of Women and Children in Roma Settlements in Serbia* (2014) (hereinafter MICS¹⁰), and the document *Children in the Social Welfare System of 2017*. prepared by The Republic Social Welfare Institution.

In these reports, poverty has been operationalized through indicators that use, among others, a child rights-based approach from which conceptual scheme we began. As we agree that contextual factors such as characteristics of the broader and narrower social backgrounds also affect the chances of children to enjoy their rights, we have described the characteristics of social setting. Such discourse should have allowed us to understand the link between socio-economic opportunity, practical policies, poverty and children's rights.

3. Research results

3.1. Desk Analysis Findings - Contextual Framework

To describe the contextual framework, we had at our disposal a relative abundance of statistics, among which we paid particular attention to indicators describing: 1. the material standard of the population (absolute and relative poverty, at-risk-of-poverty rate, labor market situation); 2. characteristics of social welfare and 3. subjective well-being: trust in institutions, quality of life and optimism.

The Third National Report (2018) states that 2017. ended with a GDP surplus (of 1.2%). But even so, the poverty rate has not declined significantly. Based on the findings presented in the aforementioned report (2018) and other documents analyzed, it could be said that a considerable number of our citizens live in a situation of financial extortion or risk of facing one. One quarter (1,790,000) of Serbia's population lives at the poverty line.

¹⁰ This is a UNICEF International Multiple Indicator Cluster Survey designed to make cross-cultural and longitudinal comparisons comparable. This survey has been conducted in Serbia in several waves since 1996 on representative samples of respondents.

The rate of risk of social exclusion¹¹ did not change significantly compared to 2013. In 2017., absolute poverty affected half a million or 7.2% of the population. In 2016., 15.7% of the population was exposed to the persistent risk of poverty, and as many as 69% of citizens barely make ends meet with the income¹² at hand. Unemployment is recognized as the key cause of poverty. Specifically, the labor market in the Republic of Serbia is characterized by a high rate of inactivity, with unemployment particularly affecting young people¹³ (aged 15-24) and people aged 55 to 64 (*The Third National Report*, 2018).

Despite the fact that the standard of living of one part of the population has not changed significantly compared to the previous period, in 2017. the share of expenditures (as well) in the area of social welfare¹⁴ decreased (*The Third National Report*, 2018). Social transfers and factual level of social assistance expenditure were reduced by 2.7%. In addition, assistance and support programs for the underprivileged, such as financial assistance and child allowance, are insufficient - the amounts do not cover basic needs. The particular concern is that only a small number of people in need are covered by this type of welfare, especially in regard to financial social assistance (*The Third National Report*, 2018). Therefore, Babovic et al. (2017: 16) findings that the efficiency of social transfers in our country is lower than in EU, is not surprising.

Besides, the citizens of the Republic of Serbia compared to EU residents lack the confidence in public services, assess their quality of life as lower and look at their own future with less optimism (*The Third National Report*, 2018).

The findings leave no doubt that poverty is more pronounced in rural areas, especially in Eastern and Southern Serbia, that single-member households, single-parent families with dependent children, as well as the unemployed¹⁵ and the low-educated are more often affected by it. Compared to the other age groups, children are more at risk of poverty (30%) (Babović, Cvejić, Stefanović, 2017; MICS, 2014; *The Third National Report*, 2018).

¹¹ This rate is described by three indicators: the at-risk-of-poverty rate, marked material deprivation, and very low labor intensity (*The Third National Report*, 2018: 24).

¹² Therefore, it is not surprising that the relative poverty in Serbia or the at-risk-of-poverty threshold in our country, calculated beyond the purchasing power standards of citizens, is lower than in the EU Member States (*Third National Report*, 2018).

¹³ The unemployment rate of highly educated young people (up to 24 years old) in 2015. was 43.5%.

¹⁴ As well as expenditures on health, education, general public services.

¹⁵ It states that every other unemployed person is at risk of poverty.

3.2. Findings of desk analysis - indicators of the status of children in the Republic of Serbia

The status of children, in general, considered as a (in)possibility to enjoy the rights, we described from the rights-based approach using following indicators: 1. material well-being (poverty, malnutrition); 2. the health status of children and their development at an early age; 3. education; 4. child labor and 5. premise in the field of social services for children.

The findings of the reports leave little room for doubt - children are at high risk of absolute poverty. According to the World Bank (*Poverty & Equity Brief. Europe & Central Asia. Serbia.* (2018), a quarter of children between the ages of 0 and 14 fell into the category of poor and about 2% were malnourished (MICS, 2014). Even though under current laws all children up to the age of majority have the right to health insurance and protection, numerous procedures complicate the prospect of children who fall into the category of vulnerable to exercise their right. In other words, significant inequality is present and the most disadvantaged are children who have not been registered in birth register (MICS, 2014, MODS, 2018).

Using a series of indicators, the authors of MISC (2014) also measured the developmental index of 3-year-olds and 4-year-olds - it is a continuous process during which a child learns to master more complicated ways of moving, thinking, speaking, feeling and relating with others (MICS, 2014: 162). The findings of the analysis showed that this index is lower in children from the poor (91%) compared to their peers from better-off families (98%). Roma children are the most vulnerable in terms of development index: only 77% develop in accordance with age.

Pre-primary education, made compulsory in 2006, is attended by 98% of children before enrollment in first grade. However, this percentage is significantly lower in the case of those whose families are the poorest in the sample (92%). The situation is even more dramatic in the case of Roma children. The authors seem to argue correctly that "School (un)readiness is influenced by socioeconomic status" (MICS, 2014: 167). They also comment on the finding that, in the case of 17% of children, the statutory requirement that a preschool institution is to be located within two kilometers of the preschooler's place of residence is violated. Therefore, it should not be a surprise that, in addition to financial difficulties (costs for clothing, food, and hygiene of the child), and lack of information regarding the obligation to attend preschool, parents also cite distance from the institution as reasons why their children are not included in this program. 97% of

children from the sample of households included in the study went to the first grade of primary school on time. Compared to boys (100%), girls (95%) attend elementary school less frequently, while 4% of children from the poorest families are out of the education system. In the case of Roma children, this percentage is far higher: only 76% of girls and 63% of boys are enrolled in the first grade of primary school. The likelihood of obtaining a high school diploma is higher in the case of children from better standing compared to poor families. Only 74% of children in the poorest households attend high school, and this percentage is three and a half times lower in the case of Roma children: only 22% of these children go to high school. In the MODS (2018) report, we also find that, with regard to the right to education, children in institutional care are particularly vulnerable. This is especially true in the case of children with disabilities.

The MICS (2014) report also provides information about children between the ages of 15 and 17 that are involved in economic activities (e.g. doing household chores or working for a non-household members), housework (e.g. cooking, cleaning, collecting fuel, caring for siblings), what conditions they worked in and for how long¹⁶. Activities that can be considered child labor - these are jobs that are not appropriate for the child's age or activities that may endanger their physical, mental, mental development and education (MISC, 2014: 201), include 10% of children. More often, child labor is performed by boys (12%) than girls (7%), followed by children who do not live in urban areas and, of course, the poorest (15%). In hazardous conditions work 3% of the poorest children. On the other hand, girls were found to be significantly more likely than boys to do housework, and by far the most burdened children in this regard are those who do not attend the school.

In the period 2016-2018. no significant progress was made in the area of community social services improvement¹⁷ (MODS, 2018), whereas the report *Children in the Social Welfare System* (2018: 49) states that from 2012-2016. the number of families with children receiving financial social assistance decreased. Why has this happened, the authors of the report did not answer. Instead, they are stressing that budget for childcare provisions from the 2016. have increased by 1% over the previous year.

¹⁶ In order for an activity to be considered child labor, it is unnecessary for a child to perform activities longer than one week for a given age (MICS, 2014).

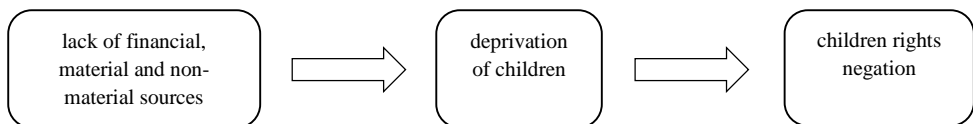
¹⁷ Financial assistance is provided by 4% of households, as expected - the poorest (11%) and those from Roma families (38%). However, this support is lacking in the case of large numbers of poor families (Third National Report, 2018).

Particularly important and fully consistent are the various studies findings that help identify poor children. The inability to meet basic needs more often affects children living in single-parent or multi-member households. Unemployment or low work activity of parents, together with low levels of education and living in economically deprived and rural areas (especially in Eastern and Southern Serbia) go hand in hand with their poverty (MICS, 2014, MODS, 2018, *The Third National Report*, 2018).

4. Discussion

The reality that poverty affects a large number of our children, that it is widespread in local communities that are inherently deprived, has been empirically confirmed in a series of official reports. However, none of authors, although there is no doubt that the poverty and social exclusion of children have been employed in a way that is akin to a child rights approach, did not address the question: does inequality among children lead to inequalities regarding the possibility of enjoying the rights bestowed? We can only speculate on the reasons why this is so. Among other things, we believe that the cause for such silence should be sought in accepting a comfortable position approached by a number of local scientists and experts. This position is defined by the unwritten rule that it is not wise to declare things that could be detrimental to adopted public policies and normative frameworks. In this regard, we will be less cautious. Our position is unambiguous, does not deviate from the opinion of a number of foreign experts and scholars, and states that rights are less accessible to children who are poor, or to use a more politically correct and practically more comprehensive term - socially excluded (Figure 1.)¹⁸

Figure 1. Poverty and child rights



Source: *A child rights approach to child poverty – discussion paper. Eurochild* (2007: 3)

¹⁸ A very interesting stand on the concepts of poverty and social exclusion is Peter Abrahamson's (by Petrovic, 2012). This author states that the term social exclusion is far more popular today than poverty because it is less accusatory.

The arguments that support this view we shall divide into three groups. We metaphorically called them: *opportunities*, *intermediaries*, and *accountability*.

When it comes to the *possibilities* of practicing law, there has already been talk of foreign authors being clear about the view that material and other inequalities produce differences in terms of opportunities for enjoying the rights. To illustrate this, Trinidad (2009: 70) cites the practice of some EU member states, with its legitimate basis, which limits the basic rights of children of involuntary, especially illegal migrants. Namely, the latter were denied the right to education and health care. Examples illustrating the violation of the rights of poor children in the domestic environment are numerous. We will list two. The first represents everyday life in big cities and concerns children working in the streets. Although the public has repeatedly urged professionals to act when young children are being used for begging purposes, this practice is still widespread. At the least such activities endanger the health and safety of children. Let alone to speak about child development and their protection. What makes the experts silent? Are these children - children with fewer rights than other better-off peers, or do we simply care less about them?

The second example concerning the practice not typical of our environment alone has its scientific and empirical validation. It is a practice of separating children from the family due to scarcity. Poverty should not be the reason for separating children from their parents. However, the findings of an unpublished study titled *Investigating the Difficulties of Families Due to Custody Authorities Decision for Separating Children from the Family and Analyzing Professional Practices in the Process*, a project¹⁹ commissioned by the Ministry of Labor, Employment, Veterans' and Social Affairs, confirmed that poverty was the reason why children were separated in 45% of cases in Belgrade region, in 48% of cases in Central Serbia and even in 64% of cases in Vojvodina. It begs the question: was separation from the parents due to the deprivation of the family in the best interests of these children? And who in this case determines what is the best interest of the child? If the child's opinion on this issue is not stated, has he/she been denied the right to participate? If social services make the final decision, isn't it a coercive paternalism²⁰ at work (Sheppard, 1992)?

¹⁹ The analysis included data from 135 centers for social work on 1 519 children separated from families. 91.3% of children separated from families during 2016 and 2017 are covered.

²⁰ It is the power exercised by one institution or individual over another person, in order to provide him with some services or prevent harm, independently until his consent (Djokovic, 2011: 432)

In addition, are these dilemmas complicated by the question that paternalism is necessarily and in any case bad? Forinova (2009) thus asks whether the coercion that an adult exerts on a child to go to (compulsory) primary school can be considered a violation of the right to decide? Or is it a ban on child labor - and this author wonders who defined the criteria for the activities of children to be considered as work, in the best interests of children when such practices are important for the economic well-being of the family and/or the source of the child's self-confidence?

The second group of arguments concerns mediators. Argumentation is related to a thesis presented by Arrigo (2002) that progress is always accompanied by the devaluation of humanity. This is evidenced by two phenomena: an increasing number of normative acts defining the rights of a group and an increasing number of intermediaries who should protect these rights. When it comes to normative frameworks, there is no doubt that children's rights are protected through a series of policies and strategies. In practice, unfortunately, it is more than likely that they do not produce the best results. For example, although adopted, the poverty reduction strategy has not led to a significant improvement in the status of children, as neither has the Family Law – large number of children remain victims of domestic violence. Intermediaries, on the other hand, offering paternalism and promote practices that are relatively difficult to achieve in the domestic context. One of the last efforts of its kind is a project entitled *The Right of the Child to be Heard*²¹. Children were involved in the project, a number of publications and a virtual application was constructed to help them express an opinion in regard to different procedures within the system of social protection, justice, education and health care (see: www.zavodsz.gov.rs). However, while the initiative for children to participate in decision-making is undoubtedly significant in terms of strengthening their rights, our concern is about the possibility of realizing participation, bearing in mind the objective economic circumstances and the specificities of local environments. For example, we do not know if such significant publications are available to children in remote villages of Eastern Serbia and what would their voice change? If they would declare that instead of walking, they would rather go to school by bus, would anyone *hear*? Would a road to their remote village be built then and a bus purchased? The question is, will the virtual app benefit children who do not have internet access? Finally, it is quite appropriate to

²¹ The project was designed and implemented by The Centre for the Rights of the Child, which has done much to improve the position of children in our county over the years of its existence.
<http://www.zavodsz.gov.rs/https://www.youtube.com/watch?v=ktVToSGIKXg>
<https://www.youtube.com/watch?v=4luTU14E411>
https://www.youtube.com/watch?v=k8Q0D_IZE_A
<https://www.youtube.com/watch?v=0k-wePqLPaA>

ask whether the different possibilities for the enjoyment of rights make inequality among children even greater?

The third group of arguments is also related to this: who is *accountable* for protecting children's rights? The answer is that it should be the state or the government of the states signatories of the *Convention*. However, the general view of the authors addressing this topic is that existing international child support programs are not sufficient to prevent their poverty (Forin, 2009; Trinidad, 2009). In fact, social transfers, including child benefit schemes and childcare, have been reduced. In addition, at the end of the first decade of the 21st century, there was an increase in long - term unemployment and worsening working conditions, both in terms of wage levels and reduced working hours, while the cost of food, energy, and other services increased in the meantime (*Child poverty and social exclusion in Europe. A matter of children's rights*, 2014). The Republic of Serbia is quite similar in that regard. The poverty rate and the at-risk-of-poverty rate are pronounced, while social benefits intended to support the most vulnerable are reduced. We are also reminded that public policymakers are not adequately addressing issues of child rights, and ultimately poverty, as well: the government has not adopted a new National Plan for Children (expired in 2015), bodies such as eg. The Council for the Rights of the Child meets irregularly, while continuous statistical monitoring of the most vulnerable among children (institutionalized children, those with disabilities, Roma children) is deficient (MODS, 2018). In addition, the public is not particularly aware of child poverty.²² It seems to have been expelled from the media. Experts and policymakers do not discuss this topic publicly, and the devastating dimensions of poverty that we are otherwise reluctant to look at can be found in rare TV shows. The scenes we see are more than tragic²³ and are doubtless evidence that child poverty goes hand in hand with the abolition of their many rights.

Instead of a conclusion

The modern world has not fulfilled its promise that children will have the right to a good start in life (Minujin et al., 2005). Over a billion children start life from positions that limit them in the future because they are unable to get out of the vicious circle of poverty. Although we agree with Utting's opinion (according to Forin, 2009: 337) that poverty

²² Unlike the dissonance on child rights, which polarizes our public. The stumbling block of advocates and adversaries among the latter question of whether children's rights abolish their obligations?

²³ See: <https://www.youtube.com/watch?v=ktVT0SGIKxg>, <https://www.youtube.com/watch?v=4IuTU14E41I>, https://www.youtube.com/watch?v=k8Q0D_IZE_A, <https://www.youtube.com/watch?v=0k-wePqLPaA>.

does not necessarily deprive the father and mother of parental warmth or authority, nor the opportunity to raise children so that they are healthy and well socialized, these processes, especially in the postmodern context, constitute a weigh. Parents face the inability to provide their offspring with adequate conditions for growth and development, and children at risk of being deprived of their rights despite those being recognized. This pessimistic scenario is globally prevalent.

It remains to be seen whether, in the future, children in our country will enjoy their rights more than their peers today. We do hope that Brickner’s prediction that "some brighter perspective no longer exists" will not come true (2010: 17).

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**WILL IT BE OR WILL IT NOT?
(US POSITION ON RATIFYING THE CRC)**

The United States had a enormous influence in the drafting of the Convention on the Rights of the Children but even then it knew that it will never ratify it. The question is why? Can it be that the US does not want International Law to influence federal and state law or it is afraid that children's rights in the US are not respected as they should be while presenting itself as a great democratic power. The US can ratify the Convention and use the RUD's (reservations, understandings and declarations) in the process of ratification so the influence of the Convention can be amended in accordance with US laws and standards, and with this action there will be no interference with the US sovereignty and laws. But still the question remains will it ratify the Convention or not?

Keywords: *Convention on the Rights of the Children, United States, United Nations, ratification.*

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1. The drafting of the Convention

The United States had a big influence on the drafting of the Convention, which was created at the end of the Cold War, in the period when the world was divided to the Eastern and the Western block including the United States. The treaty was proposed by Poland, in order to protect children’s rights. The drafting of the Convention was done in a period of ten years by a Working Group of the Commission on Human Rights, and all UN Members could participate, but at this period only few took an interest. In 1983 the international community begun to take more interest and by the end of the drafting, eighty states participated in the Working Group. The United States sent a representative from the Department of State Office of the Legal Advisor, but the US was in that period under the conservative Reagan administration, which had a negative attitude toward the treaty. Even in 1983, the U.S. delegate assumed that the Treaty will never be ratified.¹ The Reagan and Bush Administrations who were Republicans had their significant contribution in the negotiating and drafting of the treaty text and the United States made suggestions for 38 of the 40 law articles. It was the U.S. proposals that established a child’s right to family reunification, freedom of expression, freedom of religion, freedom of association and assembly.² Therefore the question is why the US made the effort to participate and propose suggestions if it new even then that it will never ratify such a treaty? Is it because it is afraid that International law and International organizations will overpower and influence the federal and state laws and interfere with its sovereignty or is it afraid that it does not respect children human rights and it will bear consequences if it ratifies the Treaty.

2. The Convention on the rights of the Children

The Convention was created in order to apply and protect the best interests of all children in the world. The Member States and their Governments who signed the Convention are obliged to respect the rights and responsibilities of all children and their parents. Every child has the right to life, to be registered at birth, to have a name, nationality, and identity. Children must not be separated from their parents against their will. Governments should also respect children’s views, expression of will, freedom of thought, belief and religion, or association, the right to privacy and access to information. Furthermore, both parents

¹ Cohen Price Cynthia. “The role of the United States in the drafting of the Convention on the rights of the child.”. Emory International Law Review. Vol 20. Retrieved from: <https://jjustice.org/wp-content/uploads/History-of-CRC.pdf>

² Davidson Howard. “Does the UN Convention on the Rights of the child make a difference?”. Retrieved from: <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1138&context=ilr> pg. 498-503

share responsibility for bringing up their child and should consider what is best for it. Governments should support parents by creating support services for children and give parents the help they need. Children should be protected from violence, abuse and neglect, the same follows for refugee children. To continue with, children with disabilities have the same rights as all the other children. Children have right to social security, adequate standard of living, right to education. The minority children or children of indigenous groups have the right to learn and use the language, customs and religion of their family. Furthermore, Governments must protect children from economic exploitation and work, from the illegal use of drugs, and from all forms of sexual abuse and exploitation, from abduction, from the risk to be sold or moved illegally, and from all other forms of exploitation, from inhumane treatment and detention. Furthermore, Governments should not allow children under the age of 15 to take part in war or join the armed forces. Children who have experienced neglect, abuse, exploitation, torture or are victims of war must receive special support. If a child is accused of breaking the law it must be treated with dignity and respect, and they have the right to legal assistance and a fair trial. Governments should inform children and adults about the Convention. Articles 43 to 54 are about how adults and governments must work together to make sure children rights are protected. Furthermore, there are three more agreements or Optional Protocols, that strengthen the Convention and add further rights. They are optional because governments that ratify the Convention can decide whether or not to agree to these Protocols. They are: “the Optional Protocol on the sale of children, child prostitution and child pornography, the Optional Protocol on the involvement of children in armed conflict and the Optional Protocol on a complaints mechanism for children (Communications Procedure)”.³ The CRC entered into force on September 1990, and has been ratified by 193 countries, making it the most ratified human rights treaty.⁴

3. Ratification process of the CRC in the US

The procedure to ratify Treaties in the United States includes the following steps: 1. Negotiation and Conclusion 2. Signature 3. Passing to the Senate by the President, (which may include proposed reservations, understandings and declarations) 4. Referral to the Senate Committee on Foreign Relations 5. Senate approval of advice and consent to ratification by a two-thirds majority 6. Ratification by the President. Therefore, the

³ “A summary of the UN Convention on the rights of the child”. UNICEF. Retrieved from: https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_summary-1.pdf?_ga=2.199875624.763547269.1569248150-712456336.1569248150

⁴ Blanchfield Luisa. “The United Nations Convention on the rights of the Child: Background and Policy issues”. 2010 Congress Research Service. Retrieved from: <https://www.refworld.org/pdfid/4d19fa2327f.pdf>

process is very long and complicated. For the ratification of the CRC to begin, the Administration first it needs to review the treaty and submit it to the Senate with proposal for any changes. The State Department must also submit documents like policy benefits and potential risks to the United States, regulatory or environmental impact of the treaty, and analysis of the issues surrounding the treaty’s implementation. The State Department may also propose RUD’s (reservations, understandings and declarations) that would make changes to the treaty before the United States ratifies it. Although the Clinton Administration wanted to send the CRC to the Senate, it never did because it faced a huge opposition in the Senate. In 1995, Senator Jesse Helms submitted a resolution to the Committee on Foreign Relations, which argued that ratification would invade U.S. sovereignty and would obstruct the rights of parents to raise their children. He also argued that the ratification of the document would give children, rights and privileges and they are not mature enough to deal with those rights, and would give control of U.S. affairs to the United Nations.⁵ This is only one view of how the senators perceive the Convention. Furthermore, Susan Rice, appointed U.S. permanent representative to the United Nations, confirmed that CRC is a “complicated” treaty, especially because the U.S. system is federalist. She pointed out that the United States will need to manage the challenges of domestic implementation of the Treaty and to add reservations and understandings which might be appropriate in the ratification process.⁶ The process of ratifying a treaty is complex in the US, and it is the same process used to amend the Constitution.⁷ Therefore the ratification process of the CRC will be complicated, costly and it will take time but it can be done if the US wants to go through that process.

4. Children rights and life in the USA (in the past and today)

In order to have a clear picture of why the US want’s or does not want to ratify the CRC it is of crucial importance to understand children rights and life in the US in the past and now. The history of children’s rights in America began with a law in 1641 in Massachusetts. This law protected children from abusive parents and gave children the opportunity to fight against abuse. But in time, it evolved into ‘*parens patriae*’, a legal

⁵ Mathur Richa. “The UN Convention on the Rights of the Child: Why Federal rights for children are important”. 2016 First Focus. Retrieved from: <https://firstfocus.org/wp-content/uploads/2016/11/UN-Convention-Child-Rights-Fact-Sheet-1.pdf>

⁶ Blanchfield Luisa. “The United Nations Convention on the rights of the Child: Background and Policy issues”. 2010 Congress Research Service. Retrieved from: <https://www.refworld.org/pdfid/4d19fa2327f.pdf> pg. 5-6

⁷ “Why won’t America ratify the UN convention on Children’s rights?”. *The Economist*. Oct.7, 2013.

Retrieved from: <https://www.economist.com/the-economist-explains/2013/10/06/why-wont-america-ratify-the-un-convention-on-childrens-rights>

basis where the state serves as the parent. There is a big gap up until the 19th century in the evolution of children rights since the period before the 19th century was the period of the Industrial Revolution when children were used as a cheap labor. Furthermore, the first prison in the United States was the New York House of Refuge built in 1825, and was used for thieves. Before this, children were placed at the same prisons as adults, even if they did not commit a crime. The houses of refuge were part of an idealist movement and the impact was not to stop crime or poverty, but to expand state power. Many youth correctional institutions in the United States have been created with a mission “to treat and rehabilitate” but they still focus on the punishment. To continue with, the Children’s Aid Society (CAS) founded in New York in 1853 was created to reduce children’s crime like stealing fruits and vegetables. Through the CAS, children were given some opportunities and rights, but there were reactions from the parents claiming their rights over their children and the state intervening in children’s lives, which is the root of the resistance today to the CRC.⁸ Parents in the US have rights over their children.

Furthermore, children in the US have been subject to abuse by their parents or other adults, because in the 16th and 17th century children were the property of their fathers. In the 70s, child abuse was noticed due to a case where an 8 year old orphan named Mary Ellen Wilson was whipped and beaten daily at her foster home. Because there was no organization to protect abused children, the orphan's situation was led by attorneys of the American Society for the Prevention of Cruelty to Animals (ASPCA). They argued that laws protecting animals should not be greater than the laws protecting children. The case went to court and the judge convicted the foster mother and sentenced her to a 1 year jail. Due to the importance of this case in 1874 it was formed the New York Society for the Prevention of Cruelty to Children. Child abuse was once again in the center of attention in 1962, when an article appeared in the Journal of the American Medical Association and described the symptoms of child abuse as a medically diagnosed. In the period of 10 years, every state had created “mandatory reporting” laws, that require certain professionals, (doctors/teachers), to report suspected child abuse to the child protective services agency. In 1974 a federal law was passed called the Child Abuse Prevention & Treatment Act (CAPTA), which helped to reduce child abuse but not to stop it.⁹ In the

⁸ Gardiner Alexandra. Children’s Rights. Why the United States should ratify the United Nations Convention on the rights of the Child. Bank Street College of Education 5-1-2017 Retrieved from: <https://educate.bankstreet.edu/cgi/viewcontent.cgi?article=1191&context=independent-studies> pg. 3- 6

⁹ “Child abuse background and history”. Retrieved from: <https://family.findlaw.com/child-abuse/child-abuse-background-and-history.html>

United States each year there are more than 3.6 million reports of child abuse which involve 6 million children. Each day 4 or 5 children are killed by child abuse.¹⁰

To continue with, in the United States, the Progressive movement challenged courts and the system, it promoted child welfare reforms, and was successful in having laws passed to regulate child labor and provide for education. It also raised awareness of some issues and established a juvenile court system. Another movement for children’s rights occurred in the 1960s and 1970s, when children were viewed as victims of discrimination.¹¹ To continue with, the American Convention on Human Rights (ACHR) in 1969 it was created to promote human rights. It obliges States to respect the rights and freedoms of persons without any discrimination of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. The term “person” in the ACHR means a human being, thus, every person has the right to a legal personality, to life, to humane treatment, to personal liberty, and to a fair trial. Parents or guardians need to provide religious and moral education for their children. The ACHR has a separate provision on children rights.¹²

But is this Convention enough to protect children’s rights? To answer this question here are some analysis. At the end of 2010, the US Department of Agriculture reported that one in four children in the US suffered from hunger. The poverty rate among children under the age of 18 has risen to 20 %, and this number varies based on a child’s ethnic and social background. For example, 43 % of African-American children live in poverty. Poverty has a wide impact, poor children have no health insurance and no opportunities to attend education. An estimated one thousand children per year die as a result of violence or neglect. Most of them are younger than 4. The Department of Education reported in 2007 that 200,000 students had suffered corporal punishment at school. Handicapped children are usually the primary victims of such crimes. Cybercriminals also exist, like virtual bullying, one in four children has been harassed online. Many children are exposed to pornography and children’s rights organizations are determined to ensure that more measures are passed. More than 8 million children have no health insurance. Children of ethnic minorities are more at risk, almost a quarter of them are not vaccinated.

¹⁰ Ibid

¹¹ Zeldin Wndy. “Children’s Rights: International law”. Library of Congress 2007 Retrieved from: <https://www.loc.gov/law/help/child-rights/international-law.php/pdfs/Children%27s%20Rights-International%20Laws.pdf>

¹² Zeldin Wndy. “Children’s Rights: International law”. Library of Congress 2007 Retrieved from: <https://www.loc.gov/law/help/child-rights/international-law.php/pdfs/Children%27s%20Rights-International%20Laws.pdf>

Child labour laws have been enforced in the US, but thousands of children, especially Hispanics, work in terrible conditions for 14 hours a day. 12 million American families struggle with food. The worst of all laws is the criminal law which contradicts a lot with the Convention on the Rights of the Child (CRC). To begin with, detainees who were minors at the time of the crime can be sentenced to the death penalty, which is still legal in some states. This contradicts with article 37 of the CRC, which states that the death penalty is not a suitable sentence. In addition, Human Rights Watch reported that in 2009, over 2500 prisoners were serving a life sentence for crimes committed before the age of 18. They were held without the possibility of parole. The United States is the only country in the world which allows this practice.¹³ The United States denies children their rights in the criminal justice system, which American children face early in life. They can be in prison-ed for childhood behavior like fighting with a teacher or doodling on a desk.¹⁴ This statistics show that the juvenile system in the US is very harsh and it does not give chance to children to rehabilitate and start over in life. Children specially minorities are still used for labor and with no health care and live in terrible conditions. This is a fragment of a picture that the US does not want the world to see.

Furthermore, the United States has ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and has adopted a resolution to avoid the use of minors as soldiers in armed conflicts, but many NGO’s have revealed the use of aggressive recruitment tactics by the US Army, and recruitment of 17 year old’s. Also the US government provides military support for countries that are known for their use of child soldiers like the Democratic Republic of Congo, Sudan, and Yemen. The US has not applied the sanctions specified by the Child Soldiers Prevention Act, that was ratified in 2008. Disturbing is the fact that the captured and detained foreign child soldiers are not recognized as minors or as child soldiers, instead, they are categorized as terrorists and judged as adults.¹⁵

Current U.S. law provides children little rights, instead, parents’ have the rights to make decisions related to their children and states’ rights are limited. These limits on state power are justified because it is assumed that parents will protect children’s best interests.

¹³ “Children of the United States of America. Realizing Children’s rights in the United States of America”. Humanium Retrieved from: <https://www.humanium.org/en/united-states-of-america/>

¹⁴ Mehta, Sarah. Nov 20, 2015. “There’s only one country that hasn’t ratified the Convention on Children’s Rights: US”. ACLU Human Rights program Retrieved from: <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens>

¹⁵ “Children of the United States of America. Realizing Children’s rights in the United States of America”. Humanium Retrieved from: <https://www.humanium.org/en/united-states-of-america/>

Greater emphasis on children’s rights would mean more state intervention in the family. United States law allows the state to protect children but does not impose on states a constitutional duty to protect children. The CRC ratification has the potential to push U.S. law in strengthening children’s rights, but as explained above that is not the situation now. The problems with current laws are demonstrated in a number of Supreme Court cases. In *DeShaney v. Winnebago County* (1989), a father beat his child badly and the child ended up in a coma, and with serious permanent disabilities. The mother sued, alleging that the state failed in its duty to protect the child. The Court ruled that there was no constitutional violation because the child had no right to protection, while the father had a right to be free from extreme intervention. Therefore, the parents **own** their children and the State can not do anything about it. CRC ratification would take into consideration the child’s right and pass some duty on the state’s. In another case, *Santosky v. Kramer* (1982), the Court ruled that a state law that allowed termination of parental rights due to a parental unfitness by using only the predominant evidence, violated parents’ constitutional rights. In this case the Court gave children’s rights very little consideration, and it did not recognize the risk of placing the kids in unfit family. CRC ratification would consider the risk for the child, and it would protect children from unfit parents helping them to move into normal adoptive homes.¹⁶

5. Cons and pros to the US non ratification of the Convention

Only three U.N. countries have not ratified the CRC: Somalia, South Sudan, and the United States. Somalia, is in anarchy and in terms of human development and respect is ranked the lowest. South Sudan is the world’s newest country, which dealt with a civil conflict but it is in the process of ratification of the Convention. And the US which is a democratic country and opposite of these two.¹⁷

The Clinton Administration signed the Convention, but did not submit it to the Senate because it was opposed by several Senators. The George W. Bush Administration opposed CRC and expressed political and legal concerns because it conflicts with U.S. laws regarding privacy and family rights. Obama’s administration in 2008 renewed the possibility of U.S. ratification, but it had to take into consideration that the CRC addresses

¹⁶ Bartholet Elizabeth. “Ratification by the Unites States of the Convention on the Rights of the Child: Pros and Cons from a Child’s rights perspective”. ANNALS, AAPSS, 633, 2011 Retrieved from: http://www.law.harvard.edu/faculty/bartholet/ANNALS382389_Rev2.for%20web.pdf

¹⁷ Attiah Karen. “Why won’t the US ratify the UN’s child rights treaty?”. Nov. 21,2014. The Washington post. Retrieved from: <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/?noredirect=on>

areas that are under the jurisdiction of state or local governments, including education, juvenile justice, and health-care, these areas need to be resolved by the executive branch and the Senate before the United States ratifies the Convention. This question has been debated for a long period. Opponents of the CRC argue that U.S. ratification would undermine its sovereignty by giving the United Nations authority to determine the best interests of its children. Also, the CRC will interfere in the private lives of families, the rights of parents to educate and discipline their children. Others believe that CRC is an ineffective mechanism for protecting children’s rights because there are countries like China and Sudan that are abusers of children’s rights and have signed the Convention. On the other side the supporters of U.S. ratification, believe that CRC’s intention is not to avoid parents but to protect children against intrusion and abuse. Also they believe that U.S. federal and state laws meet the requirements of CRC, and that U.S. ratification would strengthen the United States’ credibility internationally.¹⁸

Furthermore, opponents believe that the social and economic rights established by the treaty could provoke lawsuits for the government. To address such issues up until now the US ratified human-rights pacts with the condition not to overrule existing laws. Most American laws are already in alignment with the CRC except the laws where children under-18 can be jailed for life without parole (until 2005, the death penalty was used), and the treaty prohibits cruel and degrading punishment. Although US has laws against child abuse, a third of the states allow corporal punishment in schools and none ban it at home.¹⁹

Will the Treaty ratification make a difference? According to the Supremacy Clause of the U.S. Constitution, a treaty directly applies to all citizens, and all treaties shall be the supreme law; and the judges will be bound to it. Therefore, the valid state laws in regards to education and parents’ rights that conflict with the provisions of the Treaty will be nullified by the Constitution. For example, in the case *Missouri v. Holland*, the Supreme Court believed that a treaty passed by the President with the unanimous support of two-thirds of the Senate, is under the Supremacy Clause of Article VI, and becomes part of the supreme law which overrules the state laws. In other words, if the Convention on the Rights of the Child is sent to the U.S. Senate and ratified by two-thirds of the senators, the CRC becomes the supreme law, and when aspects of the Treaty conflict with federal

¹⁸ Blanchfield Luisa. “The United Nations Convention on the rights of the Child: Background and Policy issues”. 2010 Congress Research Service. Retrieved from: <https://www.refworld.org/pdfid/4d19fa2327f.pdf>

¹⁹ “Why won’t America ratify the UN convention on Children’s rights?”. *The Economist*. Oct.7, 2013. Retrieved from: <https://www.economist.com/the-economist-explains/2013/10/06/why-wont-america-ratify-the-un-convention-on-childrens-rights>

laws on parents’ rights, it will be up to the courts to balance and resolve the conflict, but still the state laws will be overruled. The United States will be obligated to ensure rights of children, because a State promise to “ensure” stands as an obligation and should be effectively exercised. If the United States ratifies the CRC, the U.S. government will be obligated to “ensure” all the rights of the Convention. So, the Treaty would undermine parents’ rights. Parents would not have the right to control what their children watch, whom they associate with, and what church they attend. Parents could be prosecuted and children taken away because they were spanked. For the opposition there is no doubt that this Treaty is devastating to the traditional parents’ rights. The best interest of the child is subjective and will be determined by social workers. Therefore, to bind the US with such a treaty dictating domestic policy by foreign powers would weaken the sovereignty and create no benefits for the nation and its citizens.²⁰ Furthermore, former Senator Rick Santorum made a remark opposing the CRC, that the CRC will allow instead of parents to make health-care decisions for their disabled children an administrator to make the decision for them. But the United States ratification of the Disabilities Convention would not force any government to change their laws or spend resources, that is up to the governments to decide. So the opposition needs to understand that ratification of a U.N. Convention does not force a national government, or its citizens, to do anything. But as long as there are 34 Senators willing to block any U.N. treaty, there will be no change. It is believed that the United Nations Convention on the Rights of the Child undermines traditional principles of law especially in regards to parents and children. Also it is degrading for the U.S. to be required to write a report on its record of implementation of the treaty and send a federal delegation to appear before an international panel. These critics don’t want the U.S. to answer to the U.N. The U.S. always conditions the ratification of international human rights treaties, with a non executing clause, meaning no changes in US law will be done.²¹

The U.S. so far has ratified four major human rights treaties in addition to the two Optional Protocols of the CRC. They are the Genocide Convention in 1988, the International Covenant on Civil and Political Rights in 1992 and the optional Protocols. Trafficking Victims Protection Act has become a law, the U.S. PROTECT Act has strengthened the work of those who prosecute, and the Adam Walsh Child Protection and

²⁰ Klicka J. Christopher and Estrada A. William. “The UN Convention on the rights of the Child.(The most dangerous attack on parental rights in the history of the US)”. Home School legal defense association. 1997/2007 Retrieved from: https://nche.hslda.org/cap/un_treaty_31607.pdf

²¹ Davidson Howard. “Does the UN Convention on the Rights of the child make a deference?”.

Michigan State International Law review Vol 22.2 2014 Retrieved from: <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1138&context=ilr>

Safety Act has enhanced the oversight of convicted sex offenders. These and other federal and state laws have closed holes, increased penalties for the abusers and those who exploit children, and improved assistance programs for child victims, like visa program for immigrant child victims of trafficking, abuse, neglect, and parental abandonment. The U.S. should ratify the CRC because no international police force or sanctions exist to enforce the provisions in the Treaty, therefore the US will not answer to no one. Treaties provide countries with a legal path of action to find remedies which can be as tribunals to enforce the terms and conditions of the treaty but there can be other remedies. While human rights treaties create international law that can be enforced through mechanisms specifically established by the treaty, they are still agreements signed between countries to commit themselves to achieve common goals and values for the better good. In order to understand the impact of the CRC, the distinction between “hard law” and “soft law” should be first understood. Hard law is law, legislatures write it, the executive branch enforces it, and courts interpret it and make judgments. Soft law, takes the form of declarations, statement, guidelines, and initiatives. Soft law is aspirational, it expresses hope that a country will comply to the given terms, but it has no power to enforce it. Its strength is in the moral persuasion, and shaming bad behavior. Soft law can be very powerful when it comes to encouraging actions, especially by governments to protect vulnerable populations. Therefore soft law is a cursor to instruments which can have elements of hard law, for example: the non-binding Declaration was the precursor to the Convention on the Rights of the Child. Although international treaties are not thought of as soft law, the CRC did not include an enforcement mechanism, such as a tribunal or a sanction so the CRC generates its own soft law but through the written reports and recommendations of the Committee it presents the hard law.²² But the purpose of the CRC is not to show its power through a hard law but to convince the states they need to change some laws, regulations, belief's for the better good of children. Because children are the future of every nation.

Currently, the United States does not have a complete framework that governs the rights of the child. As a result, the main needs of thousands of children are not met, in regards to health, safety, and well-being. In 2014, 1,640 children died due to abuse and neglect, 19.9% of children live in poverty, 8.58 million children live in households without food and more than 100,000 children were sexually exploited. Countries that have ratified the CRC have used it as a tool to improve conditions for children in their countries. For

²² Davidson Howard. “Does the UN Convention on the Rights of the child make a deference?”. Michigan State International Law review Vol 22.2 2014 Retrieved from:
<https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1138&context=ilr>

example: In Egypt, the CRC was a tool in the campaign against female genital mutilation, leading to a directive against the practice. In India it created free elementary education.²³

Many of the concerns associated with the ratification of the CRC are unlikely because the United States can make a declaration to the treaty that it is “non-self-executing,” which means that a legislation has to be passed by Congress to implement the treaty’s provisions. Also the US could make reservations that limit or modify its obligations. Reservations, Understandings and Declarations (RUDs) can be made and recommended at several points during the ratification process. The President can include them, the State Department can recommend RUDs and the Senate Committee on Foreign Relations can also include them.²⁴ Therefore with this action the US will be protected from outside interference, although supporters of CRC ratification, state that the inclusion of RUDs would demonstrate the unwillingness to fully implement the Convention. Others argue that instead of RUD’s, U.S. law should be in accordance with international standards. Although, supporters of CRC ratification believe that federal and state laws already meet the requirements of the Convention, thereby pose little threat to U.S. sovereignty.²⁵ The United States might attach a “reservation” or “understanding” to its ratification, clarifying that the CRC would not be executing any power. And due to the federalism, and traditional state responsibility for family the US might add an understanding indicating that any implementation would be the responsibility of either the states or the federal government. The United States takes such international law obligations very seriously and that is one reason for its hesitation to ratify.²⁶

Skeptics of the CRC point out that in many countries that ratified the CRC the children continue to be victimized as soldiers and slaves, suffer and die from diseases and live in terrible conditions. But while CRC does not guarantee any change since it is not enforceable, it will make a difference and at least some impact. Many countries have

²³ Mathur Richa. “The UN Convention on the Rights of the Child: Why Federal rights for children are important”. 2016 First Focus. Retrieved from: <https://firstfocus.org/wp-content/uploads/2016/11/UN-Convention-Child-Rights-Fact-Sheet-1.pdf>

²⁴ Ibid

²⁵ Blanchfield Luisa. “The United Nations Convention on the rights of the Child: Background and Policy issues”. 2010 Congress Research Service. Retrieved from: <https://www.refworld.org/pdfid/4d19fa2327f.pdf> pg. 7-9

²⁶ Bartholet Elizabeth. “Ratification by the Unites States of the Convention on the Rights of the Child: Pros and Cons from a Child’s rights perspective”. ANNALS, AAPSS, 633, 2011 Retrieved from: http://www.law.harvard.edu/faculty/bartholet/ANNALS382389_Rev2.for%20web.pdf

already adopted all or parts of the CRC, many have formed new law reforms, government offices, ombudsmen, to promote children’s rights.²⁷

As presented fear, uncertainty, and misinformation play a big role in preventing the U.S. to ratify the Convention. Critics fail to understand that the Convention, is voluntarily accepted, the Committee’s role is to assist nations in meeting their goals; and nations do not surrender their sovereignty. States are free to interpret the Convention as they deem appropriate, and, in the process of ratification, they may create a “reservation” to the provision that they believe is contradicting their traditional law. Many Americans misunderstand the function of the United Nations and international treaties, viewing it as a world government holding a power.²⁸

6. Conclusion

The US has always been looked at as the leading democratic power that respects and promotes human rights and dignity. In order to keep that place, it needs to ratify the CRC because as it was presented above it can use the RUD’s to protect itself from certain reservations that it holds upon the CRC. Although, it could use the CRC as a motivation to change many laws regarding children, especially the juvenile system. Because every child deserves to have a proper life and a home where it will feel secure, it will be protected, nourished and healthy. Children are the future of every nation so they need to be cherished.

²⁷ Bartholet Elizabeth. “Ratification by the Unites States of the Convention on the Rights of the Child: Pros and Cons from a Child’s rights perspective”. ANNALS, AAPSS, 633, 2011 Retrieved from: http://www.law.harvard.edu/faculty/bartholet/ANNALS382389_Rev2.for%20web.pdf

²⁸ Cohen Price Cynthia. “The role of the United States in the drafting of the Convention on the rights of the child.”. Emory International Law Review. Vol 20. Retrieved from: <https://jjustice.org/wp-content/uploads/History-of-CRC.pdf>

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BODIES IN CRIMINAL PROCEEDINGS AGAINST JUVENILES IN BOSNIA AND HERZEGOVINA

Authors describe a system of juvenile legislation in Bosnia and Herzegovina. They especially refer to actions and role of state organs participating in the proceedings against juveniles, and these are: authorized official organ (Police), guardianship organ (Social Welfare Center) and legislation organs (Prosecution and Court). They analyze the role of these organs in various stages of proceedings against juveniles, their special authorizations, legal solutions that should lead to more efficient opposition of the state to delinquent behavior of juveniles and possible shortcomings in their actions.

In the criminal proceedings against juveniles, according to the authors, the prosecuting authorities and the court have wide discretionary powers in respect of the initiation, conduct or termination of the proceedings, according to the principle of opportunity. As first, the juvenile prosecutor and the juvenile judge may decide to pronounce one or more educational recommendations, instead of initiating criminal proceedings or to initiate the suspension proceedings in the case of a criminal offense for which a prison sentence of up to five years is prescribed. The discretionary powers of the court consist not only in huge freedom when imposing one or more educational recommendations, or measures, but also in the possibility of replacing already imposed measure with another, more favorable, or suspending further execution - if a specific situation requires so.

In this context, special attention is directed towards the fact that one of key tendencies in contemporary juvenile criminal law is popularization of diversion model of reaction to juvenile crime. There is almost no country that has not joined the introduction of various forms of diversion and suspension of criminal proceedings against juveniles, and so has Bosnia and Herzegovina joined this trend. The diversion model is based on the acceptance of the possibility that, at different stages of the proceedings, certain juvenile cases will be removed from the traditional court procedure by being examined by certain out-of-court authorities,

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as well as by establishing the possibility of applying measures of para-penal character designed as to represent an adequate alternative to criminal sanctions.

Keywords: *juveniles, criminal proceedings, Bosnia and Herzegovina, court, prosecutor.*

1. Introductory remarks

At the national level of each state there is a huge interest in problem of suppression of juvenile crime. It is conditioned with the fact that inclusion of the youngest ones into criminal activities endangers the future of new generations, but also the preservation of the system of values on which social order rests. So, viewed from many aspects, juvenile crime objectively represents bigger social problem than adult crime (Radulović, 1999: 169).

The overall prevalence of juvenile crime in general crime in BiH ranges from 8 to 12 percent. Although Bosnia and Herzegovina is still not in an alarming situation according to the aforementioned statistics, it is noticeable that the number of juvenile offenders is increasing, that juveniles are increasingly violent in committing crimes, that they often associate with adult perpetrators in the commission of crimes and that the recidivism rate is on the rise.

In accordance with contemporary trends and international standards, and gradual but safe separation of juveniles, as special category of perpetrators of criminal offenses, criminal law reactions to juvenile delinquency in Bosnia and Herzegovina are separated from the criminal justice system¹. In addition to criminal sanctions for juvenile offenders, punishment of juvenile imprisonment and correctional measures, domestic legislation also provides for alternative measures, police warnings and educational recommendations.

¹ The criminal justice status of juvenile offenders is regulated in Bosnia and Herzegovina by the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings („Official Gazette of the Republika Srpska“, Nos. 13/10 and 61/13); the Law on Protection and Treatment of Children and Juveniles in the Criminal Proceedings of Brčko District of BiH (“Official Gazette of Brčko District of BiH”, No. 44/11) and the Law on Protection of Children and Juveniles in Criminal Proceedings of the Federation of BiH (“Official Gazette of the Federation of BiH”, No. 7/14). The Law on Criminal Proceedings of Bosnia and Herzegovina applies in the proceedings before the Court of Bosnia and Herzegovina („Official Gazette of BiH“, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 12/10, 72/13 and 65/18).

Adoption of the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings in the Republika Srpska, the Federation of BiH and the Brčko District of BiH has finally regulated legal status of juvenile offenders in a whole new and reforming way. These laws include provisions on substantive and procedural criminal law, organization of courts, enforcement of sanctions imposed on juvenile offenders, as well as the part referring to criminal offenses committed to the detriment of children and juveniles. The laws are based on applicable international standards as required by numerous international documents, before all the United Nations Convention on the Rights of the Child, the Beijing Rules and the Riyadh Guidelines, as well as the results of good practice of surrounding countries. In accordance with the practical and institutional recommendations required by international documents referring to the treatment of juvenile offenders, these laws specify the minimum rights that a juvenile is entitled to and that are respected at all stages of the proceedings.

2. General information about proceedings and organs of proceedings against juveniles

Before all, juvenile criminal law today understands action of social re-education of juvenile offender which, in certain cases, may be retributive, and, at the same time, constitutes both punishment and help. Science and practice try to contribute to finding of criminal political model of reaction to juvenile crime, before all through engagement of state organs, institutions and subjects participating in proceedings against juveniles.

Diversion model of reaction, which is also present in juvenile criminal legislation of Bosnia and Herzegovina, starts from the theory of guardianship, according to which a perpetrator of criminal offense is a person pliable for commission of criminal offenses. By punishment, juvenile offender is placed under guardianship of state organs, judiciary organs and public safety organs whose task is to empower him to act in accordance with legal provisions of society and to comply with the norms of legal order and social discipline. In this sense, the role of all the organs participating in the proceedings against juveniles has been determined.

Amendments in the field of criminal proceedings against juveniles were aimed at changing the classic purpose of criminal proceedings. The specificity of the proceedings against juvenile offenders is manifested in the double aim of these proceedings. The proceedings are no longer conducted solely for the determination of guilt and sentence, as for adults, but also for the identification and protection of juvenile's personality and for the selection of adequate measure to ensure his re-education (proper choice between

punishment and educational measure or the choice of educational measure which is the most suitable for this purpose) (Lazin, 1995: 50). Therefore, the aim of criminal proceedings against juveniles is not only to determine whether a crime has been committed and to impose an appropriate criminal sanction on the perpetrator, but also to establish the identity of the juvenile and to ensure his protection.

As the provisions of the general criminal proceedings² were not suitable for this purpose, specific solutions were introduced into criminal proceedings against juveniles, such as special juvenile courts, that is, specialized juvenile courts, the expanded role of social welfare authorities in criminal proceedings, as well as changes in content and character of numerous procedural institutes, which are adapted to the protection of the juvenile's personality and the need for his or her education.

Laws on the protection and treatment of children and juveniles in criminal proceedings applicable in Bosnia and Herzegovina stipulate that the following authorities shall apply to children in conflict with the law, younger adults and children who are the victims or witnesses of criminal offense: courts, prosecutors' offices, police authorities, i.e. ministries of the interior and guardianship bodies, or competent social welfare centers. In addition, the laws also recognized the role of family, school, social institutions, as well as other direct and indirect participants in procedures focused on a juvenile in conflict with the law.

All the aforementioned authorities, given the specificity of the juvenile justice system, are required to follow specific rules regarding the compliance with certain standards. In one part, these standards require trained professionals, special rules of procedure, while in the other, they establish specific standards regarding deprivation of liberty, the manner of questioning, the treatment of a judge, prosecutor and defense attorney against a minor, the manner of imposing and implementing sanctions and other measures, as well as rehabilitation programs and reintegration into society.

² They refer to the Criminal Proceedings Code of Bosnia and Herzegovina („Official Gazette of BiH“, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 12/10, 72/13 and 65/18); the Criminal Proceedings Code of the Republika Srpska („Official Gazette of the Republika Srpska“, Nos. 53/12, 91/17 and 66/18); the Criminal Proceedings Code of the Federation of Bosnia and Herzegovina („Official Gazette of the Federation of Bosnia and Herzegovina“, Nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9 / 09, 12/10, 8/13 and 59/14) and the Criminal Proceedings Code of the Brčko District of BiH („Official Gazette of Brčko District of BiH“, Nos. 10/03, 48/04, 6/05, 55/06, 12 / 07, 14/07, 21/07, 2/08, 17/09, 44/10, 9/13, 33/13, 27/14 and 3/19).

The efficient functioning of juvenile justice understands establishing and coordinating the activities of all bodies, services and institutions at different levels in the juvenile justice system and their continued cooperation at all stages of the proceedings. Juvenile proceedings should, in principle, be conducted swiftly and efficiently, since the juvenile moves into a different age category over time, which significantly affects the expected and possible effects of the criminal proceedings against him. Also, the social environment, which is of great importance when it comes to juvenile delinquency in general and its criminal law aspects, as a rule imposes the need of prompt resolution of a particular issue.

3. Expertise and specialization of officials dealing with juveniles

Laws on the protection and treatment of children and juveniles in criminal proceedings applicable in Bosnia and Herzegovina are a good example of legislative solutions that provide for specific standards relating to the expertise, professional training, specialization and education of all participants in the proceedings against juvenile offenders.

Juvenile judges and judges of the juvenile council must be persons who have acquired specific knowledge in the field of child rights and juvenile delinquency. The specialty of juvenile judges is of a formal character, which means that it is duly confirmed that a particular judge is eligible to act as a juvenile judge. This rule also applies to other official participants in the juvenile proceedings, to the juvenile prosecutor and to the juvenile police officer, as well as to person who is in charge of juvenile defense (juvenile defense counsel). In addition, the principle of specialization of its basic participants is also valid in criminal proceedings in which the subject matter are certain offenses committed to the detriment of a minor.

According to the legal provisions, a juvenile prosecutor is a prosecutor who has an affinity for working with children and special knowledge of the rights of the child and juvenile delinquency, as well as other knowledge and skills that make him or her competent to work on juvenile delinquency cases. On the other hand, the same conditions apply to juvenile judges. In addition, a juvenile judge must have a strong preference for the upbringing, needs and interests of young people and special knowledge in the field of the rights of a child and youth delinquency. In addition, other knowledge and skills that make the prosecutor or judge competent to work on juvenile delinquency cases are implied, although the legislator does not explicitly state them, but this should be knowledge related to the phenomenology and etiology of juvenile delinquency.

The centers for education of judges and prosecutors of the Republika Srpska and the Federation of Bosnia and Herzegovina, under the supervision of the High Judicial and Prosecutorial Council of BiH, are responsible for acquiring specific knowledge and continuous professional training and improvement of judges and prosecutors in the field of rights of a child, youth offenses and their criminal justice protection. The specialty of juvenile judges and prosecutors is formally confirmed by appropriate certificates or certificates of professional competence to perform duties in the field of juvenile offenses and their criminal justice protection provided by these centers.

The ministries of justice, the ministries of health, the ministries of the interior of the Republika Srpska and the Federation of BiH, the Association of Mediators of BiH and the Bar Association of the Republika Srpska and the Federation of BiH are obliged to take care of the professional development of persons working in the field of youth delinquency and criminal justice protection of children, each one of them in a specific category of participants in the proceedings. This is about educating “other” official participants in the proceedings (in addition to judges and prosecutors), i.e. police officers, social workers, mediators, lawyers and workers employed in correctional facilities and institutions.

4. Courts in the proceedings against juveniles

There are two important features of the legal status and the role of juvenile judge in criminal proceedings against juveniles in relation to the regular criminal proceedings against adult offenders. These are: a) extended jurisdiction extending through all phases of criminal proceedings against juveniles, beginning with the preparatory proceedings, and b) broad powers the juvenile judge has under the law in conducting the preparatory proceedings, conducting the main trial and the sessions of the panel, and especially in choosing the most appropriate sanctions for a juvenile.

Juvenile proceedings are conducted: as a rule, before the juvenile judge of the first instance court, before the juvenile panel of the second instance court and only exceptionally before the third instance court.

All crimes committed by juveniles for which are competent the courts of first instance, so that all criminal offenses committed during their underage time, regardless of the prescribed sentence, are adjudicated by an individual judge. The court of second instance is primarily competent to decide appeals against decisions of the first instance courts.

The third instance court, sitting in a panel composed of three judges having specific knowledge in the field of the rights of the child and youth delinquency, decides on the appeal lodged against the decision of the second instance court. If it is not possible to fully assemble a panel of three judges with special knowledge, it shall be ensured that at least one judge has special knowledge and he shall, at the same time, be the chair of the juvenile panel. As a rule, the panel consists of judges other than the same sex.

Laws on the protection and treatment of children and juveniles in criminal proceedings regulate local jurisdiction of the court in proceedings against juveniles by way of stipulating that the jurisdiction of the juvenile court according to the place of residence (*forum domicilii*), or residence (*residantiae*) of the juvenile is the rule, and jurisdiction according to the place of committing a crime (*forum loci delicti commisi*), that is, before a court in whose territory is located the facility or institution for the execution of criminal sanction in which the juvenile is - is an exception. This rule comes into account only if it is obvious that the court of the place of commission of the crime, that is before the court in whose territory is located the facility or institution for execution of criminal sanction in which the juvenile is, would conduct the proceedings easier. However, this legal authorization should be interpreted very restrictively, for the economic purpose of procedure, to avoid devaluation of the principle of determining of territorial jurisdiction of the court in the juvenile's residence or domicile, as this would endanger the criminal-pedagogical effect and the quality of the proceedings (Hirjan, Singer, 1987: 383).

4.1. Preliminary proceedings actions

During the preliminary proceedings, the juvenile judge has the same powers, under the criminal procedure laws applicable in Bosnia and Herzegovina, as those belonging to the pre-trial judge. Thus, the juvenile judge in the preliminary proceedings “shall himself determine the manner certain actions will be performed“, but in doing so, the provisions of the criminal procedure law referring to those actions should be complied with, which should be adapted to the circumstances of each individual case. At the same time, the judge is obliged to fully respect the rights of the juvenile to defense, as well as the rights of the injured party.

During the preliminary proceedings, the judge also realizes certain protective and educational goals in relation to juveniles, and in that sense, on the proposal of the prosecutor, he may determine the measure of temporary accommodation of juvenile in a shelter or similar institution for juveniles. This measure is, in some way, a restriction of the freedom of movement of a juvenile and is imposed if it is necessary for the juvenile

to be separated from the environment in which he lived or for providing help, protection or accommodation of the juvenile, and especially if necessary to eliminate the risk of recommitment of criminal offense. Determining of temporary accommodation measure combines criminal procedural measures with classic social protection measures, given that the court is the main decision making subject.

For the reasons of fairness and the need to protect the interests of a juvenile, an appeal against the decision on temporary accommodation of a juvenile may be filed within 24 hours by the juvenile, parent, adoptive parent or guardian and defense attorney. The juvenile panel of the same court shall decide on the appeal within 24 hours of the receipt of the appeal, but the appeal does not stay the execution of the decision.

4.1.1. Prohibition measures against the juvenile

Where there is a reasonable suspicion that a juvenile has committed a criminal offense and the requirements for determining detention have been met, the court may, at the proposal of the parties or defense counsel or *ex officio*, instead of determining and extending detention to a juvenile, order prohibition measures, such as: ban on leaving his place of residence and ban on traveling without permission; ban on visiting certain places or areas; ban on meeting certain persons; order to report to a certain state body from time to time and order that a younger adult should be temporarily confiscated his travel document with a ban on issuing new document, as well as prohibit the use of an identity card for crossing the state border of Bosnia and Herzegovina. The imposition of prohibition measure achieves a twofold goal: on the one hand, juvenile remains in an open environment, and on the other, these measures satisfy the interests of criminal proceedings. If there are no conditions for detention, these measures cannot be applied, that is, if there are conditions for detention, it can be replaced by one of the measures, and these measures are, therefore, sometimes referred to as “postponed detention”. The prohibition measure to leave the place of residence and the travel ban is a basic measure in addition to which other measures can be imposed, which measures in this case are additional restrictions.

The initiative to impose a prohibition measure may follow upon the request of the parties or defense counsel, or the court may *ex officio* issue a decision ordering one of the prohibition measures. In that case, the juvenile judge is obliged to examine every two months the justification for further application of the imposed prohibition measure. The party or the defense counsel may file an appeal against the decision ordering, extending or revoking the prohibition measure, and the prosecutor may also file an appeal against

the decision rejecting his proposal for the application of the measure. The out-of-court panel shall decide on the appeal within three days from the day of receipt of the appeal, but the appeal shall not stay the execution of the decision.

4.1.2. Determining of detention to a juvenile

If there is a reasonable suspicion that a juvenile has committed a criminal offense, the judge may order detention when there is one of the reasons provided for under the criminal procedure laws.

According to the decision of a juvenile judge, detention may last no longer than 30 days from the day of his/her deprivation of liberty, with the obligation of the panel to review the necessity of detention every 10 days and with the prosecutor's prior statement on actions taken for the period preceding the control. Upon a reasoned proposal of the Prosecutor, the detention may, by a decision of the Panel, be extended for a maximum period of two months. An appeal may be filed against the decision of the panel, which shall be decided by the panel of the second instance court within 24 hours of the receipt of the appeal.

After the submission of a proposal for determining of criminal sanction, a detention may be extended under a decision of the juvenile panel for another 90 days, following a reasoned proposal of the Prosecutor, with custody control every 30 days, and with the Prosecutor's prior statement of actions taken for the period preceding the control. An appeal to the panel of the second instance court is allowed against this decision, which shall decide on the appeal within 24 hours of the receipt of the appeal. The appeal does not stay the execution of the decision.

The grounds for ordering detention significantly change after the first instance verdict has been delivered. Detention shall be immediately terminated if the court rendered a decision to suspend the proceedings against the juvenile or when the court finds that it is not appropriate to impose a correctional measure or punishment on the juvenile, but to impose an educational measure on the juvenile.

After ordering of a correctional measure or the punishment of juvenile imprisonment, a detention may last for a maximum of two more months. If no second-instance decision confirming or altering the first-instance decision is issued during that time, the detention is terminated and the juvenile is released. If a second-instance decision terminating the first-instance decision is pronounced within two months, the detention may last for

another 30 days from the second-instance decision being pronounced. If the juvenile is in detention and the decision ordering him correctional measure or sentence of juvenile imprisonment has become final, the juvenile may be released pending his accommodation in the correctional institution for the execution of the correctional measure or sentence.

The juvenile is being visited in detention by a prosecutor. Upon the order of the judge and the prosecutor, the detained juvenile can be visited every 20 days by the expert advisor of the court and the prosecutor's office, of which a special report is made.

4.2. Conducts of the judge after preliminary proceedings has been finalized

The procedural activities undertaken in the preliminary proceedings shall be limited to examination of all circumstances relating to the commission of criminal offense and the personality of the juvenile, so that the juvenile prosecutor may submit to the juvenile judge a reasoned proposal for the imposition of educational measure or sentence of juvenile imprisonment, within eight days of the completion of the proceedings.

In case the prosecutor finds, after the completion of the preliminary proceedings, that there is no evidence that the juvenile has committed the criminal offense, he/she shall issue an order to suspend the preliminary proceedings. If the Prosecutor has not given substantiated reasons for not acting in accordance with the principle of opportunity, or for not applying the educational recommendation, the judge may express his disagreement with the Prosecutor's proposal for a sanction and request the juvenile panel to reach a decision on that issue within three days. The panel shall make its decision after hearing the prosecutor, and may decide to refer the case back to the Prosecutor or decide that the judge should consider the possibility and justification of application of educational recommendation, or if the requirements for their application are not met – it may decide that the judge should act on the Prosecutor's proposal for determining of criminal sanction.

If the judge finds that conducting of the proceedings and ordering of an educational measure or sentence of juvenile imprisonment would not be appropriate, it shall apply the educational recommendation. The judge makes a decision to issue an educational recommendation only when the juvenile agrees to undertake the obligation envisaged by a specific measure.

When a judge receives a Prosecutor's proposal to impose an educational measure or sentence of juvenile imprisonment, i.e. a decision of the juvenile panel, the Prosecutor's

proposal shall be submitted to the juvenile and his defense attorney, who may make preliminary objections, which shall be decided by the panel.

After receiving the Prosecutor’s proposal to impose an educational measure or sentence of juvenile imprisonment or after the panel rejects preliminary objections or decides to act on the Prosecutor's proposal for determining of criminal sanction, the judge is obliged to schedule a panel session or main hearing, within eight days from the day of receipt of the proposal, i.e. from the panel’s decision.

4.2.1. Session of the Juvenile Panel

Whether a judge will schedule a panel session or a main hearing based on the Juvenile Prosecutor's proposal to impose an educational measure or a sentence of juvenile imprisonment, it solely depends on his or her assessment. If the juvenile prosecutor proposes only the imposition of an educational measure without specifically specifying the type of measure, the juvenile judge, after examining the case file, shall have to evaluate whether to impose a correctional institution or non-institutional educational measure. If a juvenile judge decides to schedule a session of the juvenile council, it means that he has already assessed that the imposition of a correctional educational measure is unlikely.

Prosecutor, juvenile, defense attorney, parents, adoptive parents or guardians of juvenile are invited to attend the session, and a representative of the guardianship authority may be present as well. Prosecutor, juvenile and his defense attorney must be present at the session.

At the session, the Prosecutor reads the proposal and briefly presents evidence relating to the criminal offense and identity of the juvenile obtained during the preliminary proceedings, as well as the reasons justifying the proposal for determining his sanction. If in the course of the session of the panel appear certain ambiguities and dilemmas as to the facts established in the preliminary proceedings, or if there is a need for direct and contradictory evidence proceedings, or if contrary to the original expectations, the if there arises a need to impose a correctional measure or even a sentence of juvenile imprisonment, the juvenile judge may decide to hold a main hearing at a panel session.

4.2.2. The main hearing

The main hearing should be scheduled if there is a need to contradictory deliberate on the factual background, if the juvenile disputes the factual background arising from the results

of the preliminary proceedings and if he or she is to be subjected to educational measures, i.e. to determine educational correctional measures or sentence of juvenile imprisonment.

Holding of the main trial is regulated by the provisions of the criminal procedure law on the conduct of the main trial, on the adjournment and termination of the main trial, on the minutes and course the main trial, but the judge may always, after hearing the parties, deviate from these rules if he or she considers that their application to the case in question would not be expedient. In addition to these general provisions, the main hearing is regulated by special provisions contained in the laws on the protection and treatment of children and juveniles in criminal proceedings.

Juvenile, prosecutor, defense attorney and a representative of competent guardianship authority must be present at the main hearing. Parents of the juvenile and the adoptive parent or guardian of the juvenile are also invited to the main trial. When attending the main trial, these persons may make suggestions and point out to the facts and evidence significant for making of a decision.

When a juvenile is tried, the public is always excluded. The juvenile prosecutor, defense attorney and representative of the guardianship authority cannot be removed from the main trial.

4.2.3 Decisions of a juvenile judge

A juvenile judge can make three types of decisions: a decision to suspend proceedings, a decision to impose an educational measure on a juvenile, and a judgment imposing a sentence of juvenile imprisonment. The judgment can only follow after the main trial, and it only imposes a sentence of juvenile imprisonment. The decision imposes an educational measure or suspends the proceedings after a panel session or a main hearing.

When it comes to decision on the costs of proceedings, it is also connected with the type of sanction that is imposed on the juvenile in the proceedings against them. The court may oblige the juvenile to pay the costs of the criminal proceedings and to fulfill the property claim only if it imposed a sentence of juvenile to imprisonment to the juvenile. If an educational measure has been ordered against a juvenile or the proceedings are suspended, the costs of the proceedings are borne by the court budget, and the injured party is referred to a civil proceedings to achieve a property claim. If the juvenile has incomes or property, the judge may order him/her to pay the costs of the criminal proceedings and fulfill the property claim when educational measure is imposed on

him/her, or when the judge finds it is not expedient to sentence the juvenile to imprisonment or to order an educational measure.

The judge makes a decision suspending the proceedings in cases where the court renders a judgment dismissing the charges or acquitting the accused on the basis of the criminal procedure law, as well as when it finds that it is not expedient to impose a juvenile neither an educational measure nor sentence of juvenile imprisonment. By imposing a juvenile an educational measure, the judge seeks to avoid the repressive nature of the proceedings against the juvenile, trying to base the purpose of the proceedings in question on the to a juvenile and his re-education, whereby the criminal activity of the juvenile is not viewed as a result of his personality but as a result of certain social circumstances.

The sentence of juvenile imprisonment is of a subsidiary nature, since it applies only in cases where the court, even though the requirements prescribed by law have been fulfilled, assesses that education and repair of a juvenile could not be achieved by educational measures. A judgment imposing a sentence of juvenile imprisonment is in the form corresponding to a regular judgment finding a defendant guilty in a general criminal proceeding.

A person sentenced to juvenile imprisonment may be conditionally released if he or she has served at least one third of the sentence and if, on the basis of the success of the execution, it may be reasonably expected he or she shall good behave at liberty and without committing criminal offenses, but before he or she spent six months in correctional institution. When granting parole, the court may decide to determine a juvenile one of educational measures of intensified supervision during the time in question, with the possibility to apply one or more specific obligations. In this a case, parole shall last until the expiry of the period for which this sentence has been imposed.

4.3. Acting upon legal remedies

Regular remedies in juvenile proceedings are: appeal against the judgment (first and second instance) and appeal against the decision. Of the extraordinary legal remedies in juvenile proceedings, the legislator envisages: reopening of criminal proceedings and a request for protection of legality (in the Republika Srpska).

Any person entitled to appeal against a judgment under the criminal procedure law may file an appeal against a judgment imposing a sentence of juvenile imprisonment on a juvenile, and against a decision suspending the proceedings, within eight days from the

date of receipt of the judgment or decision. The juvenile prosecutor is the only one authorized to file an appeal, both in favor and to the detriment of the juvenile.

The decisions of the second instance court in the appeal proceedings are judgment or decision and they may be rendered at a panel session or at a hearing. Whether the second instance court will reach a decision at a panel session or at a hearing - depends primarily on the sanction imposed by the first instance decision. If no sentence of juvenile imprisonment or a correctional measure has been imposed, the court of second instance, when altering the decision of the first instance court, can impose these sanctions only after a hearing has taken place. If the first instance court has already pronounced a juvenile imprisonment or one of the correctional measures, the second instance court may impose a longer juvenile imprisonment or a correctional measure more severe than the one imposed by the first instance decision in the session of the panel.

The appeal against the decision of the second instance court is decided by the court of the third instance, in a panel composed of three judges determined by the work schedule in that court, having special knowledge in the field of the rights of a child and youth delinquency. Judges who participated in the delivery of the judgment contested by the appeal may not participate in this panel.

5. Actions of the prosecutor in the proceedings against juveniles

The law determines the prosecutor's office as the only authority competent to initiate proceedings against juveniles. The Prosecutor is obliged to complete the preliminary proceedings within 90 days of the issuance of the order to initiate the preliminary proceedings, and if it is not completed, the provisions of the Criminal Procedure Code on suspension and termination of investigation shall subsidiary apply to adult offenders.

The juvenile prosecutor shall be appointed by the College of Prosecutors for a term of five years, with the possibility of reappointment to the same function after the expiration of five years, following the same procedure.

In all prosecutor's offices in Bosnia and Herzegovina, there are juvenile departments consisting of one or more juvenile prosecutors and one or more expert advisers. The role of expert advisers consists in giving expert opinions, collecting data, keeping various records and performing all other tasks at the request of the prosecutor.

The juvenile prosecutor also initiates proceedings against adult perpetrators of criminal offenses if a child and juvenile appear in the criminal proceedings as damaged party, as well as in other cases if he/she deems it necessary for the purpose of special protection of the personality of children and juveniles participating in the criminal proceedings as damaged party.

5.1. Actions of the prosecutor before initiation of preliminary proceedings

The juvenile prosecutor has the opportunity, before making a decision (not) to initiate criminal proceedings – to propose the court to refer the juvenile into appropriate shelter for children and youth or to a particular educational institution, in those situations when a decision not to initiate criminal proceedings is required to examine personal characteristics of a juvenile. If a juvenile is referred to one of aforementioned institutions, he may remain there for a maximum of 30 days.

The role of the juvenile prosecutor in the proceedings for imposing of a specific alternative measure - a police warning, is particularly noted. It is a formal notice issued by the police to a juvenile perpetrator of a criminal offense for which a fine or sentence of imprisonment for the term of up to three years is prescribed. As a rule, the examination of the juvenile is carried out by the prosecutor, and the authorized official carries out the examination with the approval of the prosecutor. The police officer is obliged to examine the juvenile within 24 hours, to collect all necessary evidence, to obtain a social anamnesis and information about his earlier life, and submit a reasoned proposal with the official report to the juvenile prosecutor only in order to warn a juvenile about the specific crime committed. If the prosecutor, upon reviewing the request to impose a police warning measure, finds that there is evidence that the juvenile has committed the criminal offense and that, given the nature of the criminal offense and the circumstances under which it was committed, as well as juvenile's earlier life and personal characteristics, the initiation of criminal proceedings would not be expedient, he grants the requested approval and submits the case to a police officer to pronounce a police warning to a juvenile. On the other hand, if the prosecutor does not approve the issuance of a police warning, he shall inform the police officer about it, and before initiating the preliminary proceedings, shall consider the possibility and justification for imposing of educational recommendation, the possibility for application of the principle of opportunity or shall issue an order to initiate the preliminary proceedings.

5.2. Application of the principle of opportunity of criminal prosecution

The laws on juvenile offenders and the criminal justice protection of juveniles enables the juvenile prosecutor, under certain conditions, not to require the initiation of criminal proceedings against the juvenile, despite the fulfillment of general procedural requirements for criminal prosecution. The application of this principle is manifested in two cases: 1) with regard to the nature of committed criminal offense, its gravity and the characteristics of the juvenile offender, and 2) when the juvenile is already serving a sentence of juvenile imprisonment or an educational measure of a prison character. A common requirement for the application of the principle of opportunity in both procedural situations is that there is evidence that the juvenile has committed a criminal offense, because in the absence of information of such evidentiary credibility as to fully substantiate the existence of a reasonable doubt, it would be completely irrelevant to initiate criminal proceedings in accordance with the general rules of legality (Škulić, Stevanović, 1999: 91).

A juvenile prosecutor may decide not to seek initiation of criminal proceedings for criminal offenses for which a fine or sentence of imprisonment of up to five years is prescribed, even though there is evidence showing reasonable suspicion that the juvenile has committed a criminal offense, if he thinks it would not be expedient to conduct proceedings against a juvenile given the nature of the criminal offense and the circumstances in which it was committed, the juvenile's earlier life and his personal characteristics. It is a matter of not initiating of criminal proceedings against a juvenile for the reason of opportunity, and not of suspension of the proceedings. When a juvenile prosecutor finds that the initiation of criminal proceedings would not be expedient, he must inform the injured party and the guardianship authority about it within eight days of making of such decision, and state all the reasons.

The application of the principle of the opportunity of criminal prosecution in relation to juvenile offenders is also possible in a situation where a juvenile is serving a sentence or educational measure, and when a juvenile prosecutor decides not to request the initiation of criminal proceedings for another criminal offense, if, given the gravity of that criminal offense and punishment, that is, educational measure being enforced, there would be no need to conduct the proceedings and impose a criminal sanction for that offense. Such procedural expediency is exercised by the juvenile prosecutor on the basis of a comparison of committed criminal offense with the felony for which the juvenile has already been convicted, as well as with the sentence or educational measure already being served. The opportunity of this kind is particularly appropriate when it is clear at first

glance that nothing can be changed by the new proceedings and that its conduct would have negative consequences for the juvenile.

5.3. Application of educational recommendations

Before issuing an order to initiate preliminary proceedings against a juvenile, the prosecutor is obliged to consider the possibility and justification to apply one of legally prescribed educational recommendations. Educational recommendations for a juvenile are issued by a juvenile prosecutor or a juvenile judge, with a term of up to one year. They can be imposed if two requirements are cumulatively fulfilled: (1) objective requirement - that it is a criminal offense for which a fine or sentence of imprisonment of up to five years is prescribed, and, exceptionally, a more severe sentence; (2) subjective requirement - which occurs in three forms, and these are: that the juvenile confessed commission of the criminal offense, and that he gave such confession freely and voluntarily; that there is sufficient evidence that the juvenile committed a criminal offense and that the juvenile expressed his willingness to reconcile himself with the injured party in written, gave his consent to the application of a particular educational recommendation (if it is a younger juvenile, and that his parent, i.e. his guardian, gave such consent) and that the injured party has given written consent for the application of educational recommendation against a juvenile offender. In addition to formal requirements, the application of educational recommendations is conditioned by the cooperation of parents, guardianship authorities, humanitarian organizations and authorities involved in the prevention of juvenile delinquency and work with juveniles with behavioral disorders.

When it is established, in cooperation with the guardianship authority, that the juvenile has fulfilled his obligation from educational recommendation, the prosecutor issues an order not to initiate preliminary proceedings against the juvenile, informs the injured party about it and instructs him that he can realize his her property claim in civil proceedings, and informs the applicant. If the juvenile has only partially fulfilled educational recommendation, there will be a conditional non-initiation of criminal proceedings against the juvenile, that is, one form of atypical effect of the principle of opportunity of criminal prosecution. Namely, in this case, the prosecutor criminally prosecutes the juvenile and subsequently, provided that the juvenile partially fulfilled the obligations from educational recommendation, abandons further criminal prosecution.

The legislator also envisages situations where, on the basis of the report of the guardianship authority, it is established that the juvenile refuses to fulfill the obligation from educational recommendation or fulfills his obligation disorderly. In these cases the

juvenile prosecutor issues an order to initiate the preliminary proceedings. Assessment of juvenile's refusal to fulfill his obligation from educational recommendation or to fulfill his obligation disorderly – falls within discretion right of the juvenile prosecutor.

5.4. Conducts of the prosecutor during preliminary proceedings

The most important power that the laws on the protection and treatment of children and juveniles in criminal proceedings give to the prosecutor is issuance of order for initiation of preliminary proceedings and to conduction of preliminary proceedings. The purpose of preliminary proceedings, in addition to facts referring to the criminal offense, is that other information concerning the juvenile's personality, his behavior, as well as the environment and circumstances in which he lives, are obtained by the prosecutor. The aforementioned information is collected by the prosecutor or his expert advisor by obtaining necessary reports and by hearing the persons who can provide the information. The opinion of the guardianship authority about given circumstances is obligatory obtained, and if an educational measure has been imposed to the juvenile, a report on the application of that measure is obtained.

The prosecutor himself determines the manner in which actions shall be taken during preliminary proceedings by way of ensuring the rights of the juvenile to defense, the rights of the injured party and obtaining of evidence necessary for making of a decision. A juvenile and his defense attorney are present during preliminary proceedings, unless the presentation of particular evidence or speech by the parties could have a detrimental effect on the education of the juvenile. Also, the prosecutor may approve the representative of the guardianship authority and a parent, i.e. guardian of the juvenile, to be present at the preliminary proceedings, in which case they may give proposals and put questions to the person being questioned, or heard.

5.5. Actions of the prosecutor after preliminary proceedings

Upon completion of the preliminary proceedings, the juvenile prosecutor has three options at his disposal. He may file a request to the juvenile judge to update the proceedings in a particular direction, may state that he is withdrawing from the proceedings and file a proposal to suspend the proceedings or file a motion to impose a sanction.

If during the preliminary proceedings the prosecutor finds that there are no grounds for conducting the proceedings against the juvenile or that the imposition of a criminal sanction would have no purpose, he shall order the suspension of the preliminary

proceedings. The juvenile judge may express his disagreement with the prosecutor's proposal to suspend the proceedings, in which case a final decision shall be made by the juvenile panel, which may suspend the proceedings against a juvenile or decide to continue the proceedings before the juvenile judge.

On the basis of obtained facts, after having examined all the circumstances surrounding the commission of the criminal offense, juvenile's personality and circumstances in which he lives, the prosecutor may decide to propose sanctions to the juvenile. In this case, the prosecutor is obliged to submit to the juvenile judge a reasoned proposal for imposing of an educational measure or sentence of juvenile imprisonment, within eight days.

The proposal of the juvenile prosecutor for the imposition of educational measure or sentence of juvenile imprisonment shall be submitted by the juvenile judge to the juvenile and his defense attorney, who may, within three days from the date of the proposal, file their preliminary objections. After receiving a prosecutor's proposal for imposing of educational measure or sentence of juvenile imprisonment, that is after the panel rejects preliminary objections or decides to act on the prosecutor's proposal for imposing of criminal sanction, the judge is obliged to schedule a session or a main trial, within eight days from the day of receipt of the proposal, i.e. from the panel's decision.

6. Actions of the police in the proceedings against juveniles

In procedural sense, the role of internal affairs bodies in proceedings against juveniles is identical to their position they have in general criminal procedure, but with certain procedural specifics that are a result of the specific purpose of proceedings against juveniles. Whenever available information indicates that the perpetrator of the criminal offense is a juvenile, it is necessary to express all necessary particularities of communication with children and juveniles, in case of specific actions of police officer.

The law prescribes a number of rules relating to the behavior of a police officer towards a juvenile being in conflict with the law. The first and most important rule concerns the examination of a juvenile, which can only be carried out by a police officer with the prior approval of the prosecutor. The examination of a juvenile shall mandatory be carried out in the presence of a defense attorney, parent, guardian or adoptive parent, and if they are prevented from attending the examination of the juvenile, or if their presence would not be in the interest of the juvenile, the police officer shall examine the minor in the presence

of a representative of guardianship authority or institution for accommodation of a juvenile.

The juvenile perpetrator of a criminal offense must have a defense attorney at the first interrogation by the prosecutor or police officer, that is, throughout the entire criminal proceedings, regardless of the type and the scope of the criminal sanction prescribed.

The police officer is obliged to examine the juvenile within 24 hours, to collect all necessary evidence, to obtain a social anamnesis and information about the juvenile's earlier life, and to submit with the official report a reasoned proposal to warn the juvenile for a specific crime committed.

During deprivation of liberty and during the stay of the juvenile in the competent organizational unit of the Ministry of Interior, all contacts of authorized official with the juvenile are carried out in a way that respects the juvenile's personality and supports his well-being. The authorized official shall immediately inform the parents, that is, the guardian or adoptive parent of the juvenile, the defense attorney and the competent guardianship authority about the deprivation of liberty. The authorized official is obliged to release a juvenile without delay, and at the latest within 12 hours, to bring him before the prosecutor and inform him of the reasons and the time of deprivation of liberty. Otherwise the juvenile shall be released.

A police warning (already discussed above) is a measure of avoiding of criminal proceedings that can be imposed by authorized official, and by which a juvenile offender is given certain socio-ethical reproach and shown legal and social inadmissibility and harmfulness of his behavior, the consequences which such behavior may have on him, as well as the possibility to initiate criminal proceedings against him and impose him criminal sanction in case of repeated offense. The fact that a juvenile has committed a minor criminal offense does not automatically imply the application of measure of police warning, but that other legal requirements must also be met cumulatively.

7. Guardianship authority in the proceedings against juveniles

The role of the guardianship authority in the criminal procedure system for the protection of injured juveniles is achieved through: filing of criminal complaint to the competent prosecutor's office, cooperation with the prosecution through the role of experts providing expert assistance in the examination of juvenile and giving the court's opinion on the consequences of criminal offense for a juvenile. The most important activity of the

guardianship authority is to obtain a social history of the juvenile. Writing a social history or, as is often said in practice, findings and opinion, or reports of a social worker, is a thought-creative process in which the social worker by logical order connects selected data and information about a juvenile, analyzing it in the context of the underlying problem.

The guardianship authority also has the following rights: to familiarize itself with the course of criminal proceedings against a juvenile; to make certain suggestions during the course of the proceedings against juvenile, and to point out the facts and evidence that are relevant for making of a just decision.

The legislator explicitly orders the judge conducting the criminal proceedings to inform the competent guardianship authority of any initiation of proceedings against a juvenile offender. The role of the guardianship authority is particularly important when applying the principle of opportunity of criminal prosecution, when the prosecutor seeks the opinion of the guardianship authority about the expediency of initiation of proceedings against the juvenile and has obligation to inform the guardianship authority about non expediency to initiate the proceedings against the juvenile.

During the preliminary proceedings, the guardianship authority is left with the possibility to actively participate in the sense of being able to attend all the actions in the preliminary proceedings, upon the approval of the prosecutor and on the basis of his assessment of the justification of the presence of the guardianship authority representative. When the guardianship authority is present during the preliminary proceedings - it may make suggestions and put questions to the person being questioned or heard.

In the case of proceedings that have already been initiated against a juvenile, the obligation of the judge conducting the criminal proceedings against the juvenile to obtain information concerning the juvenile's personality and his behavior, the environment and the circumstances in which he lives, and the obligation to call representative of the competent guardianship authority to the main trial because his presence is obligatory, should be emphasized. In that sense, the role of the guardianship authority lies in its obligation to actively participate in the main trial, to familiarize itself with the course of criminal proceedings, to make suggestions and to put questions to the persons being questioned, as well as to point out to the facts and evidence relevant for making of just and lawful decisions.

The guardianship authority has certain competences in the process of enforcement of imposed measures and criminal sanctions. Namely, during the execution of educational measures that are not of an institutional character, the competent guardianship authority is obliged to submit the court and the juvenile prosecutor every six months a report on the execution, but when necessary the judge may request the report even before. If, during the execution of the criminal sanction, the judge determines that there are facts and circumstances indicating the need to take certain measures with the aim of protection of the rights of the juvenile, he shall be obliged to inform the competent guardianship authority according to the place of residence or domicile of the juvenile, and request taking of appropriate measures in accordance with the situation and needs, i.e. interests of the juvenile.

The guardianship authority has an important role when providing post-penal assistance to the juvenile, which follows after the institutional treatment of the juvenile's education and re-education in correctional and non-correctional institutions, and represents their natural extension. Post-penal assistance, in the broadest sense, consists of different measures of assistance, custody, protection, care and supervision. They should help the juvenile to overcome various difficulties he may encounter after being released from the institution.

8. Conclusion

With the entry into force of the law on protection and treatment of children and juveniles in criminal proceedings, a modern legal framework was created in Bosnia and Herzegovina, based on the protective model, i.e. on the principles of the protection of juveniles in the proceedings before judicial authorities. The model of procedural protection is reflected in the application of special rules in the procedure before the police, the prosecutor and the court, in the application of measures of social care and protection of psychological and pedagogical measures in specialized institutions. However, the evaluation of particular legislation depends not only on the manner and content of the legal solutions, but also on the possibility of their application in everyday practice.

Procedural role of the prosecutor through the principle of opportunity, and especially through educational recommendations as a form of conditional non-initiation of proceedings, is a very important link in the criminal justice intervention of the society to juvenile delinquency. In addition to its basic legal obligation to prosecute juvenile offenders, the prosecutor also plays an important social role which refers to help in finding ways for further development of the juvenile to and his behavior.

The role of police, i.e. police officers in the proceedings against juveniles, is extremely extensive, complex and significant. The reason lies in the fact that the first contact, that is, the first communication with a juvenile in conflict with the law is usually made by the members of the police.

The Social Welfare Center, as part of the social protection system, has an important role at the local level in the field of work with juveniles with behavioral problems and in conflict with the law. Their role is reflected, on the one hand, in prevention and, on the other hand, in reacting when a behavioral problems have already been manifested.

Considering the current organizational structure of the state bodies acting in criminal proceedings against juveniles in Bosnia and Herzegovina, it can be expected in the future that these bodies will be more clearly separated from the current frameworks responsible for the criminal prosecution of adult perpetrators of criminal offenses. This will require more intensive specialization of the persons employed in such bodies. These bodies are expected to go beyond the rules on which the work of each one of them has traditionally rested, when acting against juvenile offenders.

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CRIMINAL LAW PROTECTION OF CHILDREN FROM OFFENCES RELATED TO CHILD PORNOGRAPHY

Exploitation of children for pornography is one of the most prevalent forms of criminal offenses against sexual freedom committed by the abuse of information technology resources against persons below the age of 18 years. Bearing in mind that the prohibition of child pornography is recognized at the international and European level as well as at the national level, the authors in this paper deal with the criminal law aspects of the abuse of children by information technology in the context of the offences related to pornography. In that regard, the paper deals with the relevant provisions of the normative framework concerning offences related to pornography at the level of Council of Europe, the European Union and the Republic of Serbia. In this regard, special attention is dedicated to the phenomenological analysis of the manifested forms of child pornography. The paper concludes that although the danger of child pornography for the proper development of children at the level of Council of Europe, European Union and Republic of Serbia framework has already been recognized, in practice it is still noticed that there is significant number of criminal cases of child pornography. Therefore, it is suggested that, in the context of its prevention, the most effective means is the early identification of child pornography cases, thus avoiding the exposure of child victims to harmful consequences.

Keywords: children, pornography, offenses, information technology, Council of Europe, European Union.

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Introduction

Child pornography was identified as a serious problem in the 1970s. Due to aggressive law enforcement, the widespread distribution of child pornography had essentially ceased by the late 1980s. But the birth of the Internet and other technological advances, such as digital photography, led to a dramatic increase in the availability of child pornography (Hessick, 2010:2). Therefore, the advent of the Internet in the 1980s dramatically changed the scale and nature of the child pornography problem and has required new approaches to its investigation and control (Wortley, Smallbone, 2006:5). In this regard, it should be no doubt that the Internet has caused the most explosive growth in child pornography since the technology itself has greatly reduced the barrier to entry for the production and distribution of child pornography content. This is why cameras and powerful editing multimedia software are becoming more affordable and easier to use, simplifying the process of creating and distributing child pornography (Schell et al., 2007, 47). These technologies have simultaneously created a new dimension in which the sexual exploitation of children could flourish since the Internet made it extremely low-risk, enormously profitable, and unhindered by geographical boundaries. For that reason children, every day, all around the world suffer sexual abuse and sexual exploitation since individuals who seek them out in order to fulfill their own sexual needs or to profit from the child's exploitation, long ago realized that digital technology provides the ability for production illegal images of children, trading and sharing images and collection of child sexual abuse materials (International Centre for Missing & Exploited Children, 2016:3). Furthermore, it should be noticed that technological developments rapidly succeed one another, influencing the phenomenon of child pornography. This means that technological developments must be taken into account in legislation, policy and implementation. In other words, technological expertise must keep pace with legal developments in the digital domain (Dettmeijer-Vermeulen, 2012:3-4). However, the rapid development and tremendous growth in the use of electronic, computer-based communication and information have not been accompanied by adequate recognition of the dangers by child's wellbeing that may result from such technology (Stanley, 2001: 1-2).

In this sense, the important change at the level of the normative framework was introduced by the adoption of the UN Convention on the Rights of the Child from 1989 which in article 34 prohibits the exploitative use of children in pornographic

performances and materials.¹ Related to this is the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted in 2000 which also prohibits *inter alia* child pornography.² Therefore, due to the Internet expansion around the world, it should be mentioned that child pornography was internationally recognized as a crime (Lovelie, et al., 2017:107).

Followed by UN action on combating child pornography, the Council of Europe, as well as the European Union, took their responsibility in the area of the normative framework regarding child pornography. In that context, Council of Europe adopted Convention on Cybercrime known as the Budapest Convention (hereinafter: Budapest Convention) in 2001 as well as the Convention of the Council of Europe for the protection of children against sexual exploitation and abuse known as the Lanzarote Convention (hereinafter: Lanzarote Convention) in 2007.³ Together with these conventions, the EU was adopted Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011, on combating the sexual abuse and sexual exploitation of children and child pornography (Negredo, Herrero, 2016:218; Greijer, Doek, 2016:35).⁴ Finally, following recognition of child pornography as a crime at international as well as the European level, the Republic of Serbia in Criminal Code from 2006 prescribes criminal offense concerning child pornography in article 185.⁵

For that reason, the following lines will be dedicated to the analysis of the normative framework regarding offenses related to child pornography at the level of Council of Europe, including relevant provisions of Budapest as well as Lanzarote convention. Furthermore, special attention will be paid to the EU framework concerning offenses related to child pornography by considering the provision of Directive 2011/93/EU. Finally, the attention will be dedicated to the suitable provision at the national level linked

¹ UN Convention on the Rights of the Child adopted by General Assembly resolution 44/25 of 20 November 1989.

² Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted 2000.

³ Convention On Cybercrime, Budapest, 23.XI.2001 *Council of Europe, European Treaty Series* - No. 185; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25.X.2007, *Council of Europe Treaty Series* -No. 201.

⁴ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *Official Journal of the European Union*, L 335/1.

⁵ Criminal Code, *Official Gazette of RS*, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.

to the offenses related to child pornography in the Criminal Code of the Republic of Serbia.

Offences related to child pornography at the level of Council of Europe framework

Bearing in mind the fact that at the level of Council of Europe framework there are two Conventions regulating offences related to child pornography, Budapest convention adopted 2001, and Lanzarote convention, adopted 2007, in the following lines the relevant provisions of these international treaties will be considered. To start with appropriate provisions of Budapest convention concerning offences related to child pornography.

Budapest convention

First of all, when it comes to offences related to child pornography, it should be mentioned in which way this Convention defines the term child pornography. In that context, it should be pointed out that, for the purpose of this Convention, the term child pornography shall include pornographic material that visually depicts either a minor engaged in sexually explicit conduct, including showing realistic images representing a minor engaged in sexually explicit conduct, or a person appearing to be a minor engaged in sexually explicit conduct (Article 9 paragraph 2; Nunzi, 2012:293).

Although this Convention defined child pornography, it left four doubts regarding the definition of this term. Firstly, since, according to this Convention, child pornography shall include pornographic material, the question is what means this term. In that context, it is worth noting that the term *pornographic material* should be governed by national standards pertaining to the classification of materials as obscene, inconsistent with public morals. Therefore, the material having artistic, medical, scientific or similar merit may be considered not to be pornographic. Secondly, this Convention stress out that pornographic material should be in the form of visual depiction, raising the question of what means this term. In that regard, it should be pointed out that the term *visual depiction* includes data stored on computer diskette or on other electronic means of storage, which are capable of conversion into a visual image. Thirdly, this Convention specifies that child pornography shall include pornographic material that visually depicts a person engaged in sexually explicit conduct, bringing into question the meaning of the term sexually explicit conduct. From that perspective, the term *sexually explicit conduct* covers at least real or simulated: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between minors, or between an adult and a minor, of the same or opposite sex; b)

bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious exhibition of the genitals or the pubic area of a minor (Explanatory Report to the Convention on Cybercrime 2001:16; Picotti, Salvadori,2008:35).

Finally, this Convention underlines that child pornography shall include pornographic material that visually depicts either a *minor*, a person appearing to be *minor*, raising the issue of meaning of this term, since there is no uniform internationally accepted standard. In this connection, it is noteworthy that according to this Convention, the term minor shall include all persons under 18 years of age, although Party may require a lower age-limit, which shall be not less than 16 years (Article 9 paragraph 3). This convention allows Parties to require a different age-limit, provided it is not less than 16 years recognizing that certain States require a lower age-limit in national legislation regarding child pornography (Explanatory Report to the Convention on Cybercrime 2001:17; Cerezo, Lopez, Patel, 2007:13).

Bearing in mind that the definition of child pornography, as well as the controversial issues regarding this term, were analyzed it should be furthermore emphasized that Article 9 of Budapest convention prescribes offences related to child pornography. In that context, it is noteworthy that the Article 9 of Budapest convention seeks to strengthen protective measures for children against child pornography at the Council of Europe, targeting criminalization of various aspects of the electronic phenomenological forms of this phenomenon (Explanatory Report to the Convention on Cybercrime 2001:15; Weber, 2003:429; Tabansky, 2012: 119). This was because the increasing use of the Internet was strongly required that specific provisions in an international legal instrument covering this new form of child pornography (Clough, 2014: 699-700).

In this regard, according to this Convention, each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: a) producing child pornography for its distribution through a computer system; b) offering or making available child pornography through a computer system; c) distributing or transmitting child pornography through a computer system; d) procuring child pornography through a computer system for oneself or for another person; e) possessing child pornography in a computer system or on a computer data storage medium (Article 9 paragraph 1; Tanjević, 2012: 176-177). The *production* of child pornography prescribed in paragraph 1 (a) means making the child pornography content for its distribution through a computer system. The *offering* of child pornography through a computer system criminalized in paragraph 1(b) covers the act of soliciting others to obtain child pornography. Precisely, it implies that

the person offering the material can provide it. On the other side, the term *making available* child pornography through a computer system means the placing of child pornography online for the use of others e.g. by creating child pornography sites, or by creating or compiling hyperlinks of child pornography sites to facilitate access to child pornography. The term *distribution* of child pornography criminalized in paragraph 1(c) through a computer system represents the active dissemination of the material. Furthermore, sending child pornography through a computer system to another person criminalized in paragraph 1(c) would be addressed by the offence of *transmitting* child pornography. The term *procuring* for oneself or for another prescribed in paragraph 1(d) means actively obtaining child pornography, e.g. by downloading it. The *possession* of child pornography in a computer system or on a data carrier, such as a diskette or CD-Rom is criminalised in paragraph 1(e) and stimulates demand for such material (Explanatory Report to the Convention on Cybercrime 2001:16; Clough, 2014: 699-700).

Finally, in respect of subjective elements of this crime, it should be mentioned that the abovementioned conducts must be committed intentionally and without right. However, it should be noted that the term *without right* does not exclude legal defenses, excuses or similar relevant principles that relieve a person of responsibility under specific circumstances. Accordingly, the term without right allows a Party to take into account fundamental rights, such as freedom of thought, expression and privacy. Also, a Party may provide a defense in respect of conduct related to pornographic material having artistic, medical, scientific or similar merit. Finally, the term without right could also allow, for example, that a Party may provide that a person is relieved of criminal responsibility if it is established that the person depicted is not a minor in the sense of this provision (Explanatory Report to the Convention on Cybercrime 2001:17; Marion, 2010:701).

Lanzarote Convention

When it comes to offences related to child pornography in Lanzarote Convention, it should be pointed out that, on the one hand, in article 20, it prescribes offences concerning child pornography, while on the other side, in article 21, it incriminates offences concerning the participation of a child in pornographic performances. For that reason, in subsequent rows, the abovementioned provisions of this international treaty, will be discussed. Firstly, offences concerning child pornography and then offences concerning the participation of a child in pornographic performances will be examined.

Offences concerning child pornography

Article 20 related to offences concerning child pornography is adopted in Lanzarote convention by the influence of Budapest Convention. According to article 20 of Lanzarote Convention each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalized: a) producing child pornography; b) offering or making available child pornography; c) distributing or transmitting child pornography; d) procuring child pornography for oneself or another person; e) possessing child pornography; f) knowingly obtaining access, through information and communication technologies, to child pornography (Article 20 paragraph 1; Lievens, 2014:256).

The *production* of child pornography prescribed in paragraph 1(a) means making the child pornography content. The term *offering* of child pornography content prescribed in paragraph 1(b) implies that the person offering the material can provide it. On the other side, the term *making available* of child pornography content is intended to cover, for instance, the placing of child pornography online for the use of others by using child pornography sites or by creating or compiling hyperlinks of child pornography sites to facilitate access to child pornography. Paragraph 1 (c) criminalizes the *distribution* or *transmission* of child pornography. *Distribution* of child pornography is the active dissemination of the material. Sending child pornography through a computer system to another person, as well as the selling or giving of child pornographic materials such as photographs or magazines, is covered by the term *transmitting*. The term *procuring* for oneself or another in paragraph 1 (d) means actively obtaining child pornography for personal use or for another person, e.g. by downloading computer data or by buying child pornographic materials, such as films or images. The *possession* of child pornography, by whatever means, such as magazines, video cassettes, DVDs or portable phones, including stored in a computer system or on a data carrier, as well as a detachable storage device, a diskette or CD-Rom, is criminalized in paragraph 1 (e). Finally, paragraph 1 (f) is as a *new element* introduced in this Convention is intended to catch those who view child images online by accessing child pornography sites but without downloading and who cannot, therefore, be caught under the offence of procuring or possession. However, to be liable, the perpetrator must both intend to enter a site where child pornography is available and know that such images can be found there. Lastly, in the respect of subjective elements of this crime, it should be mentioned that the abovementioned conducts must be committed intentionally and without right. The term without right allows a Party not only to provide a defence in respect of conduct related to pornographic material having an artistic, medical, scientific or similar merit, but also allows activities

carried out under domestic legal powers such as the legitimate possession of child pornography by the authorities in order to institute criminal proceedings (Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007:20-21; Van der Hof, Jaap Koops, 2011:14-18).

Finally, in the context of the analyzed phenomenological forms of child pornography it should be noted that Lanzarote Convention gives each Party the right not to apply only the provisions of this Convention concerning production and possession of pornographic material consisting exclusively of simulated representations or realistic images of a non-existent child, or if it involves children who have reached the age of 18 years, where these images are produced and possessed by them with their consent and solely for their private use (Article 20 paragraph 3; Gillespie, 2013:640).

Offences concerning the participation of a child in pornographic performances

The participation of a child in pornographic performances was initially recognized by the United Nations Convention on the Rights of the Child, which in its Article 34, requires Parties to take all appropriate measures to prevent the exploitative use of children in pornographic performances. However, no definition is provided in that instrument on what constitutes pornographic performances involving children. Similarly, Lanzarote convention decided to leave any definition of pornographic performances to the Parties (Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007:22).

However, Lanzarote Convention in article 21 obliges the each Party to take the necessary legislative or other measures to ensure that the following intentional conduct, concerning the participation of a child in pornographic performances, is criminalised: a) recruiting a child into participating in pornographic performances or causing a child to participate in such performances; b) coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes; c) knowingly attending pornographic performances involving the participation of children (Article 21 paragraph 1; Bitensky, 2010: 1672-1673). Paragraph 1 (a) and (b) of article 21 contains elements relating to the organisation of pornographic performances involving children, while paragraph (c) relates to the spectator, establishing links between the supply and the demand by attaching criminal liability to the organiser of such pornographic performances as well as the customer. In the respect of subjective elements of this crime, it should be noted that all acts must be committed intentionally, while the form of this crime in paragraph (c) must be committed knowingly meaning that a person must not

only intend to attend a pornographic performance but must also know that the pornographic performance will involve children (Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007:22).

Offences concerning child pornography at the level of EU framework

The required EU legal framework in the area of child pornography was created in 2004, when it was adopted Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (Pisarić, 2012:475).⁶ However, this Decision is no longer in force since it was replaced in 2011 with Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography. That is the reason why in the following lines the relevant provisions of Directive 2011/93/EU will be analyzed.

Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography

First of all, it should be mentioned in which way, according to Directive 2011/93/EU, the term child pornography is prescribed. In this regard, article 2 (c) of this Directive defines child pornography as: i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; ii) any depiction of the sexual organs of a child for primarily sexual purposes; iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes (Moise, 2017:73).

Secondly, it should be noted that Directive 2011/93/EU prescribes offences concerning child pornography in Article 5. In this sense, it obliges the Member States to take the necessary measures to ensure that the following intentional conduct is punishable: a) acquisition or possession of child pornography; b) knowingly obtaining access, by means

⁶ Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, Official Journal of the European Union, L 13/44.

of information and communication technology, to child pornography; c) distribution, dissemination or transmission of child pornography; d) offering, supplying or making available child pornography; and e) production of child pornography. Finally, in the context of the above-mentioned conducts, it is worth noting that there are two possible exceptions of application article 5 of Directive 2011/93/EU. Firstly, from perspective of this Directive, the term child means any person below the age of 18 years, but it shall be within the discretion of Member States to decide whether this criminal offense applies to cases involving child pornography where the person appearing to be a child was in fact 18 years of age or older at the time of depiction. Secondly, it should be pointed out that it shall be within the discretion of Member States to decide whether acquisition, possession and production of child pornography should be punishable if it is established that pornographic material is produced and possessed by the producer solely for his or her private use in so far as no pornographic material has been used for its production and provided that the act involves no risk of dissemination of the material (Csipkés, 2016:147).

Offences concerning child pornography at the level of the Republic of Serbia framework

Since the Republic of Serbia ratified both Council of Europe conventions, the Budapest Convention as well as the Lanzarote convention which define offenses related to child pornography, it was constituted the obligation to harmonize its criminal law legislation with Council of Europe framework in this area (Šapić, 2016: 2).

In this regard, in the Criminal Code of the Republic of Serbia offences concerning child pornography are prescribed in article 185 in the context of criminal offense entitled as showing, procuring and possession of pornographic material and juvenile pornography (Prlja, Reljanović, Ivanović, 2012: 135; Pavlović, Petković, Matijašević Obradović, 2014: 46). In this sense, this criminal offense has four phenomenological forms. The first phenomenological form includes the following acts: selling, showing, publicly displaying or otherwise making available texts, pictures, audio-visual or other items of pornographic content to a minor or showing to a minor a pornographic performance (Slavković, 2014: 482-483). Furthermore, the second form includes the following act: abusing a minor to produce photographs, audio-visual or other items of pornographic content or abusing a minor for a pornographic show (Bodrožić, 2013:146). Aggravated form of this criminal offense exists in the case if the abovementioned forms have been perpetrated against a child. Moreover, the third form of this criminal offense includes the following acts: obtaining for himself or another person, possessing, selling, showing, publicly exhibiting

or electronically or otherwise making available pictures, audio-visual or other items of pornographic content resulting abuse of a juvenile. Finally, the fourth form of this criminal offense includes the following act: consciously through information technology accessing images, audio-visual or other objects of pornographic content obtained through exploitation of a minor. In this sense, the term objects of pornographic content obtained through exploitation of a minor means any material that visually depicts a minor engaging in real or simulated sexually explicit behaviour, as well as any depiction of the sexual organs of a child for sexual purposes (Stamenković, et.al., 2017: 68).

Concluding remarks

As a result of the rapid development of information and communication technology, there has been a significant increase in the number of cases of child pornography, which consequently has required taking appropriate normative steps at the global, regional and local levels. Although the first concrete result on this issue represented the adoption of the Budapest Convention of 2001, which was the first international document recognizing and sanctioning high-tech crimes, including offenses related to child pornography, it should be noted that the 1989 UN Convention on the Rights of the Child had already underlined the need to prevent the exploitative use of children in pornographic performances in order to protect the child from sexual exploitation and sexual abuse. In this regard, at the level of UN, next step was the adoption of the Optional Protocol on the sale of children, child prostitution and child pornography in 2000, within the UN Convention on the Rights of the Child, which highlighted concerns about the increasing availability of child pornography on the Internet and other information and communication technologies by providing the definition of the concept of child pornography. In any case, it should be noted that the Budapest Convention has introduced a wide range of offenses related to child pornography, starting with the producing of child pornography for the purpose of its distributing through computer system as well as offering or making available child pornography through computer system, through the distributing or transmitting of child pornography through computer system as well as procuring child pornography through a computer system for oneself or for another person to the possessing child pornography in a computer system or on a computer data storage medium.

However, the Lanzarote Convention introduced broader criminal law protection against child pornography, prescribing not only the above-mentioned offenses related to child pornography but also a new form, knowingly obtaining access, through information and communication technologies, to child pornography.

Following these tendencies at Council of Europe level, the European Union has taken legislative action to improve its legal framework in the field of protection of children against sexual exploitation. Based on these efforts, in 2011, Directive 2011/93 was adopted under the influence of the achievements accomplished in this area at Council of Europe level, by sanctioning the acquisition, possession, knowingly obtaining access, distribution, dissemination, transmission, offering, supplying or making available and production of child pornography. Finally, by adopting normative solutions regarding the suppression of child pornography under the influence of Council of Europe framework, in its criminal legislation, the Republic of Serbia has expanded the zone of punishment in this area prescribing not only the acts of selling, showing or publicly displaying or otherwise making available texts, pictures, audio-visual or other items of pornographic content to a minor or showing to a child a pornographic performance as well as using a minor to produce photographs, audio-visual or other items of pornographic content or for a pornographic show, but also the acts of obtaining for himself or another, possessing, selling, showing, publicly exhibiting or electronically or otherwise making available pictures, audio-visual or other items of pornographic content resulting abuse of a juvenile. Finally, the last form of this criminal offense includes the following act: consciously through information technology accessing images, audio-visual or other objects of pornographic content obtained through exploitation of a minor.

Therefore, it can be concluded that the Republic of Serbia has harmonized its criminal legislation with the legal framework of the Council of Europe and the European Union. Therefore, bearing in mind that adequate legislative measures have already been taken, it remains imperative in the field of suppression of child pornography to step up the early detection of cases of child pornography through an adequate approach, thus providing timely assistance and support to victims of this crime in order to prevent harmful consequences that can result from this behaviour.

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Milena Milićević*

PROTECTION OF CHILDREN WITH DISABILITIES AS VIEWED FROM THE ASPECTS OF DIFFERENT MODELS OF DISABILITY

“States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.”
(United Nations Convention on the Rights of the Child, Article 23.1.)

Two distinct ways of conceptualising disability are the medical and social models of disability. The first one takes disability exclusively as a direct consequence of physical and mental impairment or as a problem that requires medical intervention. The second one sees disability as a socially conditioned phenomenon caused by environmental circumstances. The central theoretical assumption of this paper is that the different positions from which the relationship between impairment and disability is considered will inevitably reflect on the prevailing recognition of child protection. It is necessary to examine the protection process by evaluating several different approaches to disability because the way disability is understood affects the issues that must be addressed regarding the lives of children with disability, including finding the most appropriate way to resolve them. Following key literature, the author attempts to present previous theoretical discussions on the relationship between impairment and disability, as well as its repercussions on the child's position and protection. Starting from the former and contemporary definitions and models of disability on which they are based, the author considers differences between the disability concepts and illustrates the consequences that this could have on the position and protection of a child.

Keywords: *disability, impairment, child protection, theoretical models of disability.*

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Introduction

Contemporary international scientific discourse recognizes the multitude of active models or models in development as different approaches to the phenomenon of disability. Moreover, different conceptual models support the social perception of disability. As stated by Teodorović & Bratković (2001), there are three different models: the medical model, the deficit model and the social model. According to Mihanović (2011), these models still have a strong influence on parameter settings for persons with disabilities, including children. The models that made the greatest impact on the approaches to disability in the second half of the twentieth century are the medical and the social model (Radoman, 2004). The time period and the social circumstances of their construction and evolution were contrasting (Išpanović-Radojković, 2007; Radoman, 2004; Teodorović & Bratković, 2001).

The development of the theoretical concept of disability has its scientific, historical and socio-political dimension. Within these dimensions, over time, gradual changes have taken place. Within these changes, one can see how the theoretical concept of disability has gradually transitioned from the medical to the social model, recognizing the revolutionary transition at one point, as opposed to the medical definition and theoretical determination of the concept of disability. A critical analysis of each model, together with the abstraction of certain positive characteristics, has formulated the optimal variant of the so-called bio-psycho-social model of disability.

The central theoretical assumption of this paper is that the different positions from which the relationship between impairment and disability is considered will inevitably reflect on the prevailing recognition of child protection. It is necessary to examine the protection process by evaluating several different approaches to disability. This is important because the way disability is understood affects the issues that must be addressed regarding the lives of children with disability, including finding the most appropriate way to resolve them.

Development of theoretical models of disability and terminology

In the nineteenth and twentieth centuries, the medical model arose from the bio-medical model of disability, which was primarily based around rehabilitation and restitution (Bury, 2001; Gough, 2005). Considered a “traditional”, this model was dominant after the end of World War I, at a time when the world public was facing a large number of

war invalids. It was developed from the pragmatic needs of medical rehabilitation and retraining, and requalification of soldiers (Radoman, 2004). In this model, disability is treated as an individual's problem caused by illness, trauma or other health or physical condition that is intrinsic to that individual. In other words, a disability diagnosis is related to an individual's physical body (Fisher & Goodley, 2007). The focus is on medical treatment of the pathologized body function or organ and its normalization. The medical explanation of the dichotomy of normal and abnormal is in the centre of this model placed. Accordingly, the focus is on damage or impairment with the “defects” (impairments and/or difficulties) as the starting points, while the goals are achieved through protection, care and prevention.

However, insisting on the concept of “normal” in the non-disabled implies its opposition value in the disabled, characterizing them as “abnormal”. Some critics of the medical model have commented on this issue. For example, Swain, French, Barnes, & Thomas (2013, p. 12) have noticed that when biomedicine sets reference points for what is “normal” or “acceptable” in society, then the cultural practises are directed towards the rejection and even despise of all that's “abnormal” in a given way. The authority introduces, constructs and establishes the category of “disabled” through their status of power and knowledge that their specialists have, such as doctors, state administrators and lawmakers. People with disabilities are recognized only as “different, abnormal, marked out as members of a minority group” (Hunt, 1966, as cited in Swain et al., 2013, p. 4). Therefore, the rehabilitation goal is to change that person to better fit into the social environment, that is, the established concept of “normality”.

The person is the object of clinical intervention. The measures and procedures undertaken by the social services, or society, are aimed at “incapacity” and planned to reduce the consequences of the “damage“ or impairment. The guiding principle used to motivate both professionals and persons with disabilities is based on the promotion of independence. If this could not be achieved, the person would be separated from the natural environment and all the opportunities that the environment could have provided and placed in the institution, most often permanently. The progress of science and medicine have made this model dominant for a long time.

During the 1970s and 1980s, the deficit model emerged as a transition between the medical and the social model. At its core, it originates from the philosophy of social integration and the normalization of persons with disabilities. This model emphasizes the importance of identifying and meeting the special needs of these individuals. It is believed that persons with disabilities have special needs. Moreover, the fulfilment of these needs

can be achieved by reducing or eliminating what hinders their social integration. Rehabilitation takes place in segregation or in the partial integration systems, aimed at reducing or eliminating difficulties in social integration.

The first indications of the social model occurred in the 1970s (Tregaskis, 2004), as the antipode to the then dominant, medical model. According to the “father” of the social model of disability, Michael Oliver, this model is an alternative interpretation to biomedical models that placed the problem in the individual with impairment (Moll & Cott, 2013). The origins of this model are based on a philosophy of inclusion that emphasizes that every person belongs to and contributes to their society. Persons with disabilities are viewed not through their limitations and difficulties, but their abilities, interests and needs, and above all, their human rights. The social model of disability explains that impairment does not restrict everyday life participation. Instead, society places physical, structural, and attitudinal barriers to full participation (Moll & Cott, 2013). Disability is seen as a socially conditioned phenomenon caused by environmental circumstances. These circumstances are disadvantageous, aggravating and put a person in a so-called handicap situation. Therefore, the basic assumption is that the position of these persons and their discrimination are socially conditioned, above all. The aim is no longer to “correct the deficit” but to completely equalize the rights of persons with disabilities with the rights of average, so-called “normal” populations. Persons with disabilities are included in all aspects of the life of the community to which they belong. In practice, this is achieved by removing all obstacles (physical barriers or prejudices) and creating conditions that equalize the opportunities for these persons to access all forms of participation in social life that any other citizen has (Teodorović & Bratković, 2001; Išpanović-Radojković, 2007). This model places each individual at the centre of the decision-making process, emphasizing an individual’s rights. At the same time, the problem is placed outside that person, into society. Impairment does objectively exist and should not be ignored. Still, the impairment does not decrease the value of a person as a human being, and such an understanding is a product of the ignorance, prejudice and fears that prevail in a given environment (Mihanović, 2011).

As a result of years of consultation and field research conducted by the International Network on Disability Creation Process – INDCP (fr. Réseau International Sur le Processus de Production du Handicap – RIPPH), the conceptual framework for the Human Development Model – Disability Creation Process (HDM-DCP or DCP model) was created and developed. This model of disability is also known as the Quebec Model (Badley, 2008), the Handicap Creation Process (Whiteneck & Djikers, 2009) or the Quebec classification. Disability is here defined as the process created through the

association of risk factors, personal characteristics, environmental factors and life habits of a person. Here, life habits are introduced as a novelty. They represent activities of daily living or a role in a family or society, valued by a person or his or her sociocultural environment as significant for survival and sense of personal well-being. They are consistent with the person's age, gender and sociocultural identity, as well. Particular attention is paid to environmental factors, whether physical or social ones. In interaction with personal factors, environmental factors can significantly facilitate or hinder the fulfilment of life habits. These situations can occur in the range between complete social participation to complete non-participation or a handicap situation (Išpanović-Radojković, 2007).

According to Išpanović-Radojković (2007), the implementation of the Quebec classification in a population of children with cognitive, motor or multiple disabilities has certain advantages over the ICF classification. The main reason is its capacity to include the developmental dimension of a child. ICF, on the other hand, has proven to be applicable, reliable, and highly correlated with commonly used standard scales. Yet, the ICF classification fails to capture and consider the developmental nature of many abilities in children. On the other hand, the Quebec classification provides a more detailed elaboration of the bio-psycho-social model of disability meeting more effectively the human rights of persons with developmental disabilities. A key change in the ideology of evaluation and approach to persons with developmental disabilities is the shift from focusing on the pathology and diagnosis to the understanding of the perspective of persons with disabilities themselves and respecting their human rights (Išpanović-Radojković, 2007).

The DCP model or paradigm underlying the Quebec classification is designed to capture the dynamics of the interactive process between personal (internal) factors and environmental (external) factors. These two factors together determine the result of the performance of life habits according to a person's age, gender and socio-cultural identity. This theoretical orientation is in line with global, holistic, systematic, environmental and destigmatizing approaches to disability. Additionally, it underlines that it is important to promote optimal participation in society and to foster equality for persons with structural and/or functional differences. In that manner, this theoretical starting point is brought closer to the human rights ideology. The novelty brought by this model is the basic premise that the set of “personal factors” is larger and more comprehensive than the subsets “organ systems” (body) and “ability” (capacity). As presented, other variables of personal identity (age, gender, socio-cultural identity) need to be taken into account: first, in a situation when explaining performance on life habits, and secondly, in a situation

when considering the interaction between person and environment. The latter is especially important from a child protection perspective. The “interaction” seen as a continuous flow whose content cannot be defined is at the centre of this model, at the point of intersection of three major domains: personal factors, environmental factors and life habits. The goal of the Disability Creation Process model is to clarify those variables that determine this interactive process (Fougeyrollas, Cloutier, Bergeron, Côté, & St Michel, 1998).

The Quebec Classification is designed to be used as a whole when identifying a causal relationship or interaction between different determinants of a disability situation. Besides, it is possible to track changes and re-gather information at different points in time. Particularly, this opens up opportunities for measuring progress in achieving life habits in the rehabilitation process and for assessing long-term maintenance of acquired skills in the field of social participation. This approach allows the monitoring of the impact of changes in some of the personal factors (e.g., restoration of walking ability, improvement of behaviour) or environmental factors (e.g. a family change, availability of a new service). The changes are reflecting on the accomplishment of life habits and they are visible through the disability creation process (handicap situation). The changes can also be monitored at the level of social policies, for example, when assessing the eligibility to a program, social insurance scheme benefits, statutory protection against disability discrimination or belongingness to a target group (Fougeyrollas et al., 1998; Silvers, 2001). In other words, through this model, it is possible to observe the role of the family in the disability creation process of its disabled member in parallel to its protection because family members are an integral part of the environment or the social networks of that person.

One of the advantages of this model is the potentiality to follow the impact that the disability creation process has on the life habits of a whole family in which a child has impairments or disabilities. In this process, the protection of a child and a child’s life habits cannot be implemented without affecting the life habits of the whole group, and vice versa. In such a way, the dimension of environmental factors is a key variable that enables the differentiation of personal capacities from the accomplishment in the domain of life habits. As defined, the accomplishment of life habits can be changed by personal factors, as well as by the environmental ones (Fougeyrollas et al., 1998).

The transitional period and the international documents

The transition from the medical model to the social one, together with the influence of changes in social consciousness and the strengthening of the human rights movement after the World War II, has led to significant changes in the society's attitude towards persons with disabilities. Considerable progress in their rehabilitation can be observed in this period. Influenced by the social model and based on research conducted at the international level, the International Classification of Functioning, Disability and Health (ICF) was adopted in 2001 (WHO, 2001). One of the ideas and purposes when creating this model was to overcome the shortcomings of the previous one, the International Classification of Impairment, Disability and Handicap (ICIDH; WHO, 1980). More precisely, ICF was designed to overcome the narrow conception of ICIDH concerning the role of the environment in disability (De Kleijn-De Vrankrijker, 2003). In that way, a framework for describing and measuring health and disability was provided for this model. It is important to note that disability is viewed as a product of the interaction of a person's physical and mental state with the social and physical environment (Mihanović, 2011). Not only that the integrity of a person's bodily functions and structures is taken into account, but also a series of everyday life activities and situations is considered. Emphasis is placed on the context of a person's life and the impact of environmental factors on functioning, activities and participation, and not exclusively on the consequences of illness or impairment, as was the case in the previous version, that is, ICIDH. Still, the influence of personal factors is not specifically classified, thus representing the weakness of this classification at the same time (Išpanović-Radojković, 2007). However, since the introduction of ICF in 2001, participation has been the focus of numerous studies in the field of disability studies. Participation is considered to be evidence of changes that have been made by moving from a medical to a biopsychosocial model of disability, or various health conditions, and that it speaks in favour of the justification of the changes that began in the last decades of the twentieth century.

The adoption of the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), the Declaration on the Rights of Mentally Retarded Persons (1971), the Declaration on the Rights of Disabled Persons (1975) and other documents, set out the basic principle. This basic principle is the right of persons with disabilities to be involved in all aspects of the life of the community to which they belong. The consolidation and operationalization of this principle for its implementation are presented within the Standard Rules on the Equalization of Opportunities for Persons with Disabilities. Adopted by the United Nations General Assembly in 1993, it was one of the

major outcomes of the Decade of Disabled Persons at the time. According to the United Nations Convention on the Rights of the Child (1989), a disabled child has the right to a full and quality life in conditions that ensure dignity, enhance self-confidence and facilitate his or her active participation in the community. The state has a duty, following available resources, to take all necessary measures and allow each child with developmental disabilities to grow up and live with a family, which is a fundamental right of every child. The institutionalization of children is an exception to the rule and should only be applied in exceptional cases and for a limited time (Išpanović-Radojković, 2007). Further, the 2006 Convention on the Rights of Persons with Disabilities is based on the fact that despite the human rights that persons with disabilities all have theoretically, in practice they do not yet have those basic rights and fundamental freedoms of the majority of people. This need has been highlighted because persons with disabilities have long been considered “objects” of care or medical treatment rather than “holders” of all basic and guaranteed human rights (Mihanović, 2011).

Comparative considerations of child position in different models of disability

The main difference between these models is the question of causality. The medical model is based on an approach that emphasizes healing, particularly treatment, considering disability as individual pathology. On the other hand, the social model emphasizes the social cause of disability and focuses on functional consequences. The social model has evolved over the last 30 years and implies, above all, an approach based on environmental factors that shape participation in society. Furthermore, it implies a more human-centred, socio-political approach that directs awareness of discrimination against persons with disabilities. The relationship between the social and the medical model is usually presented as a contrast to one another. The medical model presents disability as an individual problem, directly caused by a disease, trauma or other compromising medical condition that can only be improved or reduced by medical intervention. However, the social model presents disability, not as an essential characteristic of the individual, but as a product of the social context and environment. This involves not only the physical structure of the environment but beliefs and prejudices that lead to discrimination against these persons, as well. By developing a social model, the goal is directed more towards the identification of situations in which persons with disabilities are, rather than at the person themselves. This conceptual approach allows the promotion of positive concepts and full recognition of different dimensions of disability. Experts of various profiles should be included. At the same time, interdisciplinary and individualized support to persons with disabilities should be based on the principles of

freedom of choice and decision making. Defining policies and strategies and including persons with disabilities are important steps in systematic actions taken to raise public awareness of disability issues. Bearing in mind that Serbia is a developing country, comprehensive research on the subject is necessary (Pešić, 2006).

As explained, the social model of disability is an environmentalist approach to disability (Radoman, 2004). It represents an expansion of disability perception towards the psychosocial factors. In addition, it leads to a better understanding of the interaction regarding persons with disabilities and persons without disabilities. As acknowledged, society is not sufficiently prepared to take the needs of people with impairments into account. When it comes to the change of society, the social model is potentially a more positive approach than the individual medical model approach. The focus shifts from isolated impairment to a social environment whose organization is not fully conducive to those persons with impairment (Tregaskis, 2004). At first, *impairment*, *disability* and *handicap* are three conceptual terms that may seem consistent and coherent. Regarding the two most influential classifications, that is, ICDH (WHO, 1980) and ICF (WHO, 2001) three definitions can be summarized. First, an *impairment* can be defined as any loss or abnormality of a psychological, physiological, or anatomical structure or function. Next, a *disability* is defined as any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being. Finally, a *handicap* is a disadvantage for a given individual, resulting from an impairment or a disability that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual. However, seen from the perspectives of different disability models, they can be significant discrepancies among them. These differences inevitably affect the protection of children from this population. Regardless of the model considered dominant in a given scientific, professional and practical context, the fact that the first information pointing to the complex issues of disability appears in the sector of health care services, where the social aspect is often neglected (Jones, 2001). It is the social component or cultural determination of the impairment that may determine whether the impairment will undergo medical treatment. The decision on medical treatment depends on the type and level of severity of impairment, its distinctive characteristics and the cultural aspects with which that impairment might be associated (Jones, 2001).

When it comes to the importance of impairment in child protection, opinions vary in relation to the reference model of disability. Protection of a child with disabilities as viewed through the concept of impairment is, at first glance, fully sustainable and does not require re-examination. Nevertheless, three categories are debatable: constancy, a

constructive factor of disability, and exclusive medical context. In the case of the medical model, the focus on isolated impairment is its central problem, while supporters of the social model mostly consider socio-cultural factors.

Therefore, when speaking of the constancy of impairment, it implies some form of permanence and that impairment is undetachable over time (Tregaskis, 2004). The dimension of impairment in constituting a disability, however, is not viewed equally. Before-mentioned concepts may have diametrically opposite aspects. First, impairment can be understood as the cause of disability, and secondly, its importance in constituting a disability can be completely devaluated (Oliver, 1996 as cited in Tregaskis, 2004). Some authors have clarified that if an impairment is not the cause of disability, then it is the base element upon which disability is formed (Barnes, 2004). In the analysis of the child's position in the protection system, the question about the exact time of the onset of the impairment should be irrelevant. Similarly, this applies to whether the impairment is temporary or constant, as well. Both groups of impairment (temporary and permanent) should necessarily be equally represented and treated.

In summary, the visibly labelling and fatalistic nature of the medical approach to disability has led to a revolution in the perception of disability through developing a social model of disability. Representatives of the medical model of disability believe that the autonomy and self-sufficiency are the crucial elements in building a “normal” human condition and the standard by which the quality of life of the disabled is most often measured (Koch, 2001). They assume that persons with physical or cognitive impairments deal with limitations placed within themselves. As follows, restrictions occur when these persons try to engage in activities that are considered normal to the average person, further questioning both the quality and value of that life (Harris, 2000). On the other hand, some believe that independence and self-sufficiency are more a reflection of prejudice and discrimination than of reality (Nussbaum, 2011, as cited in Koch, 2001).

New tendencies in conceptualising disability

In recent decades, the family is increasingly encouraged to take an active role in health care, rehabilitation, education, social participation improving and vocational training for their child (Milićević & Kličić, 2014). The idea to focus directly on barriers, which children were encountering, was introduced earlier by the social model of disability. Bearing in mind this social model thinking, the experience of “disability” occurs when a person encounters diminishing or oppressive attitudes, inaccessible environments or resource

limitations. Through such an exclusion, it can be concluded that society creates disablement, not impairment itself (Moore, 2011). Although parents and/or professionals usually identify and resolve the problems of children with disabilities, they give them little or no choice or a way for their voices to be heard. Additionally, there can be disagreement between children, their parents and different specialists. Many children are aware of the prevailing influence of biological, educational, social or cultural norms (Davis & Watson, 2000). Besides, self-reporting raises concerns that neurological or psychological dysfunctions may limit a child's ability to report accurately (Muldoon, Barger, Flory, & Manuck, 1998). On the other hand, some authors suggest that the ability of children to make choices remains unrecognised many times (Davis & Watson, 2000). Two key elements of the processes of empowerment of children with disability can be found in the literature. First, adults need to question the way they interpret the child's needs and behaviour. Secondly, children should have support to speak for themselves and the opportunity to express their views. The assumption that children with disabilities are competent to make choices about issues concerning their lives enables them to (self-)empower themselves (Davis & Watson, 2000).

Nowadays, the social model of disability is generally accepted. Yet, many authorities, state administrators, lawmakers and disability specialists still base their professional working on the conception of independence, as well as on a personal-deficit based representation of disability. A notable example is the independent living movement, which occurred during the 1970s (Swain et al., 2013). Given that “dependence” is considered “abnormal”, protection of a child with disability here implies the effort invested in reducing the consequences of various functional deficits and achieving the greatest possible level of independence. Not surprisingly, as proposed in the medical model of disability, the problem lies within the person, and normality and independence in both personal and social functioning should be set as a golden standard for a child with a disability. In practical terms, functional abilities and performance are first evaluated using different assessment tools. The results are then compared with the norms or standards, usually related to gender and/or the age of that child. The previously mentioned method is sometimes referred to as “person-centred” or “personalized”. The following step implies planning of treatment and providing interventions and services to reduce variations or deviations in certain areas of functioning. Thus, periodical evaluations are used to assess improvement, if or when required.

Conclusion

After the World War II, the effects of war and industrial injury slowly gave way to a growing interest in medicine in the field of health and social care disability issues, especially when it comes to the overall impact of chronic disease and impairment. This trend followed the development of specialized branches of medicine aimed at providing specialized services to chronically disabled patients, and medical research began to develop at a rapid pace (Bury, 1996). The dominant medical model of disability and the concept of normality determined the goals and orientations at the time. In the second half of the twentieth century, with the collaboration of medical professionals and sociologists, the medical and social dimensions of chronic illnesses and disabilities converged. The result was a community-oriented social-medical model. Now the focus was on the physical, psychological or anatomical impairments, as well as on the evaluation of the need for medical treatments and the current status of people with disabilities. Relying on the professional expertise of medical practitioners, prevention strategies began to be developed. During this period, the interpretative approach to an individuals' illness experiences also directed the protection of children.

However, the social model has been the dominant paradigm in scientific, theoretical, and practical considerations of disability in the past few decades. Contributions are multiple. Initially, there is a redefinition of disability concerning a disabling environment, followed by recognition of persons with disability as citizens with guaranteed human rights. The final step includes the structuralization of the environmental features focused on overcoming disabling conditions (Barnes, 2013). Undoubtedly, the main feature of this period in disability research was the social inclusion of children with disabilities and their protection in such a process. A major segment of this effort is the development and production of barrier-free infrastructures and cultures at the local, national and international levels (Barnes, 2011).

In conclusion, the medical and social models of disability are two influencing ways of conceptualising disability. View in this way, the position and protection of the child with a disability could be significantly different depending on the prevailing approach to disability. As presented, the way disability is understood affects the prevailing perception of child protection. This leaves consequences at the level of health care, protection and prevention, as well as at creating policies and strategies, day-to-day organisation of the family resources and support in children's life. The social model of disability is generally accepted. However, many authorities, state administrators, lawmakers and disability specialists still base their professional working on the conception of independence, as

well as on a personal-deficit based representation of disability. Furthermore, the empowerment movement is one of the ways found regarding foregrounding the voices of children with disability so that their aspirations to make choices about issues concerning their lives are not overlooked.

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CHILD'S RIGHTS TO INFORMATION AND PRIVACY AND APPLICATION OF THE LAW ON PERSONAL DATA PROTECTION IN THE REPUBLIC OF SERBIA

With the adoption of the new Law on Personal Data Protection, the regulations in this field have been harmonized with the legislation of the European Union, and the protection of personal data has been established and confirmed as one of the basic human rights. However, in today's digital age, when young people are over-exposed to technology (computers, "smartphones", social networks), and the relationship with peers and the outside world is inextricably linked to their use, the question is whether the provisions of the new law at adequately and precise way protect the privacy of children. Digital technologies provide access to information, bring opportunities for learning and education, various trainings, and there is a need to strike a balance between the right of children to information and the right to the protection of personal data.

In this paper, the authors will outline the provisions of the Law on Personal Data Protection, and outline the challenges that will arise in the application of this law regarding the protection of the child's right to information and privacy in the digital age of today.

Keywords: *protection of personal data, children's rights, information society, right to privacy, right to information.*

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1. Introduction

The question how is the balance to be achieved between children’s rights to information and participation and their rights to privacy and protection, in the digital age is very important. Regarding to this issue we will in the paper first point out the definition of right to privacy and its relation with protection of personal data. After that we will present meaning of right to information, and then we will represent provisions of new Law on Personal Data Protection of Republic of Serbia which is dealing with right of child to privacy. We want emphasize that our intention is not to criticize the law, but to address specific issues related to this topic and which are very important for the protection of the personal data of children on the Internet in practice with one side, and provide realisation of right to information, from other side.

2. Right to privacy and protection of personal data

One of the first definitions of privacy as right originates from the year 1890 by young Boston lawyers Samuel Warren and Louis Brandeis which define privacy as “right to be let alone” (Warren & Brandeis, 1890:193). Warren and Brandeis argued that it was necessary for the legal system to recognize the right to privacy because, when information about an individual’s private life is made available to others, it tends to influence and even to injure the very core of an individual’s personality “his estimate of himself” (Warren & Brandeis, 1890:197). According to this view, the right to privacy implied the protection of personal autonomy, moral and physical integrity, the right to choose a lifestyle and lifestyle, interactions with other people, and so on. To inventors of the right to privacy, its meant that each individual had the right to choose to share or not to share with others information about his or her private life, habits, acts, and relations (Glancy, 1979:2). This simple definition reflects the recognition of privacy at the end of the 19th century, when print media and new technological innovations like photography were responsible for the growing invasion on private and domestic areas. This brings us to the question of the relationship between riht to privacy and the protection of personal data. Namely, if we understand the right to privacy as the right to choose whether to share with others information about our personal life (behavior, habits, relationships, etc.), there is question, what does this have to do with personal datas. Is personal datas considered part of privacy, and what does it have to do with privacy? When we say personal datas, we mean first of all the datas that makes up our identity. In terms of the subject of this paper, we define identity as sameness, that is, complete equality with ourselves, ie. the uniqueness of features that differentiate us from other persons. These features of our identity can be classified into four basic groups:

- a) legal characteristics (personal name, surname and father's name, mother's name, citizenship, marital status, residence, etc.);
- b) factual characteristics (day, month and year of birth, place of birth, nationality, registration number);
- c) physical characteristics (physical characteristics and gender, personal description, fingerprints, etc.);
- d) social characteristics (beliefs, attitudes, habits, established acquaintances, etc.).

If we understand identity on this way, then we can say that personal data, which makes our identity, represent one part of our privacy, but that concept of privacy is a much broader than concept of identity. Namely, the broadening of the concept of privacy has overshadowed the concept of identity. In fact, the theoretical overstressing of the notion privacy blurs itself with the concept of identity, “stealing” some of the latter’s conceptual space. An example of this overstressing can be found in some legal scholarship that specifically confronts the notions of privacy and identity. Here the legal doctrine (in general terms) has painted a harmonious picture, depicting privacy and identity as two sides of the same coin, operating together towards the same purposes and objectives. Such perspective is linked to the rationale of data protection and to idea that the “control over personal information is control over an aspect of the identity one those two terms, presenting a scheme that privileges and endorses a very broad definition of privacy at the expense of the concept of identity (Andrade, 2011:24). With the appearing of the Internet, the connection between concept of personal data and concept of privacy has become even stronger. Privacy is mostly defined as the right of an individual group or institution to determine when, how and to what extent information about them will be communicated to other persons. Although the term “privacy” has been in legal traffic for some hundred years, the issue has “exploded” with the development of information technology and the development of the media. The right to privacy and protection of personal data becomes, theoretically and practically, the center of interest of lawyers in the field of legislation, administration and judiciary (Pavlović, Ranđelović & Ivanović, 2018:10). Namely, the Internet has made the access and exchange of information – including personal data – easier and faster than ever. Individuals are providing their personal data online, knowingly and sometimes unknowingly for many different purposes, such as purchasing goods and services, playing, e-learning or paying taxes. Social interactions are also increasingly taking place over the net – for example in social platforms, creating new opportunities, but also risks to privacy. The frontier-less nature of the Internet, which

enables the free flow of data across countries, also brings new challenges for protection of identity and privacy. Specifically, personal data can be easily stolen, and on the basis of them can create someone's false identity that can be easily misused in the online world. In addition, many personal data along with various digital accomplishments, such as applications for tracking and surveillance collecting information about our location, habits, interests, etc., can give to someone else a lot of information about our private life. On the other hand, access and exchange of information on Internet has negative effects that are reflected in the loss of the individual's ability to control their personal data in the sense of their archiving and distribution over the Internet. Namely, the creation, collection and distribution of data are ongoing and constant. If we take into account the possibilities of the internet everyday, whether we were aware of it or not, we are generating and transmitting our personal data in many ways. Also, our personal data is collected and shared daily by organizations that manage this mass communication medium. In this way, the data became the “new currency” of the digital age, and it seems almost impossible for us to fully protect our privacy and sensitive personal information in the digitalization era (Pavlović, Randelović & Ivanović, 2018:9). The authors express that the circulation of personal information is perceived as privacy violation and suggest prioritizing human's basic right over the interest of the society to spread information (Kolter, 2010:21). Over time, this understanding is supplemented by mechanisms for practicing these rights. Thus, the citizen is enabled to have certain expectations from the entities that process his data in relation to the way this data is used (Ivanović, 2017:155). All this makes understanding of privacy and the right to protection of personal data in the digitalization era by quite complicated and demanding issues. Namely, as it was emphasized earlier in this paper the concept of privacy is usually understood as a possibility of protecting and controlling the distribution of personal data, we can conclude that the realization of complete protection of personal data in today's situation is almost impossible. In today's world, the protection of private and family life, the protection of privacy is still in its infancy and is confronted with a plethora of challenges. Photographs and footage can certainly be qualified as personal data according to the rules of internal and European law (Pavlović, 2018:94). When it comes to the question of right to privacy of children situation is more complicated because of digital era of nowadays. Namely, world of today's children has been significantly changed in relation to the world of their parents. In the world of childhood of today's parents there were no smart phones, computers, laptops, YouTube, Twitter or various on-line games. Reading and writing were learned first and only later work on a computer came. Today, children are using a computer and a smart phone even before learning to read and write. This fact shows about how the world of today's children has changed in relation to the world of their parents. Today, through the new technologies,

the media have entered much not only into our lives, but also into the lives of our children, that it is difficult to imagine the growth of today's children without the media (Pavlović, 2018: 92).

Universal Declaration of Human Rights (UDHR)¹ in Article 12 prescribes that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. In Europe right to privacy was established in the European Convention on Human Rights (ECHR) was drafted in 1950², and contained an article declaring that everyone has the right to respect for private and family life. Namely, Article 8 of paragraph 1 (ECHR) prescribes that everyone has the right to respect for his private and family life, his home and his correspondence. In the Article 8 paragraph 2 (ECHR) prescribes that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. European Conventions have continued to meet to establish standards to protect the privacy of information from European citizens. Namely, under European Union law, personal data can only be gathered legally under strict conditions, for a legitimate purpose. Furthermore, persons or organizations which collect and manage personal information must protect it from misuse and must respect certain rights of the data owners which are guaranteed by European Union law. The European Union's Data Protection Directive³ also foresees specific rules for the transfer of personal data outside the EU to ensure the best possible protection of personal data when it is exported abroad (Ivanović, 2017:157).

The Convention on the Rights of the Child (CRC)⁴ makes clear that children have a specific right to privacy. Tracking the language of the UDHR and ICCPR, Article 16 of the CRC states that “[n]o child shall be subjected to arbitrary or unlawful interference

¹ UN General Assembly. (1948), *Universal declaration of human rights* (217 [III] A), Paris. Retrieved from: <http://www.un.org/en/universal-declaration-human-rights/>.

² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Retrieved from: <http://www.refworld.org/docid/3ae6b3b04.html>.

³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *Official Journal L 281*, 23/11/1995 P. 0031 – 0050.

⁴ The United Nations. “*Convention on the Rights of the Child*.” Treaty Series 1577 (1989).

with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation,” and reaffirms that “the child has the right to the protection of the law against such interference or attacks.” The right to privacy includes a wide range of rights: the right to respect of the private and family life, the right to respect the inviolability of the home, the right to respect the inviolability of correspondence, the right to respect for honor and reputation (Dimitrijević, 1995). Privacy issues have become a hot practical topic in the conditions of use of information and communication technology and electronic communications. It has created unlimited possibilities for concentration of data, their clustering and search on various features, as well as the possibility of using it by a wide circle of users (Dimitrijević, 2011: 202).

3. Children’s right to information

CRC in Article 13 prescribes that the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice. Also in Article 17., guarantees the right of children to information and stipulates that the States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. A child’s right to freedom of expression is not absolute and can be subject to limitation in two broad circumstances. First, when the limitation complies with paragraph 2 of Article 13 of the CRC and second, where the parents of the child or the states determine that it is necessary to protect the child from harm.

The exercise of the right to freedom of expression may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others, or for the protection of national security or of public order (ordre public), or of public health or morals (paragraph 2 of Article 13 of the CRC).

CRC Committee has not made any concerted attempt to articulate the meaning of these requirements and has tended to make general statements about its concerns regarding restrictions on a child’s right to freedom of expression (Tobin, 2019, 457).

Children need access to information in formats appropriate to their age and abilities, on all issues of concern to them (UNICEF, 2011:36). Nowadays, when the Internet has become the most powerful tool for expressing, implementing and exchanging opinions

and information, especially for children, given the dangers it carries, it is rightly feared that full exercise of this right may conflict with the right of the child to special protection and care, given his physical and mental immaturity, as the basic principle of the Convention on the Rights of the Child in its preamble. There is growing concern globally about the exploitation and abuse of children through social networking sites, as well as unwanted and inappropriate exposure to extreme contents. A balance needs to be found between the need to promote opportunities for access to the Internet while also protecting children from harm (UNICEF, 2011: 36).

4. Digital age and digital generations - overview of state

The term “Fourth Industrial Revolution” was defined at the World Economic Forum in 2016, as an era of technology fusion in which the boundaries between the physical, biological and digital spheres were blurred, a digital age in which technological advancements affect the entire social system, health, economy, security, politics (Ivanović, Randelović, Totić, 2019: 85). The development and use of information and communication technologies have transformed the modern society into an ‘information society’, a ‘digital society’. The Statistical Office of the Republic of Serbia (SORS) is recording a steady increase in the use of information and communication technologies (ICT) in Serbia. The survey found that 92.6% of the population use a mobile phone, Respondents have used the Internet extensively over the last three months to search for information about goods and services (76.8%), as well as to participate in social networks such as Facebook and Twitter (70.3%), 96.4% of population age 16-24 have an account on social networks (Facebook, Twitter) (SORS, 2018:24).

According to the time they grow up in, today's generations are calling it digital. Young people (ages 15-24) are the most active age group in the digital world. Worldwide, 71% of young people of that age are connected to the internet, compared to 48% of the total population (UNICEF, 2017: 3). On average, children in Serbia start using the internet at the age of eight (Popadić et al., 2016: 14). As the impact of digital technology, and especially of the Internet, spread, so did the debate about the impact of the Internet: does it bring benefits to humanity or is it a subtle threat that undermines the social fabric? Digital technologies bring opportunities for learning and education, provide access to information, can provide economic opportunities by offering young people training opportunities and access to job-finding services, or by creating new types of jobs. However, there is a dark side to the internet and digital technologies, from abuse and sexual abuse, child trafficking and other illegal activities that harm children, hate speech, violent radicalization and extremism, influence on the development of the nervous system

(Unicef, 2017:1). The Internet is the safest and most powerful means of spreading hate speech, a multimedia platform that has become the dominant channel of communication for extremist groups through which they recruit, mobilize like-minded people (Ivanović & Randelović, 2019:50).

Teens who are over-exposed to technology (smartphones and social networks) are known as "screenagers". Their relationship with peers and the outside world is often inextricably linked to the use of mobile phones. The phones also provide them with a continuous flow of information from official news outlets. Increasingly, however, they provide various types of redistributed “alternative facts,” gossip, and even deliberately constructed false news and conspiracy theories aimed at misinforming and destabilizing societies and communities (Lenos and Keltjens, 2017:13). Traditional media have made their digital editions to meet the needs of the audience, and this is a constant need for as much information as possible in the form of sensationalist headlines.

The question is, in this digital age, how many children are exposed to media risks that are determined by the impact of media content on the "social, spiritual and moral well-being and physical and mental health" of the child in this digital age? Children have been using electronic media and the internet since their earliest days, however, they are not aware of the dangers lurking over the internet and that they are more unprotected and vulnerable than being alone on the street at night. They do not know how to preserve their privacy on the Internet, what content they are allowed to publish, how to preserve their security, first and foremost. They are not even aware that they are leaving hundreds of digital traces on the internet every day, which are organized and remain on the internet forever. This data makes it easy to analyze, identify patterns and draw conclusions about who they are and what they do. The digital age has brought new rights and new opportunities for children, but also new threats. While there has been much international attention on the ICT sector's responsibility to respect human rights in the digital environment, children's rights have rarely featured in these discussions. When children are mentioned, it has been almost exclusively in the context of sexual abuse, exploitation and harmful content, without recognition of children's full range of rights (UNICEF, 2017:11). One of the new threats that the digital age has brought with it is one that threatens the right to privacy of children. But, on the other hand, while there is now a widely accepted public imperative to protect children from harm, abuse and violence online, there has been comparatively little consideration of how to empower children as active digital rights holders (UNICEF, 2017:2).

5. New Law on Personal Data Protection – Protection of Personal Data from the Perspective of a Minor

Exposure of children to Internet risks is closely linked to compromising the security of their personal data. Children, as the youngest and most sensitive users of the Internet, are at the heart of the ever-growing market for personal data. Due to the fact that children may be less aware of the risks, consequences, measures and their rights regarding the processing of personal data, they deserve special protection of privacy on the Internet. The right to special protection relates primarily to the use of personal data of children for the purpose of marketing or creating personal or user profiles, as well as to the collection of personal data about children when using services specifically designed for them (Kuzmanović et al., 2019:31).

The Law on Personal Data Protection⁵ adopted in November 2018, with a deferred application of nine months and commencing on 21 August 2019, it is the highest standard of protection of personal data that establishes this right as one of the fundamental human rights (hereinafter: The law). It governs the right to the protection of individuals with regard to the processing of personal data and the free flow of such data, the principles of processing, the rights of the data subject, the obligations of data controllers and data processors, the code of conduct, the transfer of personal data to other countries and international organizations, oversight of the implementation of this law, remedies, liability and penalties in the event of a violation of the rights of individuals in connection with the processing of personal data, as well as special cases of processing.

For the purposes of The law, Personality Data is any information relating to an individual whose identity is determined or identifiable, directly or indirectly, especially based on an identity mark, such as name and identification number, location data, identifiers in electronic communications networks or one or more features of his physical, physiological, genetic, mental, economic, cultural and social identity. A great deal of our personal information is on the Internet, such as IP address, IMEI number of devices we access to the network, passwords, our email and social network accounts, activity history from such accounts (shares, likes), internet search history (Share Foundation, 2017:21).

Personality Data Processing is any action or set of actions that is performed automatically or automatically with personality data or sets thereof, such as collecting, recording, sorting, grouping, or structuring, storing, rendering or modifying, disclosing, insight, use,

⁵ The Law on Personal Data Protection, Official Gazette of the Republic of Serbia, no. 87/2018.

disclosure by transferring, ie delivering, duplicating, disseminating or otherwise making available, comparing, restricting, deleting or destroying. By formulating such a broad definition of data processing, the intention of the legislator to clearly consider any contact with personal data to be data processing. Also, this law extends the responsibility of people and organizations that collect and process data, elaborated instruments and procedures for implementing regulations, and introduced draconian penalties (Share Foundation, 2017: 14).

One of the features of the internet is a decentralized structure that prevents uniform application of regulations, since placing content on servers located in other countries makes it impossible to apply national regulations to them. The law has broadly defined territorial application by prescribing that it applies to the processing of personal data by a controller or processor having his or her headquarters, domicile or residence in the territory of the Republic of Serbia, within the framework of activities performed in the territory of the Republic of Serbia, regardless of whether processing takes place on the territory of the Republic of Serbia. The law also applies if the server is located outside the territory of Serbia. Also, The law applies to the processing of personal data of the data subject who is domiciled or domiciled in the territory of the Republic of Serbia by the manager or processor who is not domiciled, or domiciled or domiciled in the territory of the Republic of Serbia, if the processing operations are related for the supply of goods or services to a data subject in the territory of the Republic of Serbia, regardless of whether that person is required to pay a fee for these goods or services.

This Law is the result of the harmonization of regulations in this field with the regulations of the European Union and is a largely adapted translation of the General Data Protection Regulation, which entered into force in May 2018. One of the most important novelties of the General Data Protection Regulation (GDPR)⁶ is that it contains provisions that deal specifically with the protection of children's data. General regulations have generally advanced the European data protection regime, which indirectly but significantly benefits children. One such provision is the extension of the definition of personal data by clearly enumerating what they cover (eg a clear reference to metadata) (Krivokapić & Adamović, 2016:217). The general regulation also sets higher standards for the quality of consent and narrows the ability of operators to invoke a legitimate interest.

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/ec (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88, http://ec.europa.eu/justice/dataprotection/reform/files/regulation_oj_en.pdf, 21 June 2016.

The Law on the Protection of Personal Data protects the protection of personal data of minors in the same way as adults. Children have the same rights as adults regarding their personal data. These include the rights to access their personal data; request rectification; object to processing; and to have their personal data erased. However, in some provisions, the Law recognizes the special interest of children, as guaranteed by the Convention on the Rights of the Child, and lays down additional rules when it comes to the processing of data of minors.

5.1. Personal Data Protection Law and Special Interest of Children

When prescribing the basics of data processing, the Law stipulates that the processing is lawful if it is carried out in order to achieve the legitimate interests of the operator or a third party, unless those interests outweigh the interests or fundamental rights and freedoms of the data subject requesting the protection of personal data, especially if the data subject is a minor (Article 12 Paragraph 1 Point 6). In this formulation, the legislator places the interests of minors above the legitimate interests of the controller or third party in the process of processing personal data. The challenge that may arise in practice is in interpreting when the interests of the minor will be outweighed, that is, whether managers and processors will always be able to assess it.

5.2. The principle of transparency

The law prescribes the obligation of the operator to take appropriate measures to provide the data subject with all information regarding the exercise of the rights prescribed by the Law, in a concise, transparent, understandable and easily accessible manner, using clear and simple words, especially in the case of information, which is intended for a minor (Article 21 Paragraph 1). That means they will have to use child-friendly ways of communicating such as videos, diagrams, cartoons, or icons, to explain simply why they need the personal data they've asked for and what they plan to do with it, and explain what rights the child has and how to action them.⁷ A great example of an organisation making an effort in this area, is the BBC with their Get Out and Grow Privacy Policy.⁸

5.3. Commissioner for Information of Public Importance

The Commissioner for Information of Public Importance and Personal Data Protection is an independent and autonomous authority established under the law, which is responsible

⁷ <https://www.governmenteuropa.eu/children-and-gdpr-protecting-childrens-data-online/93235/>, available at 5/08/2019.

⁸ <https://www.dpnetwork.org.uk/opinion/gdpr-childrens-privacy-rights/>, available at 10/08/2019.

for overseeing the implementation of the Law and performing other tasks prescribed by law. In its wide range of competencies to supervise and enforce the Act, it has a special obligation to raise public awareness of the risks, rules, safeguards and rights related to processing if it concerns the processing of data on a minor (Article 78 Paragraph 1 Point 2).

The Commissioner will face a great challenge in implementing the Law, due to the introduction of new institutes and more stringent implementation. The Office of the Commissioner will be expected to provide guidance and opinions to resolve a number of concerns that will inevitably arise in practice. Certain issues will certainly arise in situations where the data of minors will be processed.

5.4. Code of Practice

The law introduced the possibility of drafting codes of conduct so that associations and other entities representing groups of operators or processors could apply its provisions more effectively. In laying down guidelines for drafting them, The law stipulates that codes of conduct must contain provisions that will specify the treatment of these entities with regard to information provided to minors, their protection, and the manner in which parental consent is obtained (Article 59 Paragraph 1 Point 7).

5.5. Consent of minors related to the use of information society services

A minor who has reached the age of 15 may give consent to the processing of personal data in the use of information society services independently (Article 16 Paragraph 1). In cases where the processing of data is done on the basis of consent, if the controller processes the data of a person under the age of 15, the processing of data will be lawful only if the consent was given by the parent exercising parental right, or by another legal representative of the minor (Article 16 Paragraph 2). The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the minor, taking into consideration available technology (Article 16 Paragraph 3).

The special rules on the consent of minors and children under The law apply only to the processing of data on children and minors related to the use of information society services.

Questions of consent for “information society services” are particularly difficult when it comes to children. What can children consent to? What understanding of data, privacy

and the online commercial environment is needed for their consent to be informed? Or, should parents be the ones to give consent for children’s use of such services? Or, again, should age threshold restrict children below a certain age from using such services at all? And if so, what age limit and on the basis of what evidence?⁹

One of the benefits of this provision is that children are able to engage freely with the internet, which is an important and largely unavoidable tool. However, some researches points out that children often struggle to distinguish between information and paid content online. Some critics of the Act argue that, if children aren’t able to recognise advertisements, they also won’t be able fully to understand how companies use their personal data – nullifying consent. There are also practical questions about expecting websites to check the ages of their users.

Article 8 of the GDPR states that parental consent is required for information society services offered directly to minors under 16 years of age. Each Member State of the European Union may fix that age to a minimum of 13 years. The controller is also required, under Article 8(2) of the GDPR, to make “reasonable efforts” to verify that consent has been given or authorised by the holder of parental responsibility in light of available technology.

The problem that may arise in practice is determining whether consent was given by a legal representative.

The GDPR and the Law does not specifies what specific mechanisms for age verification and parental consent are required; and guidance from the data protection authorities calls on industry to come up with creative solutions. The law only stipulates that the operator must take reasonable steps to determine whether consent has been given.

What will and will not qualify as “reasonable efforts” by data controllers to confirm age-appropriate consent remains to be seen and tested. And this will certainly be one of the challenges that managers will face in practice. Managers providing services related to information society services should put in place mechanisms to determine that any consenting person is old enough to have the right to do so, it is informed and granular; and that they have methods in place to allow parents to exercise their rights in relation to their children. Understanding the lawful basis for processing personal data of a child is

⁹ <https://blogs.lse.ac.uk/mediapolicyproject/2017/05/11/childrens-rights-and-the-gdpr-are-the-new-consultations-creating-light-or-further-confusion/>, available at 10/09/2019.

key. This may require parents' dashboards or a parent portal to allow for consent and revocation management. One of the problems will be that many organisations do not have the resources to build consent management tools and existing solutions are few and far between.¹⁰

The most recent Report of the European Commission Multi-stakeholder Expert Group on the GDPR application published on 11 June 2019 confirms the issues associated with the practical implementation of article 8 GDPR. First of all, stakeholders note that the information on who – the child or the parent – actually needs to give consent is often unclear. It is suggested that "this may have the consequence of denying services to children and keeping children away from the Internet until they have attained a certain age, which is not the purpose pursued by GDPR". In addition, the Expert Group also asks for clarifications in terms of age verification for the processing of children data, and more generally, the lawful grounds that can be used to process personal data of children.¹¹

One of the characteristic of the internet is that is age-blind. In the digital environment, it is generally the case that a particular platform or online service is unable to determine whether a user is a child. The consequence is that children are often treated as adults online, and it is difficult to provide particular protections appropriate to children's need or best interests (UNCRC, 2017; prema Livingstone, Carr and Byrne (2015).

5.6. Right to erasure of personal data

Data archiving has always played a very important role in society. Keeping important information and historical events is invaluable for tracking the exact history of events and guaranteeing that this information will be available to future generations. The society, however, tends to forget important information. Fortunately, in the present stage of digitization of human society, we have an internet that allows us to store huge amounts of data for an indefinite period of time. Namely, as Mayer-Schoenberg points out: "Due to digital technologies, the ability of society to forget is suspended, and replaced with almost perfect memory" (Mayer-Schönberger, 2009:16). Namely, while it is very easy for individuals to upload images, comments, videos, etc. on the web pages, on the other hand, it is very difficult for them, and sometimes it is impossible to completely delete these contents from the Internet. In a word, when some information, information or file

¹⁰ <https://www.governmenteuropa.eu/children-and-gdpr-protecting-childrens-data-online/93235/>, available at 13/08/2019.

¹¹ <https://www.betterinternetforkids.eu/web/portal/practice/awareness/detail?articleId=3017751>, available at 13/08/2019.

is uploaded to the Internet, it can have lasting significance, or consequences (Ivanović & Dečković, 2016:478). It's actually about the problem that David Lindsay called "digital eternity" (Lindsay, 2014:290). The problem of the so-called. "Digital Eternity" is important because there is an concern shared by numerous authors that all we have ever posted on Internet can to persecute us one day. Likewise, something somebody about us in the past lignifiedly announced on Internet in the future can upset or disturb our further life (Ivanović & Dečković, 2016:478). Right to erasure of personal data under provision of Law on Personal Data Protection is particularly important from children's perspective. Article 30 Paragraph 1 Point 6 Law on Personal Data Protection particularly prescribes that one of the grounds for data erasure request is when the personal data have been collected in relation to the offer of information society services referred to in Article 16 Paragraph 1. It should be noted here that the right to be forgotten reflects the individual's request that certain data be deleted so that third parties can no longer keep track of them, and is most often defined as the right to remain silent about past events that are no longer repeated. This right allows individuals to retrieve information from Internet pages, videos, or photos of themselves that have been made available so that others cannot find them through the browser (Ivanović & Dečković, 2016:484).

In regards to the implementation of the right to be forgotten, the final provision of the Article 30 Paragraph 2 imposes the obligation of the controller that has received erasure request to take reasonable steps to inform other controllers about the erasure request by such controllers of any links to, or copy or replication of those personal data, "taking account of available technology and the cost of implementation", but it does not mention data processors. This could pose a risk that the right to be forgotten cannot be fully implemented (Krivokapić & Adamović, 2016:217).

5.7. Is the right to information for children jeopardized by prescribing the age limitation?

Setting the age threshold when it comes to information society services is the result of compliance with Article 8 of the GDPR. This article has caused controversy in the general and general public. Many considered serious arguments to indicate that setting the standard age threshold at 16 was in fact a violation of children's rights, protected by the UN Convention on the Rights of the Child, which had been acceded to by all EU Member States, and that, among other things, the UN Convention guarantees the right of children to access information. the right to express views and participate in decision-making processes, the right to learn and develop, and so on. The rule in Article 8 (1) prohibits children under the age of 16 from participating in various online activities, many of which

represent a valuable means of communication and collaboration, although they also carry certain data protection risks.¹² Children, like adults, enjoy a right to access public information and they should not be subject to discrimination on the enjoyment of this right simply by virtue of their age (Tobin, 2019, 443).

However, prescribing the age threshold when it comes to providing information society services to minors does not constitute a restriction on the right of children to access information, but a measure of protecting their particular interest. Children below the age of 18 possess the full range of human rights enjoyed by adults but, as legal minors undergoing crucial processes of human development, they cannot be treated in the same way as adults (Livingstone, Carr, Byrne, 2016:7). Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data.

When it comes to the age threshold, another issue can cause problems in the implementation of the Law, as it did in its predecessor, given that the legal solutions are the same. Namely, when it comes to consent, as a basis for data processing, can minors give it consent? The provisions of the Act indicate that it is not possible unless it is an information society service. However, it is then in conflict with some other laws.¹³

We are of the opinion, of course, that the application of the provisions of the Law cannot be viewed in isolation, but within the legal system, unless it is contrary to the best interests of the child. In principle, the specific circumstances under which the data on minors are

¹² An open letter from members of the ICT Coalition for Children Online, which monitored GDPR negotiations, http://www.ictcoalition.eu/news/96/GDPR%3A_parental_consent_from_age_13_to_age_16,_possibly_a_mistake, 21/06/2016; Urs Gasser & Sandra Cortesi *str 2 - 3 i 8 -11*, Smile report, <http://www.coe.int/en/web/internet-users-rights/children-and-young-people> ; https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805af669, 21/06/2016.

¹³ The laws of the Republic of Serbia prescribe different age limits for certain legal activities and activities that may be undertaken by minors. Thus, according to Art. 64. In the case of a family law, a child who has not attained the age of 14 years (a young minor) may undertake legal tasks to which he or she acquires exclusively rights, legal activities which he / she acquires neither rights nor obligations and legal affairs of minor importance; a child who has attained the age of 14 (an elderly minor) may undertake all other legal tasks with the prior or subsequent consent of the parent, ie the consent of the guardianship authority; while a child who has attained the age of 15 years may undertake legal affairs managing and disposing of his or her earnings or property acquired by his own work. The Law on Patients' Rights, Article 25 (6), stipulates that public health research may be approved, which includes a child who is 15 years of age and able to make judgments, which does not produce direct benefit or risk for the child, if it aims to contribute to a better understanding of the health status of this population, with the written consent of the child or his or her legal representative. Health information is particularly sensitive information within the meaning of the Personal Data Protection Act. Also, the Labor Law stipulates that an employment relationship may be established with a person who is at least 15 years of age.

processed should be taken into account at all times, in particular the purpose of the processing and the type of data being processed, as well as relevant laws, depending on the basis of processing (law or consent) and the purposes of processing, and especially depending on the consequences for the data subject, would be different age threshold.¹⁴

6. Instead of conclusion

The adoption of Law on Personal Data Protection which is compliant with GDPR is certainly commendable, and it is certain that its provisions will, in lot of extent, state on the field of personal data processing make more seriously, and create favorable conditions for prevention of misuse of personal data. However, when it comes to the right of children to the protection of privacy and personal data protection, on the one hand, and the right to information on the other, certain concerns may be raised regarding the provisions of this law. Namely, considering that the provisions of the Law on Personal Data Protection of the Republic of Serbia are, to a large extent, copies of the General Data Protection Regulation translated into Serbian language, the same concerns and challenges that can be raised regarding the protection of children's privacy rights under the GDPR coincide with the concerns and challenges that may be raised regarding the provisions of the Law on Personal Data Protection.

The first concern concerns the fact that the Law on Personal Data Protection, as well as GDPR, does not define the term “child”. However, unlike the GDPR, which in its provisions use the term “child” in the Law on Personal Data Protection, the term child is not mentioned anywhere, but the term “minor” is used. Age threshold set out in the Article 16 Paragraph 1 serves only for the purposes of that Article, i.e. for rules regarding the information society services offering. What does this mean in terms of interpreting all other provisions regulating the status and rights of the minors? Thus, alternatively, this can be interpret that age threshold from the Article 16 Paragraph 1 actually incorporates definition of the minors valid for interpretation of all other provisions related to minors.

Second concern is related on too narrow a circle of persons who can consent to the collection and processing of personal data in behalf of minor who has not attained the age of 15 years. Namely, the Article 16 Paragraph 2 is drafted very narrowly in terms of who can give consent on behalf of the minor under the age of 15. Law on Personal Data

¹⁴ This view, in view of the same dilemma that arose in the application of the previous Law on Personal Data Protection, was taken by the Commissioner for Information of Public Importance and Personal Data Protection in his Opinion No. 011-00-00607/2013-05 from 16/10/2013.

Protection gives this right only to the parents or the holders of parental responsibility. However, one may ask why the legislators did not take into account a possibility of introducing certain competences in this respect also to qualified persons that are engaged in schools or education institutions. This concern is very much related to the issue of exercising the right to information by minors. Namely, a great number of research conducted in Republic of Serbia suggests that parents' digital literacy is lower than their children's. Also, the prior request of parental consent on this issue can create a problem for a teacher who practices using of information technology in his or her teaching. Also, there is a possibility that parents, due to misunderstanding or ignorance, refuse to give the minors consent to the processing of his / her personal data on the Internet, thus preventing him / her from interacting online, acquiring new knowledge, etc. (see more in Krivokapić & Adamović, 2016:212).

In cases where the processing of data is done on the basis of consent, if the controller processes the data of a person above the age of 15, the processing of data will be lawful without the parental consent. Facebook and Instagram are asking its users if they are under or over 13 years old. Does that mean effective age verification will now be introduced, or will the Law become an unintended encouragement for children to lie about their age to gain access to beneficial services, as part of their right to participate? How will this protect them better? And what does this complexifying landscape mean for media literacy education, given that schools are often expected to overcome regulatory failures by teaching children how to engage with the internet critically? What is to happen when the service provider professes not to/doesn't know if a user is a child whose consent should be sought? These problems are legion, given the number of children using services “under age” for which Facebook, for instance, simply blames the parents, and about which the law seemingly imposes no requirement on companies to make their own assessment of age. Nor, even, does it require the data protection authorities to take action in the cases where companies appear deliberately not to ask – as in the case of Instagram.

Another issue is children's ability to make reasonable choices about what to share about themselves online. Parents will also often share images of their children without asking for consent. Although the Law guarantees the right to be forgotten, the more something is shared on the internet the more difficult it is to erase. While the Law guarantees children the right to privacy, the nature of the internet can make that right difficult to enforce. Rather than trying to keep children off the internet, which – let's face it – isn't going to happen, we should be focusing on better educating children in media literacy. Schools and parents must work together to teach children how to protect their privacy online.

It is also unclear in practice just how children will be enabled to claim their rights or seek redress when their privacy is infringed. And at the end there are some baseline principles: data minimization, comprehensible terms and conditions and privacy policies. The last is a design question: since most adults either can't understand or can't bear to read terms and conditions and privacy policies, what hope of making them comprehensible to children? Most important, what is the threat model? What you implement and how is very different if you're trying to protect children's spaces from ingress by abusers than if you're trying to protect children from commercial data aggregation or content deemed harmful. Lacking a threat model, “freedom”, “privacy”, and “security” are abstract concepts with no practical meaning.

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YEARBOOK
HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHTS OF THE CHILD
“30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”

Share fondacija (2017) *Vodič kroz Zakon o zaštiti podataka o ličnosti i GDPR*. Beograd: Share fondacija.

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CHILDREN'S RIGHTS IN THE SYSTEM OF PRESCHOOL EDUCATION IN SERBIA

The paper presents the concise review of the current state of matters in preschool educational policy and practice with the aim of giving insight into possibilities for implementation of children's rights within early childhood in Serbia. Situation is presented through the analysis of aspects quality of the system of preschool education, alongside consulting newer national reports and recommendations adopted by the Council of European Union. Analysis performed shows that significant changes in all aspects of the preschool education system are in progress on national level which enable children's rights to be implemented and protected. New laws and by-laws are passed and harmonized, in addition to spreading awareness of the strategic importance of early education, as well as of the encompassing of all children through application of different types of preschool programs. Intensive work is also underway aimed at empowering practitioners for lifelong learning through support networks intended at professionals which direct them towards mutual exchange and perfection by means of exploring their own educational practice.

Keywords: *children's rights, inclusion, quality, early education, different preschools programs.*

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Introduction

Three decades ago The Convention on the Rights of the Child (1989) has been passed, while fifteen years ago the general discussion on implementing children's rights in early childhood was held within the 40th meeting of the Committee on the Rights of the Child (2004).

On that occasion, guidelines to passing General Comment No. 7 were presented: Implementing Rights in Early Childhood (2005), which emphasize the fact that children of early age are holders of all the rights provided by the Convention and that the early childhood¹ is of key importance in implementing these rights.

The same document repeats the request that children, including the youngest ones, are to be respected as persons in their own right, to be acknowledged as the active members of the family, community and society that have their own concerns, interests and opinions for whose respect and satisfaction the responsibility lies on the community.

Hence the responsibility of the state before all children of early age to ensure public policies which enables satisfaction of authentic needs for physical and emotional care and protection, as well as careful guidance and individualized support for participating in playing activities, exploration and learning through interaction with other children and responsive adults. The starting point in achieving this is the presumption that the quality of the preschool educational system in direct relationship with the mechanisms and measures which enable implementation and protection of children's rights, in which articles 2, 3, 6 and 12 of the Convention² are considered general principles of implementation of children's rights in early childhood (General Comment No.7: Implementing Rights in Early Childhood, 2005).

¹ According to the working definition of the Committee, “early childhood” applies to all children of early age since birth, during first few years of life and preschool age, up until the transition to school. However, in some countries, the transition from preschool to school setting happens soon after age four, while in other countries that transition doesn't happen until age seven. In accordance with this fact, Committee defines early childhood as a period since birth until age eight (General Comment No.7: Implementing Rights in Early Childhood, 2005).

² Articles in question are concerned with the right of the child to non discrimination (Article 2), the right to the best interest of the child in all actions which concern children (Article 3), the right to life, survival and development (Article 6), as well as the right of child to opinion and expressing emotions (Article 12).

Recommendations for Establishing Quality in Preschool Education System with Reference to the State of Matters in Serbia

In mid-2019 the Council of European Union has adopted *Recommendations on High-Quality Early Childhood Education and Care Systems* (2019), in which the “statements on quality”, presented five years earlier by the experts originating from the 25 European countries and engaged in work groups under the auspices the European Commission, are systematized and operationalized.

The previously mentioned working body has passed the *Proposal for key principles of a Quality Framework for Early Childhood Education and Care* (2014) in which five basic aspects were stated and presented in the subsequent text, together with the concise presentation of the state of matters in our educational policy and preschool education practice, for the purpose of clearer insight into levels of implementation and protection of children's rights in early childhood in Serbia.

Recommendation No. 1 states that *access of all children to programs of preschool education* is the basic right and key element of high-quality educational system. The recommendation originated from the Quality Framework and rests on the request for broadening accessibility of high-quality programs which encourage children's development and learning in early and preschool age through partnership with families, which in turn requires well coordinated network of facilities in which different programs of preschool education are realized.

According to data presented by the National Bureau of Statistics (2019/98), in late 2018 the network of 445 preschool institutions (162 state-owned and 283 private-owned) in Serbia consisted of 2842 facilities (2464 state-owned and 278 private-owned) in which 218567 children were enrolled (196808 in state-owned, and 21759 in private-owned)³, stating also that 12296 children were enrolled despite exceeding the enrolment quota (12207 state-owned and 89 private-owned), while 6740 children were left in the waiting list (6677 in state-owned and 63 in private-owned).

Latest analysis carried out by the Ministry of Education, Science and Technological Development (Progress Report on Action Plan, 2018) indicate a huge gap between the

³ An increase in enrollment numbers in private-owned institutions may be noticed at this point, due to the fact that state-sponsored subsidies in private kindergartens in certain cities have made this option more available to a wider number of preschool children.

network of preschool institutions, as well as between the levels of capacity utilization and overload, in urban and rural areas.

While ca. 40% of facilities are located in urban areas, they enrol ca. 80% of all children that take place in the system of preschool education. This brings to fore great differences in average number of children per facility in urban and rural areas in Serbia. Also, there exist significant differences between various municipalities in terms of availability of institutions and scope of the system of preschool education. The data on rates of scope of children age 3 to 5.5 in 74 municipalities⁴ show that the scope of children is larger than 60%, while in 16 municipalities it measures to less than 30% in Serbia (Ibid: 81).

According to same report, in Serbia 75% of children age 4 to 7 is included in the preschool education, which still lags behind the EU average of 95.5%. Even less children are included in the nursery programs (age 0.6 until 3) - 20% of all children of that age. Hence the importance of recognition that the enrolment of children in preschool programs in Serbia differs significantly for children in different age groups. Data show that one in five children younger than 3 is included in a nursery program, one in two children age 3 to 5.5 is included in different preschool programs, while almost every child attends mandatory preparatory school program (Progress Report on Action Plan, 2018: 80).

Concerning the children originating from vulnerable groups, the ones who need early educational and general support of the community more than anyone, the percentage of enrolment in preschool programs is nowhere near satisfactory, even though a measure has been passed according to which they are prioritized on enrolment (Progress Report on Action Plan, 2018: 81-82). According to the available data Roma children appear to be excluded from the preschool system in greatest measure, as it has been established that only 5.7% of Roma children that live in Roma settlements are enrolled in preschool institutions. Mandatory preparatory program is still not attended by ca. 20% of Roma children (Baucal et al., 2016: 27).

Recommendation No. 2 of the Council of European Union is directed towards *insurance of accessible, affordable and all-encompassing services of preschool education*. This recommendation emphasizes the need for taking into consideration the needs of parents and respecting their choices which concern the welfare of the child. It is especially

⁴ Differences between municipalities in terms of scope of preschool educational programs correspond with the degree of socio-economical development of municipalities, which means that the richer ones often have greater rate of enrollment (Baucal et al., 2016).

important to pay due attention to removal of limiting factors such as inflexible working hours, existence of (non) appropriate services for children with disabilities and those that are in any way impaired, removal of obstacles tied to poverty and geographical location.

By this recommendation General Comment No.7 of the Committee on the Rights of the Child concerned with understanding of role of the parent and respecting the child is accepted and respected, while at the same time the influence on children's achievement may be observed in timely and intensive support provided by the educated persons during house visits to families from vulnerable groups in the first few years - from prenatal period to age 3 of the child (Naučno zasnovani okvir za politiku ranog detinjstva, 2007). It is also stated that, for the children originating from families exposed to various risk factors, it is necessary to intensify support for parenting and also to improve conditions for the development and learning in family home, first and foremost by encouraging language development and symbolic communication. Also, the importance of respecting and nurturing native language in which the child spontaneously speaks up within the family is emphasized, alongside stating the importance of timely encouragement of children learning the language of formal education (Jul & Jensen, 2014; Klemenović, 2009; Siegel & Payne, 2015).

According to the report of Ministry of Education, as much as 2/3 of the parents of children age 36 to 59 months who are not enrolled in any preschool institution deem that they should not be among their peers since there are people home who can look after them (66%). Other parents state high prices of attending the preschool institution as the cause, which is more common among the parents in the Belgrade area (34%) and other urban areas (21%), while absence of the physical capacity of the institutions is the reason stated by parents from Vojvodina (21%), as well as from socio-economically less developed municipalities and poor households (17%) all over Serbia (Progress Report on Action Plan, 2018: 81).

According to the focus group study organized with parents whose children do not attend preschool education (Baucal et al., 2016: 25-26), when parents talk about the lack of proper conditions within institutions, they usually state the following reasons: (a) insufficient and selective capacities of preschool facilities (for example, parents have applied but the child has not been admitted due to lack of vacancies even though they meet the requirements for attending free preschool program, since the child in question is the third child or their socio-economical status is low); (b) no adequate age group exists in the area (for example, in rural areas there are no groups for children age 3 to 5.5, there exists only the mandatory preschool program); (c) problems with transportation and

accommodation (for example, in case the child is accepted, but the facility offered is too far away from the place of residence).

Parents who stated the reasons related to enrolment criteria, working hours and parents' needs not being harmonized state the following reasons: (a) complicated bureaucracy and inconsistent and non transparent enrolment criteria; (b) inability to harmonize the needs of parents with the arrangements offered by the preschool facility (for example, the parent cannot match the working hours with the end of the preschool program, especially in case of shorter programs - there simply isn't anyone who could take the child home), and (c) unemployment of parents (for example, unemployed parents are at the bottom of the waiting list, even though employment is not an exclusive criterion).

Finally, in some cases the reasons are related to the parents' attitude towards preschool education: (a) a child feels better when it stays home/doesn't want to go to the kindergarten (for example, in smaller towns parents spend time together and take their children with them, so it is not necessary for the child to attend kindergarten in order to socialize); (b) health situation of the child (for example, sensitive health - asthma, diabetes and other chronic illnesses); (c) difficulties tied to children with special needs (for example, the institution does not accommodate children who wear diapers such as children age 4 with developmental disabilities), and (d) dissatisfaction of parents with the quality of program and services (for example, children refuse to attend the kindergarten due to inadequate relationship on behalf of staff - too stern or neglectful; children spend too much time sleeping) (Ibid, 26).

Recommendation No. 3 encourages and promotes *professionalization of employees working in preschool education system*. What is particularly emphasized is the importance of establishing high professional standards and professional advancements, as well as an offer of attractive professional status. Initial education ensures basic knowledge and skills for the professional and capacitates them for continuous vocational improvement and professional development in order to fully realize, understand and take into consideration the welfare of children, their educational and developmental needs, relevant social movement, gender equality and understanding of children's rights in whole. Based on children's competencies for seeking care and respecting equal dignity, professionals are in a position of responsibility to acquire competencies in order to answer the needs of every child and also be aware of where and to whom to refer and in which way to improve their knowledge and skills.

According to the report of the relevant ministry, the most important activities in this field are establishing Network of Practitioners⁵ (2016) and harmonizing the Standards of Competencies for the Profession of Preschool Teacher and Their Professional Development (2018). The meaning of the effort made is in raising the awareness and empowerment of the practitioner for continuous personal and professional improvement, especially in the field of understanding the process of lifelong learning and holistic nature of human development which is conditioned culturally (Progress Report on Action Plan, 2018: 81).

Also, the importance and significance of EU-originating investments in regional initiatives is emphasized, with the goal of such being improvement of initial and lifelong education of preschool teachers. Through these activities the question of positioning the three-year vocational colleges in high education system is raised, as well as patency, whose provision is necessary in order to improve this type of studies. Even though the acquiring of competencies through practical experience is characteristic for this type of education, the importance of strengthening the research component is emphasized on the level of vocational studies as well. In accordance with these facts, two EU-funded projects were executed in Serbia. The two are Tempus project TEACH - Harmonization of Preschool Teacher Training Education in Serbia⁶ (2014-2016) and Erasmus Plus K2 program KEY – Keep Educating Yourself⁷ (2018-2021).

⁵ The Network of Practitioners for Support in Preschool Education was established for the purpose of contributing to the improvement of quality and righteousness in the system of preschool education by providing support to preschool institutions in further development of different sectors of quality and righteousness. The idea was to use the network to encourage development of quality programs and policies, empower the spreading of inclusive practice in preschool education groups on local level, as well as enable the spreading of good innovative practice through horizontal learning of the practitioners.

⁶ The consortium of Tempus project TEACH consisted of eight partner institutions, four of which are pre-school teachers' vocational colleges from Serbia (Novi Sad, Vršac, Sremska Mitrovica, Kruševac). Initial activities encompassed comparison of current curricula of the four colleges for the purpose of establishing similarities and differences between them. A framework for harmonization of curricula was defined and adopted, alongside its mandatory elements. Issues of professional title, purpose of the curriculum, entry exam, mandatory and elective courses and professional practice, as well as specifications for realization of diploma work and the diploma appendix in English. A list of generic competencies of future preschool teachers was adopted, as a result of process of modernization and harmonization of the preschool teachers' education standards in Europe.

⁷ Consortium of Erasmus Plus K2 program KEY consists of 17 institutions from 6 countries. The goal of the program is the empowerment of the preschool teachers' training within the framework of continuous professional development, their development and promotion in local municipalities, as well as testing the acquired in practice. The project is directed towards addressing deficiencies that arise between the competencies of preschool teachers with initial higher education and the real state of matters in practice, i.e. the labor market. Specific goals of the projects are the establishment of the centers of learning, building of the capacity within the continuous professional development for the purpose of tracking, evaluation and assessment of quality. The project encompasses accreditation bodies of the participating countries.

Recommendation No. 4 of the Council of European Union on high-quality systems of preschool education points to *significance of improvement of the preschool curricula* for the purpose of enabling realization of authentic interests of children, nurturing their welfare and meeting their needs and potentials of each individual child, including children with special needs, in vulnerable or unfavourable position (Official Journal of the EU, 2019: 8-9).

It is especially emphasized that the pedagogical framework within the preschool educational effort (curriculum) intended for these age groups should support holistic approach to learning and child development which enables balanced socio-emotional and cognitive development, alongside recognition of the importance of play and creativity, physical activity and contact with nature.

Importance of personal engagement is underlined, i.e. the importance of participation of every child, his or her own initiative, autonomy and creative approach to solving problems with encouragement of curiosity and propensity to group learning, exploration and cooperation. Through curriculum, it is also important to promote and cherish compassion, empathy, mutual respect and consciousness of equality and diversity, as well as enabling spontaneous early language acquisition and other forms of symbolic communication through play and/or adapted multi-lingual curricula taking into consideration the needs of children.

Creation of inclusive, democratic and participative educational environment is encouraged, one in which all children are accepted and included, which points to significance of educational continuity and integration of early, preschool and elementary school education and upbringing, alongside cultivating cooperation between nursery, preschool and school staff, as well as parents and staff, all for the sake of achieving welfare of the child during transitional periods. In order to comply with the said presumptions in preschool educational work with children and their families the staff engaged in the effort must have unique and clear guidelines/instructions with the possibility of applying digital technologies and tools.

In the end of summer 2018 a new conception of preschool education titled “Years of Ascent” has been adopted. New Preschool education curriculum basis comply with all the stated guidelines of the Council of the European Union, the Convention on the Rights of the Child, as well as the Convention on the Rights of the Child which relate to implementing the children's rights in early childhood.

The groundwork for the new basis was done by the Work group of the Institute for Education Improvement, after which the Draft was improved and finalized through public discussion and piloting of the preschool framework in educational practice⁸. The draft version of the Preschool education curriculum basis itself presents a unique conception starting point for the development of program of preschool educational work with children, from nursery to school age, which respects current documents of educational policy in Serbia, as well as examples of successful international practice of conceiving preschool education curricula (Progress Report on Action Plan, 2018).

The newly adopted program document “Years of Ascent” is based on the holistic approach to upbringing and education directed at relationships and at construction of mutual values. The goal is the support to the child's welfare which is backed in all-encompassing interaction with the surrounding through intrinsic motivated engagement, i.e. doing. The place and role of play as the basis of development and expression of all aspects of the welfare of a child is emphasized, while the learning is understood as a transformative process through which the child changes itself, its own understanding of the world, its relationships, and by that the community in which it acts and lives as well.

Recommendation No. 5 of the Council of the European Union underlines the importance of tracking and evaluation in high-quality preschool education in the center of which lies the best interest of the child. The importance of *encouragement of active participation of all participants engaged in improvement of quality through processes of tracking and evaluation is emphasized, alongside promotion of transparent and balanced procedures and tools for self-evaluation*, as well as questionnaires and guidelines for observation within the framework of quality management on the level of the system, institution, preschool group and each child individually.

In that respect, the use of tracking tools and participative procedures of evaluation through which the children are given an opportunity to be carefully listened to while speaking of their learning experiences and socialization in certain environments are encouraged on one side; on the other, tracking and evaluation on the level of the system by means of gathering information on the quality of services, staff and curriculum realized on local,

⁸ Through collaboration of Ministry of Education, Science and Technological Development, Institute for Education Improvement, Institute for Pedagogy and Andragogy of the Philosophical Faculty in Belgrade and UNICEF the draft version of the program Improving the quality of preschool education (2016-2018) was piloted in three kindergartens, with a total of eighteen preschool groups of all ages: “Zvončić” within Preschool Institution “Radosno detinjstvo” Novi Sad; “Mladost” within PI “Moje detinjstvo” Čačak, and “Zemunski biser” within PI “Dr Sima Milošević” Zemun.

regional and national level is empowered, which enables proposing initiatives which may be instrumental in addressing the needs of children, parents and local community. Continual feedback significantly simplifies the procedure of evaluating policies and analysis of use of public resources by singling out that which has proven effective in certain context. Also, by tracking and evaluating the needs of staff are determined, which in turn enables making decisions on best possible ways of improving their professional improvement (Official Journal of the EU, 2019: 9).

What indicates the need for revising and improvement of tracking and evaluation of system of preschool education on macro and micro levels is the gap appearing in evaluations of work quality between systems of external evaluation of the work performed by institutions and professional analysis carried out by means of appropriate methodology⁹. Namely, according to evaluation results performed during the last three years¹⁰, vast majority of preschool institutions (between 85% and 93%) are placed in the category of those who "work well" (grades 3 and 4)¹¹, even though professional analysis show that the practice of preschool education in Serbia of "unequal quality, insufficiently diversified and does not address the needs of children and parents" (Progress Report on Action Plan, 2018: 80).

For that reason, the Institute for Evaluation of Education Quality has, in collaboration with UNICEF, started a project titled "Improvement of the Preschool Institution Evaluation Quality", within the framework of which a proposition of revised standards and indicators for evaluating preschool institutions was created (16 standards of quality and 74 indicators)¹² which presume assessment of conditions, modes of inclusion and participation of all relevant parties.

⁹ Last such study, performed through situational analysis of the system of preschool education in Serbia, was carried out during 2015 (Baucal et al., 2016), based on which the recommendations on improving policy and practice on various levels of the system were given.

¹⁰ Evaluation of preschool institutions which were evaluated during 2016/2017 showed that the programming of work which enables optimal progress in learning and development of children (standard 2.4) is fully realized in only 10% of institutions, while the adaptation of activities so that they more closely address the needs and interests of children (standard 2.3) is not realized in one third of the kindergartens evaluated (Progress Report on AP, 2018).

¹¹ During school year 2016/2017 almost half of the preschool institutions evaluated is graded with the top grade (on a scale from 1 to 4), while no institution is graded with less than 2 (Progress Report on Action Plan, 2018).

¹² Within the current quality framework tasked with evaluating preschool institutions' effort the evaluation was carried out through 29 standards, and the level of realization of which was assessed based on 137 indicators, of which the great majority were formal and do not "grasp" the nature of the process which is important to track while working with children of early and preschool age.

Based on that, the implementation of the new program document “Years of Ascent” in preschool education practice is expected to be more adequately supported by transparent and, with the recommendation of European agency, harmonized procedures and tools for (self) evaluation of conditions and inclusion of all parties (children, teachers, parents, local community) in the learning environment within preschool education¹³.

A unique Handbook of Evaluation is in the works, intended for both external evaluators as well as employees of preschool institutions, and also for work planned on raising the capacity of external evaluators for the duties on evaluating preschool institutions by means of trainings that relate to preschool pedagogy, specificity of work in preschool institutions and the process of the evaluation of such. The training is intended to encompass external collaborators of the Ministry of Education and the Institute for Evaluation of Education Quality, as well as education councillors in school administrations tasked with preschool institutions which should provide support to employees in preschool institutions during the process of self-evaluation. The work is being hastily carried out on the *development of informational system in the function of quality tracking* within preschool education in Serbia.

Activities in the field of improving the system of accreditation of curricula and institutions of preschool education are also seen as important strategic measures expected to contribute to raising the quality of preschool education. Recently a unique Rulebook on more specific conditions for establishing, commencing work and performing of the preschool institutions (2019) has been adopted, which resolves the long-time problem of insufficiently efficient practice of regulating this area through different rulebooks, as well intends to correct the procedures of one-time verification of institutions through formal fulfilment of structural requirements in terms of quantity, but not quality.

During 2015, within the “Borderless Kindergartens 2” project, an analysis of accreditation program in preschool education has been carried out, within which recommendations and guidelines on implementing a system of accreditation of institutions and curricula of preschool education were given. The law on amendments of the law of preschool education passed in 2017 has not introduced any innovation in terms of accreditation of preschool institutions and curricula however, given that other

¹³ Internationally accepted instruments are adapted, such as Instrument for Assessing Quality Practices in Early Childhood Education Services for Children from 3 to 10 Years Old (International Step by Step Association) and Classroom Assessment Scoring System (Center for Advanced Study of Teaching and Learning).

priorities in the field of development of preschool education were put to the fore (Progress Report on Action Plan, 2018).

Through *Recommendations No. 6 and 7* the Council of the European Union gives the guidelines on financing and management of high-quality systems of preschool education through *ensuring appropriate legal framework and financial means for providing services for all children of preschool age*, intended for the member-countries. This implies the initiative to increase investments in the preschool sector with focus on availability, quality and affordability of services, including the use of the financing possibilities offered by the European structural and investment funds.

Also, it includes the creation and maintenance of adapted national, regional and local frameworks for achieving quality with promotion of intensive cooperation between sectors which organize services intended for children and their families in the domains of social and health care and education, with special emphasis the protection of children from all kinds of violence (Official Journal of the European Union, 2019: 9). The starting point is in the fact that within the system of preschool education it is entirely possible to realize the children's rights in case this system is supported by mechanisms and measures for protecting the child from discrimination and all forms of violence and neglect.

Overview of the current state of policies and practice in this area in Serbia shows that the local coordination mechanisms for protection of children from violence are still not efficient enough, so that individual institutions and parts of the system tasked with protecting the children are also not efficient enough due to difficulties in multi-sectored cooperation (National report, 2017). Still not clearly defined are the areas of responsibility on the level of the strategic document which regulates the area of local system of social care of children and preschool education, which in turn causes the insufficient efficiency of mechanisms through which various resources in the system are coordinated (Progress Report on Action Plan, 2018).

However, in recent years the inter-sectored cooperation is intensifying, so that certain steps in right direction are observed. Such is the case with the “Borderless Kindergartens 3”¹⁴ project through which, among others, work has been done on improving and

¹⁴ For example, in early 2017 the project "Borderless Kindergartens 3 - Support for Improving of the System of Social Care of Children and Preschool Education on Local Level" started, realized in three preschool institutions in Belgrade and Zrenjanin for the purpose of strengthening local governments for establishing partnerships between different systems which should improve advocacy of importance of early inclusion of children in preschool education.

harmonizing regulations on local level with national legislation and strategic framework for quality inclusive preschool education, as well as establishing local partnerships which should improve the exchange of knowledge and advocate the importance of early inclusion of children in preschool institutions, especially the children originating from vulnerable groups.

Experiences and activities of this and other projects of strengthening local governments represent the basis for finding the more acceptable and just *model of financing programs of preschool education for children age 3 to 5 in underdeveloped regions*. Namely in Serbia the price of services in preschool institutions is divided between the municipalities which pay 80% of the amount, and the parents who pay 20% of the price when it comes to financing the daily programs of education and care for children 6 months old to age 5 and 6¹⁵. It is planned to secure the subsidizing for local governments through the project “Inclusive Preschool Education in Serbia” so that the children from the most vulnerable families age 3 to 5 are prioritized in the process of free inclusion in the *different types and forms of programs*¹⁶ of preschool education.

Activities on harmonizing the legal regulations in the domain of preschool education with the educational system as a whole are also important, resulting in multiple adoption and amendments of the Law on Preschool Education (101/2017, 113/2017, 95/2018 and 10/2019). Adoption of new bylaws¹⁷ is also commenced through which the various issues in realization of the quality preschool education are addressed in accordance with the new law and new program document whose groundwork contains the general principles on realization of the children's rights.

¹⁵ Parents from the families with three and more children and/or those that live in difficult circumstances due to combination of several risk factors are entitled to receive additional measures of support through subsidizing of the price of children's stay in the preschool facilities.

¹⁶ Terms "special and specialized programs" of preschool education are substituted with pedagogically more appropriate terms "different forms and programs" in 2017, by which it is emphasized that the preschool institution, apart from daily programs of preschool educational work, develops other equally important forms and programs for realizing goals and principles of preschool education which are created in the context of needs of children and families, and in accordance with specificities of cultural and natural resources of the local community. The norm on direct preschool educational work with children on realization of different programs and forms in the duration of 20 hours per week has also been established by the law.

¹⁷ The following rulebooks are adopted: The Rulebook on Conditions and Manner of Provision of Care and for Preventive Health Protection of Children in Preschool Institution, 2017; The Rulebook on Conditions and Manner of Implementing Alimentation in Preschool Institutions, 2018; Rulebook on the Foundations of Preschool Education Program, 2018.

Conclusion

The responsibility of each signatory country of the Convention on the Rights of the Child is to ensure public policies which enable implementation of rights for all children starting from early childhood. The realization of this requirement is possible only if the measures and mechanisms which enable realization and protection of the children's rights are incorporated as the quality framework into the areas of social, health and legal care and education. Hence the commitment to analyze the children's rights in preschool education in Serbia on the basis of guidelines for development of basic aspects of the system (accessibility, staff, programs, tracking and evaluation, management and financing), which were adopted in mid-2019 by the Council of the European Union in the form of Recommendations on High-Quality Early Childhood Education and Care Systems (2019).

In Serbia the situation is such that not all children of early and preschool age have (in a satisfactory way) enabled access to the quality preschool programs, given the fact that the network of preschool institutions are characterized by insufficient space capacities and unequal geographical distribution. The scope of children from vulnerable groups is not on the satisfactory level given that the programs are not yet in sufficiently addressing the real needs of children and their parents. Some reason for careful optimism may be found in information that in the future three-year period significant infrastructural investments are planned through the project “Inclusive preschool education in Serbia”¹⁸ through which it is intended to secure ca. 17,000 vacancies in various preschool programs for children in new, renovated or repurposed facilities in 30 cities and municipalities, with special attention paid towards using the grants directed towards the poorest municipalities for securing access to children and parents from the most vulnerable social groups.

What encourages is the fact that the system of preschool education in Serbia *employees appropriate experts of different profiles that have satisfactory levels of education*, while at the same time significant regional differences in terms of expert associates and associates active in preschool institutions. Currently underway is the reorganization of the network of vocational colleges, harmonization of programs of initial education of preschool teachers and the system of professional development. The basic intention is to *support the concept of horizontal and lifelong learning* in which a significant part is

¹⁸ The project is financed by the loan taken from the International bank for reconstruction and development in total amount of EUR 47 million. The loan was signed in May 2017 and ratified by the National Assembly in November 2017. General goal of the Project is improvement of accessibility, quality and righteousness of preschool education, especially directed at children from vulnerable social groups.

played by the European projects of regional cooperation, as well as established network of practitioners which enables exchange of experiences between the staff with their own *sensitizing to the needs of children and their families* from different social groups.

Newly adopted basis of the program “Years of Ascent” represent a unique pedagogical framework for working with all children of early and preschool age due to them being founded on the holistic approach to learning and development, as well as respecting the child as autonomous personality and the bearer of its own rights, who is entitled to support and encouragement by the other more experienced surrounding persons - other children of various age, as well as adults who are knowledgeable in different areas of art, science, technique and human labour.

Program basis respect the guidelines given by the Council of the European Union, the Convention on the Rights of the Child and the General Comment No.7 of UN Committee about child’s rights in early childhood. Recently the process of introducing practitioners into the program framework and its realization in practice through the process of implementation of the new basis has been intensifying, during the course of which the training of 12,000 preschool teachers, nurses, expert associates and managers employed in preschool institutions. Support for practitioners in improving the quality of work in preschool education is ensured also through the Network of Mentors / Trainers established for support during the implementation of the program "Years of Ascent".

Besides revising standards and indicators for evaluating the work of preschool institutions, which presumes evaluation of conditions, modes of inclusion and participation of all relevant parties, currently in the works is also a unique Handbook on Evaluation for external evaluators and employees in preschool institutions. Given the fact that the new programmatic concept enables tracking and evaluation on the level of every child and preschool group through the use of digital technologies and tools, tracking and evaluation of quality of preschool education on the level of institutions and the system as a whole can also be significantly facilitated, especially through implementation of networking.

In the last two years *activities on harmonizing legal regulations and adopting new bylaws* in which are further ordered various issues on realization of quality of preschool education in accordance with new program basis and general principles of realization of the children's rights are intensified. Still, special attention must be paid to *legislation which regulates the domain of inter-sectored cooperation*. Otherwise, *insufficient coordination of important areas of acting on the side of professionals* (such as protection of children

from violence) is going to persevere for a long time in the future. As a reminder, the staff engaged in working with children within the system of preschool education is seen as a highly ethical profession which are in legal, professional and moral obligation to participate in prevention and protection of children from violence.

Bearing in mind that the strength of a law is measured by its application and the strength of the of a society by its institutions, we believe that the welfare of children is our common interest and a place of general agreement as far as planned and socially justified action is concerned.

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Veljko Delibašić*

CRIMINAL OFFENCE OF SEXUAL INTERCOURSE WITH A CHILD

After the introductory part, which points out the necessity for a comprehensive review of the Convention on the Rights of the Child and Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, as well as the basic ratio legis of prescribing the criminal offence of sexual intercourse with a child under Article 180 of the Criminal Code, the paper elaborates this criminal offence in detail. First, the basic form of criminal offence will be analysed, indicating that this offence in the criminal law sense, protects children, i.e. persons under 14 years of age. Then an act of criminal offence is explained, emphasising that the Istanbul Convention must be kept in mind. The attention is also paid to the forms of guilt of the perpetrator of this criminal offence, as well as to the mistake of fact and mistake of law. This is followed by explanations of aggravated and most aggravated forms of criminal offence, with special emphasis on the analysis of the grounds for precluding this criminal offence, when there is no significant difference in mental and physical development between the offender and the passive subject. The prescribed criminal sanction for the criminal offence of sexual intercourse with a child and limitations on criminal prosecution and enforcement of penalty for this criminal offence have been explained and critically analysed, and at the end of the paper some concluding considerations are given, along with concrete suggestions regarding the possible and necessary amendments to the Criminal Code.

Keywords: *A child; sexual intercourse; paedophilia; sexual freedom; sexual relations.*

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1. Introduction

The Convention on the Rights of the Child was adopted and made available for signature and ratification or accession in the UN General Assembly resolution no. 44/25 from 20 November 1989 and entered into force on 2 September 1990. In the framework of a comprehensive protection of children, this Convention stipulates the principal protection of children against sexual abuse, whereas the additional and more precise protection of children in that sphere is stipulated in the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse from 27 October 2007. These conventions should be considered in their entirety, but one has to bear in mind the fact that the term *child*, according to these conventions, is any person below the age of 18, whereas the criminal law in Serbia considers under the term child, any person below the age of 14 (Article 112 Paragraph 8 of the Criminal Code). In addition to stipulating a greater number of criminal offences in this sphere and undertaking other measures, the meeting of obligations assumed by signing these conventions is also contributed by the criminal offence of sexual intercourse with a child, under Article 180 of the Criminal Code.

As a matter of fact, the crucial thing about criminal offences against sexual freedom has been how to regulate them in the law, or where to set the boundary between the permitted and the criminal. This question is still relevant, although not as much as it used to be, several decades ago, following the occurrence of a wave of legislative reforms in this sphere in a number of countries. Still, certain criminal and political issues have remained active, and in terms of legal and dogmatic issues, there is almost not a single criminal offence in this category in relation to which these issues are not raised in practice. In this respect, one might say that the protective object could be reduced to a single fundamental good or right, which is the right to sexual self-determination. As a result, in the sexual sphere, only those sexual activities in which there is no conscious and willing consent of the person with whom these activities are practised, should be incriminated. Basically, this refers only the following two situations: either the situation of the sexual coercion (or when the state of helplessness is taken advantage of) or the situation when this activity is practised with a person to whom, by virtue of their physical and mental immaturity, the right to sexual self-determination cannot be recognised (Stojanović, Delić, 2015: 66-67).

Persons below the age of fourteen enjoy special criminal legal protection in terms of sexual relations. The main purpose if these incriminations is to prevent sexual relations or other forms of satisfying sex drive with persons below the age of fourteen, because they are neither physically nor mentally mature, so it could result in harmful effects on

their health and development (Lazarević, 2006: 516). Therefore, the *ratio legis* of the criminal offence of sexual intercourse with a child stems from a general opinion that the person who has not reached certain age is not objectively capable, of their own free will, to consent to sexual relations, or from the legislator's view that the person who is in the criminal legal terms, considered to be a child, is not capable whatsoever to consent, in a relevant manner, to a sexual intercourse or any act equal to that. This is about the abuse of inadequate age of the person with whom consensual sexual relations are engaged in and such abuse is a fundamental *ratio legis* of the criminal offence of sexual intercourse with a child (Škulić, 2019: 361).

2. Basic form

The act of committing the basic form of the criminal offence of sexual intercourse with a child in Article 180 of the Criminal Code is stipulated alternatively as sexual intercourse or an act equal to that. The sexual intercourse comprises a vaginal intercourse, i.e. insertion of the penis into the vagina, whereas an act equal to sexual intercourse also includes anal and oral intercourse, i.e. insertion of the penis into the anus or mouth of another person (male or female). It is questionable whether the oral intercourse between two female persons, i.e. insertion of a female's tongue into the vagina or anus of another female person, is considered an act equal to sexual intercourse. Taking into account the provisions of the Istanbul Convention (Article 36), requiring that in criminal offences against sexual freedom the act of committing be specified broadly, i.e. allow for incrimination of the vaginal, anal or oral penetration of sexual character on the body of another person without their consent, by using any part of the body or any object, the opinion should be accepted that even oral intercourse between female persons be considered and act equal to sexual intercourse.

It is important that sexual intercourse or an act equal to that be conducted with the “consent” of the passive subject. Although there is no consent in the actual sense of the word, there should not be any force or qualified threat, because in that case, it would present the most aggravated form of criminal offence of rape, under Article 178 Paragraph 4 of the Criminal Code. Also, if the act is committed against a helpless person below the age of fourteen, that will constitute the most aggravated form of criminal offence of sexual intercourse with a helpless person, under Article 179 Paragraph 3 of the Criminal Code (Stojanović, Perić, 2009: 92). Also not allowed are other forms of affecting the will of the passive subject, such as the ones typical for the criminal offence of sexual intercourse through abuse of position, as that case, if the passive subject were a child, would present

an aggravated form of this criminal offence under Article 181 Paragraph 3 of the Criminal Code (Škulić, 2019: 366).

The offender may be anyone, bearing in mind that the basic form cannot be committed by a person without any significant difference in mental and physical development compared to that of the passive subject.

The passive subject is any person below the age of fourteen, which, in the criminal and legal sense, means it is a child, whereas the age of the passive subject at the time of committing that criminal offence, is the basic characteristic of this criminal offence, which is evident in its mere legal name (Škulić, 2019: 360). In case of sexual intercourse, that refers to a child of the opposite sex, male or female. In an act equal to that of sexual intercourse, the passive subject may be a male or female, as the offender may be a male or female as well. In this case it is possible for the offender and passive subject to be persons of the same or different gender (for instance, a female person has oral intercourse with a boy or a girl below the age of fourteen; a male person has oral or anal intercourse with a boy or a girl below the age of fourteen).

The act is completed by committing sexual intercourse or an act equal to that against a person below the age of fourteen. A child's consent to sexual intercourse or an act equal to that, even when initiated by the child, does not exclude the existence of this criminal offence. Given the threat of punishment, it is also possible to punish the attempted offence. (Lazarević, 2006: 517). An attempt occurs if, for any reason, there is no penetration (for instance, there is no insertion of the penis into the vagina or anus due to erection problems), although, as a rule, in such situations the criminal offence of prohibited sexual act will be completed, under Article 180 Paragraph 2 of the Criminal Code.

A criminal offence may only be committed with premeditation, bearing in mind that, when it comes to age of the passive subject, it is not required that the offender be aware of their exact age, but only that it is a very young person. Particularly problematic is whether there exists a mistake of fact in terms of the passive subject's age. Such possibility is quite realistic, especially in cases when the passive subject was not significantly below the age of fourteen, when in their physical appearance they resembled a person who is fourteen years of age, and/or in case of the passive subject's physical and intellectual development which is above the average. As the avoidable mistake of fact also precludes the culpability, for the existence of a criminal offence it is not sufficient only that the offender was somehow able to find out the passive subject's age. The

principal question is raised here as to whether one is obliged, prior to commencing sexual relations with another person, to establish their age (Stojanović, 2017: 578).

In this regard, we should add that in both theory and practice, there is also an opinion according to which the existence of mistake in terms of the passive subject's age may only be accepted if the offender is a minor or younger adult and when it is justifiable to expect that, according to their experience and development level, they could have acted in deception. Furthermore, according to this opinion, when the offender is above the age of 21, there are no reasons not to expect from the offender to check the age of the minor with whom they are commencing sexual relations. In addition, we could talk about the existence of the mistake of fact only in certain age-restricted cases, measured in months, while more serious deviations cannot be covered by the argumentation based on the mistake of fact (Pavlović, 2013: 266).

A similar attitude is taken in regard to the mistake of law, bearing in mind, first of all, the issue concerning the adjustment of criminal norms to specific cultural and ethical minorities, such as, for instance, the Roma community, which favours early sexual relations, marriage and common law marriage. According to this opinion, the existence of the mistake of fact regarding the incriminatory character of sexual relations with children based on the customs of a particular group or national minority, could by no means be considered a valid argument, nor even an extenuating circumstance, as it is not possible to accept the logic presenting the customs involving violence and molestation as cultural traits of a nation. Furthermore, such logic is also not accepted by international conventions which, in their recommendations, strive to eliminate gender-violent and gender-discriminatory practices (Pavlović, 2013: 266).

The opposite position is taken in the judgement of the Belgrade Appellate Court KŽ1 number 392/2019 from 10 June 2019, in which the conviction was modified to acquittal, by allowing D. Č., who was 24 at the time of committing the offence, to be acquitted for committing sexual intercourse with a girl aged 13 at the time, which resulted in her pregnancy. The court found that in the given case, the culpability of D.Č. was precluded, because he was unaware that his act was prohibited, i.e. he was faced with an unavoidable mistake of law which precludes culpability, as both of them belong to the Roma community, in which early marriage and sexual relations are acceptable below the age of 14.

Several sexual intercourses committed in a short period of time with the same passive subject do not constitute a joinder of these offences, but instead, a single, continued

criminal offence. Whether the construction of a continued criminal offence should be applied or not, remains to be the question of the criminal and political justification. The possibility to apply a continued criminal offence is only a principal view, applicable to other sexual offences as well. However, the expedient use of this legal construction is particularly delicate with this offence because of the passive subject's capacity (Lazarević, 2006: 518).

When sexual intercourse or an act equal to that, is committed with a person below the age of fourteen by their relative by blood, brother or sister, there is an ideal joinder of this criminal offence with the offence of incest under Article 197 of the Criminal Code (Lazarević, 2006: 518). If sexual intercourse or an act equal to that occurs between children (both persons below the age of 14), that will not constitute a criminal offence of sexual intercourse with a child (nor any other criminal offence), because children are criminally irresponsible.

3. Aggravated form

An aggravated offence (Paragraph 2) exists if the basic form of offence resulted in a grievous bodily harm of the child against whom the act was committed, or if the act is committed by several persons or the act resulted in pregnancy. Grievous bodily harm refers to a serious physical injury or serious impairment of health, as defined in the criminal offence of grievous bodily harm under Article 121 of the Criminal Code. For the existence of this aggravated offence it is not relevant whether it comprises a common or particularly grievous bodily harm, but this fact would certainly be taken into consideration when determining the sentence.

The term 'several persons' implies two or more persons. In order for this qualifying circumstance, or aggravated form of criminal offence of sexual intercourse with a child to exist, it is necessary not only to have another person as an instigator or abettor, but for another person, or several persons to act as offenders. This means that it is necessary that they have committed sexual intercourse or an act equal to that. It is questionable, however, whether this is an aggravated or basic form of criminal offence if one person has committed sexual intercourse or an act equal to that, while the act of other person was just attempted (for instance, due to erection problems). In this case as well, we should accept the view that this is an aggravated form of criminal offence of sexual intercourse with a child, and not the completed basic form when it comes to the person who committed the sexual intercourse or an act equal to that or an attempt of the basic form

when it comes to the person who attempted to commit the sexual intercourse or an act equal to that.

It is totally indisputable whether there will exist a qualified form of criminal offence of sexual intercourse with a child specified in Paragraph 2, if the criminal offence resulted in pregnancy of the passive subject. However, given the fact that a female person may also commit the criminal offence of sexual intercourse with a male (boy), a question could be raised whether there exists a qualified form of criminal offence if it resulted in pregnancy of the person who committed this criminal offence. When responding to this question, it should be taken into account that for the qualified form of offence the legislator demands the act to result in pregnancy, without specifying whose pregnancy, the offender's or the passive subject's. Furthermore, the fact that the child is conceived, or that pregnancy occurred entails the exercise of some family and/or succession rights and obligations the passive subject may not consent to. For these reasons it should be taken into account that a qualified form of criminal offence of sexual intercourse with a child will exist also if it resulted in pregnancy of the offender (Delibašić, 2009: 80).

When it comes to a grave consequence comprising a grievous bodily harm, it has to include negligence. If there is premeditation related to a grave consequence comprising grievous bodily harm, that would be a joinder of the qualified form of criminal offence of grievous bodily harm under Article 121, Item 6 of the Criminal Code and basic form of the criminal offence of sexual intercourse with a child under Article 180, Paragraph 1 of the Criminal Code. If the grave consequence comprises the occurrence of pregnancy, there may exist either premeditation (direct or potential) or negligence. In case of several persons involved, this fact must be premeditated by the offender.

Interestingly, the legislator has not stipulated an aggravated form in case the act is committed by a person who is in a close or special relationship with the passive subject, such as parent, stepfather, stepmother, teacher, preschool teacher or guardian. However, in the criminal offence of sexual intercourse through abuse of position under Article 181 of the Criminal Code, a qualified form is stipulated (Paragraph 3) which exists if some of these persons or other person should commit a sexual intercourse with a child or an act equal to that through abuse of their power or authority. In this way the legislator has made an omission, by stipulating the same punishment, i.e. imprisonment of five to twelve years, for the basic form of the criminal offence of sexual intercourse with a child under Article 180 Paragraph 1 of the Criminal Code and for an aggravated form of criminal offence of sexual intercourse through abuse of power under Article 181 Paragraph 3 of the Criminal Code. This kind of solution is not acceptable, because the

basic form of sexual intercourse with a child implies a “voluntary” relation, i.e. there is a “consent” of the child, while an aggravated form of criminal offence of sexual intercourse through abuse of power does not entail a “voluntary” sexual intercourse. Instead, it results from the fact that the offender is abusing their power or authority. For this reason, a distinction should be made by stipulating different punishments for these two situations.

4. Most serious (most aggravated) form

The most serious form of the criminal offence of sexual intercourse with a child (Paragraph 3) exists if the death of the child occurred due to a basic or serious form. For this form to exist, it is necessary that the negligence of the offender includes a grave consequence. If the grave consequence were premeditated by the offender, it would be a joinder of the criminal offence of aggravated murder under Article 114, Item 9 of the Criminal Code and the basic form of the criminal offence of sexual intercourse with a child under Article 180, Paragraph 1 of the Criminal Code.

Specific grounds for preclusion of criminal offence

The offender will not be punished for the basic form of the criminal offence, which means that there is no criminal offence in this case (Article 112, Paragraph 29 of the CC), unless there is a significant difference between their mental and physical maturity (Paragraph 4). In this way, the legislator stipulated the grounds for precluding the existence of a criminal offence when it comes to certain offenders. Although one might argue that this is a specific basis for the preclusion of unlawfulness, it is nevertheless a circumstance that relates to the offender's personality. In fact, a person with certain characteristics cannot commit this criminal offence, therefore it is a personal basis for the preclusion of punishability. This issue is not of practical importance, since there is no criminal offence in either case. As a matter of fact, this solution introduced by the 2005 Criminal Code has long been proposed in the literature and it also exists in foreign legislation. This solution is criminally and politically indisputable, but there are some differences as to the manner and conditions under which it is stipulated in foreign legislation. Although the Criminal Code does not explicitly stipulate the condition that in this case the offender must be a minor (a person who has reached the age of fourteen and has not attained the age of eighteen), if the offender is of legal age, the condition that there is no significant difference between mental and physical maturity of the offender and the passive subject would not be fulfilled. With regard to the maximum age difference that could exist and in order for the condition to be fulfilled, somewhat different solutions are found in foreign legislation, or in case law conclusions (unless explicitly prescribed by law, which is most

common), or in opinions expressed in theory. According to these views, the difference ranges between two and four years, with the requirement that the passive subject must not be less than twelve years old. These would also be acceptable indicative criteria for the application of this ground for preclusion of unlawfulness in our criminal legislation. Starting from solutions and experience in criminal law of other countries, as well as attitudes in theory, one could take a stand that in cases where this difference is no more than two years, one should start from the assumption that the said condition regarding the mental and physical maturity is fulfilled. If this difference were between two and four years, it would be necessary in this particular case to determine and compare the degree of mental and physical maturity of the offender and the passive subject, on which the existence of the criminal offence would depend (Stojanović, Perić, 2009: 93-94). For example, this criminal offence will not exist in a situation where there is only a slight difference between the offender and the child in “emotional and social maturity and stability” (ASK, Kžl 555/2015), i.e. Their mental and physical maturity. However, there will be a significant difference in mental and physical maturity, and thus this criminal offence will exist, if the offender (20 years old) were at the level of an older minor in their emotional maturity and their passive subject (12 years old) at the level of the child (VSN, K 143 / 2011-2) (Stojanovic, Skulic, Delibasic, 2018: 230).

If both actors of consensual sexual intercourse are children in terms of criminal law, then, of course, neither of the actors in such a sexual intercourse or an act of equal value is guilty, since their age also makes them incapable of being charged with an act which is unlawful and legally prescribed as a criminal offence. Therefore, in such a situation, there is no criminal offence at all because of the absence of guilt as a subjective element of the general concept of criminal offence (Škulić, 2019: 363).

5. Prescribed criminal sanction

The basic form of the criminal offence of sexual intercourse with a child is punishable by imprisonment of five to twelve years, the aggravated form is punishable by imprisonment of five to fifteen years, while the most aggravated form is punishable by imprisonment of at least ten years. The amendments to the Criminal Code, which enter into force on 1 December 2019, prescribe a sentence of imprisonment of at least ten years or life imprisonment for the most aggravated form of criminal offence. Due to the fact that the most aggravated form of this criminal offence results in the death of the child, due to the negligence of the offender, in theory this solution is criticised with the explanation that such legal solution contains elements of objective liability that is not immanent to modern criminal law (see: Škulić, 2019: 377).

Article 57 (Paragraph 2) of the Criminal Code stipulates the prohibition on mitigation of punishment, inter alia, for the criminal offence of sexual intercourse with a child. In theory, rightly criticised is the introduction of exclusion of a possibility to mitigate punishment in our criminal legislation, not only for the criminal offence of sexual intercourse with a child, but also for other offences where this prohibition is prescribed (see: Stojanović Z., “Krivično pravo, ljudska prava i globalna kriza”, *Zaštita ljudskih prava i sloboda u vreme ekonomske krize*, Tara, 2011, pg. 22; Delić N., “Zabrana (isključenje) ublažavanja kazne u određenim slučajevima”, *Crimen*, Number 2, Belgrade, 2010, pg. 228-245).

In these criticisms, the reason why the possibility to mitigate the punishment should be allowed, is that the exclusion of such a possibility not only repudiates the mitigation of the punishment, but also a number of other general criminal law institutes, which is clearly contrary to their legal nature, because the essence of general institutes is that they are always applied when the legal requirements are fulfilled, regardless of the criminal offence in question. Thus, the exclusion of the possibility to mitigate punishment completely marginalises the importance of exceeding the necessary defence and necessity (these two institutes are inapplicable in the criminal offence of sexual intercourse with a child), disregards the criminal law importance of compulsive force and threat, substantially diminished mental competence and the avoidable mistake of law. It also erases the distinction between attempted and completed criminal offence and between certain forms of complicity, and neglects the importance of personal capacity of instigators and abettors. All this speaks in favour of the necessity to allow the possibility of applying a punishment mitigation institute for this criminal offence. In fact, the possibility to mitigate punishment should exist in relation to all criminal offences, as it is a general institute, which further means that the provision of Article 57, Paragraph 2 of the Criminal Code should be erased (Delić, 2010: 238).

In this connection, reference should be made to the cited judgement of the Belgrade Appellate Court Kž1, no. 392/2019 of 10 June 2019, by which D. Č. who was 24 years old was acquitted, because he was found in an unavoidable mistake of law (!?) when he had sexual intercourse with 13-year-old child, which resulted in her pregnancy. Taking into account that it is difficult to find valid arguments to defend the position of the Belgrade Appellate Court that this is the case of an unavoidable mistake of law, first of all, given the great age difference, one may assume that the court was guided by pragmatic reasons, or that the social aspect in the decision making process was above the law. As a matter of fact, D. Č. entered into common-law relationship with the victim, in which a

child was born, ¹ so that D. Č. takes care of his common-law wife and newborn baby. Therefore a logical question is, if D. Č. was sentenced to five years' imprisonment, which is the minimum sentence for this criminal offence, without the possibility of mitigation, who would take care and who would support the victim and their newly born child. It is logical to assume that in this situation, between social justice and strict adherence to the law, the court opted for the first option, which is basically, unacceptable. Namely, if this is a case of mistake of law, one can only accept that it is an avoidable mistake of law, referred to in Article 29, Paragraph 3 of the Criminal Code, which stipulates a possibility to mitigate the punishment. However, since the sexual intercourse with a child does not include mitigation of the punishment, the court was in a rather unenviable situation when deciding whether to send the father of a newly born child to prison for five years, and thereby break up the newly formed family and leave the mother and child to take care of themselves for a long period of time or to acquit D. Č. of charges by invoking a mistake of law, without sufficient valid arguments.

On the other hand, in accordance with Pavlović's acceptable, but already cited position, such a court decision acknowledges the existence of a misconception about the incriminatory character of sexual acts with children, based on the customs of a particular group or national minority, which can by no means be considered a valid argument, or even a mitigating circumstance, because one cannot accept the logic that presents violent and abusive customs as cultural features of a nation, all the more so because such logic is not accepted by the international conventions that seek to eradicate gender-violent and discriminatory customs. All these problems would be smaller and the dilemma would be easier to solve if an adequate criminal sanction were prescribed for the criminal offence of sexual intercourse with a child, which could, for instance, also be a suspended sentence for the basic form, in the mitigation process. Then, in the specific case, by imposing a suspended sentence, the law would be obeyed, it would be made clear that our society does not accept gender-violent and discriminatory customs, and it would still allow that person to continue to take care for the infant and his or her mother.

Finally, when it comes to mitigation of punishment, it should be noted that mitigation of punishment for the criminal offence of sexual intercourse with a child, in addition to the

¹ In that way, D. Č. has committed the criminal offence of a common-law marriage with a minor (the girl has turned 14 in the meantime), under Article 190 of the Criminal Code, which in its basic form prescribes a sentence of imprisonment of up to three years for an adult living in a common-law marriage with a minor (a person who turned fourteen, and has not attained the age of eighteen (Article 112, Paragraph 9 of the Criminal Code), and in view of the facts thus established, the Public Prosecutor should instigate the proceedings for this criminal offence.

Criminal Code (Article 57, Paragraph 2), is also not permitted by the Law on the Special Measures to Prevent Criminal Offences against Sexual Freedoms against the Minors, the so-called Marija's Law (Article 5, Paragraph 1). The same article (Paragraph 2) stipulates that a person convicted of, inter alia the criminal offence of sexual intercourse with a child, cannot be released on parole. In the context of the problems identified above, the adequacy of the prescribed criminal sanction for the criminal offence of sexual intercourse with a child should be re-examined, as well as the possibility of mitigating the punishment, or realising on parole.

6. The statute of limitations on the criminal prosecution and execution of the criminal sanction for the criminal offence of sexual intercourse with a child

Although the arguments against the institute of the statute of limitations, which is nowadays a generally accepted institute in modern criminal law, do not have any major significance, e.g. to weaken general prevention, to oppose the idea of justice, or to achieve retribution, if it is also perceived as the purpose of punishment, etc. (Stojanović, 2015: 368), the legislator nevertheless decided to exclude this institute when it comes to the criminal offence of sexual intercourse with a child, among other things. This was done by the Law on Special Measures to Prevent the Criminal Offences against Sexual Freedom against the Minors, which stipulates that the criminal prosecution and execution of a sentence shall not become time-barred for the offences referred to in Article 3, which were committed against the minors (Article 5, Paragraph 3), which includes the following criminal offences: 1) rape (Article 178, Paragraph 3 and 4); 2) sexual intercourse with a helpless person (Article 179 Para. 2 and 3); 3) sexual intercourse with a child (Article 180); 4) sexual intercourse through abuse of position (Article 181); 5) prohibited sexual acts (Article 182); 6) procuring and facilitating sexual intercourse (Article 183); 7) mediation in prostitution (Article 184, paragraph 2); 8) showing, obtaining and possessing pornographic material and exploiting a minor for pornography (Article 185); 9) inducing a minor to attend sexual acts (Article 185a); 10) abuse of a computer network or communication with other technical means for the commission of criminal offences against sexual freedoms of a minor (Article 185b), but this Law does not apply to juvenile offenders.

Such a solution is not good because the reasons for the existence of the institute of statute of limitations are, first of all, of criminal and political nature and its justification lies in the failure of the state to criminally prosecute or execute the imposed sanction through its authorities. After a certain period of time, the state, in a way, loses its right to impose punishments, because it becomes seriously questionable from the point of view of

legitimacy, after a longer period of time. The very need for punishment and achieving the purpose of punishment, including the exercise of a protective function as a basic function of criminal law, weakens over time. When it comes to criminal prosecution, there is also an additional practical reason, which is that it becomes more difficult, over time, to prove the criminal offence committed (Stojanović, 2015: 368).

It can be assumed that the legislator has opted for the solution that involves the preclusion of the institute of statute of limitations, given the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which provides (Article 33) that each party will take all necessary legislative or other measures to ensure that the statute of limitations for instigating the proceedings relating, inter alia, to the criminal offence of sexual intercourse with a child, does not occur in the period of time which is long enough to allow the effective commencement of the proceedings. However, this provision does not justify the preclusion of the institute of statute of limitations, as the statute of limitations itself, prescribed under Articles 103 to 107 of the Criminal Code, leaves ample time to detect and prosecute these criminal offences, thus completely fulfilling our international legal obligations, even without the solution from the so-called Marija's law, which completely precludes the institute of statute of limitations for these criminal offences. Therefore, in a future reform, such a solution should be modified and a possibility of applying the institute of statute of limitations for these criminal offences, should be restored (Delibašić, 2017: 567-568).

7. Conclusion

The Convention on the Rights of the Child and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse proclaim, inter alia, the protection of children against sexual abuse. Undoubtedly, in the sexual sphere, only those sexual acts in which there is no conscious and willing consent of the person against whom they are undertaken, should be incriminated, which are basically only two situations: either the situation where the sexual act is committed by coercion, or when the state of helplessness is taken advantage of, or the situation when the act is committed against a person whose right to sexual orientation cannot be recognised due to their mental and physical immaturity. Within the framework of comprehensive child protection, Serbia prescribes several criminal offences, including the criminal offence of sexual intercourse with a child, under Article 180 of the Criminal Code.

Ratio legis of this criminal offence stems from the general view that a person who has not reached a certain age is not objectively capable of consenting to sexual intercourse by

their own free will, that is, from the legislator's point of view, that a person who is considered a child, in terms of criminal law, is not at all able to consent, in a relevant way, to a sexual intercourse or an act equal to it. The act of committing the basic form of the criminal offence of sexual intercourse with a child is prescribed alternatively as a sexual intercourse or an equal act, whereby it is essential that the sexual intercourse or the equal act be performed with the “consent” of the passive subject, although there is no consent in the true sense of the word.

When it comes to a qualified form of this criminal offence which, among other things, exists if the offence resulted in pregnancy, it is completely undisputed that this condition would be fulfilled if the pregnancy occurred with the passive subject. However, given the fact that a female person may also commit the criminal offence of sexual intercourse with a male (boy), a question could be raised whether there exists a qualified form of criminal offence if it resulted in pregnancy of the person who committed this criminal offence. For a number of reasons, it should be considered that there will be a qualified form of the criminal offence of sexual intercourse with a child, even in when the act resulted in the pregnancy of the offender.

The legislator did not stipulate an aggravated form in the event that the act is committed by a person who is in close or special relationship with the passive subject, such as a parent, stepfather, stepmother, teacher, educator or guardian. On the other hand, in case of the criminal offence of sexual intercourse through abuse of position, a qualified form is stipulated that exists if one of these persons or another person who commits the sexual intercourse or an act of equal value with the child, does so through abuse of their position or authority. This is an omission of the legislator because they stipulated the same sentence, although the basic form of sexual intercourse with a child is a “voluntary” relationship, i.e. there is a “consent” of the child, while an aggravated form of the criminal offence of sexual intercourse through abuse of position does not occur “voluntarily”, but as a result of the fact that the offender abuses their position or authority. For this reason, a distinction should be made by stipulating different punishments for these two situations.

The Criminal Code also prescribes a prohibition on the mitigation of punishment, *inter alia*, for the criminal offence of sexual intercourse with a child. Given that the possibility of mitigating the punishment should exist in relation to all offences, as it is a general institute, this prohibition should be repealed.

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**ADEQUATE TRAINING OF JUVENILES DEPRIVED OF
LIBERTY: A STEP TOWARD SUCCESSFUL
REINTEGRATION¹**

The issue of juvenile delinquency or juvenile criminality is an issue that traditionally occupies a special and very important place in criminal science. One of the indicators of the (un)success of the program through which minors pass during the educational measure of sending to the correctional institution, and thus the success in achieving the basic purpose of criminal law, is the number of persons who were again in the system (recidivists). Following the review of the basic theoretical conceptions, the authors presented international standards regarding child-friendly justice, as well as the normative framework in the Republic of Serbia that is relevant to the subject of this paper. In this sense, in terms of compliance with standards in practice, the authors presented the results of the research carried out by the Institute of Criminological and Sociological Research in cooperation with the OSCE Mission to Serbia in 2017. This is a part of the research related to the recidivism of persons released during the 2012 and 2013 from the Krusevac Correctional Institution. In the last part of the paper, the authors conclude that, in addition to legal standards, for the successful reintegration of minors, it is necessary to establish a good system of postpenal support.

Keywords: *Juveniles, International Standards, Recidivism, Research Study, Krusevac Correctional Institution, Educational (Institutional) Measures.*

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Introduction: Theoretical Review of the Problem of “Juvenile Delinquency” or “Juvenile Criminality”

One of the questions which traditionally attract attention of the scientific and professional public is the issue of juvenile delinquency and criminality of young people. These two terms are often considered the same, although they are not really synonyms. As for juvenile delinquency, most theoreticians agree that this is primarily about unadjusted behavior of young people (Ljubičić, 2011: 21), which implies not only crimes, but also offences, economic offences and disciplinary delicts. At theoretical plan, this implies a difference between these two terms, where criminality is a narrower term (Ignjatović, 2015: 20). However, this view is not absolute, since often the terms “juvenile delinquency” and “juvenile criminality” are identifiable, while the term “antisocial behavior” in another group of theorists has a different and wider meaning (Newburn, 2007: 717-718), including the term “juvenile delinquency” exclusively for the commission of criminal offenses by minors, and no other behavior that could be classified as “anti-social behavior” (Škulić, 2011: 26-27).

Literature about juvenile delinquency points to a series of variables which bring about delinquent behavior, where it is rightly pointed to the fact that examination of risk factors can be of significance for successful reaction in the aim of prevention of juvenile criminality (Church, Wharton & Taylor, 2009: 3). Deviant behavior in youth, i.e., crimes committed in the period of adolescence, is one of the most frequent risk factors the science points to, whose presence enlarges chances for committing crimes later in life, i.e., for recidivism (Haynie, 2001: 1050).

It seems that the above statement is not absolutely undoubted. In fact, if we wish to view a certain problem, i.e., to act preventively on a person, it is necessary to establish the causes which bring about undesirable social behaviors. In this sense, theory of social control, whose foundations were laid by Hirschi in 1969, which is based on over-bridging of the link between individuals and conventional social institutions in the aim of explaining delinquent behavior (this theory postulates that individuals are inherently prone to be deviant), even today receives significant empirical support (Hirschi, 2009: 16). This theory, with regard to young people, is today usually connected with undesirable behavior of children in school, where findings from contemporary research suggest that poor fulfilling of school obligations, i.e., lack of attachment, committing and active participation in work, bring about poor behavior in school, together with the existence of other negative factors, can bring about deviant behavior (Peguero, Popp, Latimore, Shckarkhar & Koo, 2011: 60).

As Loeber et al. rightly note, longitudinal studies were crucial in discovery of developmental paths of delinquency, since they had attempted, in a comprehensive way, to view all possible factors which produce occurrence of juvenile criminality (Loeber, Wei, Stouthamer-Loeber, Huizanga & Thornberry, 1999: 249). Longitudinal studies dating from the fifties of the twentieth century had started studying risk factors which included biological and ecological impacts (Zolkoski & Bullock, 2012: 2296). Contemporary theories, which among other things, are based on longitudinal examinations, apart from risk factors discussed in the theory, focus also on the so-called protective factors. As risk factors exist in various contexts, thus protective factors make a part of specific situations and contexts (Pavićević & Stevanović, 2015: 294). DeMateo and Marczyk define risk factors as “outside or inside impacts or states which are *linked with a negative outcome or are predictive for it*”, while they define protective factors in contrast as “outside or inside impacts or states which *lower the probability for a negative outcome or increase the probability of a positive outcome*” (Simeunović-Patić, 2009: 61). As for risk factors, literature usually uses the classification given by Haugen, which includes a multitude of individual factors, into one the following four categories: individual factors, factors linked with the family, factors linked with the neighborhood and community, and factors linked with school and mutual relations with the peers (Haugen, 2000: 7-8). The most important protective factors to which the literature indicates are: the presence of care and support by an important person in a young person’s life; high expectations and positive belief that activate innate vitality and self-rectifying capacity of adolescents and finally, last but not least, the possibility of participation of minors in those activities that require of them to show a certain level of responsibility (Pavićević & Stevanović, 2015: 300).

A major contribution to the examination of the possible effects of various factors on personality behavior, which in certain conditions can be expressed as delinquent behavior, has contributed to the factor-analytic theory of Hans J. Eysenck, where the person is viewed as an “established hierarchy”, and delinquency appears as a coincidence from certain factors of personality and some situational factors, although Eysenck was inclined to give the highest importance to the factors of personality (Knežević: 1994: 39-41).

Prevention of juvenile delinquency plays an important role in the efforts for reducing criminality, through early identification and targeting of young people at the highest risk to become delinquents. Green et al. have done a longitudinal research, which showed that respondents who had three and more risk factors have as much as eight times more chances to commit a crime, in comparison to persons with absence of three factors, i.e., who had two risk factors at the most (Green, Gesten, Greenwald & Salcedo, 2008: 323).

It seems that Robinson is right saying that these types of theories are based on probability, and that effects of risk factors to behavior depend on frequency, regularity, intensity and time of exposure of individuals, so that: if a person is more frequently exposed (frequency), if a person is more regularly exposed (regularity), if a person is exposed earlier (time), and if factors are more intense (intensity), it is more probable that antisocial behavior shall occur (Robinson, 2009: 491-492).

Multidisciplinary approach, which is especially emphasized in research of the problem of juvenile delinquency, has contributed to viewing juveniles from the aspect of criminal-legal action not as adult perpetrators, but are treated in a different manner, with the aim to “*give them another chance*” (Škulić, 2011: 26). In modern legislatures, correctional orders usually present instruments which enable diverting from the classical criminal procedure - *diversion model* (Radulović, 2010: 79). Still, we should not neglect the fact that there are juvenile perpetrators for whom, bearing in mind the manner, heaviness and consequences of committed crimes, it would not be justified to implement correctional orders, but they are punished with correctional measures, or with the penalty of serving time in juvenile prisons. Here we could ask - what to do with juveniles after their release from correctional institutions, i.e., juvenile prisons? This question can be asked justifiably, since many juveniles return to their communities with serious risks from repeated committing of crimes, where inadequacy of their acceptance - return to communities, significantly reduces chances for their successful reintegration.

It seems that for this reason it is necessary to define in the introduction itself the term child-friendly judicature (justice)², which designates a judicial system which guarantees respect and effective implementation of all children`s rights at the highest possible level,... This is primarily judicature which is accessible, age-adjusted, efficient, adjusted to needs and rights of children³, and focused on these needs and rights, respects children's rights, including the right on a procedure in accordance to the law, the right to participate in the procedure, and to understand the procedure, the right on respect for private and family life and the right on integrity and dignity. This concept presents the necessary step in realization, promotion and protection of children`s rights. Realization of “child-friendly judicature (justice) implies judicature adjusted so as to be more appropriate for children, and efficient procedures accessible for children, with ensuring of necessary

² Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted on November 17, 2010 at the 1098th session of deputy ministers of the Council of Europe - revised version from May 31, 2011.

³ In terms of the Convention, a child is a person under 18 years of age.

independent legal representation. This enables children, when they come in contact with judiciary and administrative systems, either as witnesses, victims (injured), or as perpetrators of crimes, accusers and submitters of complaints in civic, administrative procedures and procedures before independent bodies, to be able to adequately protect their rights and interests” (Stevanović, 2016: 590-593).

With regard to criminal procedures, it is notable that attention of the scientific community is usually focused on children as victims of criminal procedures; therefore child-friendly justice is discussed in this context. In this paper authors discuss child-friendly justice primarily from the aspect of juveniles who were in conflict with the law, and the possibilities the system offers for their successful reintegration in the normal course of life. For the said reason, before analysis of the normative framework and presentation of results of the research done by the research team of the Institute of Criminological and Sociological Research in Belgrade, with cooperation with the OSCE Mission in Serbia, we wish to point to the study done by Bouffard and Bergseth, with the aim to review the impact of adequate post-penal acceptance to reduction of recidivism of juveniles. At the end of the twentieth century founding of Community-Based Mentoring Services in the USA was intensified, which, in short, aim to work with juveniles with a strong mentoring component, i.e., to render them services which should bring about “correction of their behavior”. These authors did a research whose aim was to review the impact of such Services to reducing of recidivism. They examined two groups of juveniles who had been in correctional institutions and who after release spent at least six months at large. In the criteria group were persons who after release did use services of these Services, while control groups consisted of persons who did not use such a form of post-penal acceptance. The research has shown that respondents who used these services receded in a much smaller degree than those from the control group, by which the authors have pointed to a large significance of post-penal acceptance after release from the correctional system (Bouffard & Bergseth, 2008: 295-297).

1. International standards relevant to the subject of this paper: THIRTY YEARS FROM THE ADOPTION OF THE Convention on the Rights of the Child

With regard to child-friendly justice, respect for the said principle is in accordance with the *Convention on the Rights of the Child*,⁴ *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*,⁵ *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts*⁶, as well as with numerous international documents, especially Standard Minimum Rules for the Administration of Juvenile Justice (*Beijing Rules*),⁷ United Nations Rules for the Protection of Juveniles Deprived of their Liberty,⁸ United Nations Guidelines for the Prevention of Juvenile Delinquency (*Riyadh guidelines*),⁹ United Nations Standard Minimum Rules for Non-Custodial Measures (*Tokyo Rules*),¹⁰ Recommendation CM/Rec (2008) 11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures¹¹, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted in 2010¹², as well as Directive (EU) 2016/800 of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings, adopted in 2016.¹³

For the subject analysis of importance are first of all provisions stipulated within articles 39 and 40 of the Convention on the Rights of the Child, based on which the right is

⁴Convention on the Rights of the Child, *Official Gazette of SFRY - International Treaties*, no. 15/90.

⁵Optional Protocol on sale of children, child prostitution and child pornography, to the Convention on the Rights of the Child, *Official Gazette of SRY - International Treaties*, no. 22/02.

⁶Optional Protocol on Involvement of Children in Armed Conflicts, to the Convention on the Rights of the Child, *Official Gazette of SFRY - International Treaties*, no. 22/02.

⁷Standard Minimum Rules for the Administration of Juvenile Justice (*Beijing Rules*) adopted by the United Nations General Assembly Resolution 40/33, from November 29, 1985 (A/Resol/40/33, November 29, 1985).

⁸United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the UN General Assembly Resolution 45/113, from December 14, 1990 (A/Resol/45/113, December 14, 1990).

⁹United Nations Guidelines for the Prevention of Juvenile Delinquency (*Riyadh guidelines*), adopted by the UN General Assembly Resolution 45/112 from December 14, 1990 (A/Resol/45/112, December 14, 1990).

¹⁰United Nations Standard Minimum Rules for Non-Custodial Measures (*Tokyo Rules*), adopted by the UN General Assembly Resolution 45/100, from December 14, 1990 (A/Resol/45/100, December 14, 1990).

¹¹ Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures¹¹, adopted by the Committee of Ministers of the Council of Europe on November 5, 2008 at the 1040th session of deputy ministers.

¹² Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010.

¹³ Directive (EU) 2016/800 of the European Parliament and of the Council, adopted by the European Parliament and the Council of the European Union on 11 May 2016.

recognized of each child who was in conflict with the law, in the sense of perpetration of a crime. In accordance with the provision of Art. 39 of the Convention: States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. However, for the subject of this paper, it is important to point out the following rules, prescribed in Art. 40 of the Convention:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

- (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
- a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate

to their well-being and proportionate both to their circumstances and the offence.

After this we point out to the fact that the Committee for the Rights of the Child, wishing to especially encourage countries signatories to adopt and implement a comprehensive policy of juvenile justice for prevention and treating of juvenile delinquency based on and in accordance with the *Convention on the Rights of the Child*, has passed the *General Comment No. 10: “Children’s Rights in Juvenile Justice”* (from hereon: *General Comment No. 10*).¹⁴ The goal of passing the General Comment No. 10 are as follows: offering guidelines and recommendations to member-countries concerning the content of the comprehensive policy in the field of juvenile justice, with special accent on prevention of juvenile delinquency, introduction of alternative measures to ensure that the issue of juvenile delinquency is solved without court procedures, as well as during interpretation and implementation of all other provisions contained in articles 37 and 40 of the *Convention on the Rights of the Child*, as well as stimulating countries to include the newly-adopted international standards in their national systems of juvenile justice (Vučković Šahović, Doek, Zermatten, 2012: 303-309). The Committee is of the opinion that this goal can be best achieved through full respect and implementation of the leading and comprehensive principles of juvenile justice contained in the *Convention on the Rights of the Child*, defining in the *General Comment No. 10* a set of basic principles for treatment which should be adjusted to children in conflict with the law:

- *Treatment that is consistent with the child’s sense of dignity and worth.* (This principle reflects the fundamental human right enshrined in article 1 of UDHR, which stipulates that all human beings are born free and equal in dignity and rights. This inherent right to dignity and worth, to which the preamble of CRC makes explicit reference, has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child);
- *Treatment that reinforces the child’s respect for the human rights and freedoms of others.* (Within the juvenile justice system, the treatment and education of children shall be directed to the development of respect for human rights and freedoms, as well as respect for and implementation of the guarantees for a fair

¹⁴General Comment No. 10: “Children’s Rights in Juvenile Justice”, adopted by the Committee for the Rights of the Child on April 25, 2007, at the 44th session (CRC/C/GC/10).

trial recognized in article 40 (2) of the *Convention on the Rights of the Child* (Paragraph 40-67 of the General Comment No. 10). The Committee also states the question: “If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?”;

- *Treatment that takes into account the child’s age and promotes the child’s reintegration and the child’s assuming a constructive role in society.* (This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child. It requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being);
- *Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.* (The Committee for the Rights of the Child especially insists on this since reports received by the Committee show that violence occurs in all phases of the juvenile justice process, from the first contact with the police, during pretrial detention and during the stay in treatment and other facilities for children sentenced to deprivation of liberty. The committee urges the States parties to take effective measures to prevent such violence).

Taking into consideration the above stated, here we would like to especially point out to the importance of the document adopted by the Committee of Ministers of the Council of Europe titled: *European Rules for juvenile offenders subject to sanctions or measures* (Recommendation CM/REC (2008)11) which offers guidelines to all member-countries of the Council of Europe for further development of national systems for treatment of children in conflict with the law, including situations when juveniles appear as offenders and are subject to “sanctions or measures”. These are the following guidelines:

- Juvenile offenders subject to sanctions or measures shall be treated with respect for their human rights.
- The sanctions or measures that may be imposed on juveniles, as well as the manner of their implementation, shall be specified by law and based on the

principles of social integration and education and of the prevention of re-offending.

- Sanctions and measures shall be imposed by a court or if imposed by another legally recognised authority they shall be subject to prompt judicial review. They shall be determinate and imposed for the minimum necessary period and only for a legitimate purpose.
- The minimum age for the imposition of sanctions or measures as a result of the commission of an offence shall not be too low and shall be determined by law.
- The imposition and implementation of sanctions or measures shall be based on the best interests of the juvenile offenders, limited by the gravity of the offences committed (principle of proportionality) and take account of their age, physical and mental well-being, development, capacities and personal circumstances (principle of individualisation) as ascertained when necessary by psychological, psychiatric or social inquiry reports.
- In order to adapt the implementation of sanctions and measures to the particular circumstances of each case the authorities responsible for the implementation shall have a sufficient degree of discretion without leading to serious inequality of treatment.
- Sanctions or measures shall not humiliate or degrade the juveniles subject to them.
- Sanctions or measures shall not be implemented in a manner that aggravates their afflictive character or poses an undue risk of physical or mental harm.
- Sanctions or measures shall be implemented without undue delay and only to the extent and for the period strictly necessary (principle of minimum intervention).
- Deprivation of liberty of a juvenile shall be a measure of last resort and imposed and implemented for the shortest period possible. Special efforts must be undertaken to avoid pre-trial detention.

- Sanctions or measures shall be imposed and implemented without discrimination on any ground such as sex, race, colour, language, religion, sexual orientation, political or other opinion, national or social origin, association with a national minority, property, birth or other status (principle of non-discrimination).
- Mediation or other restorative measures shall be encouraged at all stages of dealing with juveniles.
- Any justice system dealing with juveniles shall ensure their effective participation in the proceedings concerning the imposition as well as the implementation of sanctions or measures. Juveniles shall not have fewer legal rights and safeguards than those provided to adult offenders by the general rules of criminal procedure.
- Any justice system dealing with juveniles shall take due account of the rights and responsibilities of the parents and legal guardians and shall as far as possible involve them in the proceedings and the execution of sanctions or measures, except if this is not in the best interests of the juvenile. Where the offender is over the age of majority, the participation of parents and legal guardians is not compulsory. Members of the juveniles’ extended families and the wider community may also be associated with the proceedings where appropriate.
- Any justice system dealing with juveniles shall follow a multi-disciplinary and multi-agency approach and be integrated with wider social initiatives for juveniles in order to ensure a holistic approach to and continuity of the care of such juveniles (principles of community involvement and continuous care).
- The juvenile’s right to privacy shall be fully respected at all stages of the proceedings. The identity of juveniles and confidential information about them and their families shall not be conveyed to anyone who is not authorised by law to receive it.
- Young adult offenders may, where appropriate, be regarded as juveniles and dealt with accordingly.
- All staff working with juveniles perform an important public service. Their recruitment, special training and conditions of work shall ensure that they are

able to provide the appropriate standard of care to meet the distinctive needs of juveniles and provide positive role models for them.

- Sufficient resources and staffing shall be provided to ensure that interventions in the lives of juveniles are meaningful. Lack of resources shall never justify the infringement of the human rights of juveniles.
- The execution of any sanction or measure shall be subjected to regular government inspection and independent monitoring.

Finally, we would like to point out the provisions of the Directive (EU) 2016/800 of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings. In accordance with the provision of Article 12, item 5, when children are detained, Member States shall take appropriate measures to:

- a) ensure and preserve their health and their physical and mental development;
- b) ensure their right to education and training, including where the children have physical, sensory or learning disabilities;
- c) ensure the effective and regular exercise of their right to family life;
- d) ensure access to programmes that foster their development and their reintegration into society; and
- e) ensure respect for their freedom of religion or belief.

The measures taken pursuant to this paragraph shall be proportionate and appropriate to the duration of the detention. Points (a) and (e) of the first subparagraph shall also apply to situations of deprivation of liberty other than detention. The measures taken shall be proportionate and appropriate to such situations of deprivation of liberty. Points (b), (c), and (d) of the first subparagraph shall apply to situations of deprivation of liberty other than detention only to the extent that is appropriate and proportionate in the light of the nature and duration of such situations.

2. Normative Framework IN THE REPUBLIC OF SERBIA: Ordering and Enforcement of Educational Measure Remand to Correctional Institution and Postinstitutional Treatment

According to Article 3 Para 1 of the Law on Juvenile Criminal Offenders and Criminal Protection Law (here and after: JL)¹⁵ a juvenile is a person who at the time of commission of the criminal offence has attained fourteen years of age and has not attained eighteen years of age. The JL makes the difference between younger and elder juvenile. A younger juvenile is a person who at the time of commission of the criminal offence has attained fourteen and is under sixteen years of age (Article 3 Para 2 JL), while an elder juvenile is a person who at the time of commission of the criminal offence has attained sixteen and is under eighteen years of age (Article 3 Para 3 JL).

The Court shall order remand of a juvenile to a correctional institution when, in addition to separation from current environment, increased supervision measures and specialized professional educational programs have to be applied. In deliberating whether to order this measure the Court shall particularly take into account previous lifestyle of the juvenile, degree of personal and behavioral deviation, gravity and nature of the committed criminal offence and previous criminal or misdemeanor records of the juvenile (Article 21 Para 1 and 2 JL).

The juvenile shall remain in the correctional institution for minimum six months and maximum four years, and every six months the Court shall reconsider whether grounds for suspension of enforcement of this measure or its substitution with another educational measure exist (Article 21 Para 3 JL). During execution of educational (correctional) measures of sending to correctional institutions for juvenile it is passed on, the following is valid: general rules on execution of criminal sanctions for juveniles, general rules relating to execution of institutional correctional measures, as well as special rules applied exclusively in case of execution of these institutional correctional measures.

Enforcement of educational measures and juvenile prison sentences is based on individualised program of treatment of the juvenile that is adapted to his character and is in accordance with contemporary achievements of science, pedagogy and penology practice. Individualised programs are compiled on basis of comprehensive understanding of the maturity and other personal characteristics of the juvenile, his age, education level, previous life and behavior within the social context, form of behavioral deviation, type of

¹⁵Law on Juvenile Criminal Offenders and Criminal Protection Law. *Official Gazette RS*, no. 85/05.

criminal offence and circumstances of its commission. Individualised programs particularly determine: the maturity of the juvenile, other personal characteristics, feasibility of inclusion into an educational or vocational program, use and organization of leisure time, work with the juvenile’s parents, adoptive parent or guardian and other family members, as well as other forms of psychosocial, pedagogic and penology impact on the juvenile (Article 93 JL).

The educational measure of remand to a correctional facility is enforced in the correctional facility. The educational measure of remand to a correctional facility ordered to a female person is enforced in the women’s ward of the correctional facility. A person of legal age to whom the educational measure specified in paragraph 1 of this Article is ordered and the juvenile who attains legal age in the correctional facility during enforcement of this measure shall be accommodated in a separate ward of the correctional facility. A person to whom remand to a correctional facility has been ordered may remain there until attaining twenty three years of age (Article 124 JL).

2.1. Postinstitutional treatment of juveniles after release from the correctional institution

A juvenile is discharged from serving of educational measure, including the educational measure of sending to the correctional institution, after expiry of the longest statutory duration of the measure or when the Court orders: 1. revoking of its enforcement, 2. substitution of the ordered educational measure by another or 3.conditional release (Article 119 Para 1 JL). When a juvenile is in the finishing grade of school or at the end of his vocational training and discharge from the facility or institution where the measure is enforced would prevent completion of schooling or vocational training, the facility or institution may at the application of the juvenile enable him to complete schooling or vocational training. In such cases provisions of Article 120, paragraph 4 JL and Article 124, paragraph 4 JL hereof shall not apply to the juvenile (Article 119 paragraph 3 JL).

For the duration of the institutional measure and juvenile prison sentence the competent guardianship authority shall maintain constant contact with the juvenile, his family and institution in which the juvenile is remanded, in order to better prepare the juvenile and his family for his return to the former social environment and inclusion in social activities (Article 147 paragraph 1 JL).

An institution or facility in which the juvenile is serving his juvenile prison sentence are required to notify at least three months in advance of the scheduled leave of the juvenile,

his parents, adoptive parent, guardian, and/or close relatives with whom the juvenile used to live, as well as the competent guardianship authority, and suggest measures for accepting the juvenile on his return (Article 147 paragraph 2 JL).

A parent, adoptive parent or guardian, and/or close relative with whom the juvenile used to live before serving his institutional sentence or juvenile prison sentence, is required to notify the competent guardianship authority about the juvenile’s return to his family. Competent guardianship authority is required to provide necessary assistance to the juvenile, after he has served criminal sanction under paragraph 1 of this Article (Article 148 JL).

The competent guardianship authority shall on release of the juvenile from serving of his institutional measure or juvenile prison sentence take special care of a juvenile without parents and of a juvenile whose family and material circumstances are in disorder. This care shall particularly include accommodation, nourishment, provision of clothing, medical treatment, assistance in settling family circumstance, finalizing vocational training and employment of the juvenile (Article 149 JL).

As for cooperation with custodial bodies concerning post-institutional acceptance of juveniles and prevention of recidivism, it is necessary to point to several provisions of the Law on Social Prevention (here and after: LSP)¹⁶, which are relevant for regulating of this issue.

Article 7 of LSP regulates that institutions and other forms of organizing regulated by the law, which perform activities, i.e., render social protection services, are to cooperate with the following institutions: institutions of pre-school, elementary, high school and university education, health care institutions, police, judicial and other governmental bodies, bodies of territorial autonomy, i.e., bodies of local self-management units, associations and other legal and physical entities. Also, the same provision emphasizes that cooperation in rendering social protection services is realized primarily within the framework of and in the manner defined by agreements on cooperation. Thus, LSP also provides for cooperation among social work centers and police and judicial and other governmental bodies, which, among other things, includes cooperation with correctional institutions during and immediately after release of juveniles from serving their

¹⁶ Law on Social Protection, *Official Gazette RS*, no. 24/11.

correctional measures in correctional institutions, although this is not explicitly stated in the LSP.

With regard to post-institutional treatment of juveniles after release from correctional institutions, we should consider the provision of the Law on Execution of Criminal Sanctions (here and after: LECS)¹⁷, which regulates the issue of providing help and acceptance to adult persons after they have served time in prison. This is Article 186 of LECS which, as emphasized in Article 4 of JL, may be applied to juveniles and young adults, provided it is not contrary to JL. According to paragraph 1 of Article 186 of LECS, in realization of providing help and acceptance, institutions (for execution of correctional sanctions) in question cooperate with custodial bodies competent according to last places of residence of convicted persons before their sending to prisons, with the police, and the appropriate organizations or associations. According implementation of this provision to juveniles released from correctional institutions would indicate that correctional institutions are obliged to cooperate with custodial bodies competent per last places of residence of convicted persons before they were sent to prisons, with the police, and the appropriate organizations or associations. In this, apart from cooperation with custodial bodies (i.e., competent social work centers, which is emphasized by the currently valid decisions from the system of juvenile legislature) cooperation could be especially useful of correctional institutions with the non-governmental sector, especially with organizations and associations of citizens dealing with protection of rights of children and young people, as well as persons belonging to marginalized social groups.

In fact, the obligation to cooperate with “appropriate organizations or associations”, regulated in paragraph 1 of Article 186 of LECS, really clears the space for inclusion of the non-governmental sector into the post-institutional acceptance and treatment of offenders. Although the stated provision relates to persons of age, there are no hindrances to implement it accordingly also to juveniles, i.e., to non-governmental organizations which have capacities, whether as ancillary or additional subjects, or as equal partners with competent governmental institutions, to participate in creation and implementation of various programs and measures for post-institutional treatment of juveniles.

Here we wish to point to the necessity of creating conditions for linking of the said systems, especially bearing in mind that primarily persons of age come out of correctional institutions, after having served their time, i.e., after suspension of correctional measures. It could be rightly advocated that passing of similar provisions for juveniles, or according

¹⁷ Law on Execution of Criminal Sanctions, *Official Gazette RS*, no. 55/14.

implementation of appropriate provisions of the Law on Execution of Out-of-Institutional Sanctions and Measures¹⁸ to juveniles, could contribute to establishing of a more efficient system for their post-institutional acceptance and their better reintegration into communities, and thus to reducing of recidivism.

3. Research of Juvenile Recidivism in the Krusevac Correctional Institution

3.1. Introductory and methodological notes

3.1.1. Background, subject and goal of the research

The research of recidivism among juvenile offenders for whom correctional measure of sending to a correctional institution was passed is a part of a large research performed in 2017 by the Institute for Criminological and Sociological Research, supported by the OSCE Mission in Serbia.¹⁹ It is important to emphasize that this research was preceded by a pilot research of needs of juvenile offenders - perpetrators of crimes, who were given correctional measures of sending to correctional institutions, which was done in March 2016 in the Krusevac correctional institution. There were two focus groups which consisted of two specific populations of adolescents, and two group testings of juveniles from open and semi-open departments. The first focus group consisted of all female adolescents who were in the institution at the time (N=8), and the second consisted of all juveniles who were in the closed department because of disciplinary offences (N=10). Apart from these two focus groups, group testing was done in which 40 juveniles participated.²⁰

¹⁸ Law on Execution of Out-of-Institutional Sanctions and Measures, *Official Gazette RS*, no. 55/14, 35/19.

¹⁹ This is a research whose primary goal was to review the impact of professional training on recidivism in the Republic of Serbia, as well as, based on special models, to make a prediction of criminal recidivism. Apart from the research performed in correctional institutions in Sremska Mitrovica, Pozarevac and Nis, persons were considered toward whom the measure of mandatory treatment of drug addicts was applied, and the security measure of mandatory treatment of alcoholics, and alternative criminal sanctions to recidivism. The principal results of the research, adjusted to the profession, were published in the following publication: Stevanović, I., Međedović, J., Petrović, B. & Vujičić, N. (2018) *Ekspertsko istraživanje i analiza povrata u Republici Srbiji*. Beograd: Institut za kriminološka i sociološka istraživanja & Misija OEBS u Srbiji.

²⁰ Results of the pilot research are presented in the following study: “Analysis of the current state, identification of needs of juveniles and proposal for the reintegration program”, made by the professional team of the Institute for Criminological and Sociological Research (Stevanović, I., Zeleskov Đorić, J., Batričević, A. & Milojević, S.). Some conclusions of this research are available in: Stevanović, I., Batričević, A. & Milojević, S. (2016) What to expect after juvenile correctional institution? Recidivism or reintegration. In I. Stevanović & A. Batričević (Eds.) *Criminal and Misdemeanor Sanctions and Measures: Imposing, Enforcement and Conditional Release* (pp. 307-319). Belgrade: Institute of Criminological and Sociological Research.

Bearing in mind the normative framework described previously, the subject, i.e., goal of the research was to review the success of the system of criminal-legal reaction, via the answer to the question how many persons who received correctional measures to be sent to correctional institutions found themselves again in the system of execution, i.e., how many of them were recidivism. This is of special importance because this institutional criminal sanction for juveniles is passed by judges for juveniles annually only for 4 to 5%, and presents, apart from juvenile prisons, the hardest institutional measure, to which most often multiple recidivism are sentenced (Stevanović et al., 2018 29).

3.1.2. Sample, instrument and variables

The sample included 181 persons (94.5% males and 5.5% females) in the Krusevac correctional institution, whose correctional measures expired in 2012 (79 of them, i.e., 43.6%) and 2013 (102 of them, i.e., 56.4%), i.e., who left the institution based on some other legal basis. Data on criminal recidivism were collected based on the records of the Directorate for Execution of Criminal Sanctions, with the final date being November 20, 2017.

Apart from the basic socio-demographic (gender, year of birth, type of finished training and year of expiry of the penalty) and data on the correctional measure, variables were registered of crimes because of which the persons were sanctioned, and on recidivism.

As for *data on crimes*, the following variables were registered:

Criminal offense. The original variable has 26 categories and represents the exact type of criminal offense for which the respondent has served the last criminal sanction.

Number of criminal offenses. Exact data on the number of criminal offenses committed by the respondent for which he was criminally sanctioned.

Multiplicity of crimes. A variable that indicates whether the respondent was previously sanctioned for only one type of crime (coded with 0) or had valid verdicts for a different type of criminal offenses (coded by 1).

Type of crimes. The variable “criminal offense” is binarized and reduced to criminal offenses with elements of violence (coded with 1) and criminal offenses without elements of violence (coded with 0).

As for data on *recidivism*, the following variables were registered:

Recidivism. Binary variable - recidivist respondents are coded with 1, and with 0 coded respondents who were not recidivated.

Year of the new verdict. This variable indicates the year when a new verdict was passed.

New criminal offense. The original variable has 12 categories that represent the exact type of criminal offense, due to which respondents are again in the execution system.

Number of new criminal offenses. Exact data on how much the total number of new criminal offenses was committed by the respondent for which he was pronounced a new criminal sanction.

Type of new criminal offense. The variable “criminal offense” is binarized and reduced to criminal offenses with elements of violence (coded with 1) and criminal offenses without elements of violence (coded with 0).

The type of new punishment. A categorical variable indicating whether a new sanction implies the execution of a prison sentence (coded by 1), some of the alternative sanctions (coded by 2), or the safety measure of compulsory treatment, i.e. Special Prison Hospital (coded with 3).

The length of the new criminal sanction. A variable that represents the exact data on the duration of the new sanction imposed in months.

3.2. Results of the research

The average respondent was born in 1992 ($SD = 1.65$), with the age span from 1989 to 1996 year of birth. During execution of correctional measures all respondents in the sample had attended and finished mandatory trainings, where most of them finished training for the following professions: moulder, brick-layer, plumber, car-mechanic and smith. In recent years there is an increased trend of persons training for florists, which is the consequence of the innovative program implemented in the Krusevac correctional institution - production of flowers which are subsequently sold at free market. Here it is important to point to the difference between these responders and adult responders,

responders who are in prisons. In fact, in contrast to juveniles who all go through special trainings, this is not the case with adult offenders.²¹

3.2.1. Data on crimes, numbers, multiple character and type of crimes

Data on crimes - Viewed by crimes, the largest number of persons was sanctioned because of Compound Larceny from Article 204 SCC²² (41.4%), Robbery from Article 206 SCC (14.4%) and Theft from Article 203 SCC. As we can see, around 2/3 of all criminal acts are acts relating to property.²³ After these three most frequent crimes, these crimes appear in the following order: Murder from Article 113 of SCC (6 respondents), Unauthorized Use of Another's Vehicle from Article 213 of SCC (6 respondents), Domestic Violence from Article 194 of SCC (4 respondents), Rape from Article 178 of SCC (4 respondents), Unlawful Production and Circulation of Narcotics drugs from Article 246 of SCC (3 respondents), Violent Behavior from Article 344 of SCC (3 respondents) and Aggravated Murder from Article 114 of SCC (3 respondents). Individually viewed, participation of the said crimes is below 5% of the total structure of performed crimes. The category *other* includes crimes whose participation is negligible.

Type of crimes²⁴ - the respondents in 40.3% cases committed crimes with elements of violence, while with 50.2% of respondents absence of violence was recorded in their execution of crime. As for types of crimes, data are not available for 7.2% persons.

Number of crimes-The research has also shown that responders from this sample were, in average, sanctioned for two crimes (SD = 1.12), while the number of crimes per

²¹ This was the reason that the so-called VET project was implemented in the largest correctional institutions in the Republic of Serbia (Sremska Mitrovica, Pozarevac and Nis) – "Support for professional education and training in prison institutions in Serbia", which is an example of good practice after about twenty years of "terminating" of education in our prisons. On the project itself you can see more here: Knežić, B. (2017) *Obrazovanje osuđenika: način da se bude slobodan*. Beograd: Institut za kriminološka i sociološka istraživanja.

²² Serbian Criminal Code. (2005) Official Gazette RS, (85/05, 88/05 - revise, 107/05 - revise, 72/09, 111/09, 121/12, 104/13, 108/14 and 94/16). - *here and after*: SCC.

²³ It is interesting to mention that Serbia during 2013 and 2014 participated in the international survey of self-reporting of delinquency (ISRD 3) where one of the results of this study matches with the findings of this research, which is that juveniles in the Republic of Serbia most often perform crimes of property character. See: Čopić, S. & Stevković, Lj. (2018) Parental Supervision and Control as a Factor of Juvenile Delinquency in Serbia: Results of the International Self-Reported Delinquency Study. In I. Stevanović (Ed.) *Child Friendly Justice* (pp. 279-29). Belgrade: Institute of Criminological and Sociological Research.

²⁴ These are essentially forms of violent (includes crimes where for achieving of certain goals attack on victims were applied, or threatened) and property criminality (includes all crimes concerning property, and their perpetrators try to gain benefits for themselves or somebody else, or to cause damage for somebody), where individual crimes regulated in a separate part of SCC are grouped in one of the stated two categories. The consequence of this is that the criminal act of robbery is from the criminological aspect viewed as a form of a violent crime, although the SCC regulates it is a property crime (Ignjatović, 2016: 110, 118).

respondent was from one to four. We should state that only in 36% of cases respondents performed only one crime, while in 31% of cases they committed three or more criminal offenses.

As for the **multiplicity of crimes**, it was recorded in 42.9% cases, i.e., was not recorded in 57.1% cases.

3.2.2. Recidivism - descriptive statistics

Juvenile recidivism was registered for 36% respondents (65 of them were recidivated). The biggest number of new convictions was passed after 2015, more than 83% of the total number of new convictions.

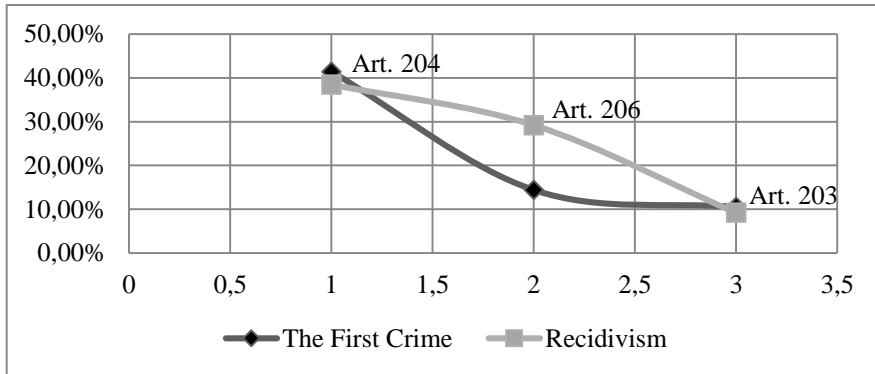
Data on new crimes-Viewed by crimes, the largest number of persons- 38.5% is again within the system for execution because of performed crimes from Article 204 of the SCC - Compound Larceny, then because of the crime of Robbery from Article 206 of the SCC - 29.2%, crime of Theft from Article 203 of the SCC - 9.2% and crime of Aggravated Murder from Article 114 SCC - 4.6%. With 3.1% each in the total structure of crimes, there are the following crimes: Murder from Art. 113 SCC, Domestic Violence from Article 194 SCC and Unlawful Production and Circulation of Narcotics from Article 246 SCC. Individual participation of other crimes is negligible.

In around 85% cases new criminal sanctions followed after a single crime, while in around 15% cases there were two crimes (*concatenation of crimes*). It is important to point out to the fact that **in more than 52% new crimes included elements of violence**.²⁵ This difference is especially visible if we consider three most frequent crimes. At first sight we could say that there is no essential difference in the original structure of crimes (*crimes because of which respondents were convicted to a correctional measure*) and crimes done in recidives (*recidivism*). However, if the procentual decrease for new acts is negligible for crimes of Compound Larceny from Article 204 SCC and Theft from Article 203 SCC, this is not the case for the crime of Robbery from Article 206 SCC, whose participation is

²⁵ In contrast to ISRD3 studies, the last, fifth issue of the Sourcebook of Crime and Criminal Justice Statistics, gives the data that, although juveniles in Serbia most frequently commit property crimes, on the other hand they in a much larger degree commit crimes with elements of violence than their peers in other European countries. See: Aebi et al. (2014), *European Sourcebook of Crime and Criminal Justice Statistics*. Helsinki: European Institute for Crime Prevention and Control. Similarly, if we view generally Robbery as a form of a violent crime (juvenile and adult perpetrators of crimes) the Republic of Serbia is at the top of the European list of committed crimes of Robbery. According to: Vujičić, N. (2017) Razbojništvo-kriminološki aspekti. In N. Kršljanin (Ed.) *Identitetski preobražaj Srbije: prilozi projektu 2016 – kolektivna monografija* (pp. 319-331). Beograd: Pravni fakultet Univerziteta u Beogradu.

by 102.8% larger than in the original structure of crimes. This difference is shown in Diagram 1.

Diagram 1. Structure of most frequent crimes before and after recidivism



Average duration of a newly passed penalty is 50.95 months (something more than 4 years), but the span is very large, from 3 months to as much as 20 years.²⁶ It is important to say that those whose new crimes do not include elements of violence are sentenced with averagely 37 months of imprisonment, while those who committed crimes with elements of violence were convicted in average to 66 months of imprisonment, which was expected. This difference is statistically significant ($t_{(55)}=-2.172$, $p=.034$).

New sanctions (mostly imprisonment, in 93.8% cases) were mostly passed for crimes of Compound Larceny from article 204 SCC and Robbery from Article 206 SCC. In three cases the court passed, together with imprisonment, the mandatory measure of treatment for drug addicts, while in one case the court passed implementation of an alternative criminal sanction – Community Service.

3.2.3. Prediction of recidivism

In order to make a model for prediction of recidivism (*multivariate analysis - MVA*) in which all potential predictors participate, we used the binary logistic regression. It controls mutual correlations of the predictors themselves, so that redundancy is avoided in prediction. Results (Table 1) have shown that the suitability of the model is good

²⁶This was a respondent who had committed several crimes, and according to data of the Ministry of Justice - Directorate for Execution of Criminal Sanctions (these are individual convictions) this person was sentenced to 287 months of prison in total. By implementation of provision from article 60, paragraph 2 item 2 SCC, the court passed a unique penalty in duration of 240 months.

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($\chi^2=11.267$; $p=.187$) and regression itself was statistically significant ($\chi^2=25.606$; $p=.000$). With the help of the used collection of predictors 20% recidivism variances was explained.

In such a set model only two predictors have remained statistically significant: the number of previously committed acts and the type of committed acts -in fact, respondents prone to committing of a larger number of crimes which do not include elements of violence shall have a bigger chance of recidivism.

Table 1. Multivariate model for prediction of recidivism

	B	S.E.	Wald	df	Sig.	Exp(B)
Step 1 ^a Gender	-.897	.729	1.512	1	.219	.408
Year of Birth	.087	.109	.644	1	.422	1.091
Number of Crimes	.593	.208	8.137	1	.004	1.809
Multiple Crimes	.108	.492	.048	1	.826	1.114
Type of Crime	-1.532	.429	12.727	1	.000	.216
Year of Release	-.378	.358	1.117	1	.290	.685
Constant	586.430	746.502	.617	1	.432	4.821E254

Conclusion

Bearing in mind the presented results of the rate of recidivism of juveniles sentenced to correctional measures of serving time in correctional facilities in Serbia, and the necessity to reduce them in future, it is necessary to make an analysis of the needs of juvenile perpetrators of crimes and a comprehensive plan for their (re)integration into the community. The next necessary step is to consider the possibility for implementation and modification, and scopes of potential solutions, i.e., to design a formal program of reintegration which would best responds to specific needs of juveniles. We should especially bear in mind that because of specific needs of juveniles programs for treatment and reintegration of juveniles must be especially targeted. All of the above must have its legal basis in the sense of promotion of the normative-legal basis, but also its implementation in practice.

Here we wish to point to the necessity of creating conditions for better linking of the system of juvenile criminal legislature with the system of post-penal acceptance of adult perpetrators of crimes, especially bearing in mind that primarily adult persons are released

from correctional institutions after having served their time there, i.e., after suspension of correctional measures. In this sense, we may justifiably advocate that according implementation of provisions of the Law on Execution of Out-of-Institutional Sanctions and Measures to juveniles could contribute to establishing of a more efficient system for their postinstitutional acceptance and their better reintegration in the community. This would create more space for inclusion of the non-governmental sector in postinstitutional acceptance and treatment of juvenile perpetrators of crimes (see: article 186. pgs. 1 and 3 of LECS),²⁷ i.e., this would create space for citizens` associations which have the capacity, as auxiliary or additional subjects, equal partners with competent governmental institutions, to participate in creation and implementation of various programs and measures for postinstitutional treatment of juveniles, and possibilities which we hope shall be more frequently used, which are linked also with the institute of paroles releases with institutional correctional measure of serving time in correctional facilities. Here we should mention that at the end of March 2019 the *Network of organizations for postpenal support of Serbia* was founded, whose principal cause is improvement of policies and practices in the field of reintegration and postpenal acceptance, so that they are in accordance with the needs of persons who received criminal sanctions, and juveniles who were, or are in conflict with the law, which should contribute to their better acceptance in the community.

Of course, we should always bear in mind that in the Republic of Serbia, the system of social and health protection is the basis for support to juveniles in conflict with the law during the process of their resocialization and reintegration. Better connecting of these two systems with the system of juvenile legislature, as well as continual support to primary families, if juveniles have them, during and after institutional correctional measures, also are a precondition for reducing the rate of recidivism of this age category.

International standards stated in the paper surely present guidelines both for legislature and practice. However, we should not forget the fact that pure legal transplantation for juveniles in conflict with the law does not have to mean a step forward in situations when the norm and the practice are not in harmony. The research presented in this paper, in the part concerning juveniles` training, in fact shows that in this sense the goal is to try and realize the right on their reintegration, since education and trainings are the path for juveniles, after being released from an institution, to apply for jobs, and in this sense be

²⁷ In Article 186 Para 3 of the LECS it is stated that the procedure for providing assistance and acceptance of the convicted person after the imprisonment is regulated by a special law. This is the already mentioned Law on Execution of Out-of-Institutional Sanctions and Measures.

turned toward socially acceptable behavior. Still, as it was mentioned several times, juveniles after being released from institutions primarily need post-penal support. In other words, we could hardly expect that most of them will by themselves, without help from others, continue with their lives in the right direction, i.e., abandon criminal behavior. For this reason we believe that international standards, but also current legislative framework in the Republic of Serbia, offer sufficient space for further development of the practice, which should be especially insisted on.

Because of all this future reform processes of juvenile legislature in the Republic of Serbia should insist that what is set in the legislative framework, concerning the necessity for the program of postinstitutional acceptance of juveniles, must be set and developed from the entry of these persons in institutions, as well as during the process of their (re)integration in the community. This is because the success of a criminal policy of a country, especially concerning juveniles, is measured primarily through the rate of recidivism.

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YEARBOOK
HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHTS OF THE CHILD
“30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”

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Ines Cerović*

THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS IN IMPLEMENTING THE RIGHTS OF THE CHILD

Non-governmental organisations (NGOs) are often the strongest voice in promotion and implementation of human rights and children's rights in particular. In order to achieve the change in children's lives, NGOs need to have unique knowledge and experience to influence and shape policy and strategy. The Convention on the Rights of the Child (Convention) is often perceived as the treaty that enables strong participation of NGOs. NGOs were actively involved in the drafting of the Convention itself as well as its three Optional Protocols (OPs) and have a strong relationship with the Committee on the Rights of the Child (CRC Committee). NGOs must be able to work in an enabling environment which implies that favourable institutional, legal, political and administrative conditions are in place securing effective and independent NGOs functioning.

Keywords: *human rights, rights of the child, non-governmental organisations, treaty monitoring, Convention on the Rights of the Child, Committee on the Rights of the Child.*

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1. Introduction

Even though the primary duty bearers for implementation of ratified international treaties are States parties, achieving the change for children requires joint efforts of the whole society. This particularly implies engagement of NGOs, national human rights institutions (NHRIs), media and children themselves.

NGOs are part of a broad spectrum of non-governmental actors commonly referred to as ‘civil society’, encompassing also social movements, foundations, education institutions, media, churches, religious bodies, voluntary associations, trade unions, etc. (Cullen, Morrow, 2001: 8) NGOs have a vital role in the overall human rights regime (Steiner, Alston, 2000: 938). An empowered non-governmental sector is a key indicator of open, inclusive and accountable governance, which is essential for implementation of the rights of the child (Save the Children, *Child Rights Governance, Safeguarding civil society space for children*, 2016: 4).

In this paper I will examine different roles that NGOs working for and with children have had in the process of codification of children’s rights, which will be followed by showing a whole spectrum of different ways of engagement of NGOs in advancement of children’s rights and implementation of international and regional standards in both international and national context, with special focus on their specific relationship with the CRC Committee. It is important to note that the concept of NGOs dealt with in this paper refers to non-profit organisations rather than civil society in general and takes into account a wide variety of NGOs greatly differing among themselves in shapes and forms, aims and activities. Having analysed the role of NGOs in facilitating change, I shall shortly reflect on current challenges that NGOs concerned with children’s rights face in Serbia and draw up some conclusions on how the important role of NGOs can be further strengthened.

2. The Role of Human Rights NGOs

The post-Cold War era, characterized by end of communism, democratization and technological progress in post-conflict societies, has been marked by an expansion of NGOs. This rise is apparent in the United Nations (UN) context, where increased importance of NGOs has emerged primarily due to reluctance of governments’ representatives to criticize their counterparts from other countries and openly accuse them of human rights violations. NGOs have proved to be the main, if not only source of information on the state of human rights in a particular country. Thus NGOs have become essential to ensure good governance and implementation of human rights. They play a

critical part in developing society, improving communities, and promoting citizen participation. Many NGOs dealing with the rights of the child adopted a rights-based approach, comprising the principles of non-discrimination, participation and accountability, requiring the governments to fulfill their responsibilities towards children.

NGOs play an equally important role in initiating and influencing development and enactment of international treaties, as well as in the implementation of these treaties in the national context and in monitoring the activities of States and non-state actors. As stated by Steiner and Alston: “They provoke and energize. They spread the message of human rights and mobilise people to realise that message.” As opposed to often bureaucratic, politicized and over-administrative way of functioning of international organisations, NGOs are inventive, innovative, more flexible, speedy and decentralized in decision making and taking action. (Steiner, Alston, 2000: 938)

Even though most human rights treaties do not specifically provide for participation of NGOs, in reality a high share of the most important initiatives related to drafting new international treaties, introducing new procedures or standards, has happened as a result of NGOs’ efforts.

The Convention allows for involvement of non-state actors as responsible for its implementation. The NGOs had strongly contributed to the rights of the child lawmaking process which was recognised in the Convention by giving NGOs a formal role in the subsequent monitoring process – under article 45(a) of the Convention the CRC Committee may invite specialized agencies, UNICEF and other competent bodies to provide expert advice on the implementation of the Convention. Hence the term “other competent bodies” includes NGOs.

Other international treaties also acknowledge the role of NGOs in promotion and protection of human rights. Those are: the Statute of the International Criminal Court (articles 15 (2) and 44 (4)); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 74 (4)); the UN Convention on the Rights of Persons with Disabilities (articles 32 (1) and 33 (3)). Governments are thus obliged to promote and enable space for civil society organisations and to cooperate with them in implementation of international standards (Vučković Šahović, 2010: 3).

3. International Children’s Rights Movement

NGOs have had a strong impact in the international rights of the child movement which began one hundred years ago with the establishment of the Save the Children Fund - in 1919. Its founder Eglantyne Jebb drafted the document that became the Declaration of the Rights of the Child which was adopted in 1924 by the League of Nations (Turkelli, Vandenhole, 2012: 36). This declaration for the very first time mentioned the term ‘right of the child’ in international context. It articulated that all people owe children the right to means for their development, special help in times of need, priority for relief, economic freedom and protection from exploitation and an upbringing that instills social consciousness and duty.

In 1948 the Universal Declaration of Human Rights was adopted by the General Assembly of the newly established UN. Its Article 25 entitles mothers and children to ‘special care and assistance’ and ‘social protection’. Further, in 1959 the UN General Assembly adopted the Declaration of the Rights of the Child which is still valid today. The Declaration recognized, among other rights, children’s rights to education, play, a supportive environment and health care. Many NGOs granted the consultative status by ECOSOC were involved in the adoption of the 1959 Declaration.

3.1. The Convention and NGOs - Impact of NGOs in the Lawmaking Process

When the process of drafting of the Convention was initiated by Poland in 1978, a number of NGOs actively participated by setting items on the agenda and by submitting their written statements to the UN Commission on Human Rights and later participated in the debates on the draft Convention content. An ‘Open-ended Working Group’ of the UN Commission on Human Rights was established and met from 1979 to 1988 allowing non-members of the UN Commission on Human Rights, such as UN Member and Observer States, NGOs in consultative status with ECOSOC and inter-governmental organisations to attend its public meetings as observers. These NGOs further met in 1983 to define and agree upon the future role of the NGOs in contributing to the drafting process. This resulted in the establishment of the NGO Ad Hoc Group on the Drafting of the Convention. The NGO Ad Hoc Group was created to develop joint proposals and ensure better coherence and coordination among various NGOs. It employed both formal lobbying and informal networking techniques to influence the drafting phase. It was the first time that the NGOs participated at such an extensive capacity in a treaty-drafting process at the international level (Cohen, 1990:140). The extent of the overall NGO contribution can be seen from the fact that, when reviewing the final text of the

Convention, the NGO Ad Hoc Group was able to identify at least thirteen substantive articles or paragraphs proposed by the NGOs. Thus the NGOs’ impact in drafting the Convention is “without parallel in the history of drafting international instruments” (Cantwell in Detrick (ed.), 1992: 19).

The Ad Hoc NGO Group later emerged into the NGO Group for the Convention on the Rights of the Child, and further into Child Rights Connect, today representing a strong network of international and national NGOs working together and in partnership with the CRC Committee, to implement the Convention and its three OPs. The Child Rights Connect empowers civil society and non-State actors, including children and NHRIs, to engage effectively with the CRC Committee. It is an organisation specialized in the work of the CRC Committee, ensuring regular and timely flow of information between the CRC Committee and other non-state actors thus strongly supporting the reporting process.

The Convention was adopted by the UN General Assembly in 1989 and is widely commended as a landmark achievement for human rights, recognizing the roles of children as social, economic, political, civil and cultural actors. The Convention guarantees and sets minimum standards for protecting the rights of children in all capacities.

The NGOs have had an equally strong impact in drafting the three OPs to the Convention. The UN General Assembly adopted two OPs to the Convention in 2000, obligating States parties to take key actions to prevent children from taking part in hostilities during armed conflict and to end the sale, sexual exploitation and abuse of children. In 2011, a new OP to the Convention on a communications procedure was adopted, enabling the CRC Committee to assess complaints of alleged child rights violations and undertake inquiries into allegations of grave or systematic violations of rights under the Convention and its OPs.

4. NGOs in the Work of the CRC Committee

Each of the ten human rights treaties has an expert group, a treaty body, responsible for reviewing whether States parties are fulfilling their obligations under that specific treaty. The CRC Committee is the treaty body composed of 18 independent experts that monitors the implementation of the Convention and its OPs. Upon the ratification of the Convention NGOs began their active involvement in the work of the CRC Committee. The Committee has systematically and strongly encouraged NGOs to participate in its work and has demonstrated that NGOs are perceived as its important partner. NGOs are

encouraged to submit alternative reports, documentation or other information in order to provide the CRC Committee with a comprehensive picture as to how the Convention and its OPs are being implemented in a particular country. Written information from international, regional, national and local organizations are welcomed by the CRC Committee.

The CRC Committee has further operationalized the role of NGOs in implementation of children’s rights and in the monitoring and reporting process in its General Comments. For instance, the General Comment No. 5 on general measures of implementation provides that “the State needs to work closely with NGOs in the widest sense, while respecting their autonomy... NGOs’... involvement in the process of implementation is vital” (CRC Committee, General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5 para. 58). In its most recent General Comment on children in the justice system, the CRC Committee emphasizes that NGOs can and do play an important role in child justice system, recommending that States parties should seek to actively engage with such organizations in the development and implementation of their comprehensive child justice policy and, where appropriate, provide them with the necessary resources for this involvement (CRC/GC/2019/24 paras. 110 and 111).

The interaction of NGOs with the CRC Committee is of key importance in the reporting process, at the General Discussion Days and in providing inputs in drafting the General Comments.

4.1. Reporting to the CRC Committee

All States parties are obliged to submit regular reports to the CRC Committee on how the rights are being implemented – an initial report two years after acceding to the Convention and then periodic reports every five years. The CRC Committee also reviews the initial and periodic reports submitted by States parties on the OPs. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of country specific “concluding observations”.

In its reporting guidelines, the CRC Committee emphasises that the preparation of reports represents a useful opportunity to review law and policy, which might prompt improvements in national legislation and practices. In addition, as the scrutiny of these reports by independent experts should expose non-compliance with treaty obligations, consequently such exposure and publicity should encourage change.

Understanding and taking part in the various stages of the CRC Committee reporting cycle is a powerful way for NGOs to monitor and help improve children’s rights in their countries. When provided with reliable and relevant information from a variety of sources, the CRC Committee is better able to make concrete and effective recommendations to States, to more fully guarantee the rights defined in the Convention and its OPs.

In order to rationalize the CRC Committee’s work, written information provided by NGOs should be submitted to the CRC Committee secretariat at least two months prior to the beginning of the pre-sessional working group concerned. The alternative report serves as the basis for the work of the CRC Committee, in addition to the research that is carried out by the Secretariat within the Office of the High Commissioner for Human Rights (OHCHR) that prepares a country profile on the situation in the country concerned. Based on the written information submitted, the Committee will issue a written invitation to selected NGOs to participate in the pre-sessional working group. The CRC Committee will only invite those NGOs whose information is particularly relevant to its consideration of the State party’s report. Priority will be given to those NGOs that have submitted information within the requested time-frame, are working in the State party and can provide reliable information that is complementary to information already available to the Committee.

NGOs have been continuously invited to participate in the pre-sessional meetings of the CRC Committee since 1995. The pre-sessional working group is a meeting closed to the public - no government representatives are allowed. Upon this meeting a list of issues is drafted and further sent to the State party concerned. The list of issues serves as a basis for the constructive discussion during the CRC Committee sessions with the States parties’ delegations. This is a key moment for NGOs to interact with the CRC Committee members and provide them with an input on desirable change.

Information may be submitted by individual NGOs or national coalitions or committees of NGOs. The CRC Committee favours submission of a joint report by a coalition of NGOs, with a thematic structure, prepared as a response to the State party’s report with specific recommendations – proposed suggestions for the content of concluding observations. Coalitions better promote advocacy for the improvement of the rights of the child, mobilise the public and encourage children’s participation in the process.

At the subsequent session of the Committee, the report and all other information is discussed with government representatives during a public meeting. NGOs can attend as

observers but are not allowed to speak – the Committee as a body does not meet formally with NGOs at this stage.

Even though NGOs have been given a prominent place in the work of the CRC Committee, the relationship between the Committee and the NGOs in state reporting is not without tensions. With regard to the pre-sessional Working Group, NGOs have regretted the absence of the Committee members, sometimes their unpreparedness for the discussion and lack of opportunity to substantially examine issues, due to lack of time and resources. (Turkelli, Vandenhole, 2012: 63)

4.2. Days of General Discussion

The CRC Committee holds a Day of General Discussion (DGD) in Geneva every two years focussing on a specific article of the Convention or a related subject. These meetings are an important opportunity for NGOs to develop a deeper understanding of the contents and implications of the Convention and network with the CRC Committee members and other child rights organisations around the globe. Ideas for possible themes are initiated by the CRC Committee members, UN agencies, NGOs, representatives of academia, and any other relevant stakeholder who can submit confidential or public written information to the CRC Committee before the DGD. On this occasion children are encouraged to send various materials, such as drawings, reports, videos, or express their opinion on the topic in any other form.¹ The public submissions are published on the CRC Committee’s webpage. This is also a useful opportunity for NGOs to conduct consultations with children and other relevant stakeholders at local, national and regional levels on the topic and undertake advocacy or capacity building activities in the country. As a result of the conclusions of the DGDs, the CRC Committee usually elaborates a General Comment on the selected topic.

4.3. General Comments

The CRC Committee develops General Comments to elaborate the rights contained in the Convention and its OPs in detail. They provide an authoritative interpretation of the rights contained in provisions of the Convention and its OPs, especially those that are more vague and thus misunderstood in practice, and are based on the CRC Committee’s experience in monitoring reports from States parties and systematic violations of

¹ E.g. In 2018 the Child Rights Centre from Serbia supported children to submit their contribution to the CRC Committee in the context of the 2018 DGD: “Protecting and Empowering Children as Human Rights Defenders”.

children’s rights. They represent a valuable tool for the States parties as they provide guidance on how to operationalize the Convention and its OPs in national context.

NGOs with relevant expertise can get involved in the preparation of General Comments. Ideas for the topics dealt may be suggested by NGOs that can submit their written comments in the drafting phase to the CRC Committee. General Comments are a very useful tool for NGOs as they also provide guidance for NGOs actions and may help in strengthening national advocacy targeting changes in legislation or policy on a particular topic. Also, national judiciary may refer to General Comments to clarify legislative provisions in their decisions.

4.4. Conclusions on the Role of NGOs in Work of the CRC Committee

Interactions of NGOs with the CRC Committee essentially contribute to better implementation of the Convention and its OPs at the national level. The process of preparation of an alternative report or participating in the DGDs or drafting of General Comments generates a wide consultation process with various stakeholders at the national level, thus it is in itself a valuable constructive process. It encourages and facilitates public scrutiny of government policies and provides NGOs and other relevant stakeholders with a golden opportunity to influence the national agenda and affect changes for the advancement of children’s rights.

Concluding observations of the CRC Committee are one of the most powerful basis for future NGOs’ actions. In the five-year period following the consideration of the report by the CRC Committee, NGOs can periodically monitor implementation of the recommendations, review measures undertaken, evaluate their success and adequacy and advocate for future actions. These recommendations are usually the most concrete and comprehensive guidance for improving the situation of children in the country. Moreover, effective monitoring helps to build an NGO’s reputation and authority as a child rights defender thus making it an important partner in the realisation of children’s rights (Save the Children, *Report from the workshop on NGO reporting to the UN Committee on the Rights of the Child*, 2007: 4)

5. Different Types and Roles of Children’s Rights NGOs

NGOs dealing with children’s rights come in a variety of type and scope of work. They range from small pressure groups on specific concerns or specific rights violations to international NGOs (INGOs) with members in different parts of the world. Whereas

national NGOs limit their activities in their home country, INGOs act in two or more countries.

5.1. International NGOs

Human rights INGOs focus on preparation of country profile reports, provide the evidence and information to media, and use the information and research to engage in advocacy to put pressure about certain government’s human rights violations before national bodies or international organizations. They often engage in drafting proposals for improved international standards, provide human rights training and education, initiate protests and demonstrations, campaigns, monitor the work of governments and international organisations etc. Some of the most prominent INGOs include: Amnesty International, Human Rights Watch, the International Committee of the Red Cross, *Médecins Sans Frontières*, Child Rights Information Network (CRIN), NGO Group for the Convention on the Rights of the Child etc. Some INGOs operate both internationally and at national level, such as Save the Children Sweden, which works in a number of regions and countries, but it is also very active in Sweden.

5.2. NGOs Operating in National Context

NGOs working in national context engage in the protection of the rights of the child to different extent – in a general way or with a specialized focus, addressing e.g. rights of children with disabilities, refugees and migrant children, victims of sexual abuse and exploitation, with local or national scope etc. Their impact is essential when performing any of the following functions: the role of a watchdog, where they monitor the work of the state bodies and institutions, hold them accountable and promote transparency in work. They have an important advocacy role, urging the relevant state bodies for positive changes for children by introducing or amending the existing laws, policies and budgets. They can also provide education and training contributing to increasing awareness and building capacities of professionals, practitioners, children and their families. Many NGOs provide essential community-based services to children and their families. They can also have an important role in humanitarian situations and emergency response, recovery, reconstruction and peace-building, and in implementing disaster management and preparedness. Very specific and important role of NGOs is in promoting and facilitating the participation of children in governance. (Save the Children, *Child Rights Governance, Safeguarding civil society space for children*, 2016: 7) The roles of NGOs are multiple and only some of them, most typical for Serbian context, are outlined below.

5.2.1. Monitoring and reporting

One of the primary roles of the NGOs is monitoring and reporting on the situation for children in their countries. NGOs observe and evaluate whether governments properly perform their functions and do not violate the limits of their powers. If not, they raise public concern about the misconduct or abuse of power. This role significantly contributes to promotion of governments’ transparency and holding them accountable.

Some NGOs may be involved in monitoring detention facilities or residential care institutions. Because children in institutions are extremely vulnerable, it is very important that the institutions are open to families and to the community as far as possible. This adds to their transparency and accountability for realizing the rights of children in their care. It also helps children to be rehabilitated and reintegrated in the society on their release. When performing monitoring visits, NGOs can function with a high degree of independence from authorities and make their reports public.

5.2.2. Advocacy and litigation

Advocacy represents a set of organised activities designed to influence the policies and actions of responsible stakeholders to achieve positive changes in children’s lives, based on the research, experience and knowledge of working directly with children, their families and communities. It is an important element of NGOs’ work and central for work to safeguard civil society space. NGOs often engage in advocacy and campaigning in order to bring about legislative and/or policy change. If legislation/policy is not in line with relevant international or regional standards, NGOs can ensure that this framework is revised and advocate for its amendments. New legislation should be created with clear implementation plan in mind and sufficient resources secured for its proper implementation.

Advocacy actions have numerous forms, depending on target groups, objectives and resources. When advocating for reforms, NGOs need to carefully gather data, evidence and information necessary to perform analysis on the situation of children in a society in different sectors, identify problems and challenges, carry out analysis on alignment of national laws and policy with international and regional standards, undertake cost and budget analysis, propose drafts, build consensus among different stakeholders, lobby with key stakeholders and provide technical assistance and support in the drafting process, organize focus groups with relevant professionals etc. NGOs should also reach out to the society through media to increase its understating on the rights of the child and contribute

towards achievement of a shared understanding of the core values necessary for their implementation.

Governments tend to work on implementation of the rights of the child on a more general level, covering the whole population of children in a country. That is the reason because the role of NGOs is important in ensuring that not even the smallest minority group of children remains invisible. Thus NGOs should ensure that specific needs of e.g. girl offenders or children with disabilities in different court proceedings are not neglected and under-researched but rather that their needs are addressed and reflected in relevant policies and programmes.

Some of common forms of advocacy include letter-writing campaigns to relevant government bodies, meetings or public debates with state representatives, street actions, lobbying practices, actions through social media etc. Very important campaigns carried out by NGOs are those for changing attitudes and behaviour through development forms of communication intended to facilitate the understanding of people’s perceptions, priorities and knowledge using various tools, techniques, media and methods – communication for development and social change .²

As very often children do not have full access to justice, strategic litigation is a very powerful tool to enforce children's rights at the national, regional and international levels. Strategic litigation involves selecting and bringing a case to the court with the goal of creating broader impact change in society. Strategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the particular selected cases themselves.

5.2.3. Education and training

Implementation of the Convention requires States parties and other stakeholders to undertake education, training and awareness-raising on children’s rights. One of the most common activity of NGOs is to provide some sort of training to groups of professionals, children, their families, media and general public with the aim to mobilise support in particular instances of child rights violations. In its General Comment No. 5 on general measures of implementation of the Convention, the CRC Committee emphasizes the need for ongoing training and periodic evaluation of the effectiveness of training, whereas the

² Those include e.g. campaigns promoting breastfeeding, inclusive education and addressing discriminative prejudices against children with mental disability attending mainstream schools.

purpose of training is to strengthen the status of the child as a rights holder. Usually NGOs provide trainings in order to strengthen capacities of groups of professionals such as members of judiciary, law enforcement, social welfare, education, health systems, but also parliamentarians, media and other NGOs. Moreover, it is also important to spread the knowledge and inform children about the rights provided by relevant child rights standards, e.g. through regular school curriculum. An important role of NGOs is in providing this information to children through peer education and workshops, when this important topic is not included in the regular school curriculum (Vučković Šahović, 2010: 44).

5.2.4. Community-based services

Very common feature of NGOs' work is service provision to children and families in the local community. To ensure future sustainability services are very often initially tested for certain period of time through setting up pilot schemes that will then be taken over by or financed by relevant government bodies. Thus NGOs provide social services, carry out home visits, collaborate with schools, provide education support, psychosocial services to children and families, family therapy, rehabilitation and reintegration etc. Some NGOs set up a telephone hotline for children to report violence which can be overseen by a relevant government body. Service provision implies setting up standards and developing guidelines for practitioners providing them at the local level in order to improve institutional capacity of social and child protection system for planning, developing and delivering quality community-based services.³

5.2.5. Child participation

Children should not be seen as victims but rather as active citizens and agents of change in their societies. NGOs have an important role when working directly with children, including the duty to really listen to children's opinions, understand them and respond to their needs and requests. When building evidence about needed reforms in certain area, the information should be obtained from children themselves. This is particularly important when preparing alternative reports to the human rights treaty bodies. Measures that fail to take into consideration the views, feelings and experiences of children are unlikely to meet their needs.

³ An important example of this type of role of NGOs is service provision with the aim to advance the protection of vulnerable children and their families so that children live in safe and non-violent families and family-like environments.

When working with children, child safeguarding policy should be respected at all times, in particular children’s rights to privacy, confidentiality, obtained informed consent and children’s ongoing protection. Children’s participation should always be voluntary and they should be clearly explained the purpose of their participation and ensure anonymity.

The General Comment No. 12 on the right of the child to be heard emphasizes: “the CRC Committee welcomes the significant contributions by NGOs in promoting awareness-raising on children’s right to be heard and their participation in all domains of their lives, and encourages them to further promote child participation in all matters affecting them, including at the grass-roots, community, and national or international levels, and to facilitate exchanges of best practices (UN CRC Committee, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 10).

There must be an ongoing commitment to children’s meaningful participation in particular for those children who are socially excluded and particularly vulnerable. When children learn to communicate opinions, take responsibility and make decisions, they are prepared for improved academic performance and good citizenship. A growing body of evidence indicates that opportunities to participate increase the level of competence in children. Children who are encouraged to express their views are less vulnerable to abuse and better able to contribute towards their own protection – as children now, and later - in adult life.

5.2.6. Conclusions on Types and Roles of NGOs

In order to achieve the change in children’s lives, NGOs need to have unique knowledge and experience to influence and shape policy and strategy. Identifying and building solutions require a wide range of skills, and professionals working in NGOs need to have expertise and be able to analyse the context and have an understanding of the range of actors, their strengths and weaknesses and their role in the policy process. A knowledgeable, energetic and vibrant non-governmental sector is fundamental for keeping children’s rights high on the agenda. (Vučković Šahović, 2010: 51).

6. An Enabling Environment for Civil Society

NGOs function within a political, social and economic context that may be more or less favourable to change. They put pressure on their governments to uphold basic human rights protection, very often in settings where rule of law is fragile, judiciary not always credible and where past abuses and conflicts have not been properly addressed. In order

to effectively contribute to implementation of children’s rights, NGOs must be able to work in an enabling environment. This implies that favourable institutional, legal, political and administrative conditions are in place securing effective and independent NGOs functioning. These include the rights to access information and to freedom of peaceful assembly, association, opinion and expression (Save the Children, *Child Rights Governance, Safeguarding civil society space for children*, 2016: 9).

The European Commission’s Serbia 2019 Report finds that “no progress was made towards establishing an enabling environment for the development and financing of civil society and that further efforts are needed to ensure systematic cooperation between the government and civil society. The environment in which NGOs operate is not open to criticism, with the authorities making negative statements, echoed by the media, on civil society in general and on funding of certain associations in particular. ... However, the relationship between the government and CSOs is still marked by fragmented cooperation. The continued frequent use of the urgent procedure for the adoption of laws limits the effective inclusion of civil society in the law-making process. A number of CSOs have reported that periods for public consultations are sometimes too short, or that their comments on draft laws were not given sufficient consideration and follow-up. A national strategy and action plan to contribute to an enabling environment for civil society have still not been adopted. A council for civil society cooperation still needs to be set up. Criteria for public financial support for CSOs need to be better defined and implemented to ensure overall transparency, especially at local level.” (European Commission’s Serbia 2019 Report, p. 10)

6.1. Key Challenges and Proposed Way Forward Towards a Stronger Non-Governmental Sector

Very often NGOs do not function to their full potential, but rather they are limited by donors’ funding aims, face perpetual concerns of financial instability, and lack the opportunities and capacity for sustainable development. Another important issue is that NGOs are not often well perceived in media and generally among citizens, very often due to lack of insight of public into their operations.

International donors’ aid combined with a lack of other types of support has led to a dependency situation through which local NGOs rely upon international aid for their very existence and for a very long period of time. There is reduced certainty of funding availability and sources. Donor criteria and funding priorities are constantly changing, including more stringent requirements to demonstrate impact which is in turn dependent

on good collaboration with the government. On their side, government funds are often unavailable to a wide range of NGOs and their funding procedures are not always sufficiently transparent. NGOs in addition face many obstacles in terms of strict legal and administrative limitations, without tax incentives. Private sector is still insufficiently interested in funding human rights NGOs, even though they fund different activities in local community. That is probably because business sector is not yet convinced of the importance and impact of human rights work and does not have any tax incentives when providing support to NGOs.

Funding further reflects on the relationship between NGOs and the communities in which they function. There is no practice of membership-funded NGOs, even though citizens have a tendency to support people in need. It is thus important that NGOs reach out and link with citizens for whom they in fact perform their work, better communicate their actions and goals and make their work more visible and transparent. NGOs will become real citizens' associations once they find a way to mobilise the community in which they operate and increase its accountability and transparency to people. (Mertus, 1998: 220)

Another challenge is the concept of Government Organization's Non-Government Organization, so called "GONGOs". They are not independent organizations but rather government controlled agencies that do not really contribute to improvement of human rights. GONGOs are specifically designed to imitate independent NGOs and therefore be mistaken for autonomous, grassroots organizations with the aim to gain government or foreign funding. These organisations may also create a wrong impression of a strong civil society in a country, especially when taking part in international events.

There are also a number of NGOs whose staff works between government jobs and NGOs which seriously hampers the NGOs' independence and integrity and can potentially lead to conflict of interest in performing of their work. This is due to discouraging trend of insecurity of employment in the non-governmental sector, subject to availability of fluctuating funding resources.

In order to ensure a strong non-governmental sector in implementing the Convention it is necessary that the government put children's rights high on the agenda. Government should facilitate NGOs' participation in dialogue and consultations and should allocate specific funds for improvement of children's rights and introduce transparent procedures for NGO funding applications and evaluation of proposed actions, based on clear and previously defined criteria. Both government and donors should involve NGOs in programming and planning activities concerning children's rights.

NGOs should continuously strengthen their capacities and skills – professional, managerial, financial, and establish links and networks with similar NGOs at both national and international level. They should develop volunteering programmes and establish stronger links with citizens, media and attract private sector. The work of NGOs should be more visible to the general public and systematically evaluated against improvement of children’s lives.

7. Conclusions

NGOs are often the strongest voice in promotion and implementation of human rights and children’s rights in particular. The impact of NGOs in drafting the Convention and continuous involvement of NGOs in various aspects of work of the CRC Committee are appraised as very strong. A knowledgeable, energetic, independent, provocative and vibrant non-governmental sector is fundamental for keeping children’s rights high on the agenda. Its impact is essential when performing any of the following functions: the role of a watchdog, advocacy role, education and training role, service provision and in promoting and facilitating the participation of children in governance. In order to perform these roles, NGOs need to work in an enabling environment but they also need to ensure that they retain the highest ethical standards and integrity, core mission, meaningfulness and high level of trust. They should always be guardians of those the most marginalized and invisible.

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30 YEARS OF THE CONVENTION ON THE RIGHTS ON THE CHILD - CHANGING ENVIRONMENT

In the three decades of the existence of the Convention on the Rights of the Child, the Convention initiated transformations of the society and introduced reforms across the nations, systems, and frameworks. The paper provides a brief overview of the main achievements and challenges in the implementation of the Convention, including some of the most relevant lessons learned. The paper explores the Convention as a tool for maintaining and enhancing child’s wellbeing, standard setting and law reforms, including the role of national human rights institutions, as well as access to justice for children.

Keywords: *Convention on the Rights of the Child, rights of the child, implementation, enforcement.*

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1. Introduction

Children are essential and critical world’s demographic group. In 2019, only children aged between 0 and 14 constituted 26% of the world’s population (UNFPA, 2019). Moreover, according to the World Health Organization (WHO) (2019) despite the significant reductions in mortality of children since 1990, it was estimated that 6.2 million below the age of 15 died from the preventable causes out of which 5.3 million of deaths occurred in the children below the age of five. The data on the deaths of children that occurred due to preventable causes paint a gloomy picture of the contemporary world.

In the modern world, nations, and the global community despite their (to somewhat extend) developed capacities are still not able to respond to the challenges children are faced with. Moreover, they are still not able to fully support the child to live, survive, develop, and thrive. At the same time, it seems that this is the best of times to be a child as in the last three decades, the state of the world’s children significantly improved (UNICEF, 2009). Additionally, the states have developed legal, and policy frameworks built institutions and have established good practices to promote and protect children’s rights and maintain and advance children’s wellbeing. This transformational shift can be attributed to the adoption and implementation of the Convention on the Rights of the Child (UN General Assembly, 1989).

This year marks 30 years since the adoption of the United Nations Convention on the Rights of the Child (CRC), and 29 years of its implementation. The 30th anniversary of the CRC represents an excellent opportunity to reflect on the achievements, as well as on challenges in the implementation of the Convention with a purpose of identifying main advancements and the lessons learned in order to enhance the protection and advancement of the rights of the child and child’s wellbeing. This paper provides an overview of the Convention on the rights of the child, which is followed by a brief examination of the Convention as a tool for advancing the wellbeing of children. The paper then turns focus on the impact Convention has had on the process of transformation and reformation of societies, and identifies some of the new and emerging issues. Finally, the paper concludes.

2. A brief overview of the Convention on the Rights of the Child

The Convention on the Rights of the Child (hereinafter the Convention) was adopted on 20 November 1989 in New York. Pursuant to article 49, paragraph 1, the Convention came into force on 2 September 1990 when 20 member states of the United Nations (UN)

ratified it. The Convention is almost universally ratified human rights instrument with 196 parties to it. The United States of America is the only nation that did not ratify the Convention, although it signed it in 1995. However, it is interesting to note that the United States of America did ratify two optional protocols to the Convention.

According to Doek (2009), the Convention is a record holder among the treaties in terms of the number of ratification, which makes the Convention as one of the most successful human rights treaties so far. The almost universal ratification of the Convention could be understood to be indicative of the commitment of both international community and individual member states to the human rights of children. In that regard, the commitment to human rights of children seems to transcend the differences between and among the nations and unite the international community in efforts for ensuring the survival, development and thriving of all children. The differences among and between the countries could have different types and forms of manifestation. One could argue that these differences could potentially manifest in the form of inconsistencies, tensions, and contradictions that arise in the implementation of the Convention. In that regard, Quennerstedt et al. (2018) point out to the research gap on the contradictions, tensions, and inconsistencies in the implementation, monitoring and evaluation of the Convention.

It is critical to note that the Convention's ability to transcend the differences does not mean that the Convention is a “perfect” human rights treaty. For instance, Arts (2014) draws attention to the fact that it is not perfect, and elaborates more on this concept in the context of the implementation of the Convention by focusing on how the lack of this quality does not undermine the Convention's impact and relevance. For the purpose of this paper, “perfect” human rights treaty refers to the existence of the expectation that the Convention should be free from contradictions and tensions. Such an expectation is neither realistic nor beneficial. In addition, the Convention is not a formula of rights that can be applied automatically.

Similarly, no activity nor measure can replace the involvement of the children, but also all other relevant actors in the implementation of the Convention. Hence, inconsistencies, contradictions and tensions that are emerging from the implementation of the Convention emphasise the fact that that the Convention is a living instrument evolving across the time, territories, and cultures. Moreover, these contradictions, inconsistencies and tensions mirror dynamics between different groups in society, and above all, it reflects how the society is structured towards children. In that context, the conflicts that arise from the implementation of the Convention are of great importance as they put the light on the

areas in need for attention, balancing and integration, presenting themselves as opportunities for growth.

Furthermore, the potential of the Convention to transcend the differences, balance, harmonise and integrate different perspective is of particular importance given the fact that one of the most common critiques of the Convention is that the Convention is founded in the Western concepts and philosophies (Bennett Jr., 1987; Todres, 1998; Cantwell, 2007). Moreover, authors such as Harris-Short (2001) pointed out the existence of the Western biases in the monitoring of the implementation of the Convention by the UN Committee on the Rights of the Child. Criticising the Convention because it embodies the so-called Western concepts simultaneously communicates two types of messages that appear to contradict each other. Both groups of messages have a significant impact on the implementation of the Convention, and in overall, they shape the public's attitudes towards it.

Within the first group of messages are the ones that point out to the need that the implementation of the Convention should be adjusted to the specific contexts, which among other things means that the implementation should be more culturally sensitive, respective, and all-embracing. Furthermore, in such cases, there is an invitation to take different perspectives into account and integrate them, or in the words of Arts (2014), there is a call for the accommodation of diversity. These messages promote the principle of inclusion and integration. Within the second group of messages are those messages that are focused on the power dynamics between the countries, and that indirectly communicate that the Convention is used as a potential tool of oppression of non-Western countries. Such implicit messages promote the principle of exclusion, which application can significantly challenge the implementation of the Convention. Moreover, such implicit messages do injustice to the Convention, defeat its purpose, harm friendly relations among the nations and negatively impact the rights and wellbeing of children.

The Convention applies to all below the age of 18 (article 1). It is one of the most innovative and comprehensive human rights instruments there is. In its 54 articles, the Convention proclaims civil, political, social, economic, and cultural rights of the child in a comprehensive manner (Doek, 2009). The innovative aspects of the Convention are reflected in the formulations of its provisions which are able to withstand the tests of time. In that regard, the Convention establishes a set of global standards that ensure not only the protection, survival, and development of the child, but also set the standards that enable the child to thrive and reach his or her full potential. One of the unique features of the Convention is that the Convention has four general principles, meaning that these four

general principles should be taken into account during the implementation of the other articles of the Convention (Doek, 2007). These four guiding principles are as follows:

- Article 2: the right to non-discrimination;
- Article 3: the best interest of the child;
- Article 6: the right to life, survival and development;
- Article 12: the right to be heard.

In addition, there are three Optional Protocols to the Convention. They are:

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (UN General Assembly, 2000);
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (UN General Assembly, 2001);
- Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (UN Human Rights Council, 2011)

First two optional protocols to the Convention entered into force in 2003, while it took three years for the Third Optional Protocol to come into force.

3. The Convention on the Rights of the Child- an instrument of advancing the status and wellbeing of children

The Convention on the Rights of the Child is not only international human rights instruments, but it is also an instrument of advancing the status and wellbeing of children. According to Mekonen and Tiruneh (2014), the Convention has had a significant impact on shaping favourable attitudes toward children, and as such it was a critical tool for featuring the rights of the child issues as one of the priorities of the international and national agenda, including focusing the efforts to realise both the rights and wellbeing of children. The authors found that despite the significant differences in implementation of the Convention across the states and regions, there is a correlation between the implementation of the Convention and maintaining and increasing the wellbeing of children (Mekonen & Tiruneh, 2014). Hence, the implementation of the Convention is intrinsically linked to the wellbeing of the child.

For Doek (2014) the child’s wellbeing is closely related to his or her material and psychosocial conditions, implying that enjoyment of the right to highest attainable standard of health (article 19), the right to adequate standard of living (article 22), the right to education (article 23) are instrumental for child’s harmonious development. Furthermore, Doek (2014) emphasises the connection between wellbeing and well-becoming. Given the fact that the child’s developing body requires more air for breathing, more food to eat, and more water to drink, but also loving and supporting environments, child’s well-becoming is of the same importance as the child’s wellbeing. Thus, the child’s wellbeing and well-becoming are intertwined and impossible to separate.

It is beyond any doubt that the Convention has had a significant beneficial impact on millions if not billions of children across the globe in the previous three decades. Some of the areas with the most noticeable improvements are the ones relating to the reduction of child’s mortality, prevention of common diseases, access to education, child labour, juvenile justice, corporal punishment, and different forms of violence against children. However, there is a number of issues that require urgent attention, and that pose significant challenges for the implementation of the Convention. These challenges adversely impact the quality of life of children. Some of those issues are environmental degradation and climate change, poverty, and digitalisation. In addition, it should be noted that some of the issues or areas that recorded significant progress in some of their aspects simultaneously pose and a significant challenge. Child mortality rate demonstrates well the dual nature of some of the issues. For instance, despite the significant decrease of the child mortality rates (WHO, 2019), children are still the ones the most impacted by environmental degradation as deaths of 1.7 million of children under five could be prevented through better environmental management (Prüss-Ustün et al., 2016). Therefore, we seem to be presented with what could be called the child’s rights paradox, whereby child rights are both enjoyed and denied at the same time as it was seen on the example of the child mortality.

Bearing in mind that the particular aspects of the realisation of the rights of the child have attained achievements, while other aspects have been overlooked or challenging, the question of the role of different actors in the implementation of the Convention arises. Child Rights actors could be distinguished based on whether they are state or non-state actors. Business and industry, civil society organisations, and individuals such as children themselves are the most significant non-state rights of the child actors.

The Convention is a critical instrument for non-state actors, particularly civil society organisations and citizens, to introduce and facilitate the transformational change in the

society. Failures to implement the Convention point out to the opportunities for improvements for both state and non-state actors because the cooperation of the states with the civil society is of vital importance for the implementation of the Convention (UN Committee on the Rights of the Child, 2003: para. 58). Mainly the work of the civil society organisations, including child and youth and youth-led organisations, have made a significant contribution to the implementation of the Convention and its promotion but also monitoring. That is why the civil society have had a significant impact on the implementing general measures of the Convention (Vučković Šahović, 2010). According to the research of Polonko and Lombardo (2015), more than half of the member states to the Convention had a national coalition with membership to the Child Rights Information Network (CRIN), and for majority of the states at least one alternative report was submitted to the UN Committee on the Rights of the Child.

4. Convention on the Rights of the Child and Transformation and Reform

Since its adoption, throughout the world, the Convention initiated significant reforms of the legal and policy frameworks, institutions, standard-setting, jurisprudence, campaigning and advocacy, and in overall the decision making particularly at the national and regional level (Doek, 2009; Arts, 2014; Liefwaard & Doek, 2015; Liefwaard & Sloth-Nielsen, 2017; Kilkelly & Liefwaard, 2019). As per article 4 of the Convention

“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regards to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.”

At times it seems that there is a myriad of measures that the States could undertake in order to comply with the Convention’s provision, and at times that there is a limited number of measures available due to social, economic and political conditions and factors. However, as there is no one solution fits all kind formula for the implementation and enforcement of the Convention, appropriateness of the legal, administrative, and other measures are always context-dependent and should be examined on the case by case basis.

4.1. Law Reform

The Convention of the Rights of the child’s related law reforms is one of the most tangible outcomes (Arts, 2014). However, the law reforms that were influenced, motivated or inspired by the Convention are only indicative of the measures taken by the States to implement the Convention. However, these reforms are not indicative of the appropriateness of these measures, meaning that different types of tools, instruments and indicators should be employed to assess the appropriateness. In that regard, the assessment of the law reform firstly takes into account changes in legislation, and secondly the appropriateness of these changes that are always context-dependent.

According to Tobin (2005), the Convention had a transformative effect on the national constitutions as there is a tendency of the states to provide constitutional recognition and protection of the rights of the child. Furthermore, the constitution is a powerful tool for the implementation of the Convention, but also a tool of legal and policy reform (Duncan, 2008). However, it should be noted that constitutional recognition is not an automatic guarantee for the enjoyment of the rights of the child (Tobin, 2005). Nevertheless, constitutional recognition of the rights of the child is of great importance for the implementation of the Convention, as it internalises the Convention into the domestic system. That way, ensuring the enjoyment, protection, and advancement of the rights of the child no longer only a matter of compliance with the international law, but also matter of compliance with the highest law of the country. In overall, there is a growing trend of constitutionalization of the rights of the child across the world and regions. For instance, in 2014 among the member states of the Council of Europe, only three constitutions in Europe did not contain any provision on the rights of the child, while all other national constitutions did contain rights of the child provisions (Venice Commission, 2014).

In addition to the constitutionalization of the rights of the child as one of the implementation measures of the Convention, the Convention also influenced reforms of the legislative and policy frameworks at the national level. The implementation of the Convention has been translated in the legislative reform whereby the state has developed exclusive rights of the child legislations, such as for example Child and Adolescent Statute in Brazil, or reformed the existing sectoral legislation to meet the obligations posed by the Convention (UNICEF, 2008; Doek, 2009; Arts, 2014). An excellent example of the sectoral reforms is a reform of the social protection, education and health systems for the rights of the child. For instance, Reinbold (2019) found that the Convention has had a positive impact on the health outcomes of children in less developed countries. Despite the progress made in respect to the law reforms, Polonko et al. (2016) analysed

reports of 179 states submitted to the UN Committee on the Rights of the Child identified that in the majority of the countries are facing significant challenges in the implementation of the Convention, as well as that the states are still more focused on the child welfare than on the child-rights based legislation.

4.2. Access to Justice for Children

The UN Committee on the Rights of the Child (2003: para 24) stated that

“for rights to have meaning, effective remedies must be available to redress violations.”

Therefore, access to justice for children is of the utmost importance for the protection, promotion, and advancement of the right of the child. However, when it comes to the conceptualisation of the access to justice for children, Liefwaard (2019: 196) notes that

“The concept of access to justice for children has nevertheless emerged in the past decades and manifested itself firmly in international human rights and sustainable development agendas. Access to justice is grounded in the fundamental right to an effective remedy and revolves around the right of children to seek remedies in case of (alleged) rights violations. Moreover, it concentrates on the legal empowerment of children thereto.”

The Convention guarantees the protection of the rights of the child. However, merely having available, accessible, affordable, and appropriate remedies are simply not enough. This is due to the fact that the protection of children is an interplay of different types of rights (Sandberg, 2018). Nevertheless, violations of the rights of the child have been brought before regional human rights courts and before the national courts (Liefwaard & Doek, 2015). For instance, at the regional level, the case-law of the European Court of Human Rights has contributed to protection and advancement of the rights of the child, and thus supported the implementation of the Convention (Kilkelly, 2015). Although the use of the Convention in domestic jurisprudence varies from country to country, and even though there is an increasing interest in strategic litigations (Liefwaard & Doek, 2015), the example of Serbia demonstrates the challenges and opportunities of the countries that have not fully embraced rights of the child, and more specifically, the right of the child to access justice and effective remedies (Vučković-Šahović & Savić, 2015).

4.3. National Human Rights Institutions

In 1981, Norway was the first country to establish the Children’s Ombudsperson and champion the protection and promotion of the rights and interests of children. However, it is interesting to note that the Convention on the Rights of the Child does not impose obligations on the states to establish the National Human Rights Institutions. Nevertheless, the UN Committee on the Rights of the Child (2002) issued a General Comment on the role of independent national human rights institutions in the promotion and protection of the rights of the child.

Article 4 of the Convention, together with the General Comment on the role of the national human rights institutions and General Comment on the means of implementation provide a solid legal foundation for the establishment of the national human rights institutions for children. The national human rights institutions have been instrumental in promoting and protecting the rights of the child. In that regard, they did not only supported and enhanced implementation and monitoring of the Convention at the national level, but they also supported children and enhanced their access to public services, access to justice and participation opportunities, while on the other hand they have supported states in their compliance with the Convention and reducing the costs of failing to protect and promote the rights of the child (UNICEF Innocenti Research Centre, 2001). Sloth-Nielsen (2019) highlights the relevance of the national human rights institutions and their capacity and efficiency in bringing child-orientated focus in adult-orientated governance. In addition, independent human rights institutions for children are a critical instrument for closing the gap between social and formal accountability for children’s rights (Sedletzki, 2017).

Nowadays, throughout the world, there are more than 100 national human rights institutions mandated to promote, protect, and advance the rights of the child in more than 80 countries (CRIN, 2017). Due to the increasing importance and relevance of the national human rights institutions, the establishment of the regional networks is not uncommon. For instance, within the European region, there is the European Network of Ombudspersons for Children (ENOC) (2019) which gathers 43 institutions from 34 countries of the Council of Europe. These institutions initiate substantial changes and shifts in the legal, policy and institutional framework of the country, making the protection of the rights of the child easily accessible and effective. However, these institutions also face significant challenges. Stamm and Würth (2018) found that 89% of the national human rights institutions believe that they could make their work on the rights of the child more effective and that the main challenges in their work are:

- insufficient financial resources,
- lack of specialised staff,
- no means to secure implementation of recommendations,
- others, and
- lack of effective processing of complaints.

5. New and Emerging Challenges

The Convention significantly influenced the international agenda, especially in regards to issues such as children in armed conflict, sexual exploitation of children, violence against children (Doek, 2009). In addition, the Convention significantly influenced international, regional, and national sustainable development and environmental agendas (Savić, 2016). On the other hand, environmental issues, and particularly climate change have been one of the main concerns of the international community. The process of developing and adopting Sustainable Development Goals (SDGs) has demonstrated, both directly and indirectly, the commitment and determination of the international community to the rights of the child and implementation of the Convention. This commitment was translated into evidence based development of the SDGs. In that regard, the implementation of the Millennium Development Goals (MDGs) provided significant lessons for policymakers and stakeholders, especially in regards to the rights of the child.

With the merging of the two international development processes (development and sustainable development), crowned with the SDGs, the Convention has received more attention than ever, and the implementation of the Convention gained new momentum at the international level. On the other hand, the implementation of the Convention has been severely impacted by environmental degradation and climate change. In that regard, it is widely recognised that especially climate change causes and also results in the violation of the rights of the child (Savić 2016; Arts, 2019).

6. Conclusion

In the previous three decades, the Convention on the rights of the Child has made seismic shifts in the rights of the child arena. In that regard, the almost thirty years-long implementations of the CRC pointing out the directions of evolution of our civilisation. The implementation also emphasises the complexities, challenges, but also misconceptions that individuals, groups, and nations hold both in relation to children and human rights. Law reforms have been one of the most tangible outcomes of the implementation of the Convention. In addition, these law reforms and enforcement of the legal and policy frameworks show vividly where the opportunities for the improvements are. The opportunities for improvement often manifest themselves in the new and emerging challenges, such as for example the environmental degradation, climate change and digitalisation.

Despite the fact of the greater awareness of the importance of the rights of the child, children across the globe are faced with numerous violations of their rights. In that regard, it should be noted that this is at the same time the best time for being a child and the worst time. Even though in the last three decades, the child’s access to justice has significantly improved, many challenges remain to be tackled and address in a holistic and integrative manner. Such an approach is of the great importance taking into account the so-called child’s rights paradox whereby certain aspects of the rights are enjoyed, while other aspects of the rights are violated.

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YEARBOOK
HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHTS OF THE CHILD
“30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”

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PROTECTION OF CHILD RIGHTS IN THE CRIMINAL PROCEDURE IN LIGHT OF THE NEW HUNGARIAN CRIMINAL PROCEDURAL CODE

The aim of this paper is to introduce the protection of child rights in Hungarian criminal procedures in light of the new Hungarian Criminal Procedural Code, through presenting the changes in legislation during the course of the past 30 years both at an international and national level. Firstly, the author will consider the international and EU regulations regarding the rights of child and child-friendly justice system programs, then will evaluate their impact on the Hungarian legislature and will consider the changes in the new Hungarian Criminal Procedural Code and Criminal Code regarding child offenders, witnesses and injured parties. The paper will show that in Hungary the goal of legislature was to create a justice system in which the criminal procedures' goals meet the minimum standards of the EU and international regulations in paying attention to the special needs of children.

Keywords: *protection of child rights, child-friendly justice, child victims and offenders, special measures*

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1. Protection of child rights in the justice system

All European Union (hereinafter “EU”) Member States have a duty to ensure that children’s best interests are the primary consideration in any action affecting them. This consideration is of particular importance when children are involved in criminal proceedings as those are considered very stressful even for adult people – not to mention children, who might become traumatized easily if the procedures are not child friendly and do not take into consideration the delicate personalities of them.

Based on these facts, the treatment of children in criminal proceedings is an important fundamental rights concern, addressed by the United Nations in its Convention on the Rights of the Child, which has been ratified by all EU Member States. EU Member States also show their commitment to this issue by promoting the Council of Europe’s 2010 Guidelines on child-friendly justice and improving the protection of child rights in their justice systems.

Regarding the above-mentioned steps, the question arises, what are the results of these measures taken by EU Member States in order to provide a more child-friendly surrounding in the course of a criminal proceedings?

1.1 The international regulations regarding the protection of child rights

Firstly, it is important to take a look at the United Nation’s Convention on the Rights of the Child (hereinafter “Convention”) signed in New York on the 20th of November 1989. The guiding principle of the Convention is stated in Article 3 and claims that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The Convention’s principles consist of basic human rights (such as right to life, freedom of expression, freedom of thought, conscience, and religion, prohibition of torture or inhuman or degrading treatment) that shall be granted to all people – including children – and some of them are for the protection of the child as special legal entity. For example, in order to focus on the interest of the child, the use of imprisonment shall be considered ultima ratio and, even then, child perpetrators shall be separated from adult perpetrators in a penitentiary institute. In 2003, the UN’s Committee on the Rights of the Child declared in General Comment no. 5 that the Parties shall make an extra effort in order to insure effective and child-friendly procedures. (UN Committee on the Rights of the Child, 2003)

The above-mentioned principles paved the way for the idea of child-friendly procedures that have been put into the focus of legislators too. As a result, on the 17th of November 2010, in the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, the definition of child-friendly justice was declared for the first time.¹ The definition shows that child-friendly justice systems shall take into account first and foremost the interest of the child and shall consider the right of child during every step of the procedure.

Since the Lisbon Treaty has been in effect, there has been also a growing pressure and attention put on the protection of rights of child and their prevail in the European Union. (European Commission – Directorate-General for Justice, 2014) Furthermore, Article 24 of the EU Charter of Fundamental Rights (hereinafter “Charter”) states that children shall have the right to such protection and care as is necessary for their well-being. They may also express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. Moreover, in accordance with the Convention, the Charter states that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

As the EU believed that the rights of children in criminal procedures were not well organized and could be mainly found in the case law of ECHR, Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings was accepted (hereinafter “Directive”). The purpose of this Directive was to establish procedural safeguards to ensure that children, meaning persons under the age of eighteen, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration. The minimum principles are the following:

¹ “child-friendly justice refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.” - II. Definitions, c)

- Right to information
- Right of the child to have the holder of parental responsibility informed
- Assistance by a lawyer
- Right to an individual assessment
- Right to a medical examination
- Audio-visual recording of questioning
- Limitation of deprivation of liberty
- Alternative measures
- Specific treatment in the case of deprivation of liberty
- Timely and diligent treatment of cases
- Right to protection of privacy
- Right of the child to be accompanied by the holder of parental responsibility during the proceedings
- Right of children to appear in person at, and participate in, their trial
- Right to legal aid
- Effective remedies under national law
- Training of staff of law enforcement authorities and of detention facilities, judges, prosecutors (Hungarian Helsinki Committee, helsinki.hu, 2018)

It can be clearly seen from the above listed set of extra safeguards, the goal of the Directive is to keep in mind the utmost interest of the child in criminal proceedings, which were also the minimum standards for making the codification of the new Hungarian Criminal Procedural Code.

1.2. The transposition of international regulations of the protection of child rights into Hungarian legislation

As a Member State of the European Union, the Council of Europe and the United Nations, Hungary had to strategize and lay down its own rules concerning the establishment of a child-friendly justice system. The basis of the protection of child rights is established in Article XV and XVI of the Fundamental Law of Hungary, declaring that fundamental rights shall be provided for children as well as adults. Based on this declaration, it can be observed that the rights of child embraces the Hungarian legislation, especially “in cases children get directly or indirectly in contact with the justice system”. (dr. Bencze-Bózsár, 2015: 8)

As a first step, in 2011, the Ministry of Public Administration and Justice in Hungary – with the help of the Ministry of Interior and Ministry of Human Resources – established the Child-friendly Justice Workgroup, in order to prepare for necessary legislation changes and as a result, in 2012, the government of Hungary declared “the Year of Child-friendly Justice” program.

1.2.1. Hungarian child-friendly justice system

The first “package” of legislation changes in connection with child-friendly justice has been introduced through Act LXII of 2012 on the modification of legislation in connection with the realization of child-friendly justice. This “package” modified, among others, the Hungarian Criminal Code and the Criminal Procedural Code.

After this modification became effective, Statue 32/2011. (XI. 18.) of the Minister of Public Administration and Justice was declared which ordered the establishment of children’s interrogatory rooms at investigative authorities’ buildings and as of now, it is ruled by the 34/2015. (XI. 10.) Statue of the Ministry of Justice on the establishment and design of interrogation rooms at investigative authorities’ buildings for child offenders, witnesses or victims (injured parties) who need special treatment during their interrogation. In connection with this program, the President of the National Office for the Judiciary established the Workgroup for Child-focused Justice System in 2013. The goal of this Workgroup was for the rights of child to be more effective in the course of criminal and civil proceedings regardless their age and their role in the procedure (whether they are parties, defendants, or witnesses in the procedure).

Szilvia Gyurkó claims that – through several changes in the Hungarian legislation – most of the child rights mentioned in the Convention and Charta have been already included in

the Hungarian legislation. (Gyurkó, 2012: 114) However, the adopted provisions of child-friendly justice can be divided into three part: i) before the judicial procedure, ii) during the judicial procedure, iii) and after the judicial procedure.

The general elements of child-friendly justice are the following:

- Giving information and advice
- Protection of private and family life
- Security (special preventative measures)
- Training of professionals
- Multi-disciplinary approach
- Deprivation of liberty (dr. Hegedűs, 2018: 4)

The Hungarian child-friendly justice system before judicial procedures involve the following:

- In case it is in the interest of the child, alternative methods to the judicial procedure shall be encouraged (e.g. mediation, diversion, alternative dispute resolution methods).
- The child shall be informed about all the possible procedures awaiting him or her and shall be ensured to exercise the rights of child.
- The provisions of the investigative authorities for child offenders, juveniles, witnesses – it is of utmost importance that the child is provided an attorney throughout the whole procedure. (dr. Hegedűs, 2018: 6)

The Hungarian child-friendly justice system involve the following during judicial procedures:

- The right to request judicial hearings, proceedings
- Legal advice and representation

- Right to hearing and freedom of expression
- Right to avoid unreasonable delay
- Child-friendly environment and use of language
- Child statements and declarations (dr. Hegedűs, 2018: 7)

Hungarian child-friendly justice system after the judicial procedures consists of the following:

- the attorney shall explain the order or the verdict to the child in a way which is understandable for him and with the use of child-friendly language
- the child shall be supported and given instructions after the procedures by the authorities and the child’s attorney (dr. Hegedűs, 2018: 9)

Thus, all the above-mentioned factors must be taken into account while dealing with a child in any criminal procedure in light of the child-friendly justice provisions.

1.2.2. The new Hungarian Criminal Procedural Code

While making the new Criminal Procedural Code, Hungarian legislators had two European trends to consider. One of them is to regulate the provisions relating to young people in a separate Act like Scandinavian nations did. The other option was to create a unified criminal legislation including the provisions relating to young people, which is usually applied by Middle-European countries and was opted by the legislators making the codification of Act XC of 2017 on the Criminal Procedural Code, which labelled the procedures relating to young people as special procedures in Part XX, Chapter XCV. According to the Commentary on the Criminal Procedural Code, based on the Convention and EU Directive, it is expected from every Member States to create a justice system in which the criminal procedures’ goals are the following: taking into account special needs of juveniles and are directed at preventing recidivism, promoting integration into society, re-socializing and re-integrating of children, compensating and making amends in connection with the negative effects of the committed crime. (Polt dr. et. al, 2019: 1389) These goals in the Hungarian Criminal Procedural Code coincide completely with the principles set out in Directive 2016/800 and by the expectations of the child-friendly justice programs both nationally and internationally.

Child as a juvenile offender

Firstly, it is necessary to examine who is considered a child, a juvenile or a young adult in the Hungarian justice system. The literature divides society into five generations: the “Builders’ generation” who were born before 1946, the “baby-boomers” (born between 1946-1964), the “X generation” (born between 1965-1979), the “Y generation” (born between 1980-1994), and finally the “Z generation” (born after 1995). (Strauss-Neil Howe, 1999 and 2000) At the moment, Z generation consists of people who are under 24 years old which group shall be examined from a criminal law point of view as follows: children, juveniles, and young adult perpetrators on the side of offenders, and victims under the age of fourteen and eighteen.

Z generation is the most taught generation – being the children of the information and digital age – and their lives are determined by social media and social life on the Internet. In general, it could be seen that they are not connected well with their family, live for a long time in their family home, do not thrive to build a family of their own. All of these aspects make them intellectually more and more mature, but at the same time, emotionally they do not develop as they should. Based on these facts, they are not able to cope and process emotionally all the information given to them, and thus it might lead them to assert their interests aggressively. (Mocsáry, 2017:1)

In the past couple of years, statistics showed that the most active circle of offenders are juveniles (aged between fourteen and twenty-four years) – mainly committing (violent) crimes against property, battery, and public nuisance. (Ugyeszseg.hu, 2013) Moreover, among Z generation, violent crimes are committed mainly by twelve-thirteen years-old children. (Ugyeszseg.hu, 2013)

Considering the above described facts, it can be seen that it was understandable to make changes in the legislation in order to adapt to the changes in the generations and their behaviour. According to the Commentary on Act C of 2012 on the Criminal Code, the Criminal Code laid down the minimum age for punishability at fourteen years old to twelve years old (related to five crimes) and the reason for this was the fact that most children finish elementary school at that age and reach certain level of maturity both physically and mentally which allows them to be accountable for their actions. As this development in children accelerated during the past years, committing violent crimes has become more common among children between the age of twelve and fourteen years old, so legislators had to take actions regarding this matter. (Hegedűs dr. et. al, 2013)

2.1. Victim and/or perpetrator

On the other hand, it must be mentioned that according to practice, among underage children, there is a significant overlap between victims and perpetrators. Eszter Mocsáry claims most of the children committing crimes have their own problems in their family, in their school and are subject to failure in solving these challenges. (Mocsáry, 2017:2) These children, most of the time, are subject to rigid, abusive parental behaviours, psychological and physical violence. As a result, it is not unusual that victims themselves often become perpetrators due to the abuse they have to deal with at a young age and its effect on their psyche. Typical example can be the drug related crimes for the mentioned overlap. One of the classmate can be buyer of drugs and at the same time seller as well in his class. The lawyers and investigator's responsibility to realise the right and detailed circumstance. At this stage is understandable that drug trafficking is much more serious crime than drug consumption, so is very important to measure the main aspect/motivation of the committed punishable act. Is the juvenile perpetrator a real criminal or victim of adult perpetrators?

2.2. The special rights of juveniles and their special procedural rights

Based on all the above-mentioned facts, it is not a surprise that, for juveniles, there were special rules introduced in the justice system. Chapter XI (Provisions relating to young people) of the Criminal Code is applicable (*lex specialis derogate legi generali*) for juveniles, the other provisions of the Criminal Code are only applicable in cases there are no special provisions applicable. Furthermore, during criminal procedures, special procedural rights are provided for children.

As for sanctions, according to Section 106 of the Criminal Code, the principle objective of any penalty or measure imposed upon a juvenile is to positively influence the juvenile's development to become a useful member of society, and such penalty or measure should therefore have as a primary consideration the juvenile's guidance, education and protection, which goal was originally set out not just in the Directive, but before that also in the Convention and Child-friendly justice system programs.

During the course of the criminal procedure, according to Section 679 of Act XC of 2017, the court, the prosecution service and the investigating authority are required to investigate continuously whether there is any circumstance that may justify the obligation to report or to initiate legal proceedings in relation to a juvenile under the Child Protection

and Guardianship Administration Act.² Unlike previous regulations, Act XC of 2017 now requires not only just to initiate official proceedings, but also calls for a continuous investigation into whether the circumstances underlying the child might trigger the obligation to signal and institute legal proceedings in accordance with Section 17 (2) of Act XXXI of 1997 on the Child Protection and Guardianship Administration Act. According to that, child protection institutions and persons carrying out a task connected with the system are required to signal the case of a child at risk, to a provider of child welfare services, or initiate legal proceedings for child abuse or gross neglect or other serious danger, and also if the child himself showed seriously threatening behaviour. (Polt dr. et. al, 2019: 1395)

Moreover, it is obligatory for an attorney to be present at all the time during the criminal procedure concerning a juvenile offender.³ It means, that attorney must be present on the juvenile’s interrogation. This is an important difference with adult offenders, because in that case the attorney’s summon is enough, but his presence is not obliged. According to this, the effective defence can be just formal in case of adult offenders.

The investigation shall be closed within one year – instead of the general two years - from the time of the interrogation of the accused in case the juvenile offender committed a crime punishable for up to five years imprisonment. In case the juvenile committed a crime punishable over five years imprisonment, the investigation shall be finished within two years from the time of the interrogation of the accused.⁴ During this time, the arrest of a juvenile can only be ordered if it is necessary due to the extreme severity of the criminal offense.⁵

In order to protect the rights of child, at the beginning of the trial period, hearing in chambers shall be ordered and thus the public cannot be present at the trial.⁶ However, it is not allowed to hold a trial in case the juvenile is not present.⁷

² Act XXXI of 1997 on the Child Protection and Guardianship Administration Act

³ Section 682 of Act XC of 2017 on the Criminal Procedural Act

⁴ Section 687 (1), (2) of Act XC of 2017 on the Criminal Procedural Act

⁵ Section 688 (1) of Act XC of 2017 on the Criminal Procedural Act

⁶ Section 691 (1) of Act XC of 2017 on the Criminal Procedural Act

⁷ Section 694 (2) of Act XC of 2017 on the Criminal Procedural Act

2.3. The differentiation of penalties and measures based on age in the Hungarian Criminal Code

On the other hand, not just special procedural rights are provided to children during a criminal procedure, but also special rules are applicable to them regarding penalties and measures. Section 15 a) of Act C of 2012 states that the perpetrator may be totally or partially exempted from criminal responsibility, or an act may be fully or partly exempted from criminalization if the perpetrator is below the age of criminal responsibility – which is the age of fourteen. According to Eszter Mocsáry, this indicates that the presumption of law is the fact that children, who did not reach the age of fourteen, do not have the necessary discretionary power to understand the nature and consequences of their acts.

On the other hand, based on the previously mentioned changes among child perpetrators' capacity to understand the nature and consequences of their acts, Section 16 of the Act C of 2012 states that persons under the age of fourteen years at the time the criminal offense was committed shall be exempt from criminal responsibility, with the exception of homicide, voluntary manslaughter, battery, acts of terrorism, robbery and plundering, if over the age of twelve years at the time the criminal offense was committed, and if having the capacity to understand the nature and consequences of his acts. As the definition of discretionary power was not drawn up by the legislators, it is obligatory to appoint a forensic expert (such as a psychiatrist forensic expert) to decide whether the child perpetrator could be accounted for his or her actions or not.

Although Section 105 (1) of Act C of 2012 declares that juvenile offender shall mean any person between the age of twelve and eighteen years at the time of committing a criminal offense, a juvenile is between the age of fourteen and eighteen years. With this Section, the legislature indicated that in case of these listed crimes, the presumption of punishability at the age of fourteen can be rebutted.

Based on the special provisions of the Criminal Code, only measures can be imposed upon juvenile offenders between the age of twelve and fourteen years, such as warning or conditional sentence. Moreover, confiscation, confiscation of property or irreversibly rendering electronic information inaccessible measures can be imposed upon juvenile offenders too. It is important that the measures to be imposed against juveniles shall *inter alia* include placement in a reformatory institution.⁸

⁸ Section 108 of Act C of 2012 on the Criminal Code

However, in cases of offenses committed in a juvenile delinquency – partly before and partly after the age of fourteen – the general rules of the Criminal Code shall be applied. Should this previously mentioned situation happen, it is considered a mitigating circumstance that at the time of committing the crimes, the offender was partly before and partly after the age of fourteen.

In general, the minimum term of imprisonment to be imposed upon juvenile offenders shall be one month for all types of criminal acts.⁹ Yet, there is a distinction made by legislature regarding the maximum term of imprisonment that may be imposed upon juvenile offenders over the age of sixteen years at the time the crime was committed in Section 109 (1), (2) and (3).¹⁰ Understandably, against a juvenile, community service work and work performed in amends may only be imposed over the age of sixteen years at the time of sentencing.¹¹

Finally, according to Section 41 of Act C of 2012, life imprisonment shall only be imposed on persons over the age of twenty at the time of commission of the criminal act.

3. Child as the injured party

The Criminal Code – in accordance with international and EU standards – provides an intensified protection to children as injured parties with creating several independent crimes involving child victims (and/or injured parties) such as exploitation of child prostitution, child pornography and in Chapter XX (Offenses against children and against family law) crimes such as child labour and domestic violence.

According to Hungarian statistics, the number of crimes committed against a child injured party has been constantly increasing in the last couple of years. The most common

⁹ Section 109 (1) of Act C of 2012 on the Criminal Code

¹⁰Section 109 (2) of Act C of 2012 on the Criminal Code

The maximum term of imprisonment that may be imposed upon a juvenile offender over the age of sixteen years at the time the crime is committed shall be:

- a) ten years for a crime that carries a maximum sentence of life imprisonment;
- b) five years for a crime that carries a prison term of more than five years.

(3) The maximum term of imprisonment that may be imposed against a juvenile offender over the age of sixteen years at the time the crime is committed shall be:

- a) fifteen years for a crime that carries a maximum sentence of life imprisonment;
- b) ten years for a crime that carries a prison term of more than ten years;
- c) five years for a crime that carries a prison term of more than five years.

¹¹ Section 112 of Act C of 2012 on the Criminal Code

offenses in those cases are crimes against property and sexual offences, from which the victim of all the known offenses were under the age of fourteen.

Thus, it was necessary for the legislature to differentiate the injured parties and provide a higher level of protection for injured parties under the age of fourteen and eighteen. For example, the Hungarian Criminal Code considers it an aggravated circumstance in cases of sexual exploitation and sexual violence if the age of the injured party is not over twelve, fourteen and eighteen years. In case of sexual abuse, it is an aggravated circumstance if the injured party is under the age of fourteen. Moreover, in cases of homicide, if the victim is under the age of fourteen, it shall be considered an aggravated circumstance too.

These facts show legislature tries to provide more safeguards with creating aggravated circumstances and individual offenses for injured parties under the age of twelve, fourteen, and eighteen. What is more, in the new Hungarian Criminal Procedural Code more special provisions are laid down for young injured parties and witnesses.

3.1. Special measures in the course of criminal proceedings

According to the right to a fair trial laid down in Article XXVII (1) of the Fundamental Law of Hungary, the witnesses and injured parties shall have also their rights protected during to course of the criminal procedure. These special provisions of the new Hungarian Criminal Procedural Code also confirm to Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. Article 22 of the mentioned Directive states Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. According to Article 81 (2) a) of Act XC of 2017, the affected person’s age can invoke these special measures to be used and Article 82 clarifies that in case the affected person is under the age of eighteen, that person falls automatically, without any decision by the court, the prosecution office or the investigating authority.

In case these special measures must be used, the courts, the prosecution service and the investigating authority shall promote, in so far as is practicable, the promotion of the rights, obligations and welfare of persons requiring special treatment with – for example – ensuring that the person concerned, in the absence of obstacles arising out of the

circumstances justifying the special treatment, is entitled to exercise his or her rights and obligations under the Criminal Procedural Code and takes into account the personal needs of the person concerned during the planning and execution of criminal procedural acts, and without delay carry out certain procedural acts requiring the participation of the person concerned.¹²

Moreover, in Section 96 (3) of Act XC of 2017, it is stated if the defendant is under the age of fourteen, the court, the prosecution office and the investigating authority may order the confrontation between the defendant and the witness or injured party only with their consent in order to facilitate the exercise of his or her rights and obligations.

4. Conclusion

It is important to realise that a child’s experience in his or her childhood will be determinative in their adult life and will form their personality because statistics show that child abuse can lead children to be juvenile or adult offenders later on. (Lansford, J et. al, 2007) Thus, childhood experience is very important for children because they learn to trust in the justice system specifically at that age. As a result, justice system should provide special rights and a proper environment for children as injured parties and witnesses to cope with stress and psychological pressure caused by a criminal procedure. It can be seen that newer regulations – which concern offenders under the age of eighteen – try to cope with children’s special needs and interests during criminal procedures which might be very stressful for them. As a result, more and more guarantees are provided by legislation both internationally and nationally for children who are under the age of eighteen and are involved in criminal procedures both at the side of injured parties, witnesses and for child offenders too.

As long-term results of these relatively newly incorporated rules cannot be assessed at the moment, we cannot state whether child-friendly justice programs and minimum standards of safeguards for children in criminal procedures really do help children, yet, at the moment, it is more important that legislature is aware of the problems and tries to find a solution for them.

To conclude, although it is obvious that the rights of child in criminal procedures and the child-friendly justice system still require more effort on the part of legislature and legal practitioners, more and more special provisions are incorporated into our national legal

¹² Section 85 (1) of Act XC of 2017 on the Criminal Procedural Code

systems in order to adjust to international and EU standards and to promote a child-friendly and balanced criminal procedure for both child offenders, injured parties and witnesses.

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Đurađ Stakić*

CHILD'S RIGHT TO DEVELOPMENTALLY SENSITIVE FORENSIC INTERVIEWING

The paper examines the adequacy of the way in which, during a judicial procedure, child victims and witnesses are accepted, supported and questioned so that they maximise their developmental capacities and provide reliable testimony.

The purpose of the paper is to, by critically analysing the state of theory and research, extract and demonstrate legally established, developmentally sensitive and empirically demonstrated effective models, protocols and methodology of forensic interviewing of child victims and witnesses, which are based on the Convention on the Rights of the Child.

The paper considers the following questions: (a) definitions, development and characteristics of forensic interviewing of children (b) capacities (limitations and potentials) of a child to provide credible and reliable testimony; (c) models, protocols and core phases of forensic interview with the child; (d) validated effective methodologies of interviewing children; (e) interviewer's role, competencies and training, as well as (f) open-ended questions, needs and directions of further improvements of theory and practice of child forensic interviewing.

Keywords: *child victims and witnesses, child abuse, forensic interviewing of children, models and protocols, methodology of child interviewing, the Convention on the Rights of the Child.*

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1. Definition and characteristics of child forensic interviewing

A forensic interview of a child¹ is legally sound, developmentally sensitive and validated effective method of gathering information regarding the grounds for suspicion and determining circumstances of abuse which is conducted before the appropriate judicial authorities, as part of the investigative process.

1.1. FIC characteristics FIC is a specific type of an interview. It differs from the clinical (diagnostic or therapeutic), investigative or forensic interview with adult victims and witnesses and as such is characterised by the following distinctive features:

1.1.1. Legal grounds. FIC is an integral component of measures for legal and criminal law protection of children, or investigation procedure and consequently what stems from and follows is a range of strictly legal requirements regarding the procedure and the method of gathering, documenting and presenting, scope, details and quality of data so that they would be admissible in court as a reliable evidence.

1.1.2. Objectivity and neutrality. Striving to fully protect the rights, safety and the best interest of a victim; human rights of a suspect as well as the general interest of the community, FIC fosters an objective and neutral approach to gathering, documenting, presenting and evaluating data.

1.1.3. Child centred approach. FIC is primarily focused on the promotion of rights and safety protection, best interest and welfare of a child. This general principle, derived from the Convention on the Rights of the Child, set of international documents on the treatment of children in the juvenile justice system, highest ethical principles and instructions for working with child victims of violence and abuse, serves as a crucial criterion for making decisions on all accounts of FIC core phases.

1.1.4. Developmental sensitivity. FIC poses a great cognitive, communication and emotional challenge for a child. A requirement to recall and communicate, in an unfamiliar setting and conversation with an unfamiliar authoritative person, the details of their abuse experience can surpass the developmental capacities of a child, cause secondary trauma and compromise the quality of the child’s testimony. Adapting the conditions, course and method of examination to the developmental level enables the

¹ Abbreviation “FIC” will hereafter be used for “forensic interview of a child”.

child to exercise their right to full participation and provide reliable, comprehensive and detailed statement.

1.1.5. Conceptual and methodological basis. FIC is based on recognised theoretical concepts, models, established protocols and methodology, which, thereby, ensure its coherence and credible application in direct practice.

1.1.6. Empirically confirmed effectiveness. As an expression of concern for the best interest of a child, FIC exclusively applies “evidence-based”² methodology (strategies, methods and techniques), whose effectiveness has been determined by the rigorous, empirical evaluation.

1.1.7 Multidisciplinary approach. Abuse is a complex phenomenon, which is why the comprehensive and in-depth clarification of circumstances of every specific case requires the involvement and coordinated team work of experts from different agencies and profiles of professions.

1.1.8. Competent experts. Complexity and delicacy of tasks, that interviewer faces, require a high level of their professional competency (knowledge, skills and views), which is acquired, maintained and improved through professional improvement, training, supervision and continuous education.

1.1.9. Multicultural sensibility. Conducting FIC is adjusted to cultural features of the (local) environment, families children originate from, and especially, limitations and potentials of specific multicultural or vulnerable groups of children.

1.1.10 Safe and child-friendly³.FIC is conducted in a neutral, safe and child-friendly environment. Child-friendly environment implies providing such conditions, approaches, organisation and methods of conducting FIC which, while maintaining forensic neutrality and legal integrity, gives the child a sense of acceptance, support and understanding.

² “Evidence-based” - A term used in professional literature to indicate programmes, methodology and practice for which, on empirical and scientific basis, there are demonstrated evidence on effectiveness.

³ “Child-friendly” environment entails conditions (physical and psychological) which are adapted to the age, developmental level, cultural and other features of a child so that it feels “at home”, in a designed child-friendly environment.

The fulfilment of the above mentioned characteristics enables children, witnesses and victims of abuse to competently and fully participate in the judicial process and provide comprehensive, detailed and reliable testimony of the event and their abuse experience.

2. Development and conceptualisation of the forensic interview with the child model

Development and conceptualisation of the FIC model, protocol and methodology has been marked by the periods of wanderings, peaks and controversies (Faller, 2015). The following is a brief description of the course and turning points of FIC development.

2.1. Scotomisation and disinterest. Child abuse, especially sexual, has been neglected for a long time and kept outside the focus of interest of the professional public. Children were rarely summoned to court, because of doubt in their capacity for reliable testimony, and even when they were, they were interrogated in the similar manner as adults.

2.2. Significant discoveries and their disregard. The beginning of the XX century brought a range of very important discoveries for FIC (see: Stakić, 2019), including the conceptualisation of suggestibility of children and categorisation of types of questions, clarification of differences in perception, recollection and formulation of answers of children and adults, children's tendency to succumb to the suggestive influence of interviewer's questions and authority, etc. Although authors offered applicable recommendations for the improvement of child treatment and examination method, their recommendations were disregarded and never found their way to case law.

2.3. Child abuse in the focus of interest. The full interest of public for (sexual) child abuse occurred during 1970s and 1980s, as a consequence of the publication of several shocking cases of sexual child abuses and different institutions of social child care. This “eye-opening” caused the reconsideration and significant changes in the case law (Ceci, Bruck, 1995) and unanimous acceptance of the fact that the problem with child testimonies is not (only) in children's capacities but also in the ways how children were accepted, supported and interviewed.

2.4. Model's forerunners. The forerunner of contemporary models of FIC is considered to be the first published manual⁴ (Jones, McQuiston, 1986) for FIC. A semi-structured protocol and three-phase interviewing process were suggested, as well as the

⁴ Instruction for professionals who interview children in cases of sexual abuse.

establishment of trust and cooperation with a child and methodology based on a neutral approach and open-ended questions. The instruction served as a starting point for immediate work and encouraged the search for FIC models.

2.5. *Diversification.* Relying on what already existed (therapeutic interview, forensic interview with adults, interview with physically abused children, etc.), authors and agencies, moving in different directions, created several heterogeneous FIC models and protocols. The diversification quickly led to intertwining, conflict and fight for prestige of various models, agencies and authors.

2.6. *Convergence.* Meeting and getting to know the protagonists of different models led to the identification of the need to cooperate and search for common denominators, concepts and methodology. Thus, already in 1993, based on the international consensus⁵, FIC strategy, protocols and methodology were established (Lamb and others, 2007), and twenty years later, a very influential publication was published (OJJDP⁶ Title, 2015) which quite accurately determined the undisputed concepts, clear principles and basic methodology of FIC.

2.7. *Determining criteria and standards.* In the last few decades, based on the results of evaluative studies, the standard of empirically demonstrated effectiveness has been accepted and the requirement that while working with children, only the models which possess empirically demonstrated evidence of effectiveness can be applied (Stakić, 2016). The application of criteria of empirically demonstrated effectiveness of model and practice has encouraged the separation of wheat from the chaff, improvement of the quality of practice and acceleration of further FIC conceptualisation.

2.8. *Completing and improving model's coherence.* Modern FIC models are characterised by the complete and coherent structure which includes: (a) conceptual-theoretical framework; (b) defined goals, tasks, principles and standards; (c) protocols set in sequences; (d) operational methodology; (e) training, supervision and continuous education programmes, and (f) method of systematic monitoring, evaluation and review and upgrading of the model. Such high standards are inspired by both scientific-professional and value-based and ethical reasons i.e. commitment to fully respect child's rights by consistently applying the most up-to-date work methodologies.

⁵ “The investigation of child sexual abuse⁵: An international, interdisciplinary consensus statement”

⁶ OJJDP – Office of Juvenile Justice and Delinquency Prevention

2.9. *Adaptation of the model according to special needs and conditions.* The application of conceptual models is directed towards (a) the adjustment of the model to the social, cultural and organisational features and potentials of the local community where the model is applied and (b) the adjustment of the model to the multicultural features of different groups of vulnerable children. The goal of multicultural sensitivity is to provide full participation and consistent and unbiased respect of all participants’ rights.

3. Developmental potentials and limitations of a child

Contemporary knowledge of child development emphasises that children think, feel and behave, and therefore testify, in a different way from adults. Good knowledge of cognitive, emotional and social factors of child development as well as how to help a child use its developmental potential is considered a necessary prerequisite for conducting FIC.

3.1 *Cognitive capacities.* FIC primarily relies on the ability to observe, remember and recollect, as well as on the ability to communicate and understand the forensically relevant concepts (Middleton, 2017).

3.1.1. *Memory.* Memory is a process of observing (perception), encoding (registration), storing (working memory), keeping (long-term memory) and accessing (recollection) of the remembered material. Memory is selective and does not represent the photographic image of the observed. It is subject to changes under the impacts of various factors, which makes recollection more re-constructive than reproductive, i.e. it never represents the true scanned copy of the remembered. FIC interviewers apply strategies and methods which help children fully remember the event and better organise, articulate and recount their recollections.

3.1.2. *Forgetting* means the loss of the possibility to remember and starts immediately and is the most intensive during the first few hours upon memorisation. New knowledge and experience, recollections and discussions about the event compromise the authenticity of the remembered and the reliability of the recollected which is why FIC is conducted as soon as possible and avoids multiple repetitions of FIC.

3.1.3. *Recalling or decoding* is the ability to bring the remembered to conscience. Recalling can be spontaneous or free and it is then more credible. However, it can be incomplete and imprecise or based on recognition, which is more precise but bears the risk of suggestibility and inaccuracy. Therefore, FIC primarily relies on the free

recollection (free narrative) through open-ended questions and neutral incentives, and only then it introduces recognition through closed and focused questions.

3.1.4. Attention, maintaining concentration and selective focus on the chosen aspects of a situation is the prerequisite for both good observation and recollection of details of earlier experience. Interviewers strive to create conditions and help a child to achieve focus and maintain full concentration during the interview.

3.1.5. Understanding the forensically significant concepts and child’s ability to clearly and verbally communicate details of their memories is the essence of FIC. Since a child may experience delays in understanding or possess idiosyncratic understandings of forensically relevant concepts (up-down, inside-outside, before-after, etc.), an interviewer assesses the level of understanding and child’s communication ability and reconciles ways of asking questions.

3.2. *Suggestibility* is a universal characteristics of remembering and recollecting processes. It is more prominent in children, especially young and disabled children. Many socio-psychological factors (quality of what is remembered, social status, interviewer’s attitude and behaviour, way of asking questions, etc.) can mitigate or potentiate child’s suggestibility. Interviewers who use neutral incentives and open-ended questions and nurture encouraging attitude towards a child (Saywitz, Camparo, 2014), can significantly reduce child’s suggestibility during an interview.

3.3. Stress and trauma. The experience of abuse is always accompanied by strong emotional reactions (stress) which often surpass child’s capacities to understand, process and overcome them (trauma). Stress is present also during an interview and impacts child’s readiness to evoke and face the details of their traumatic experience. By creating child-friendly conditions of an examination, an interviewer reduces stress level, improves the quality of the narrative and avoids a secondary trauma for a child.

3.4. *Children with disabilities*. Abused children with disabilities in psychological-physical development (intellectual, social/emotional, speech development, communication, hearing and sight, etc.), when adequately supported, can give reliable testimony at court. Children with disabilities are more at risk of abuse and they less willingly, less frequently and after prolonged delay report abuse. They are also often inadequately treated by court experts (Cederborg, Lamb, 2006; Hershkowitz, Horowitz, Lamb M. E. 2007), all the more so with younger children and children with severe developmental disabilities. It was determined that although competencies of children with

disabilities as witnesses depends on the characteristics of developmental disabilities, the validity and reliability of their testimony primarily depends on the conditions and the method of interviewing. Familiarisation with the need and ways of adjusting FIC model, protocols and methodology to the needs and abilities of children with disabilities, so as to enable them to participate equally and effectively in all FIC activities, is an indispensable part of the interviewer’s training.

The results of studying factors and the course of child development as well as mechanisms (cognitive, social and emotional), which impact the ability of children to be reliable witnesses, confirm that the most important factor is the way in which an interviewer accepts, prepares, encourages and supports a child in their effort to remember, organise and communicate their account of the event and experience of the abuse. An interviewer’s duty is to adopt and consistently apply developmentally sensitive methodology of interviewing children, which is based on scientific concepts and empirically demonstrated effectiveness.

4. Interviewer - competencies and training

The role of an interviewer is to create conditions, encourage and help a child provide a reliable narrative (Teoh and Lamb, 2013), which is why a child is put into focus and promoted to an expert (“I wasn’t there and I don’t know what happened, but you were and you know”). The delicacy of a neutral but encouraging role demands a high level of professional competency from an interviewer (knowledge, skills and views) which is established, maintained and improved with suitable education and training. Interviewer’s competency deteriorates over time, which is why the adequate supervision, peer support and attending continuous training courses are insisted on. (Stewart, Katz i La Roy, 2011). Neglecting adequate training compromises a child’s right to exercise their rights through quality court support.

5. Process - phases of forensic interview with the child

FIC process is based on relatively structured protocol, which determines phases and sequentially established procedure and activities. The context and stages of FIC have been composed of three major steps: (a) pre - interview, (b) direct interview with the child and (c) post - interview (Orbach et al., 2000).

5.1. Pre- interview. Pre-interview indicates measures and activities that precede the FIC and are undertaken by a multidisciplinary team. The purpose of the pre-interview is to

plan, determine goals and tasks, allocate tasks and adjust the conditions (place and time, atmosphere of the environment) of the interview to the needs of the child so that they feel accepted, safe, free and protected;

5.2. *FIC - direct interview with the child.* The process of interviewing the child directly is also done through three main phases, namely: (a) the orientation phase, establishing a cooperative relationship and preparing the child for the interview; (b) the phase of obtaining and elaborating the child's free statement and (c) the phase of concluding and closing the interview

5.2.1. The orientation-preparatory phase is intended to prepare the child for conversation and includes: (a) acceptance, orientation and information about the need for query and its requirements; (b) establishing a relationship of trust and cooperation; (c) assessing the developmental level and determining the optimal mode of communication; (d) introducing and practising interview rules; (e) considering the truth lie issues; (f) trial interview, training on giving a free narrative about a neutral recent event from the child's life.

Researches (Brubacher, & La Roy, 2014) have determined that when children are well prepared, the central phase of the interview takes less time, the interview runs without stress, interruption, and misunderstanding, the interviewer rarely intervenes, and the child's narrative is more comprehensive, detailed, and reliable, and therefore serious preparation of the child, which at least includes establishing of relationship, consideration of work rules and trial interview, is considered the basic standard of good FIC practice.

5.2.2. Central - main phase. The goal of the main phase is to obtain a spontaneous, authentic, comprehensive, detailed and reliable narrative of the child. The term “free” means refraining from any inducement or suggestions in order to preserve the authenticity of the child's statement (Orbach and Pipe, 2011). The central phase is consisted of the following sequences: (a) transition, transfer from preparatory to central phase by gradually introducing the main topic of conversation; (b) obtaining of the free statement by active listening and neutral stimulation of recollection and description of events; (c) elaboration of free statement using neutral stimulants and open-ended questions; (d) collection of details, additional information and clarifications of ambiguities by applying focused, specific and closed questions; (e) a brief break to consult with team members and to check the comprehensiveness and quality of the collected data; (f) deepened elaboration and clarification of unclear and

missed information by applying questions based on recognition and careful introduction of information from other sources; (g) testing of the alternative hypothesis, obtaining of information about confiding in others, risks and further course of the FIC; (h) announcement of the completion of the main phase of the FIC.

5.2.3. The phase of closing the interview. In the same way the interviewer introduced, motivated, and prepared a child to participate in FIC activities, they should prepare the child for the interview closure. The interviewer helps the child to sort out, reorganize and return to their usual daily activities and leave the interview with positive feelings. The closure phase encompasses: (a) announcement of upcoming end of the interview; (b) a summary of the achieved results with verification of the approval; (c) an invitation to provide additional details to the narrative; (d) giving the child an opportunity to ask questions; (e) educating the child regarding the further course of the event; (f) safety and risk assessment; (g) a gradual transition by introducing neutral topics into the conversation; and (h) expressing gratitude to the child for their participation in the interview.

5.3. *Post - interview.* Post-interview. A post-interview or de-briefing meeting of a multidisciplinary team focuses on analysis of the flow and the ways the interview has been conducted, and on assessment of the scope, quality, relevance and completeness of the collected data (Lamb et al., 2015). In addition, special consideration is given to the necessity to provide additional assistance and support to the child and their family

6. Forensic interview methodology

FIC is performed by applying a set of empirically validated effective strategies, methods, techniques, and additional prompts to prepare the child for the interview, and motivate, invite, and encourage them to recall, elaborate, and communicate their memories of a critical abuse event (Stakić, 2019). The standard arsenal of the FIC methods and techniques encompasses a variety of questions, neutral prompts and reminders, reflection and clarification techniques, a set of different aids, and strategies for orchestrating the application of particular methods.

6.1. Asking questions Effective process of asking questions require (a) knowledge about the capabilities and limitations of the different types of questions; (b) careful listening and understanding of the child; and (c) ability to align the comparative advantages of the questions with the real abilities of the child (Walker, 2013).

In the FIC practice different types of questions are used, some of which are very effective, while others are problematic and inappropriate, especially for children of younger age. Open-ended questions (“Tell me everything you can remember”) give the child great freedom of formulation of the answer, encourage free recall and provoke longer, elaborative answers, but, therefore, the answers may remain incomplete and not sufficiently detailed. Closed questions (“What time was it precisely?”) do not provide much freedom and require provision of facts or yes or no answers. Questions can also be focused (“Where exactly did this happen?”), stimulating (“Tell me more about it”), supporting (“What happened after?”), forced - choice questions (“Was his cap blue, white or red?”), and others. It is important for questions to be formulated in a neutral way so that they do not suggest (“He did this to you, did he?”) or induce (“When you tell me, you will be able to go home”), or enter information from external sources (“Your mom told me differently, how was it really?”). FIC primarily relies on open-ended neutral questions, to elaborate narratives it relies on neutral focused and closed-ended questions, to clarify details on multiple-choice questions, while multiple, complex, suggestive or inducing questions are always avoided. Careful listening and understanding of the child is the key to being able to choose, formulate and combine questions successfully.

6.2. Minimal prompts. Minimal prompts arise from active listening and following of the flow, manner and content of what the child is saying, and are consisted of the use of discrete verbal (“Yes ...” “Understand”) or non-verbal (interested gaze or head tilt) interventions. Minimal prompts help the child keep focus, rhythm and thread of speech

by letting the child know that the interviewer is listening to them and that the interviewer is interested in the child's continuance of talking about the topic

6.3. Reflection techniques. Reflection techniques occur in two forms: (a) reflecting the content of the child's speech and (b) reflecting the accompanying emotional tone and condition of the child. Reflecting on the content of speech involves paraphrasing parts of the statements (“You have said ...”), or concise summarizing (“You first mentioned ... as well as ... and finally you said ...”) of several related statements made by the child. Reflecting on the content serves to give the child the opportunity to “hear” themselves and possibly review, elaborate and upgrade their statement, as well as to help the interviewer check whether they have understood the child correctly. Reflection of emotions contributes to the detection and “processing” of latent feelings and makes the child aware that the interviewer is following and understanding them, which strengthens the relationship of trust.

6.4. Clarification techniques. Techniques for clarification of vague, controversial, or inconsistent statements help the child spot and possibly re-examine their inconsistent statements and make them clearer and more coherent. The clarification technique involves drawing the child's attention to the discrepancy in their statement and an invitation to just clarify what they have actually wanted to say (“If I have heard correctly, you have said XXX before, and now you say YYY, what have you really meant?”), and it never involves the interviewer's clarifications or interpretations of the discrepancies. Clarification techniques are never used initially, but only after a proper trust relationship has been established and only when forensically relevant matters are involved.

6.5. Aids. In an effort to enhance the child's ability to be a reliable witness, interviewers resort to the use of certain aids such as: (a) drawing, freely or by task, (b) anatomical diagrams of a human figure and (c) anatomical dolls, with or without explicit sexual characteristics. Aids are especially used with younger children, children whose verbal ability has not been developed, or children with communication, psycho-physical and functioning disabilities, and are considered an expression of respect for their rights to express or more precisely explain their opinions and views in a way other than verbal. The type, manner and frequency of use of the aids varies greatly among the FIC models, as well as among the experts. While some experts are very enthusiastic and fully trust the potentials and effectiveness of aids, others are extremely sceptical, avoid them, find them ineffective and even potentially very problematic, especially as regards their suggestiveness and decrease of the authenticity of the recollections and the accuracy of the information. The issue of the usefulness and appropriateness of the use of various aids

in the FIC is considered open, and therefore it is recommended: (a) to improve the methodology for evaluation of their effectiveness; (b) to use these aids solely for the purpose of clarification and possibly as an addition to the already acquired free narrative of the child, and not in any way to encourage recollection; (c) not to interpret the material obtained this way externally, by the interviewer, but to have only the child elaborate it; and (d) that the aids are only used by properly trained and experienced professionals.

6.6. Strategies for prompting recollection and improving the quality of narratives. The methods and techniques differ a lot, and therefore it is necessary to combine them during FIC in order to benefit from their complementary advantages. During the FIC, several principles or strategies have been articulated that serve as a methodological framework for setting up and conducting interviews and selecting and using specific interviewing methods and techniques.

6.6.1 Funnel strategy. The strategy of the funnel requires that the interview first starts with general, open and completely neutral questions and prompts, and later, after the free statement of the child has been obtained, elaborates this statement first with specific and focused, then closed and, if necessary, multiple choice questions. This generally accepted strategy ensures the authenticity, comprehensiveness and specificity of the statement while avoiding suggestiveness.

6.6.2. Pairing strategy The technique of pairing different types of questions is that closed, specific questions are always “paired” with an accompanying open-ended question (Interviewer: “You said that NN grabbed you. Which part of your body did he grab?” Child: “He grabbed my bottom”. Interviewer: “ Tell me everything that happened after that. “). This way a specific answer is ensured, but its elaboration and interpretation of its meaning is left to the child.

6.6.3 A strategy of verbal and visual cues. Elaboration through verbal or visual cues attempts to compensate for the child’s lack of knowledge of the typical course of events “script”, due to which their free narrative may remain poor. The strategy offers the child a suitable cognitive framework in the form of a series of questions or images that involve the participants, place and conditions of the events, actions, communication and relationships among the participants (“Tell me more about the people who were there. How did they look?”). This procedure only provides the child with a framework for better recollection and more comprehensive organization of responses.

6.6.4. Strategies for enhancing communication and improving resilience to suggestiveness. These strategies target weaknesses in the child's communication with the authoritative adult and an increased risk of suggestiveness that results from it. Research (Peters, Nunez, 1999) confirmed that when children were trained during the preparatory phase in identifying unclear or suggestive questions and notifying the interviewer of them, the accuracy of their answers drastically increased. Based on these findings, specific techniques have been developed (Saywitz and Camparo, 2014) which proved to be very useful in improving the child's resilience to the suggestiveness.

6.6.5. Cognitive interview strategies. In FIC, three such strategies can be used with due care. The first is known as a “mental reconstruction” of the event, and is consisted of request and provision of help to the child to mentally (in their own head) return to the scene of the critical event, to be able to “see” and review the entire incident again. This request is problematic for younger children who do not have the ability to clearly distinguish imagination from reality (Pool and Dickinson, 2014), and additionally can cause intense stress, and therefore it is not recommended to be applied with younger children. The second strategy is known as “reordering”, where it is required from the child to recall the actions of the event in reverse order, starting from the last sequence, and towards the beginning. Finally, the third is a “change of perspective” which requires from the child to try to describe the event from the perspective of another person who was present there, to say what the person who stood on the left, right side, behind, etc. sees.

These strategies, originally intended for adults, require developmentally inappropriate level of cognitive abilities and intellectual flexibility, thus their implementation with (younger) children is very problematic.

Proper implementation of the above mentioned strategies can have multiple positive effects on the interview flow and the outcomes, including (a) improved preparedness and participation, and reduced stress for the child; (b) reduced need for the interviewer to intervene and interfere in conversation during the interview; (c) enhanced child's ability to recall, articulate and communicate their experiences; (d) improved volume, quality and reliability of the data and, most importantly, (e) improved degree of the report's admissibility by the court.

In the end, it is necessary to emphasize that the effectiveness of the methods and techniques does not lie in their methodological characteristics but in the interviewer's

ability to reconcile those complementary advantages of the methods with the child's developmental characteristics (needs and abilities).

There is still a lot of serious research to be done on the conceptualization and methodological refinement of the FIC, by means of examining the potential of the existing methodological arsenal to help the interviewed children to more freely, spontaneously, fully, accurately and reliably present themselves, and protect their rights and interests.

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THE INTEGRATION OF MIGRANT CHILDREN IN SERBIA: LEGAL AND SOCIAL ASPECTS

After the closing of the Balkan route, Serbia lost its role of the country of transit. Instead, it has become the country of destination, or the country in which migrants tend to stay for a longer period of time. That is the reason why Serbia has been facing a series of challenges related to the integration of migrants staying within its borders. As the most vulnerable category within the migrant population, migrant children, especially the unaccompanied ones, must be given special protection. Apart from the respect of their fundamental rights, the latter particularly refers to creating the atmosphere that facilitates and encourages their integration into education system and their participation in social, cultural, sports and leisure activities, preventing their discrimination and marginalisation. The authors of the paper analyse international and national legal framework regulating the protection of migrant children, with particular focus on Child's Rights Convention, and to highlight key practical problems and obstacles that stand in the way of their full integration in our society. They also highlight the examples of good practice in the field of migrant children integration in Serbia and, provide suggestions for further improvements in this area.

Keywords: migrants, integration, children, human rights, asylum.

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1. Introduction - Migrant Children in Serbia after the Closing of the Balkan Route

Between 2008 and 2017, the number of migrant children has been increasing and reached its maximum in the past three years of that period. For example, almost 400.000 underage migrants comprised one third of the total number of migrants - asylum seekers in the European Union countries in 2016 and more than two thirds of these underage migrants were children under fourteen years of age (Solarević, Pavlović, 2018: 232).

Serbia has been facing an intensive increase in the number of migrants, refugees and asylum seekers since July 2013, which turned into so-called “migrant crisis” in 2015, when more than 800,000 migrants crossed its state borders. The number of persons who expressed the intention to seek asylum in Serbia in 2015 was 577,995 and the majority of them have arrived from Syria, Afghanistan, Iraq, Pakistan, Somalia and Eritrea.¹ According to UNHCR, around 7,200 refugees, asylum seekers and migrants were staying in Serbia in 2017. This number included all persons in 18 centres for transit and asylum in Serbia as well as the foreign persons who dwelled outside these institutions - in hotels, private apartments and informal gathering spots (Vukašević, Majlat, 2017: 10).

The data collected by the Ministry of Interior of the Republic of Serbia show that 5,390 migrant children (3,708 boys and 1,628 girls) expressed the intention to ask for asylum in Serbia in 2016 as well as that there were 177 unaccompanied and separated children among them (165 boys and 12 girls) (Krašić *et al.*, 2017: 10). Moreover, during the first four months of 2017, 35 unaccompanied and separated children asked for asylum in Serbia, out of which 33 were boys and 2 girls (*Ibid.*). In 2016 and 2017, the majority of unaccompanied and separated children came from the states involved with armed conflicts such as Afghanistan, Syria, and Iraq, but some of them also arrived from Pakistan, Somalia, Palestine, Algeria, Morocco, Ghana and Libya (*Ibid.*). After the closing of the Balkan route in March 2016, a number of migrants remained in Serbia and the time of their staying was significantly prolonged - from a couple of months up to one year and one third of these migrants were children under fourteen years of age (Šantić *et al.*, 2017; Umek *et al.*, 2018; Minca *et al.*, 2018, according to: Đorđević *et al.*, 2018: 79). According to the latest information published on 20.08.2019. by Asylum Protection Centre of the Republic of Serbia (hereinafter: APC), the number of unaccompanied

¹ Politika i praksa zaštite prava izbeglica i migranata u Srbiji 2017 – Policy Briefing, Centar za zaštitu i pomoć tražiocima azila APC/CZA, BETA novinska agencija, Centar za istraživanje javnih politika, <https://www.azilsrbija.rs/wp-content/uploads/2019/04/Politika-i-praksa-za-%C5%A1tite-migranata-i-izbeglica.pdf>, 23.06.2019.

underage migrants on the Northern borders of Serbia is increasing and at least one half of migrants staying at the open location Horgoš are children without parental guardianship (APC, 2019). These information indicate that the protection of migrant children's rights and the challenges of their integration into Serbian society still are and most probably will remain the issues of great relevance.

When the return of the refugees to the countries of their origins turns out to be impossible, integration should be taken into consideration as one of the models for permanently resolving their problems (Dimitrijević, 2015: 146). Nevertheless, local integration of the persons under international protection is a complex and gradual process with legal, economic, social and cultural dimensions and, as such, represents a specific challenge for both - the country of admission on the one hand and the persons under international protection on the other (Dimitrijević, 2015: 143-144). Unfortunately, in numerous cases, obtaining the citizenship of the country of admission represents the only result of the integration process, although it is familiar that real, genuine integration cannot be achieved without full acceptance of refugees by the local community (*Ibid.*). Therefore, the prolongation of the staying of migrant children and their families in Serbia has made it necessary not only to provide their adequate protection and health care but also to facilitate their access to education (Šantić *et al.*, 2017; Umek *et al.*, 2018; Minca *et al.*, 2018, according to: Đorđević *et al.*, 2018: 79), as well as to some other contents and activities relevant for their integration, which are discussed in this paper.

2. Protection of Migrant Children's Rights - International Normative Framework

2.1. General Observations

Child's rights are guaranteed by several international documents regulating various aspects of human rights in general, the most significant of which are: 1) Universal Declaration of Human Rights², 2) European Convention for the Protection of Human Rights and Fundamental Freedoms³, 3) International Covenant on Civil and Political

² Universal Declaration of Human Rights, United Nations General Assembly, 217 (III) A, 1948, Paris, <http://www.un.org/en/universal-declaration-human-rights/>, 11.08.2019.

³ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Council of Europe, Rome, 04.11.1950., European Treaty Series - No. 5, <https://rm.coe.int/1680063765>, 11.08.2019.

Rights⁴, 4) International Covenant on Economic, Social and Cultural Rights⁵, 5) Convention on the Elimination of All Forms of Discrimination against Women⁶, 6) International Convention for the Protection of All Persons from Enforced Disappearance⁷ and 7) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸.

Apart from the aforementioned international legal documents, there are numerous other sources of international law pertinent to the protection of migrant children, whose rights include both – child’s rights in general as well as some specific rights, derived from their particularly vulnerable position.

2.2. Convention Relating to the Status of Refugees (1951) and Protocol Relating to the Status of Refugees (1967)

Grounded in Article 14 of the Universal Declaration of Human Rights, recognising the right of persons to seek asylum from persecution in other countries, Convention Relating to the Status of Refugees⁹ (hereinafter: CRSR), adopted in 1951, represents the centrepiece of international refugee protection today (UNHCR, 2010: 2). The Convention entered into force on 22 April 1954, and it has been subject to only one amendment in the form of a 1967 Protocol Relating to the Status of Refugees¹⁰ (hereinafter: PRSR), which removed the geographic and temporal limits of the 1951 Convention (*Ibid.*). Namely, as

⁴ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, 20.06.2019.

⁵ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, 20.06.2019.

⁶ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>, 20.06.2019.

⁷ International Convention for the Protection of All Persons from Enforced Disappearance, UN General Assembly Resolution A/RES/61/177, 20.12.2006., https://treaties.un.org/doc/source/docs/A_RES_61_177-E.pdf, 11.09.2019.

⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1), <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>, 20.06.2019.

⁹ Convention Relating to the Status of Refugees, Geneva, 28 July, 1951, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en#2, 20.06.2019.

¹⁰ Protocol Relating to the Status of Refugees, United Nations Treaty Series, vol. 606, p. 267, <http://www.refworld.org/docid/3ae6b3ae4.html>, 20.06.2019.

a post-Second World War instrument, the scope of CRSR was originally limited to the persons fleeing events occurring before 1 January 1951 and within Europe. The PRSR removed these limitations, giving the CRSR a universal coverage (*Ibid.*).

CRSR embraces a single definition of the term “refugee” in its Article 1, the aim of which is to protect persons from political or other forms of persecution. According to CRSR, the term refugee refers to a person who is unable or unwilling to return to his/her country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion (UNHCR, 2010: 3). CRSR is a status and rights-based instrument that is underpinned by a series of essential principles, the most significant of which are: non-discrimination, non-penalization and non-refoulement. Accordingly, CRSR is applied without discrimination as to race, religion or country of origin, whereas the evolution of the international human rights law has also reinforced the principle of non-discrimination, expanding it to the prohibition of discrimination based on sex, age, disability, sexuality, or other grounds (*Ibid.*). CRSR recognizes that the seeking of asylum may force refugees to violate immigration rules and, in accordance with that, proclaims that should not be penalized for their illegal entry or stay. It is also important to mention that the Convention encompasses different safeguards against the expulsion of refugees. Its key principle - the principle of non-refoulement provides that no one shall expel or return a refugee against his/her will, in any manner whatsoever, to a territory where he/she fears threats to life or freedom (*Ibid.*). CRSR imposes basic minimum standards for the treatment of refugees, without prejudice to the states granting more favorable treatment, including: the access to the courts, to primary education, to work, and the provision for documentation, particularly a refugee travel document (*Ibid.*).

Recommendation B, adopted within the CRSR Conference refers to the principle of the family unity and is of particular importance for the protection of children. Namely, the Conference considers that the family represents the natural and fundamental group unit of society and an essential right of the refugee, which is constantly threatened. At the same time, the Conference emphasizes that according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to his/her family members. Therefore, it is strongly recommended to the Governments to take the necessary measures for the protection of the refugee’s family. Hence, CRSP Conference highlights the importance of ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country. Also, CRSR Conference emphasises the significance of the protection of refugees who are

minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

2.3. Convention on the Rights of the Child (1989)

By ratifying Convention on the Rights of the Child¹¹ (hereinafter: CRC), and its optional protocols (Protocol on the sale of children, child prostitution and child pornography¹² and Protocol on the involvement of children in armed conflict¹³), the Republic of Serbia has committed itself to take care of all children under its jurisdiction, including children with Serbian or other nationality, children without nationality, refugee children or migrant children (Krašić *et al.*, 2017: 13). In its Article 1, CRC defines a child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

When it comes to the position of migrant children, it is important to mention that CRC prohibits the discrimination, by obliging States Parties to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (Article 2 Paragraph 1). Moreover, CRC emphasises that States Parties must take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members (Article 2 Paragraph 2).

The protection of children who are seeking refugee status or who are considered refugees is regulated by Article 22 of CRC, which obliges the States Parties to take appropriate measures in order to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures,

¹¹ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, 20.06.2019.

¹² Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002, <https://www.ohchr.org/Documents/ProfessionalInterest/crc-sale.pdf>, 11.08.2019.

¹³ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002, <https://www.ohchr.org/Documents/ProfessionalInterest/crc-conflict.pdf>, 11.08.2019.

whether unaccompanied or accompanied by his or her parents or by any other person, will receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties (Article 22 Paragraph 1). Besides, States Parties have to provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In addition, CRC prescribes that in the cases where no parents or other members of the family can be found, the child has to be given the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in CRC (Article 22 Paragraph 1).

Child's rights guaranteed by CRC are regulated in a more detailed manner by 20 general comments of the Committee on the Rights of the Child (Krašić *et al.*, 2017: 13). Among these comments, the following contain provisions relevant to the children who have left the country of their origin: 1) General comment No. 6 (2005): treatment of unaccompanied and separated children outside their country of origin¹⁴, 2) General comment No. 12 (2009): The right of the child to be heard¹⁵ and 3) General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration¹⁶ (Krašić *et al.*, 2017: 14).

Serbia has recently passed through the process of reporting on the application of the CRC in front of the UN Committee on the Rights of the Child (hereinafter: the Committee) (Krašić *et al.*, 2017: 10). Although the Committee welcomed the progress of Serbia in several areas relevant to child's rights protection, including the adoption of the Strategy for Prevention and Protection against Discrimination¹⁷ and other institutional and policy

¹⁴ UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CRC/GC/2005/6, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiQql8gX5Zxh0cQqSRzx6ZfXmRo9mdg35%2bm8BvAjpgxjOPXPQumY0uSJjNwpdL6bFpqljfu3aX2s6Yi1797MEXI29uw8wUJIT3kCKSbL1T9>, 11.08.2019.

¹⁵ UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, <https://www.refworld.org/docid/4ae562c52.html>, 11.08.2019.

¹⁶ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 Para. 1), 29 May 2013, CRC /C/GC/14, <https://www.refworld.org/docid/51a84b5e4.htm>, 11.08.2019.

¹⁷ Strategy for Prevention and Protection against Discrimination, *Official Gazette of the Republic of Serbia*, No. 60/2013.

measures related to children’s rights since its last review, it identified some difficulties in this field (UN Committee on the Rights of the Child, 2017: 1).

When it comes to the protection of migrant children’s rights, it is worth mentioning that the Committee expressed concern that Serbian budgeting process does not stipulate budget allocations for children in the relevant sectors and agencies, including indicators and tracking systems at all levels, as well as targeted budget allocations for children in marginalized and vulnerable situations, including migrant, refugee and asylum seeking children (UN Committee on the Rights of the Child, 2017: 3). Likewise, the Committee pointed out that migrant, refugee and asylum seeking children, (among other marginalized categories of children such as minority children, children living in remote areas, children in street situations, children with HIV/AIDS and LGBT children) continue to face discrimination with regard to access to education, health care and adequate housing (UN Committee on the Rights of the Child, 2017: 5). That is the reason why the Committee urged Serbia to ensure full implementation of relevant existing laws prohibiting discrimination, including by strengthening public education campaigns to address negative social attitudes towards all marginalised categories of children, including migrant and asylum seeking children (*Ibid.*).

Despite the fact that the Committee noted the positive efforts that Serbia made to improve the education system, it still expressed the concern because of equity gaps that continue to prevent children from vulnerable groups, including migrant and asylum seeking children from accessing quality education (UN Committee on the Rights of the Child, 2017:15).

2.4. The New York Declaration for Refugees and Migrants (2016)

The New York Declaration for Refugees and Migrants¹⁸ (hereinafter: NYDRM) contains a set of commitments that apply to both refugees and migrants, but also separate sets of commitments for refugees and migrants (Article 21), all of which contain provisions relevant to the protection of children under these specific circumstances. When the set of commitments that apply to both refugees and migrants is concerned, first of all, it is worth mentioning that NYDRM recognises and addresses the special needs of all persons who have found themselves in vulnerable situations and who are travelling within large

¹⁸ New York Declaration for Refugees and Migrants: Resolution adopted by the General Assembly, 3 October 2016, A/RES/71/1, <http://www.refworld.org/docid/57ceb74a4.html>, 20.06.2019.

movements of refugees and migrants, particularly women at risk and children, especially those who are unaccompanied or separated from their families (Article 23).

It is particularly important to mention that NYDRM recognises the fact that migrants can find themselves in the situations that make them particularly vulnerable for various reasons that often overlap (Vukašević, Majlat, 2017: 15). Broadly speaking, migrants in particularly vulnerable position comprise two groups: the migrants who have some specific individual feature that makes them particularly vulnerable and the migrants who are considered particularly vulnerable because of the situation they are facing. The first group of particularly vulnerable migrants includes, among others, children, especially those who are separated from their parents or who travel without parents or guardians (*Ibid.*).

Therefore, NYDRM obliges its parties to recognise and take steps to address the particular vulnerabilities of women and children during the journey from country of origin to country of arrival, including their potential exposure to discrimination and exploitation, as well as to sexual, physical and psychological abuse, violence, human trafficking and contemporary forms of slavery (Article 29).

NYDRM States Parties have committed themselves to comply with their international obligations under the CRC and, hence, to protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child (Article 32). This particularly refers to unaccompanied children and children separated from their families, which means that States Parties have to refer their care to the relevant national child protection authorities and other relevant authorities (*Ibid.*). Moreover, the Parties have confirmed that they are determined to ensure that all children are receiving education within a few months of arrival. To facilitate that, they have promised to prioritize budgetary provisions, including support for host countries as required, as well as to provide refugee and migrant children with a nurturing environment for the full realization of their rights and capabilities (*Ibid.*). NYDRM recognises that detention for the purposes of determining migration status is seldom as well as that alternatives to detention should be pursued and used only as a measure of last resort if ever, in the best interest of the child, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child (Article 33).

When it comes to the commitments relevant only to migrants, it should be highlighted that NYDRM recommends its Parties to consider developing non-binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance (Article 52). NYDRM confirms the principle that children should not be criminalized or subject to punitive measures because of their migration status or that of their parents (Article 56). It also emphasises that any type of return (voluntary or otherwise) has to be in harmony with international human rights law and in compliance with the principle of non-refoulement, particularly highlighting that such process must be conducted with due process and in compliance with the best interests of children. In addition, NYDRM stresses that particular attention should be given to the needs of migrants in vulnerable situations who return, such as children, older persons, persons with disabilities and victims of trafficking (Article 58). The Parties to NYDRM reaffirm their dedication to the protection of migrant children’s human rights, taking into consideration their vulnerability, which particularly refers to unaccompanied migrant children (Article 59). Therefore, they promise to provide them access to basic health, education and psychosocial services, as well as to ensure that the best interests of the child is a primary consideration in all relevant policies (*Ibid*).

NYDRM’s commitments for refugees insist on promoting access for children to child-appropriate procedures in the process of early and effective registration and documentation of refugees (Article 70). As an issue of particular importance for migrant children integration, it is important to mention that NYDRM recognises that the access to quality education, including for host communities, gives fundamental protection to children and youth in displacement contexts, particularly in situations of conflict and crisis (Article 81). Therefore, NYDRM expresses the determination of States Parties to provide quality primary and secondary education in safe learning environments for all refugee children, and to do so within a few months of the initial displacement (*Ibid*). In order to facilitate this, the Parties have committed to providing host countries with support in this field (*Ibid*) as well as to supporting early childhood education for refugee children (Article 82). Having in mind that in conflict and crisis situations, higher education serves as a powerful driver for change, shelters and protects a critical group of young people by maintaining their hopes for the future, fosters inclusion and non-discrimination and acts as a catalyst for the recovery and rebuilding of post-conflict countries, the Parties also expressed their willingness to promote tertiary education, skills training and vocational education (*Ibid*).

2.5. Transforming our World: the 2030 Agenda for Sustainable Development (2015)

Transforming our World: the 2030 Agenda for Sustainable Development¹⁹ (hereinafter: ASD) considers children and youth on the one hand, and refugees, internally displaced persons and migrants on the other, as particularly vulnerable, and strongly insists on the promotion of their empowerment (Article 23). In the context of migrants’ integration in general (including migrant children as well), it is worth mentioning that ASD recognizes the positive impact that migrants have on the process of inclusive growth and sustainable development (Article 29). Having in mind the fact that international migration is considered a multidimensional reality of major relevance for the development of countries of origin, transit and destination, requiring coherent and comprehensive responses, ASD insists on international cooperation in order to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons (*Ibid*). The latter is aimed at strengthening the resilience of communities hosting refugees, particularly in developing countries, but also at the affirmation of migrants’ right to return to their country of citizenship (*Ibid*).

Another issue of essential importance for the integration of migrant children, which is mentioned in ASD includes to providing inclusive and equitable quality education at all levels – early childhood, primary, secondary, tertiary, technical and vocational training (Article 25). In accordance with this provision, all people regardless of their sex, age, race or ethnicity, and persons with disabilities, migrants, indigenous peoples, children and youth, especially those in vulnerable situations, should have access to life-long learning opportunities that help them to acquire the knowledge and skills needed to exploit opportunities and to participate fully in society (*Ibid*). Therefore, it should be emphasized that ADS insists on providing all children and youth (including those with the status of migrants) with a nurturing environment for the full realization of their rights and capabilities, helping our countries to reap the demographic dividend, including through safe schools and cohesive communities and families (*Ibid*).

¹⁹ Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the UN General Assembly on 25 September 2015, A/RES/70/1, https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E, 08.08.2019.

3. Protection of Migrant Children’s Rights - National Legislative Framework

3.1. Constitution of the Republic of Serbia

Constitution of the Republic of Serbia²⁰ (hereinafter: CRS) proclaims several principles relevant to the protection and integration of migrant children. First of all, in its Article 21, CRS explicitly prohibits any kind of discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited. It is also highlighted by the same constitutional provision that exceptional measures the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens are not considered discrimination.

In the context of the rights of migrant children, it is of particular importance to mention that CRC guarantees the right to asylum. Namely, according to Article 57 of CRS: *“Any foreign national with reasonable fear of prosecution based on his race, gender, language, religion, national origin or association with some other group, political opinions, shall have the right to asylum in the Republic of Serbia. The procedure for granting asylum shall be regulated by the law.”*

Moreover, it is worth emphasizing that CRC contains several provisions relevant to the protection of the rights of the child that have to be respected and applied on migrant children as well, in accordance with the aforementioned prohibition of discrimination. According to Article 64 of CRS: *“A child shall enjoy human rights suitable to their age and mental maturity. Every child shall have the right to personal name, entry in the registry of births, the right to learn about its ancestry, and the right to preserve his own identity. A child shall be protected from psychological, physical, economic and any other form of exploitation or abuse. A child born out of wedlock shall have the same rights as a child born in wedlock. Rights of the child and their protection shall be regulated by the law”.*

Furthermore, Article 65 of CRS proclaims the duties and obligations of parents, as complementary to the aforementioned child’s rights by prescribing the following: *“Parents shall have the right and duty to support, provide upbringing and education to their children in which they shall be equal. All or individual rights may be revoked from*

²⁰ Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 98/2006.

one or both parents only by the ruling of the court if this is in the best interests of the child, in accordance with the law.”

Finally, CRS guarantees special protection of the family, mother, single parent and child in its Article 66, by proclaiming the following: *“Families, mothers, single parents and any child in the Republic of Serbia shall enjoy special protection in the Republic of Serbia in accordance with the law. Mothers shall be given special support and protection before and after childbirth. Special protection shall be provided for children without parental care and mentally or physically handicapped children. Children under 15 years of age may not be employed, nor may children under 18 years of age be employed at jobs detrimental to their health or morals.”*

Having in mind the standpoint that education can significantly contribute to the success of the process of migrant children integration (that is discussed in detail in the part of the paper dedicated to social issues of migrant children integration), it is particularly worth mentioning that Article 71 of CRS proclaims the right to education by prescribing the following principles: *“Everyone shall have the right to education. Primary education is mandatory and free, whereas secondary education is free. All citizens shall have access under equal conditions to higher education. The Republic of Serbia shall provide for free tertiary education to successful and talented students of lower property status in accordance with the law.”*

3.2. Law on Asylum and Contemporary Protection

Law on Asylum and Contemporary Protection²¹ (hereinafter: LACP) contains several provisions pertinent to the protection of the rights of migrant children as well as to their integration within the country of asylum. In its Article 2, LACP defines an underage person as a foreigner who is less than 18 years old (Paragraph 1, Subparagraph 13) (which is compatible with the definition of a child from CRC). Article 2 LACP defines an unaccompanied underage person as a foreigner who is less than 18 years old and who has entered the Republic of Serbia unaccompanied by a parent or guardian or other adult responsible for him/her or who has remained unaccompanied by these persons after entering the Republic of Serbia (Paragraph 1, Subparagraph 14). LACP also defines an underage person separated from parents as a foreigner who is less than 18 years old and who has entered the Republic of Serbia unaccompanied by a parent or guardian or other adult responsible for him/her or who has remained unaccompanied by these persons after

²¹ Law on Asylum and Contemporary Protection, *Official Gazette of the Republic of Serbia*, No. 24/2018.

entering the Republic of Serbia, but who is not necessarily without the companionship of other relatives (Paragraph 1, Subparagraph 15).

There are several principles proclaimed by LACP, but two of them seem to be the most important in the context of migrant children protection: 1) the principle of family unity (Article 9) and 2) the principle of the protection of underage person's best interest (Article 10). In accordance with the principle of family unity, relevant state bodies are supposed to undertake all disposable measures in order to maintain family unity throughout the asylum procedure as well as after the right to asylum or contemporary protection have been granted (Article 9 Paragraph 1). Moreover, the persons who have been granted asylum or contemporary protection are entitled to claim family unification in accordance with LACP (Article 9 Paragraph 2). When it comes to the protection of underage person's best interest, it is important to mention that LACP explicitly says that its provisions need to be applied in the manner that is in compliance with that principle (Article 10 Paragraph 1). LACP further explains this principle by prescribing that when assessing the underage person's best interest the following conditions have to be taken into consideration: welfare, social development and origin of that person, the opinion of underage person in accordance with his/her age and maturity, the principle of family unity as well as the protection and safety of underage person, particularly if there are circumstances that indicate that this person could be the victim of human trafficking, family violence or other forms of gender based violence (Article 10 Paragraph 2).

Article 11 of LACP prescribes that a parent or a guardian is entitled to express the intention to seek asylum as well as to submit asylum application on the behalf of an underage person, unless the underage person is more than 16 years old and married. In accordance with Article 12 of LACP, the social welfare centre chooses a temporary guardian for an unaccompanied underage person, unless the underage person is more than 16 years old and married. The temporary guardian is obliged to inform the unaccompanied underage person about his/her rights as well as to be present when he/she expresses the intent to seek asylum or submits the asylum application. The temporary guardian is also entitled to submit the asylum application on the behalf of the unaccompanied underage person if this is in his/her best interest. In order to protect the vulnerable position of this specific category of underage persons, LACP insists that procedures initiated upon the application of the unaccompanied underage persons as well as other procedures that are pertinent to his/her rights have the priority over other procedures (Article 12 Paragraph 9).

Finally, it is important to mention that LACP contains a list of the rights that are guaranteed to asylum seekers in the Republic of Serbia, including: 1) the right to stay in and move across the Republic of Serbia, 2) the right to material acceptance conditions, 3) the right to social welfare assistance, 4) the right to health protection, 5) the right to primary and secondary education, 6) the right to information and legal assistance, 7) the freedom of religious belief, 8) the right to access labour market and 9) the right to obtain personal documents in accordance with Articles 90 and 91 of LACP (Article 48)

3.3. Law on Foundations of Educational System

Law on Foundations of Educational System²² (hereinafter: LFES) regulates the enrolment of foreign citizens, stateless persons, and citizenship applicants in school system. According to Article 23 Paragraph 1 of LFES, the aforementioned persons have the right to education and can be enrolled in the educational institutions under the same conditions and in the same procedure as the ones prescribed for the citizens of the Republic of Serbia. When it comes to refugees and migrant children who do not speak the language that is used in the education system or who are not familiar with some parts of curriculum important for the proceeding of education, the relevant educational institution has to organise Serbian language lessons, preparatory and additional lessons in accordance with professional instructions adopted by the Minister in charge of education²³, (Article 23 Paragraph 2 LFES). Moreover, while staying in Serbia, a child of a foreign citizen has got the right to attend his/her maternal language and culture lessons within the premises chosen by the local community (Article 23 Paragraph 3 LFES).

LFES unambiguously prohibits discrimination and discriminatory conduct in its Article 110 Paragraph 1. Discriminatory conduct refers to either direct or indirect, explicit or implicit differentiation or unequal treatment of one person or groups of persons or their family members, based upon their race, skin colour, ancestors, citizenship, migrant or displaced person status, nationality or ethnic origin, language, religious or political convictions, sex, gender identity, sexual orientation, financial status, social or cultural origin, birth, genetic characteristics, health condition, impairments or disabilities marital or family status, previous conviction, age, appearance, membership in political, synodical and other organisations and other actual or presumed personal characteristics as well as

²² Law on Foundations of Educational System, *Official Gazette of the Republic of Serbia*, No. 88/2017, 27/2018 and 10/2019.

²³ Professional Instruction for the Inclusion of Refugee/Asylum Seeking Students in the System of Education and Upbringing, Ministry of Education, Science and Technological Development of the Republic of Serbia, No. 601-00-00042/2017-18 of 05.05.2017., <http://www.mpn.gov.rs/wp-content/uploads/2017/06/STRUCNO-UPUTSTVO.pdf>, 18.09.2019.

other grounds prescribed by the Law on the Prohibition of Discrimination²⁴. However, LFES emphasises (Article 110 Paragraph 2) that special measures designed to facilitate the achievement of full equality, protection and prosperity of persons or a group of persons that are in an unequal position shall not be considered discrimination.

In the case of discriminatory conduct (or the doubt of such conduct), the educational institution is obliged to apply all necessary measures provided by the law (Article 110 Paragraph 3 LFES). More detailed criteria for the recognition of various discrimination forms within the educational institution by employees, children, students, adults, parents, legal representatives or other persons are prescribed by the Ministers in charge of education and human and minority rights (Article 110 Paragraph 4 LFES). The actions that should be taken by the educational institutions in the cases of doubted or confirmed discrimination, as well as the means to conduct prevention and intervention, the obligations and responsibilities of the employees and other involved persons and bodies and other issues pertinent to protection from discrimination are prescribed by the Minister in charge of education (Article 110 Paragraph 5 LFES).

3.4. Other relevant documents

The Ministry of Labour, Employment, Veteran and Social Affairs of the Republic of Serbia adopted the Instruction on the conduct of social welfare centres and institutions of social protection for the accommodation of users in providing the protection and accommodation of unaccompanied underage migrants²⁵, with the intention to provide for their functioning in accordance with international standards and domestic legal framework.

Another important document, Standard Operative Procedure for the protection of Migrant/Refugee Children has been created under the auspices of the aforementioned ministry and in cooperation with UNICEF and IDEAS and presented in 2016 (Milanović *et al*, 2016). This document contains clear directives for all involved subjects, designed to facilitate the discovering and identification of vulnerable and unaccompanied children and their prompt referral to relevant institutions with the purpose to guarantee the protection of their fundamental rights (Milanović *et al*, 2016: 3). The Procedure is

²⁴ Law on the Prohibition of Discrimination, *Official Gazette of the Republic of Serbia*, No. 22/2009.

²⁵ Instruction on the conduct of social welfare centres and institutions of social protection for the accommodation of users in providing the protection and accommodation of unaccompanied underage migrants, No. 110-00-00469/2015-14 from 10.07.2015., Ministry of Labour, Employment, Veteran and Social Affairs of the Republic of Serbia.

designed for all relevant organisations conducting their activities alongside migrants' and refugees' route in Serbia, including: local police stations, local health care centres, local social welfare centres providing the services of accommodation, family accommodation centres, Centre for the Protection of Human Trafficking Victims, Commissariat for Refugees and Migration, Red Cross, UNHCR, UNICEF and other international organisations, as well as domestic non-governmental organisations working with children and young people in emergency situations (Krašić *et al.*, 2017: 29).

The procedures are aimed at completing the following tasks: 1) to determine the procedures of protection applicable in the context of mass migrations; 2) to define the roles of the subjects acting in the field and achieve a systematic response of both - governmental and civil sector; 3) to direct the attention of all relevant services towards the most vulnerable children; 4) to formulate the indicators for quick identification of children at risk; 5) to define the lines of communication between several subjects acting in the field in the process of the estimation of children's' risks and needs and 6) to define the steps of the decision making process regarding child's best interest as well as providing assistance and support. Milanović *et al.*, 2016: 8). The aim of these tasks is to: harmonise the roles and activities of different subjects, make the system of protection more flexible and more adaptable to the challenges of mass migrations and their application is supposed to contribute to the following goals in the field of child protection: 1) providing physical and emotional safety of children, 2) preventing family dissolution, 3) mitigating the risks of damage and injuries, 4) facilitating prompt identification and adequate protection of children in particularly vulnerable situations (*Ibid.*). Also, the Ministry of Education, Science and Technological Development of the Republic of Serbia (hereinafter: MESTD) has adopted the Professional Instruction for the Inclusion of Refugee/Asylum Seeking Students in the System of Education and Upbringing in 2017 in order to facilitate their integration.

4. Integration of Migrant Children in Serbia - Social Aspects

4.1. Key Problems of Migrant Children in Serbia

Migrant children in general, and particularly unaccompanied underage minors represent the most vulnerable category of migrants in Serbia, and their position seems to be particularly difficult if they are illegally staying in the country that they predominantly consider transit. However, the actual scope of this issue as well as the problems they are facing in Serbia cannot be determined with certainty since there are no precise information on their exact number (Sokolović, 2013: 3). Nevertheless, these young people

are facing numerous difficulties, some of which are highlighted in Council of Europe Report from 13.10.2017. (Council of Europe, 2017; Sokolović, 2017: 2).

The circumstances under which migrations occur strongly influence the safety and welfare of children. Namely, the unexpected appearance of emergency situations such as armed conflicts, violence and family dissolution have a significant impact on physical and psychological state of migrant children (Solarević, Pavlović, 2018: 232). For example, the results of the field research conducted by the Humanitarian Centre for Integration and Tolerance (hereinafter: HCIT) confirm that migrant children almost inevitably experience serious stress and trauma that are often overlooked (Biro, 2016: 87). Field experiences of HCIT show imply that pre-school migrant children did not tend to show any signs of post-traumatic stress and that they even seemed to be completely unaware of the traumas their families had survived. However, the drawings they made within the project of urgent humanitarian aid including psychological support, leisure activities for children, informing and providing clothes and hygiene essentials, revealed something completely different: a number of symbols indicating that these children were deeply suffering (Biro, 2016: 87). The trauma and stress during the journey to Serbia are even more severe in the cases of unaccompanied or separated migrant children. For example, the staff of the Commissariat for Migration and Refugees noticed that there had been numerous allegations of sexual abuse of Afghani boys and young men, during their journeys before arriving in Serbia (Council of Europe, 2017). What is more, a large number of unaccompanied migrant children in Obrenovac attempted to cross the borders irregularly with the assistance of smugglers (Council of Europe, 2017).

Unaccompanied minors and children are in a particularly vulnerable position due to several factors. The lack of a comprehensive system of protection of unaccompanied migrant children seems to be an unresolved issue in all countries in the Balkans and, as EUROPOL's reports confirm, around 10,000 unaccompanied migrant minors have disappeared from the European system in 2016, which means that they cannot be provided with adequate protection in any European country (*Ibid.*). Being alone on an extremely dangerous journey, these children are exposed to several risks including: smuggling, human trafficking, forced labour, slavery, abuse and captivity (*Ibid.*).

Although relevant state bodies claim that all unaccompanied migrant children are provided accommodation in reception centres, there are indications showing that some of them are still dwelling outside the institutions, deprived of adequate housing, clothes, food, water and safety (Sokolović, 2017: 4). But, even if accommodated in some of the reception centres, unaccompanied migrant children are still facing serious problems. As

CAP experts have recently described the existing centres for the accommodation of unaccompanied underage migrants in Serbia as inappropriate and overcrowded, suggesting the establishment of a special centre designed exclusively for migrant children without parental guardianship (Večernje novosti, 2019). As CAP experts emphasised, the accommodation these children are given is not acceptable because, despite the genuine efforts of the reception centres' management to keep them in separate units, the children are actually sharing the same space with adults, which puts them under the risk of being exposed to various forms of abuse, violence and manipulation (Council of Europe, 2017). Moreover, according to CAP experts, the children themselves have expressed concern for their own safety, claiming that they have been frightened, threatened and robbed (Večernje novosti, 2019). When it comes to reporting allegations of serious offences to relevant law enforcement authorities, the management of reception centres tend to act rather hesitantly, including, for example a case of paedophilia, which the centre's management resolved without involving the police (Council of Europe, 2017). In that context, it is rather difficult to determine whether the relevant state bodies are familiar with the scope of the risks and abuses underage unaccompanied migrant children staying in reception centres are exposed to (Sokolović, 2017: 5).

Age assessment commonly appears as one of the issues related to the protection and integration of migrant children. Namely, the children who are unaccompanied by a parent, guardian or responsible adult are considered at particular risk and their preliminary identification can be made either by police officers during their regular work with refugees and migrants, or by the NGO staff who have received specific training on the identification and assessment of child's best interest. (Council of Europe, 2017). However, the age-determination practices seem to vary from one reception center to another. What actually occurs is the fact that the Commissariat for Migration and Refugees staff tend to refer the cases of children suspected of being unaccompanied to the local social welfare centers that are supposed to determine their age. Since many of these children are teenagers, determining whether they are under 18 years of age is often rather difficult. Furthermore, identifying unaccompanied children is linked to several difficulties since they sometimes travel together with adults, so relevant state authorities cannot claim with certainty whether some of those adults are their parents or guardians or not (*Ibid.*).

The issue of guardianship of unaccompanied migrant children also seems to be rather complex and related to several practical difficulties. Namely, the Border Police or the Commissariat for Refugees and Migration are obliged to notify relevant social welfare centers about the cases of separated or unaccompanied migrant children (Council of

Europe, 2017). However, although the instructions for the determination of the best interest of unaccompanied children and the follow-up procedures are quite detailed, the guardianship system in Serbia does not seem to be ready to face the challenges of such a high number of unaccompanied children (*Ibid.*). Therefore, social welfare centers commonly appoint one guardian to several children - sometimes 50 or more. For example, in the reception centre in Obrenovac one guardian was appointed to altogether 218 unaccompanied children staying there. As a result, these appointed guardians cannot maintain regular contacts with the children and provide them with adequate attention and care (*Ibid.*). Also, the majority of unaccompanied migrant children refuse to accept this kind of assistance under the influence of their older male companions. Moreover, in some cases unaccompanied minors would initially accept temporary guardians and accommodations, but leave the procedure after some time and return to live under inconvenient and risky circumstances due to several reasons (HCIT, 2017: 97).

The language barrier between migrant children on the one side and the guardians on the other, combined with the insufficient number of professional translators, also appears to be an issue since the children cannot communicate with the guardian and be informed about their rights and obligations (Council of Europe, 2017.). It is important to mention that without an efficient system of temporary guardianship, the access to legally prescribed asylum procedures cannot be provided to unaccompanied migrant children, which makes them even more vulnerable and exposed to the risks of violence, sexual exploitation or abuse (*Ibid.*). For example, some local and international NGOs providing support services in asylum and reception centers reported 40 identified cases of human trafficking of unaccompanied children and also raised the question of their mental health deterioration, caused by prolonged dwelling in asylum or reception centers (*Ibid.*).

A significant obstacle for the integration of migrant children refers to the issue of the inscription of new-born children in birth registries. The main obstacle for the inscription is the lack of their parents' identification documents such as passport or ID card from the states of their origins - either because they have never had them or because they have lost them during the journey (HCIT, 2017: 99). Furthermore, providing the translation of relevant documents into Serbian also represented an obstacle for prompt inscription. In order to avoid the risk of statelessness, relevant state bodies applied a flexible approach and were willing to facilitate the inscription of migrant children into birth registry books and required the possession of the following documents, i.e. their translated versions: parents' id cards, marriage certificate and official birth confirmation issued by the hospital where the child was born (*Ibid.*).

When it comes to the integration of migrant children into Serbian educational system, the following key issues and challenges have been identified: the language barrier, which is the most obvious one; the time that the school requires to adapt to the needs of the child and to prepare the plan of support; socio-economic marginalisation (including trauma, the loss of the beloved ones, new and unfamiliar surroundings, financial insecurity, uncertain accommodation); providing support and making new friendships; the prevention of their discrimination (including prejudice and various negative stereotypes)²⁶ (Solarević, Pavlović, 2018: 234).

4.2. Good Practice Regarding the Integration of Migrant Children in Education System Serbia

The Republic of Serbia has made significant efforts to facilitate the integration of migrant children into domestic educational system. This process started in 2013, when children asylum seekers were enrolled in elementary school in Bogovađa, whereas 7 more students were included into education system in 2014 (Solarević, Pavlović, 2018: 235). During the first 6 months of 2015, 30 asylum seeking children were enrolled in elementary schools in Serbia (MESTD, 2017). In 2016 fall semester, 101 migrant students were included in Serbian education system in 6 elementary schools, whereas in 207 almost 95% of children of elementary school age who were at the time accommodated in refugee centres were enrolled in 45 elementary schools (Solarević, Pavlović, 2018: 235).

According to MESTD, at the beginning of Fall 2017 Semester, altogether 503 migrant children were enrolled in Serbian schools, including 447 children in 37 elementary schools and 56 children in 8 high schools. In total, 30% of these children were enrolled in schools in Belgrade. In December 2017 and January 2018, 454 students attended lessons - 425 in elementary schools and 25 in high schools, whereas 83 children attended classes at collective centres (Đorđević et al, 2018: 76-77). In April 2018, there were less students than in previous months - 400 in elementary schools and 27 in high schools (*Ibid*).

Despite these variations, a large number of migrant children of school age required a prompt and adequate reaction of relevant state institutions in order to facilitate their integration in education system. In August 2016, MESTD sent a note to school

²⁶ Professional Instruction for the Inclusion of Refugee/Asylum Seeking Students in the System of Education and Upbringing, Ministry of Education, Science and Technological Development of the Republic of Serbia, No. 601-00-00042/2017-18 of 05.05.2017., <http://www.mpn.gov.rs/wp-content/uploads/2017/06/STRUCNO-UPUTSTVO.pdf>, 18.09.2019.

administrations, which required schools and preschool institutions to facilitate undisturbed inclusion of children with the status of migrants, asylum seekers or refugees in Serbian education system (Solarević, Pavlović, 2018: 235).

As the result of cooperation between the government of the Republic of Serbia and UNICEF between 2016 and 2017, a working plan for the support of strengthening of the system for the access to quality education in emergency situations was developed. Consequently, a joint concept of support for migrant/refugee children in Serbia was applied in cooperation with Centre for Educational Policies. The project comprised the preparation and realisation of professional training for educational institutions and school administrations. Moreover, mentor support and small grants for educational institutions were provided (Mihajlović, 2018: 1).

A special working group within MESTD was formed with the purpose to provide support in terms of education of students with the status of migrants/refugees through planning, keeping up with and managing the activities related to their education. Such approach has appeared to be genuinely inclusive and suitable to guarantee the respect of individual characteristics, capacities, cultural personal and family experiences of migrant/refugee students. The support given to these students includes the program of adaptation, stress management and intensive Serbian language courses throughout regular school program as well as during extra-curricular activities, via peer support, individualised approach to learning, adaptation of schedule, working methods and teaching equipment (Mihajlović, 2018: 1).

When planning and implementing of the program designed for the support of the inclusion of migrant students in education system, the spatial distribution of altogether 19 reception centres for migrants and their relations with school administrations were taken into consideration. The centres were distributed on the territories of nine school administrations and, within these administrations, special advisors were appointed in order to track and manage all educational activities. In addition, altogether ten teachers and professional advisors of the MESTD were also involved with the programme as mentors with advisory roles in schools where migrant children were enrolled (Solarević, Pavlović, 2018: 236)

School administrations initially selected 45 elementary schools where migrant children would be enrolled. High school education was recommended, but it is not obligatory. Nevertheless, the resources of high schools, the number of students as well as the language skills and interests of young migrants were analysed. Moreover, a so-called

“Welcoming Programme” was prepared for each student, and a school report, a document issued by the school to a migrant student who is leaving Serbia, which contains a summary of international experiences regarding students’ evaluation and learning processes (Mihajlović, 2018: 1).

A high level of cooperation has been established between the schools and the Commissariat for Refugees and Migration that was involved with the distribution of the information among migrant parents on the possibilities for education in Serbia, as well as in the addressing of school administrations and health institutions in order to facilitate medical examinations of migrant students prior to their inclusion in education system. Also, in cooperation with UNICEF and Centre for Educational Policies, multilingual brochures and leaflets containing information on Serbian education system were prepared (Mihajlović, 2018: 2).

The application of these inclusive approaches required the education and adequate preparation of teachers involved with the project. That is the reason why, the representatives of all school involved participated in the professional training program dedicated to inclusive education, with special focus on the characteristics of migrant children education. So, for the purpose of providing and adequate approach to migrant children, in 2017 and 2018, altogether 750 teachers and teaching assistants attended various types of professional trainings. Besides, a handbook for the implementation of Professional Instruction for the Inclusion of Refugee/Asylum Seeking Students in the System of Education and Upbringing, written by the experts from in schools, UNICEF, NGOs and MESTD (Mihajlović, 2018: 2).

A good example of these efforts is a two-days’ workshop “Including refugee/migrant children in formal education”, organized by UNICEF, Centre for Educational Policies, and Ministry of Education, Science and Technological Development in Belgrade in July 2017. The workshop was conducted within the project “Supporting refugee/migrant students in the territory of the Republic of Serbia” with the aim to identify the challenges that were identified during the admission and support of students and to facilitate the creating of models and individual activities that might contribute to overcoming the challenges regarding the application of the Expert Instruction for the inclusion of student refugees/asylum seekers in the education system. One of the goals of this workshop included: the making of a draft version of a Welcome Program for migrant and refugee children, the identification of the needs of schools for support, and the preparation of educational institutions for the inclusion of migrant students in the education program for the school year 2017/2018. Representatives of schools and preschool institutions involved

in the project participated in the workshop, together with educational councillors from school administrations, from the schools and preschool institutions as well as the representatives of social welfare centres and NGOs such as UNICEF, UNHCR, Save the Children, Adra etc. (Social Inclusion and Poverty Reduction Unit: 2017).

5. Conclusion - Key Challenges and Recommendations

One of the first preconditions for the successful integration of migrant children includes their safe accommodation, which particularly refers to unaccompanied underage migrants. As it has already been pointed out, unaccompanied migrant children are often accommodated in reception centres together with adults, which puts them under serious risks of becoming the victims of abuse, violence, human trafficking etc. That is the reason why a separate centre designed exclusively for the accommodation of unaccompanied migrant children in which they could be provided with all the necessary assistance should be established.

As it has been mentioned in the section of the paper dealing with the practical issues of migrant children in Serbia, particularly those who are unaccompanied, guardianship represents an important but at the same time an insufficiently regulated institution. Namely, the system of guardianship established by relevant laws allows a large number of children to be under the guardianship of a single person. Consequently, the guardian cannot perform his/her duties appropriately and dedicate sufficient amount of time and energy to each child. Therefore, it seems logical not only to increase the number of guardians, but also to provide them with assistance by social welfare and/or NGOs representatives or volunteers.

Since the language barrier represents a serious obstacle for the integration of migrants into Serbian society in general, and particularly the integration of migrant children into school system and their capability to participate in learning and other activities. Therefore, the number of available translators should be increased, the learning material should always be translated into migrants' languages and more intensive and frequent lessons of Serbian language that they can attend apart from regular school classes should be provided (Kozma, 2018).

School appears to be one of the most important supporting factors in the process of migrant students' integration. Therefore, warm atmosphere, willingness of the children and teachers to accept new students and to show interest for their culture and language represent key preconditions for successful integration (Vidosavljević *et al.*, 2016: 185-

201, according to: Nikolić, Cvijanović, 2017: 94). One of the manners in which this can be achieved is the implementation of the intercultural education, which is directed towards the development of a sustainable lifestyle in a multicultural society via understanding, mutual respect, dialogue and non-discrimination among various cultures (Nikolić, Cvijanović, 2017: 96). Such approach would require a radical shift in the attitudes of children and teachers not only to migrants and migrant students but also towards differences in general, including different languages, cultures, traditions, customs etc., which cannot be achieved instantly, but, requires willingness, time, patience and continuous work, instead. Finally, the capacities of the teachers to encourage the students to participate in positive interaction with migrant children in curricular and extracurricular activities should be enhanced (Kozma, 2018).

Since migrant children who arrive to Serbia have various cultural backgrounds that significantly differ from the milieu of the students from our country, it is of particular importance to apply the concept of intercultural education that has been explained previously. In that sense, not only the acceptance of but also the participation in other person's cultural activities and the exchange of cultural backgrounds, knowledges, customs etc. should be encouraged. Such approach would facilitate the perception of other (migrants') cultures as equally valuable as the domestic one, as worth studying and exploring, making migrant children feel as useful and accepted members of the community. This requires a radical shift in the approach to education in general and imposes an obligation for relevant Ministry to conduct a series of workshops or other similar occasions where teachers could learn and accept the essence of intercultural education in general, and particularly its application in the context of migrate children.

Although the Republic of Serbia has got an appropriate legislative framework for the prevention of discrimination, which includes both – national as well as international legal documents, their practical application does not always seem to be completely accurate. So, in order to achieve full integration of migrant children, some practices such as: sending these children to schools that are situated far away from their camps, enrolling migrant children in schools in which the majority of students belong to Roma or returnees' population, complete and systematic exclusion of their parents from the education process etc. should be avoided.²⁷

²⁷ For further information see: Migracije i obrazovanje Izazovi integracije dece migranata/azilanata u obrazovni sistem u Republici Srbiji, <https://www.azilsrbija.rs/wp-content/uploads/2018/11/MIGRACIJE-I-OBRAZOVANJE-izazovi-integracije-dece-migranata-azilanata-f.pdf>, 01.09.2019.

Moreover, it should be highlighted that current concept of integration of migrant children in Serbian education system should not be observed as a temporary solution. Namely, since the closing of the Balkans route, the number of migrants planning or accepting to stay in Serbia seems to be increasing. Therefore, instead of being perceived as a short-term, *ad hoc* and project based, the program of migrant children's integration should be conceptualised as a long - term sustainable model, especially in the field of education.²⁸

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Veljko Turanjanin*

UNACCOMPANIED MIGRANT MINORS DETENTION BEFORE THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The author deals with the one of the most problematic issues of the migrant crisis, namely the deprivation of liberty of a unaccompanied migrant minor in his or her migrant journey. The situation of migrants in the crisis that has hit Europe is not easy in itself, but it is made even more difficult by the fact that children often travel with adult migrants, and the most difficult aspect of this phenomenon is certainly unaccompanied migrant children. The countries most affected by the influx of unaccompanied children are Greece and Malta. Article 5 of the European Convention on Human Rights and Fundamental Freedoms lays down the grounds on which a person may be deprived of his liberty, and in recent years the European Court of Human Rights has elaborated in detail the basis for ordering detention of migrants. The author has paid the greatest attention to the views of this Court when it comes to unaccompanied migrant children analyzing all the judgments rendered by July 2019, and the difficulty of their position is sufficiently illustrated by the fact that the Court found violations of convention rights in all judgments in their deprivation of liberty.

Keywords: *unaccompanied minor, detention, migrant crisis, European Court of Human Rights, European Convention on Human Rights and Fundamental Freedoms.*

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1. Introduction

The Mediterranean migrant crisis is not calming down. Between 1950 and 2010 however, the nature and character of these migrations changed (Haas, 2011: 60). The Italy has, for many years, faced an influx of illegal migrants by sea, often organized by criminal groups (Pascale, 2010: 283). However, according to the proceedings pending and/or ended before the European Court of Human Rights (“the Court”), Greece and Malta do not lag behind Italy. With less success, migrants file complaints against other countries, such as countries in the region. Such voyages are fraught with life-threatening hazards, ships often carry far more migrants than a ship can dock, do not have standard equipment, and captains often are not professional sailors (Klug, 2014: 49).

Migrants are in a difficult position in both developed and developing countries (Ogg, 2016: 385). It is a mixed migration, while this concept still evolving, encompassing migrants of different nationalities, motives, etc. (Sharpe, 2018). However, the pressure of migration cannot relieve states of their human rights obligations (Moreno-Lax, 2012: 598). The focus of this paper will be at the Mediterranean crisis and the situation of juvenile migrants, accompanied and unaccompanied, primarily from the perspective of the Court, with other countries, such as Australia, facing similar problems (Schloenhardt and Craig, 2015; Marmo and Giannacopoulos 2017: 5; Henderson, 2014).

It should be noted at the outset, as stated in numerous judgments, that the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) is a living instrument, which may result in its provisions being interpreted over time in a different way (Mekbrajd, 2009: 17; Bjorge, 2013: 120). The most famous judgment in this area dates back to 2012, welcomed as historic by human rights defenders (Mann, 2018: 357), which drew attention to key international instruments in force in this area (*Hirsi Jamaa and Others v. Italy*, 2012), in which the Court found a violation of Articles 3, 13 and 13 of the Convention and Article 4 of Protocol 4 to the Convention, while not forgetting the Commission's decision on the inadmissibility of the application in *JHA v. Spain* (for lack of *locus standi* (*J.H.A. v. Spain*, 2008)). This is the first judgment where the Court unanimously found a state responsible for violating the human rights of migrants and refugees intercepted on the high seas and repatriated to a third country (Giuffre, 2012: 729) and represents an improvement of the Court's case-law in several fields, such as the extraterritorial application of human rights and the treatment to be provided to migrants and asylum seekers (Papanicolopulu, 2013: 420). As the judge *Pinto de Albuquerque* points out in this judgment, the ultimate question is how Europe

should recognize that migrants are entitled to have rights (about it Hirsch and Bell, 2017: 418).

A key element of the EU's evolution is the abolition of internal borders and the establishment of freedom of movement, which, however, is not accompanied by a single legal system (Mitsilegas, 2014: 182). The foundations of the modern system of migrant protection were laid after the Second World War (Betts, 2013: 10). The last decade, however, has been marked by two different approaches to the migrant issue, and on the one hand we have increased militarization and border control, while raising fences, and on the other, strengthening human rights and freedoms of migrants (Aas and Gundhus, 2015: 1). Economic crisis and political change in certain regions of Africa and Asia inevitably cause challenges for Europe (Černič, 2016: 237), that are in this context primarily emigrational. In line with developments, politicians, lawyers, lay people are advertised through social networks, announcements and papers. International organizations around the world look at how human rights can protect migrants' rights (Cantor, 2014: 79), and the debate on the link between human rights and migrant rights is deeply relevant (Harvey, 2014: 44; McConnachie, 2017: 191). It is a really big problem and political discourse (Meçe, 2018: 45), and thereby, the biggest discussion on migrant control is kept regarding the legality of the activities of repression (*push-backs*) (Markard, 2016: 591-592). Immigration control systems are today characterized by “extraterritoriality” strategies (Ryan, 2010: 3), which primarily include interception measures on ships at sea or in territorial waters of third countries and the appointment of immigration officers to prevent migrants from embarking on flights to a third country (Klug and Howe, 2010: 69-70). EU Member States use a range of means to control their borders, extending beyond their territories (Costello, 2012: 290). While, on the one hand, we have states' activities to address migrant issues, the problem has arisen to what extent the Convention is a means of extraterritorial immigration control, especially after the judgment of *Banković and Others v. Belgium and Others* further stirred the sea (Brouwer, 2010: 213). Both figuratively and in nature.

The 1951 Geneva Convention Relating to the Status of Refugees sets out situations in which a State must grant refugee status to persons seeking that status. Article 1 of the Geneva Convention defines the concept of a refugee, as a person who, due to a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion, finds himself outside the country of his nationality and is unable or, because of such fear, does not want to use the protection of that country; or persons who, because they do not have a nationality but reside, because of such events, outside the country in which they were previously settled, and cannot or,

because of such fear, do not wish to return to it. Thereafter, under Article 33, paragraph 1, no Contracting State shall in any way expel or return (*refouler*)¹ a refugee to the border of a territory where his life or freedom would be threatened on the basis of race, religion, nationality, affiliation with a particular social group or political opinions. Of course, international law allows states to take reasonable measures in their territorial waters to prevent the entry of ships carrying illegal migrants (Guilfoyle, 2009: 222). Simply, the link between migrants and migration control has always been a point of conflict between state sovereignty and international law (Gammeltoft-Hansen, 2011: 11), but also between law and politics. However, the existence of international treaties and national legislation guaranteeing rights does not mean that their violation will not occur at the same time (further on this topic: Storey, 2016: 20).

As we can see, one of the basic principles in this area is precisely the principle of non-refoulement, as pointed out by the UNHCR in its Note on International Protection of 13 September 2001, emphasizing that it is a key principle of protection embodied in the Convention, which is not allowed (see about the legal nature of this principle Greenman, 2015). In a significant sense, this principle is a logical continuation of the right to seek asylum, recognized in the Universal Declaration of Human Rights, which has come to be regarded as a rule of customary international law binding on all states. In addition, international humanitarian law establishes non-refoulement as a fundamental component of an absolute ban on torture and cruel, inhuman or degrading treatment or punishment. The duty not to return (*refouler*) has also been recognized as applicable to refugees regardless of the formal recognition of their status, so it obviously involves asylum seekers whose status has not yet been decided. It implies all measures attributable to the State that could have the effect of returning an asylum seeker or refugee to the borders of a territory where their life or liberty would be threatened, or where they would be at risk of persecution. These include border refusal, interception and indirect *refoulement*, either by an individual seeking asylum or in situations of mass influx. Although at first glance it may seem that returning a ship to the high seas does not have to lead to refoulement, because the ship can theoretically sail to any country in the world that has the sea, the matter is far more complicated (Guilfoyle, 2009: 222). Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe on the interception and rescue at sea of asylum seekers, refugees and irregular migrants is also very significant.² Although

¹ This principle dates back to 1933 (Bhuiyon, 2013: 101).

²1. The surveillance of Europe's southern borders has become a regional priority. The European continent is having to cope with the relatively large-scale arrival of migratory flows by sea from Africa, reaching Europe mainly through Italy, Malta, Spain, Greece and Cyprus.

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2. Migrants, refugees, asylum-seekers and others risk their lives to reach Europe’s southern borders, mostly in unseaworthy vessels. These journeys, always undertaken illicitly, mostly on board flagless vessels, putting them at risk of falling into the hands of migrant smuggling and trafficking rings, reflect the desperation of the passengers, who have no legal means and, above all, no safer means of reaching Europe.
3. Although the number of arrivals by sea has fallen drastically in recent years, resulting in a shift of migratory routes (particularly towards the land border between Turkey and Greece), the Parliamentary Assembly, recalling, *inter alia*, its Resolution 1637 (2008) on Europe’s boat people: mixed migration flows by sea into southern Europe, once again expresses its deep concern over the measures taken to deal with the arrival by sea of these mixed migratory flows. Many people in distress at sea have been rescued and many attempting to reach Europe have been pushed back, but the list of fatal incidents – as predictable as they are tragic – is a long one and it is currently getting longer on an almost daily basis.
4. Furthermore, recent arrivals in Italy and Malta following the turmoil in North Africa confirm that Europe must always be ready to face the possible large-scale arrival of irregular migrants, asylum-seekers and refugees on its southern shores.
5. The Assembly notes that measures to manage these maritime arrivals raise numerous problems, of which five are particularly worrying:
 - 5.1. despite several relevant international instruments which are applicable in this area and which satisfactorily set out the rights and obligations of States and individuals applicable in this area, interpretations of their content appear to differ. Some States do not agree on the nature and extent of their responsibilities in specific situations and some States also call into question the application of the principle of non-refoulement on the high seas;
 - 5.2. while the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a ‘place of safety’, the notion of ‘place of safety’ does not appear to be interpreted in the same way by all member States. Yet it is clear that the notion of ‘place of safety’ should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights;
 - 5.3. divergences of this kind directly endanger the lives of the people to be rescued, in particular by delaying or preventing rescue measures, and they are likely to dissuade seafarers from rescuing people in distress at sea. Furthermore, they could result in a violation of the principle of non-refoulement in respect of a number of persons, including some in need of international protection;
 - 5.4. although the European Agency for the Management of Operational Cooperation at the External Borders of the member States of the European Union (Frontex) plays an ever increasing role in interception at sea, there are inadequate guarantees of respect for human rights and obligations arising under international and European Union law, in the context of the joint operations it coordinates (Aas and Gundhus, 2015));
 - 5.5. finally, these sea arrivals place a disproportionate burden on the States located on the southern borders of the European Union. The goal of responsibilities being shared more fairly and greater solidarity in the migration sphere between European States is far from being attained.
6. The situation is rendered more complex by the fact that these migratory flows are of a mixed nature and therefore call for specialised and tailored protection-sensitive responses in keeping with the status of those rescued. To respond to sea arrivals adequately and in line with the relevant international standards, the States must take account of this aspect in their migration management policies and activities.
7. The Assembly reminds member States of their obligations under international law, including the European Convention on Human Rights (ETS No. 5), the United Nations Convention on the Law of the Sea of 1982 and the 1951 Geneva Convention relating to the Status of Refugees, and particularly reminds them of the principle of non-refoulement and the right to seek asylum. The Assembly also reiterates the obligations of the States Parties to the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue.
8. Finally and above all, the Assembly reminds member States that they have both a moral and legal obligation to save persons in distress at sea without the slightest delay, and unequivocally reiterates the interpretation given by the Office of the United Nations High Commissioner for Refugees (UNHCR), which states that the principle of non-refoulement is equally applicable on the high seas. The high seas are not an area where States are exempt

from their legal obligations, including those emerging from international human rights law and international refugee law.

9. Accordingly, the Assembly calls on member States, when conducting maritime border surveillance operations, whether in the context of preventing smuggling and trafficking in human beings or in connection with border management, be it in the exercise of *de jure* or *de facto* jurisdiction, to:

- 9.1. fulfil without exception and without delay their obligation to save people in distress at sea;
- 9.2. ensure that their border management policies and activities, including interception measures, recognise the mixed make-up of flows of individuals attempting to cross maritime borders;
- 9.3. guarantee for all intercepted persons humane treatment and systematic respect for their human rights, including the principle of non-refoulement, regardless of whether interception measures are implemented within their own territorial waters, those of another State on the basis of an *ad hoc* bilateral agreement, or on the high seas;
- 9.4. refrain from any practices that might be tantamount to direct or indirect refoulement, including on the high seas, in keeping with the UNHCR’s interpretation of the extraterritorial application of that principle and with the relevant judgments of the European Court of Human Rights;
- 9.5. carry out as a priority action the swift disembarkation of rescued persons to a ‘place of safety’ and interpret a ‘place of safety’ as meaning a place which can meet the immediate needs of those disembarked and in no way jeopardises their fundamental rights, since the notion of ‘safety’ extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation;
- 9.6. guarantee access to a fair and effective asylum procedure for those intercepted who are in need of international protection;
- 9.7. guarantee access to protection and assistance, including to asylum procedures, for those intercepted who are victims of human trafficking or at risk of being trafficked;
- 9.8. ensure that the placement in a detention facility of those intercepted – always excluding minors and vulnerable categories – regardless of their status, is authorised by the judicial authorities and occurs only where necessary and on grounds prescribed by law, that there is no other suitable alternative and that such placement conforms to the minimum standards and principles set forth in Assembly Resolution 1707 (2010) on the detention of asylum-seekers and irregular migrants in Europe;
- 9.9. suspend any bilateral agreements they may have concluded with third States if the human rights of those intercepted are not appropriately guaranteed therein, particularly the right of access to an asylum procedure, and wherever these might be tantamount to a violation of the principle of non-refoulement, and conclude new bilateral agreements specifically containing such human rights guarantees and measures for their regular and effective monitoring;
- 9.10. sign and ratify, if they have not already done so, the aforementioned relevant international instruments and take account of the International Maritime Organization (IMO) Guidelines on the Treatment of Persons Rescued at Sea;
- 9.11. sign and ratify, if they have not already done so, the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and the so-called ‘Palermo Protocols’ to the United Nations Convention against Transnational Organised Crime (2000);
- 9.12. ensure that maritime border surveillance operations and border control measures do not affect the specific protection afforded under international law to vulnerable categories such as refugees, stateless persons, women and unaccompanied children, migrants, victims of trafficking or at risk of being trafficked, or victims of torture and trauma.

10. The Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union States and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations coordinated by that agency. While the Assembly welcomes the proposals presented by the European Commission to amend the rules governing that agency, with a view to strengthening guarantees of full respect for fundamental rights, it considers them inadequate and would

individual states enter into treaties that somehow attempt to circumvent the rules of international law, they cannot be rendered invalid in this way. For example, Italy and Libya concluded several secret agreements in the period 2000-2012, some of which concerned the control of smuggling of migrants to Italy and their sending back to Libya (Gallaghe and David, 2014: 7; Hessbruegge, 2012: 423; on smuggling and routes extensively in Tinti and Reitano, 2017), and Italy has concluded similar contracts with Tunisia. The treaties were repealed (Pera, 2017: 358) to conclude a new one two months after the verdict, which obliges Libya to strengthen its land and sea borders and Italy to provide technical assistance, equipment and training to Libyan officials (Gammeltoft-Hansen, 2014: 586). However, between May 6 and November 6, 2009, 834 persons were returned to Libya, 23 to Algeria (Giuffré, 2013: 697), and generally speaking, thousands of migrants were returned from European borders in recent years (Bevilacqua, 2017: 168). In the case of minors, however, Directive 2005/85, which provides that public authorities must avoid the detention of minors, is of great importance for these considerations.

2. Detention for migrants

Article 5 of the Convention guarantees that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty except in cases enumerated in such cases and in accordance with the procedure prescribed by law. This Article concerns the protection of each person, as confirmed by the Court in *Nada v. Switzerland* (*Nada v. Switzerland*, 2012: §224). Most EU countries allow migrants to be deprived of their

like the European Parliament to be entrusted with the democratic supervision of the agency's activities, particularly where respect for fundamental rights is concerned.

11. The Assembly also considers it essential that efforts be made to remedy the prime causes prompting desperate individuals to risk their lives by boarding boats bound for Europe. The Assembly calls on all member States to step up their efforts to promote peace, the rule of law and prosperity in the countries of origin of potential immigrants and asylum-seekers.

12. Finally, in view of the serious challenges posed to coastal States by the irregular arrival by sea of mixed flows of individuals, the Assembly calls on the international community, particularly the IMO, the UNHCR, the International Organization for Migration (IOM), the Council of Europe and the European Union (including Frontex and the European Asylum Support Office) to:

12.1. provide any assistance required to those States in a spirit of solidarity and sharing of responsibilities;

12.2. under the auspices of the IMO, make concerted efforts to ensure a consistent and harmonised approach to international maritime law through, inter alia, agreement on the definition and content of the key terms and norms;

12.3. establish an inter-agency group with the aim of studying and resolving the main problems in the area of maritime interception, including the five problems identified in the present resolution, setting clear policy priorities, providing guidance to States and other relevant actors, and monitoring and evaluating the use of maritime interception measures. The group should be made up of members of the IMO, the UNHCR, the IOM, the Council of Europe, Frontex and the European Asylum Support Office.

liberty upon entering the country, most often by border police (Cornelisse, 2010: 8). Establishing a global image of imprisonment for migrants is considered extremely difficult (Fiske, 2016: 191). The grounds for deprivation of liberty are exhaustively stated in the Convention and a person cannot be deprived of his liberty beyond the enumerated grounds (see *Saadi v. the United Kingdom*, 2008: §43). For these considerations it is important Article 5 § 1 (f) of the Convention, which prescribes the lawful arrest or deprivation of liberty of a person in order to prevent his unauthorized entry into the country or persons against whom expulsion or extradition measures are being taken, is significant. In other words, the deprivation of liberty of aliens in the context of immigration control is allowed. In *Saadi v. the United Kingdom* The Court for the first time explained the meaning of this point, holding that until the State authorizes the entry into the country of any foreigner, this procedure is considered unlawful and the detention of a person who wants to enter the country and who needs it and for which he does not have a permit may be lawful in terms of unauthorized entry. However, detention must be compatible with the overall purpose of Article 5, which ensures that no one is arbitrarily deprived of his liberty (*Saadi v. the United Kingdom*, 2008: §66). In keeping with this view, the Court held in *Suso Musa v. Malta* that the question of when the first part of Article 5 of the Convention ceases to apply because the individual has been granted a formal entry or stay permit depends largely on national law (*Suso Musa v. Malta*, 2013: §97).

Deprivation of liberty must be lawful, and when it comes to the lawfulness of detention, including the issue of the procedure prescribed by law, the Convention essentially refers to national law and provides for an obligation to respect the substantive and procedural rules of specific legislation. However, compliance with domestic law is not enough, and any deprivation of liberty must protect the individual from arbitrariness. Further, no arbitrary detention may be compatible with Article 5 of the Convention, whereby the notion of arbitrariness extends beyond incompatibility with domestic law, so that deprivation of liberty may be in conformity with domestic law, but still be contrary to the Convention (*Saadi v. the United Kingdom*, 2008: §67; *Mahamed Jama v. Malta*, 2015: §139). Also important for these considerations are the views taken by the Court in the judgments *A. and Others v. the United Kingdom* and *Louled Massoud v. Malta*. Namely, in order to avoid any detention being regarded as arbitrary, it must be determined in good faith. Then, it must be closely linked to the grounds for detention, the place and conditions in which the person is detained must be appropriate given the fact that this measure applies not to persons who have committed the crime but to aliens who are often in fear for their own lives, have fled their country, the length of detention not exceeding the time

reasonably necessary for the purpose for which it was determined (A. and Others v. the United Kingdom, 2009: §164; Louled Massoud v. Malta, 2010: §62).

3. Detention of the unaccompanied migrants minors in the ECtHR's jurisprudence

The Court has so far pursued numerous proceedings to protect the rights of migrants, but particular emphasis is placed on the protection of the rights of juvenile migrants, accompanied and unaccompanied. The issue of imprisonment is particularly sensitive in this regard. Due to the scope of the work, only the issue of deprivation of liberty under Article 5 of the Convention will be explained here, while the issue of conditions of detention falls under Article 3 of the Convention, which will not be addressed, although it is known that migrants suffer various forms of violence when trying to cross the state border (Jeandesboz, 2015: 87). According to the *Popov protiv Francuske*, a measure of confinement must therefore be proportionate to the aim pursued by the authorities, namely the enforcement of a removal decision in the present case. It can be seen from the Court's case-law that, where families are concerned, the authorities must, in assessing proportionality, take account of the child's best interests. In this connection the Court would point out that there is currently a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount. Protection of the child's best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort (Popov protiv Francuske, 2012: §§140-141).

One of the best observations of a child's position is given by the Court in the judgment *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, emphasizing that it must be borne in mind that the extreme vulnerability of the child is a determining factor and takes precedence over the status of illegal migrants (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006: §55). In this case, there was a nearly two-month imprisonment at the Centre for Adult Persons, a five-year-old migrant Congo national who travelled to meet her mother, who obtained refugee status in Canada and her subsequent repatriation. Although the application was filed by two applicants, there was only one person deprived of liberty in the present case, and the Court had already noted at the outset that only a person deprived of liberty could be considered a victim within the meaning of Article 5 of the Convention (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006: §96). In the present case, it was not disputed that the applicant was lawfully deprived of her liberty, whereby the particular situation was brought under Article 5 § 1f of the Convention, which prescribed the lawful arrest or detention of a person in order to prevent his

unauthorized entry into the country or persons against whom action is being taken to expel or extradite. However, the mere fact that a person's deprivation of liberty was brought under this article does not mean at the same time that the deprivation of liberty was lawful. In a series of judgments, the Court made clear that there must be a link between the grounds for deprivation of liberty and the place and conditions of detention (for example, *Ashingdane v. the United Kingdom*, 1985: §44; *Aerts v. Belgium*, 1998: §46). In this case, the Court drew attention to the fact that the child was imprisoned in a detention centre for illegal migrants on the same conditions as adults. These conditions were certainly not adapted to the situation of extreme vulnerability in which the child was unaccompanied (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006: §103). Therefore, Belgium violated Article 5 § 1f of the Convention, since its legal system did not sufficiently protect the applicant's right to liberty. At the same time, the applicant was not even allowed in this case to file a remedy against the decision on deportation, within the meaning of Article 5 § 4 of the Convention, which provided that everyone deprived of his liberty was entitled to bring proceedings in which the court would urgently examine the lawfulness of deprivation of liberty and to order release if imprisonment is unlawful. Since it is *lex specialis* in relation to Article 13 of the Convention, which provides for the right to an effective remedy, the Belgian authorities have failed to fulfil their obligations under this paragraph as well, since the deportation is not equated with the urgent release, one way violated convention rights.

Thereafter, Article 5 § 4 of the Convention was not respected in the case *Bubullima v. Greece*. The case involved a minor Albanian citizen who lived in Greece with an uncle who exercised his parental right. However, he was arrested by the immigration police who initiated the deportation proceedings against him for not having a valid residence permit. He was taken into custody, and after the deportation order was made, he was detained because of the risk of escape. The court ruled on the applicant's benefit, holding that the remedies available to the applicant did not meet the urgency criterion (*Bubullima v. Greece*, 2010: §31). The 14-day time-limit for deciding to terminate custody did not meet the above request, and the Court found stand in *Kadem v. Malta*, in which the period of 17 days did not meet the criterion of urgency *Kadem v. Malta* (*Kadem v. Malta*, 2003).

Viewed chronologically, the next item in this sequence is *Rahimi v. Greece*, in which the Court also found a violation of Article 5. In this case, an unaccompanied minor migrant was detained in the adult centre. Although detained at the centre for only two days, the Court took the view that the Greek authorities did not consider the best interests of the child or his situation as an unaccompanied migrant. Also, no alternative to custody was considered, which would be sufficient to secure deportation. These factors, therefore, cast

doubt on good faith in ordering custody (*Rahimi v. Greece*, 2011: §109). What is more problematic in this case is the violation of paragraph 4 of this article, due to a number of irregularities of the Greek authorities, beginning with the fact that it was practically impossible for the minor to reach a lawyer, then a brochure containing information on available remedies was written in the language which the minor did not understand, although his hearing was conducted in his native language, to the point that the minor was registered with an escort. Essentially, even if the applicant had remedies available, the Court in the present case did not conclude that it could have used them (*Rahimi v. Greece*, 2011: §120). The Court reached a similar conclusion in *Housein v. Greece*. Namely, in this case also the unaccompanied minor was placed in an adult centre from 2 June 2011 until 28 July of the same year. In this case, too, the Greek authorities did not take into account the fact that he was an unaccompanied minor, nor did they examine whether the purpose could be mitigated, although a proposal was made to move the juvenile to a centre tailored to his needs during the on-going proceedings (*Housein v. Greece*, 2013: §§75-77, 83).

Mohamad v. Greece is characterized by the fact that at the time of his arrest, the applicant, an Iraqi national, was an unaccompanied minor who had reached the age of majority in custody. The Court found a violation of Article 5 § 1 on the ground that the Greek authorities had detained the minor in detention without regard to his unaccompanied minor status, and after reaching the age of majority they continued his detention without taking any steps towards his abolition (*Mohamad v. Greece*, 2014: §85).

In the case of *Abdullahi Elmi and Aweys Abubakar v. Malta* the Court, building on the understanding expressed in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* very nicely draws attention to the fact that children have specific needs that are particularly linked to their age and lack of independence and asylum seeker status, with the Convention on the Rights of the Child encouraging States to take appropriate measures to provide protection for a child seeking refugee status, and humanitarian aid, whether the child is alone or accompanied by a parent (*Abdullahi Elmi and Aweys Abubakar v. Malta*, 2016: §103).³ In this case, the first applicant illegally arrived in Malta by boat, after which he was registered by the immigration policy. He informed the authorities that he was 16 years old. No interpreter was present during the interrogation and was assisted in the conversation by other illegal migrants who spoke English. He was taken into

³ The court also in *Tarakhel v. Switzerland* noted that reception conditions for asylum-seeking children must be adjusted to their age in order to avoid situations of stress and anxiety, with particularly traumatic consequences (*Tarakhel v. Switzerland*, 2014: §99).

custody and was given a brochure on Arabic-language rules and obligations in custody, which the applicant did not understand. The second applicant arrived the same way in Malta fifteen days later. When questioned, he stated that he was 17 years old and had been handed the same brochure in Arabic, which was not spoken by this applicant. He was subsequently detained. In the present case the Court also found violations of Article 5 §§ 1 and 4 of the Convention. Essentially, the applicants remained in detention for several months after being found to be minors. Although it is not disputed in this case that the detention order was closely linked to the grounds for detention in this case based on the prevention of unauthorized entry, delays after determining the applicants' age raised serious doubts about the good faith of the authorities, especially given the fact that at no stage did the authorities identify alternatives to detention (*Abdullahi Elmi and Aweys Abubakar v. Malta*, 2016: §146). The extent to which certain legislations have poor solutions is demonstrated by the Court from time to time when it does not refer to individual cases, but finds a violation only by referring to older cases on the same issue. In the instant case, the Court considered that the remedies available to the applicants were ineffective and insufficient for the purposes of Article 5 § 4 of the Convention, with reference to the positions taken in the cases *Mahamed Jama v. Malta* and *Mohamed Ismaaciil and Abdirahman Warsame v. Malta* (*Mahamed Jama v. Malta*, 2015; *Mohamed Ismaaciil and Abdirahman Warsame v. Malta*, 2016).

The last two judgments regarding custody are dated 2019. However, despite the intense case law of the Court in this area, it turns out that as time goes on, so do the states, with increasing number of violations of convention rights, as evidenced by these two judgments. In the first place, in *H.A. i and Others v. Greece*, the authorities of the latter state imprisoned nine unaccompanied migrant minors, keeping them in police stations for periods of between twenty-one and thirty-three days. They were then transferred to a reception centre and then to special juvenile facilities. The court concluded that the placement of minors in police stations could be considered deprivation of liberty which was not lawful, and the public prosecutor, who by law was their guardian, did not contact the lawyer or file a complaint to terminate custody in order to expedite their transfer to the appropriate facilities (*H.A. and Others v. Greece*, 2019: §§207, 212).

In the second place, in *Sh. D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, five unaccompanied migrants between the ages of 14 and 17 entered Greece in 2016. Juvenile migrants were placed in police stations in custody. The court had initially dismissed the petition against Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia as manifestly ill-founded. The Court again found that the Greek authorities had violated Article 5 of the Convention, since the detention

was illegal, as the Greek authorities did not explain why the applicants were first housed in police stations instead of in alternative temporary accommodation (Sh. D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia, 2019: §69).

4. Conclusion

The second half of the XX and the beginning of the XXI century was marked by waves of migration, which move from east to west, from poorer to richer states. Migration flows are different and routes vary depending on the attitude of individual countries towards migrants. As is well known, Serbia is not spared from migration, although they certainly do not belong to countries that represent the final destination for migrants but only a transition country. There are exceptions, of course. On the one hand, Italy is the most exposed wave of migration coming from the sea, most often from Libya and Tunisia. An attempt by the Italian authorities to stop the migration by contracting with the countries concerned has failed. The applications submitted to the Court against Italy were successful, viewed by migrants points of view, whom the Court acknowledged violations of the Convention's rights. Greece and Malta, on the other hand, are also countries that are also affected by migration, and judging by the Court's judgments, these countries have hitherto suffered the most serious violations of Convention rights for unaccompanied migrant children. Although there are many international and national documents, which emphasize that in all actions where children appear their best interests must be the basic idea of the guideline, practice has shown that this is not always the case. Respect for human rights to this category of applicants was far from the required level, as demonstrated by the judgments we analyzed in the paper. While it could be concluded that over the years the migrant crisis will take place, and that Council of Europe countries will take the Court's views more seriously on these issues, practice has shown that this is not the case. Even in the most recent 2019 judgments, the Court takes the view that the imprisonment of unaccompanied children is still incompatible with the law. Which really raises the question of the reasons for, so to speak, so much disinterest in respecting basic human rights and freedoms. However, regardless of all the problems that the migrant crisis carries and the countries facing, it is necessary to take maximum care of this unique and universal part of the population - children.

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**AUSTRALIAN “SORRY”: BEYOND APOLOGY AND FACING
REALITY IN THE LIGHT OF CELEBRATING 30 YEARS OF
THE UN CONVENTION ON THE RIGHTS OF THE CHILD**

Australia failed Aboriginal and Torres Strait Islander children and their rights despite signing the United Nations Convention on the Rights of the Child. Removal of children from their families and violation of their rights is continuing in modern Australia, especially in the Northern Territory. This paper will provide a summary of the latest report conducted by UNICEF Australia related to the UN Convention on the Rights of the Child with special consideration of Aboriginal and Torres Strait Islander children and current government policies and measures. Finally, the paper will provide a brief clinician's reflection on delivering clinical supervision to those working with Aboriginal and Torres Strait Islander children and their families in remote and rural regions in Australia.

Keywords: *The Stolen Generations, Aboriginal and Torres Strait Islander children, UN Convention on the Rights of the Child, clinical supervision*

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Australia and the UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child is an international legal agreement that sets out the fundamental human rights for all children. Australia ratified the Convention on the Rights of the Child (Children's Convention) in December 1990, promising that outcomes for the current and future generations of children will improve. The Convention, however, stayed out of the Australian law with more than five million children affected (Secretariat of National Aboriginal and Islander Child Care, 2012).

From the political perspective, Australia has been the least stable democracy in the Asia-Pacific region with seven different prime ministers within the last 11 years. Australian Government policies and implementation strategies change almost every year (UNICEF, 2018). Many surveys confirmed that Australians tend to put children as a priority, but unfortunately, the reality is very different. Children do not feel they are valued and visible by parents, society and communities, particularly those in low socio-economic classes and Aboriginal and Torres Strait Islander children living in remote and rural communities (UNICEF, 2018). Recently, the Royal Commission has investigated into the *Child Institutional Sexual Abuse and Detention of Children in the Northern Territory* and provided recommendation and actions for the Federal and State Government. However, before further discussion about the Children's Convention it is essential to define and introduce the *Stolen Generations* for those not familiar with it.

The Stolen Generations were the children of Australian Aboriginal and Torres Strait Islander descent who were forcibly removed from their families by the Australian Federal Government and State Government agencies and church missions under the acts and government policies in the period between 1905 and 1970. Almost every third child was removed from their family. The exact number of children removed from families is unknown, but the estimation is that at least 300,000 children were removed from their parents. To acknowledge the history of Aboriginal and Torres Strait Islander children, many books have been written such as *Follow the Rabbit-Proof Fence* by Doris Pilkington Garimara which was later adapted to *Rabbit-Proof Fence* movie directed by Phillip Noyce. The term Stolen Generations refers to those children who were removed based on their race as proof of neglect was often not required. The main aim of the forced removal was to assimilate children with mixed ancestry into the non-Indigenous community.

On February 2008, former Prime Minister Kevin Rudd formally apologised to the Stolen Generations on behalf of the Parliament and the Government (Kevin Rudd, Prime

Minister, 2008). This was an Australian “Sorry” for the abuse conducted on Aboriginal and Torres Strait Islander children. The word “Sorry” in Aboriginal is related to “Loss”, so the Apology is not about responsibility but about acknowledging the loss of Aboriginal and Torres Strait Islander people. The Apology created much debate in Australia, particularly around the reparation process for Aboriginal and Torres Strait Islander people. International law provides a foundation for reparations claims, and the theory of reparation stands within the *Basic Principles* and the *United Nations Declarations on the Rights of Indigenous Peoples* (“UNDRIP”) (U.N. 61/295, 2007), however the removal of children in Australia started before the incorporation of the relevant human right treaties into domestic law. Also, one of the concerning facts is that Australian law does not include the right to reparations for violation of human rights (Hocking & Stephenson, 2008). *Bringing them Home* initiative to reunited Aboriginal and Torres Strait Islander children with their families stands on the ground of racial removal and represent a severe breach of international human rights obligations under the *Universal Declaration of Human Rights*, (U. N. 216, art 2., 1948), the *Convention on the Elimination of All Forms of Racial Discrimination* (U. N. 660 UNTS 195, 1969) and the *Convention on the Rights of the Child* (U. N. 1577 UNTS 3, 1990). Since the release of *Bringing them Home* in 1997 and Stolen Generations litigation, the Commonwealth has not established any adequate reparations for the Stolen Generations, which is opposite to the fact that reconciliation is proclaimed to be one of the core value of Australian society. As Lawry (2010) stated “It is time for Australia to move beyond the Apology (p. 94).

According to the UNICEF report released during 2018, there are multiple measures of implementation which the Australian Government failed to achieve related to the Children's Convention. UNICEF Australia released a report based on interviews with 527 children and young people from 4 to 24 years of age across 30 different geographical location in Australia (UNICEF, 2018). This paper will briefly provide a summary of that report to familiarize the readers with the current state of human rights related to Aboriginal and Torrent Strait Islander children in particular.

According to the report, the Australian Government still has not withdrawn the reservation under article 37 (c) of the Children's Convention, which requires separate deprivation of liberty for children from adults in detention facilities. This concerning situation led to abuse and deprivation of basic human rights of children in modern Australia and reminded the world that democratic societies could fail in respecting international laws and conventions. Deprivation of children together with adults in Australia is a horrible reality currently happening in the background of the economic growth and prosperity proudly announced in Australian media and newspapers.

Additionally, the Australian Government does not have a national comprehensive research data collection for children and young people in Australia. The lack of research data collection led to the disaggregation of data as children could not access available programs of support. The Commonwealth of Australia Constitution Act 1990 (Cth) does not include legal protection of the right to equality and non-discrimination, undermining anti-discrimination laws at all levels - federal, state and territory - providing the legal framework to understand feelings of discrimination in all areas of the life of children and young people. Aboriginal and Torres Strait Islander children are discriminated through measurements implemented in schools, health sector and criminal justice system.

Psychologists' contribution to the current situation is enormous and concerning. The silence of the psychological profession is related to the Stolen generations period when psychologists in Australia did not do anything but comply and directly support the removal of Aboriginal and Torres Strait Islander children from their families. Racism, coupled with Australia's history of colonisation has a profound impact on intergenerational trauma of Aboriginal and Torres Strait Islander children and their families. Instead of acknowledging the violent history of their ancestors, Australian psychologists are “sorry” for what the Stolen generations went through. They are preoccupied with a new technique or intervention which might help to fix the intergenerational trauma in Aboriginal and Torres Strait Islander children. Trauma cannot be fixed; it might be healed if those who abuse children accept their responsibility toward the genocide of Aboriginal and Torres Strait Islander children. Unfortunately, Australia is far from being ready to look into its history.

Another important outcome of the UNICEF Australia report was that a significant number of Aboriginal and Torres Strait Islander children were denied the entitlements of citizenship due to the inability to provide a birth certificate to prove it. As a consequence, these children were unable to enrol in school or access health and social services, gain employment or housing and participate in society. The low level of literacy and awareness about the importance of birth registration among Aboriginal and Torres Strait Islander people led their children to be disadvantaged in the Australian society without any support from the Australian Government to address it.

Government department which has a direct effect on Aboriginal and Torres Strait Islander children is a Child Protection Department. There are considerable public concerns that Child Protection does not facilitate the preservation of cultural and linguistic identity. On the contrary, the system imposes practices that support adoption and removal of Aboriginal children from their communities and families. As an example, a recent change

in New South Wales (NSW) when the Parliament of NSW passed legislation related to permanent adoption, imposing 24 months for children in out-of-home care to be reunited with their families confirmed these concerns (Longbottom, McGlade, Langton & Clapham, 2019). This legislation conflict with the established principles of healing for Aboriginal and Torres Strait Islander children and open the possibility for new “Stolen generations” by risking permanent separation of another generation of Aboriginal and Torres Strait Islander children from their families. NSW Government's new legislation represents a serious human rights breach and ignores UN recommendations to stop removal of Aboriginal and Torres Strait Islander children. According to available data, Aboriginal and Torres Strait Islander children are ten times more likely to be involved in the Child Protection system compared to their non-Indigenous peers (Australian Institute of Health and Welfare, 2017).

Aboriginal and Torres Strait Islander children are overrepresented in out-of-home care in the Australian system as a consequence of family violence. Almost every third woman in Australia is experiencing physical violence, and nearly one in five women experience sexual abuse. Aboriginal and Torres Strait Islander women are 45 times more likely to experience family violence. Family violence is a critical driver in the Child Protection system. Due to the high rates of domestic and family violence in Aboriginal women, many children are removed and put in out-of-home care or introduced into an adoption system. Numbers of children, especially Aboriginal and Torres Strait Islander children in out-of-home care, have been dramatically increasing in the last five years. For example, in 2012, there were 18% less Aboriginal and Torres Strait Islander children in out-of-home care compared to 2017. The Aboriginal and Torres Strait Islander children continue to be removed from their families and placed in out-of-home care at almost ten times the rate of non-Indigenous children. Significant concerns have been raised around the placement of children in out-of-home care according to availability, not the best fit for a child (UNICEF, 2018). Furthermore, those children are sometimes placed in unsafe environments where further physical, emotional and sexual abuse continually happen.

Interestingly, since the Australian Parliament apologized to Stolen generation in 2008 the number of Aboriginal and Torres Strait Islander children who were removed from their families doubled and it is predicted to be tripled by 2036. Even more severe is an overrepresentation of Aboriginal and Torres Strait Islander women in custody with a 60% increase in the past ten years. The consequence of this figure is the increased number of Aboriginal and Torres Strait Islander children placed in out-of-home care as children are removed, and the parent is taken to custody. Failure to follow the *Aboriginal and Torres Strait Islander Child Placement Principle* with a significant decrease of relatives/kin or

Aboriginal carers where Aboriginal and Torres Strait Islander children can be placed when removed from their parents tell the story of dismissal and ignorance for the oldest culture on Earth. Enduring impact on government policies on Aboriginal and Torres Strait Islander children in out-of-home care is reflected in adoption policy changes, particularly when those children are placed in non-Indigenous families. In New South Wales, reforms propose the adoption as a preferred option for children in out-of-home care with permanency parental orders being pursued without any focus of reunification of Aboriginal and Torres Strait Islander children with their families.

Revealing facts about the constant decrease in the use of Aboriginal language at home from 23% in 2015 to less than 10% in 2016 confirm the disadvantages for Aboriginal and Torres Strait Islander children in Australia. According to the statistics, more than half of Aboriginal and Torres Strait Islanders languages have been lost since the European settlement. Being aware that language is related to history and forming cultural identity, it is more than evident that Aboriginal children are not just violated on the bases of their rights as per the UN Convention on the Right of a Child, but also through the deliberate exclusion of Indigenous languages into the school environment.

Detention of Aboriginal children compared to non-Indigenous is dramatically high. According to available data, Aboriginal and Torres Strait Islander children are 24 times more likely to be in detention than non-Indigenous children. Even though recommendations have been made in 2005 and 2012 to change the legislation, mandatory sentencing continues to be in force, for example, in the youth justice system in Western Australia.

Royal Commission investigation into Don Dale Youth Detention Centre in Darwin during 2016 revealed horrible conditions for youths and unacceptable behaviours of youth justice officers in the Centre. After videos released in the media, the Royal Commission was invited to Darwin to investigate circumstances under which mainly Aboriginal and Torres Strait Islander youths were detained. Deliberately withholding basic human needs such as water and food, stripping cloths of female adolescents by male youth justice officers were just some of behaviours Royal Commission found in the Centre. Children were also detained in adult facilities.

Furthermore, previous recommendations related to youth justice in Australia have not been actioned. Currently, the minimum age at which children can be held criminally responsible in Australia across jurisdictions is ten years of age. Even though this standard is internationally unacceptable, the Australian Government failed to change the

legislation. International human rights organization inquires drawn attention to the failure to protect the fundamental human rights for children in Australian youth criminal justice system.

To conclude this section, 191 recommendations in total have been made to the Australian Government with the request for policies and acts to be changed and comply with international standards of human rights of children. The future will inform us if anything happens above and beyond “Sorry”.

Clinical supervision process in Australia

In this part of the paper, the clinician's live experience during the supervision process with one of the supervisees who works in Aboriginal and Torres Strait Islander community will be discussed. Before discussing the clinical case, an overview of clinical supervision process is provided.

Clinical supervision is a key component in providing high-quality mental health services with positive outcomes for clients and has been acknowledged as a central to the professional development of psychotherapists, especially those in training (Bernard & Goodyear, 2014). Development, retention, motivation and training of highly skilled workforce are impossible without clinical supervision within the organization. The effective healthcare system cannot function without this essential component of therapists' support (Kadushin, 2002) which represents one of the necessary constituents in the training of mental health professionals (Berger & Mizrahi, 2001; Milne, Sheikh, Pattison, & Wilkinson, 2011; Watkins, 2011). Clinical supervision has been recognized as one of the core competencies within the mental health field (Brosan, Reynolds, & Moore, 2008). The underlying principle in providing clinical supervision is reflection connected to the empowerment and not control, as we usually have in individual performance appraisal. Being a formal process of professional support and learning, through discussion with a senior and more experienced colleague, clinical supervision enables individual practitioners to develop their knowledge, skills, receive feedback on their work, explore ethical implications and dilemmas and clarify boundaries between the therapist and the client.

Competency-based clinical supervision is understood as a best practice, where the primary focus is on the clinical practice of the clinician. Effective clinical supervision relies on the development of a strong alliance between the supervisee and the supervisor. When choosing a clinical supervisor, professional and practice boundaries should be

respected. A colleague who is a friend or a family member or a colleague with whom there is an operational reporting relationship should not be a clinical supervisor. Structure of clinical supervision is obvious; sessions are formalised and have an agreed purpose with one-hour duration. The most useful way of generating discussion and identifying the pertinent issues is thought case presentation when supervisee is presenting the case study. Clinical supervision can be done face-to-face, through the email, video or teleconferencing if necessary (Todd & Storm, 2002). As with clients, the agreement between the supervisor and the supervisee should be signed. The written contract protects both the supervisor and the supervisee and provides a safe space for exploration of each person's expectations during this process.

When it comes to supervisor's competencies and training accreditation and registration, supervisors usually require specific training to be recognized as an “accredited supervisor”, however, experienced clinicians are granted this position on the bases of their clinical experience and suitability for the role (Falender, Burnes, & Ellis; 2013; Bernard & Goodyear, 2014; Reiser & Milne, 2012). The purpose of specific clinical supervision training is to develop supervisor competencies. Core competencies for clinical supervisor include knowledge and skill development in (Queensland Government, 2009):

1. Models of supervision
2. Practitioner development
3. Development of the supervisory relationship
4. Supervision methods and techniques
5. Ethical, legal, professional and organizational regulatory issues
6. Evaluation tools and processes
7. Administrative skills

Confidentiality in a supervisory relationship is a crucial factor for successful clinical supervision. The material presented by the supervisee is confidential except in circumstances of serious concerns related to the ethical or professional conduct of the supervisee or the safety of the client. Material that is presented in supervision should be

de-identified. Breaching the Code of Ethics in Psychology or Psychotherapy is evidence of unsatisfactory performance and is under mandatory reporting requirements.

The administrative perspective of the supervision process must be fulfilled with the minimum standards for documentation. This includes a completed supervision agreement signed by the supervisor and the supervisee and continuing record of attendance. Supervision notes must be written for each session and if recorded electronically, must be securely stored and encrypted. Supervision notes usually include time and date of the session, name of the clinician, outline of the agenda, outcomes and action plan, date and time of the next session. The supervisee can write session notes as well as reflective diary about professional growth.

As previously stated clinical supervision expand therapist's understanding not just for a client who is coming to therapy, but also for the social, cultural and political circumstances mainly when working with clients from culturally and linguistically different background (Bernard & Goodyear, 2014). Providing clinical supervision in a multicultural society can be very challenging, and supervisors have the responsibility to discuss multicultural issues and identities with clients as a regular part of their role (Chopra 2013). Clients from different cultures have specific cultural values and identities that influence their lives but also the counselling or therapy process (Bernard and Goodyear 2014). Multiculturalism can be defined as related to the diversity of racial, ethnic, and cultural heritage (Paone et al. 2015; Soheilian et al. 2014) and it is rooted in every aspect of the counselling process (Chopra 2013, Lee 2013). Working as a sensitive multicultural therapist or a counsellor requires understanding and openness to explore narratives and experiences of community and culture. Apart from this, the importance of awareness, skills and knowledge is essential (Luke & Goodrich 2013). The integration process of various identities is a continuous process for the client, and the primary responsibility and duty of the therapist is to support that integration. Therefore, the core elements of providing culturally sensitive clinical supervision should be learnt by clinical supervisors who work in multicultural societies. The first element of culturally competent practice is no-knowing stance which is reflective practice. Developing and maintaining self-awareness is essential to the not-knowing position. For example, the supervision “parallel process” fosters the supervisee ability to reflect and structure the next session. Supervisor's cognitive flexibility and sensitivity are pivotal to navigate cultural issues in the psychotherapy session. The other skills necessary for a supervisor to learn is humility. Cultural humility promotes ongoing self-evaluation, fostering a collaborative approach to treatment and abandonment of unhelpful or unreliable assumptions.

With humility, opportunities to explore uncertainties are possible and open to both, the supervisor and the supervisee (Kirmayer, 2013). The final skill of cultural competence in working with the otherness. In an encounter of two persons, there are always unknown aspects of the other person which can be investigated. Finally, the cross-cultural space has been described as “multiplicity of voices which are a constant source of critique and disequilibrium” (Guzder & Rousseau, 2013). As Gestalt therapy is process-oriented, clinical supervision needs to be open and focus on how “clinicians ascribe meaning and how they are integrating that meaning in the clinical encounter” (Lakes, Lopez & Garro, 2006, p. 12) especially when working with different groups. Process approach to clinical supervision in multicultural society emphasizes concepts of identity and perception. Being evolving and flexible its remind on the culture itself (Whaley & Davis, 2007).

The “Twins”

For discussion related to the UN Convention on the Rights of the Child and its implementation in Australia, I will present the clinical case entitled the “Twins”. Due to confidentiality and privacy reasons, all names and initials are altered, and written consent is provided from my supervisee G. H.

G. H. is a non-Indigenous female counsellor who came to work in the Northern Territory with Aboriginal and Torres Strait Islander communities. I have been seeing G. H. for more than a year when she came on her clinical supervision and was visibly distressed. She talked about the “Twins”, two Aboriginal girls aged 14 and 15 who lived with their mother in the Aboriginal and Torres Strait Islander community where G. H. occasionally worked. This case made G. H. distressed mainly due to the lack of the reaction she experienced when calling the Child Protection Department. Other Government services failed to act as well despite numerous calls. G. H. described two girls as “gorgeous teens with big black eyes that smile”. G. H. provided a family background of this case - the girls lived in poverty in one small Aboriginal and Torres Strait Islander community. The “Twins” lived with their mother, and they did not have any contact with the incarcerated father. The grandmother was a career and an important figure in this family. Girls presented with behavioural issues at the local school and were not willing to attend it. They also exercised anti-social behaviour and had problems with the law. G. H. provided counselling and also visited them in the community. She was distressed not so much with the girls, but with the system that failed these children. She reported, but no one from the Government reacted. The necessary support to the mother was lacking, and the family was left with the well-known scenario - these twins will end up in the youth detention centre, or they will be removed. The mother will be allocated to alcohol and drugs support

recovery group with non-Indigenous CBT therapists, and the system will tick the box they did something for this family. My supervisee was angry, and I was feeling that anger too. I can recall our silence during the session and my supervisee tears. She was crying. She said to me: “They have big black eyes that smile with me” (G.H, personal communication, April 2019). I can remember providing support and also trying to contain her feelings of anger, hopelessness and frustration. As a supervisor, I felt overwhelmed with anger and frustration. It felt like everything was taken from me, and I was left alone without anything. I stayed with my embodied reaction. It was as I needed to be numb and desensitized in the next moment. From anger to numbness. Withdrawing. Denial and freeze. I communicated my embodied reaction on this clinical case to the supervisee. She confirmed what I shared with her, and we became aware that transgenerational trauma of Aboriginal and Torres Strait Islander children and context of the darkest Australian history might be the field in which both of us embarked when discussing this case. We also became aware of the need to respect and acknowledge that field and context. By doing so, G. H. was able to be more connected with her skills to help the “Twins” and her limitations. I was sitting with her and we were confronted with limits and desire to change something that was beyond our control. This was painful. The case deeply touched her. I was more and more affected with the “Twins” as my supervisee came back and talked about them during many supervision sessions. I was pleased to listen to how she built a therapeutic relationship with them and how they trusted her. They were important to her, and she was important to them. For me, this case was the one I took with me above and beyond in thinking and writing. I reflected on my excitement when G. H. started to talk about them, my joyfulness and smile when she described the “Twins”, their adventures in the community and how they improved their behaviour. I also reflected on my sadness and deep appreciation for the opportunity I was given to experience the Aboriginal and Torres Strait Islander's land. I became aware that I was confronted with enormous abuse and suffering of Aboriginal and Torres Strait Islander's people which I could not imagine coming as an immigrant to this country. The “Twins” started to be part of our lives and our supervision. Every session, we checked on them and then continued to discuss other cases.

G. H. tried to involve the Government as much as she could and hoped they would support the family. Unfortunately, that did not happen for some reason. The workers in the Government Department were changing every couple of months, and the new ones needed some time to read the case. In the meanwhile, G. H. visited the “Twins” at home and during school classes. The abuse continued in the community. Their mother did not receive appropriate support to be able to take care for them. As many, the “Twins” were

left by the system to stand alone and to go where all others go - youth detention centre. G. H. was angry, frustrated and exhausted. I was as well and probably, for the first time, felt hopelessness. Co-created feeling between me and G. H. was hopelessness - neither of us could do anything. We gaze into each other and felt deep sadness, loss, grief and acceptance.

Intergenerational trauma of Aboriginal and Torres Strait Islander people and the suffering of their children is difficult to express in words. The body of the therapist and the supervisor can feel it. It is an embodied experience of the human deepest pain. The depth and intensity of that pain and loss were overwhelming for both of us. We became aware of the loss. The abrupt, unexpected, sharp cut of own existence, identity and culture. Loss of the land, loss of the language, loss of the culture. Grief for the ancestors, grief for the parents, for who they were and who they are. Grief for taken opportunity to become. Above all, apart from tears, those eyes were smiling, still believing in the other, trusting despite the genocide, hoping for future. As a supervisor, I have never experienced such a strong field that was emerging and co-creating between us. G. H. cried, and I cried with her. We acknowledged the field and discussed what happened in the here and now. We acknowledged the transgenerational trauma that happened. We also started to understand that this field is much more than we can fully understand and that we could only feel it in our bodies. After that session, our next supervision brought change in the “Twins” as they were much more present at the school and engaged in therapy with G. H. They worked hard, and we were sad when G. H. informed them she needed to stop their therapy due to new circumstances related to her work arrangements. G. H. handed over the case to another worker and hoped they would take care of them. We both knew that G. H. developed a significant relationship with them, and she impacted them as much as the “Twins” impacted both of us. Eyes that smile stayed in our heart and influenced our work, G. H. as their therapist and me as her supervisor. I am grateful and honoured for the opportunity they gave me to participate in their lives, their dreaming and stories.

In conclusion and to reflect on the topic discussed, as an academic, researcher, psychotherapist, psychologist and supervisor, I would like to express my deepest concern. Implementation of the UN Convention on the Rights of the Child with Aboriginal and Torres Strait Islander children in Australia nowadays is very problematic, and I hope with the support of the United Nations, UNICEF and International community these children will get their rights back.

Finally, as deepest feelings can be expressed through poetry, I would like to share this Aboriginal song called Wiyathul by Geoffrey Gurrumul Yunupingu. This song represents

Aboriginal and Torres Strait Islanders people as they are - resilient, human and unique.
One of the Earth's oldest culture we need to respect.

Wiyathul song

M.m

Märrma djiawurr näthinana, nambawu larrunana Guwalilnawu
Rirrakayunmina liyandyja milkarri, nambawu larrunana Murrurnawu
Roniyirri rirrakayyu. y.a barrawajayu y.a Mutlwutjna galaniniyu
Ga namba Guwalilna, ga namba Warradika, ga namba Yumayna, m.m
Yä wulman näthinana, yä dhiyanuna lanyindhu dhungunayu
Yä bäpa Kamba-Djunadjuna, miln'thurrana mayma Mayan-naraka
Yä nändi manda, marrkapmirri manda, nhumanydja nayathanana Ruypu Milinditj
Yä nändi manda marrkapmirri manda, nhumanydja näthiyana milnurr Burarrapu
Yä namba guwalilna, yä gunambal warradika, yä namba Yumayna

M.m

English translation of the Wiyathul song

Two scrub fowl crying out, looking for Guwalilna
The calls like a woman crying, looking for Murrurnawu
The cries returning his mind to the jungles at Mutlwutjna
Oh place Guwalilna, Warradika, Yumayna, m.m
Oh the old man cries, from the drink
Oh dad Kamba-Djunadjuna, home Mayan-Naraka bright in his mind
Oh my two mums, beloved mums, hold Ruypu Milinditj
Oh my two mums, beloved mums, cry for the sacred spring Burarrapu
Oh the place Guwalilna, Warradika, Yumayna, m.m

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“THE BEST INTEREST OF THE CHILD” AS ONE OF BASIC PRINCIPLES IN THE PROTECTION OF CHILDREN IN CASES INTERNATIONAL HIJACKINGS

Family private international law was also influenced by the Convention on Rights the child, as a kind of international constitution on the rights of the child, and whose provisions are state Members must, when enacting child legislation, address the issues it regulates they must respect. Namely, just from the transfer of the provisions or ideas of this one Conventions in multilateral treaties of private international law depend a great deal on the ability to compromise on the quality of the solutions themselves. The authors in the paper do an analysis of the “best interests of the child” principle introduced into our legal system The United Nations Convention on the Rights of the Child (1989), and the further foundation of this principle through case law when deciding upon a request to see or return a child.

Keywords: convention, best interest, protective mechanisms, private international law, human rights.

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1. Introduction

Family private international law was also affected by the Convention on the child, as a kind of international constitution on the rights of the child whose provisions of the state must respect when passing child legislation on issues of who edits. All States that are signatories to the Convention on Abduction have ratified Convention Of the United Nations on the Rights of the Child 1989 (hereinafter: CRC), with the exception of USA. In countries where the CRC is not implemented in national law, and The Hijacking Convention, the courts will generally try to interpret the Hijacking Convention to a way that is compatible with their government's international commitments to the CRC.

2. The best interest of the child

Occurrence of international child abduction is not of recent age, although the term “abduction” of a relatively recent date. (Katić, 2019) The standard of “best interests of the child” is accepted as one of the basic principles for the regulation and protection of the rights of the child in the Convention on Rights the child (hereinafter: the Convention), but also in other documents which are directly or indirectly affect these rights. Article 3, paragraph 1, states that “in all activities involving children, whether public or private social welfare institutions, courts, administrative or legislative bodies, the best the interest of the child will be paramount”. The provision in paragraph 2 of this Article shall be used broader term – “welfare” of a child, also present in the part of comparative right, to whose insurance also commit themselves to the Member States' having regard to the rights and obligations of the child's parents, legal guardians or other persons legally responsible for the child and taking in to that end, all necessary legislative and administrative measures. “In both cases, this is a standard, thanks to their width and indeterminacy, they can be applied in all of the above activities and all disputes, that is, when undertaking certain measures, with an obligation determining their content in each case”. (Bubić, 2016)

So the determination of the best interests of the child is made on an individual basis, having in view of the context in which it is decided and the circumstances that exist on the individual side child and parent. Neglecting and abusing children is particularly difficult a form of victimization given that evident vulnerability of the youngest presupposes and the grave consequences of those experiences. (Petković, Pavlović, 2016). Attainment uniformity should not be aspired to: from the point of view of a child she would have more bad than good. This would be contrary to the objectives pursued by the use of standards. U as a rule, it is easier to define this standard as negative than positive, it is often easier to say what it is more opposite to him than what is in his favor.

However, this kind of determination should to avoid, because in practice it leads to the weakening of the importance of this principle. (Marijanović, 2014)

The competent authorities and bodies are obliged to respect this principle when adopting each decisions concerning the child, whether the parent is caring for him or her, or the realization of the individual rights conferred on the child by the Convention. The prerequisites for the realization of this principle are additionally secured by obliging parents to manage the best interests of the child in the performance of certain duties thereto. It is in function of helping to bring the most appropriate decisions with the obligatory systematic search for “the solution with the most positive or the least negative impact on the child or children in question, “its application should “limit the spread of adult authority over children (parents, professionals, teachers, doctors, judges, etc.) “. (Marijanović, 2014)

To determine the content of the best interests of the child and to make a decision that will be appreciated this interest, more favorable than litigation, is the family mediation process. His the benefits are numerous, and they are particularly pronounced in the process of deciding on the care of the child and the child's contact with the parent. Obligation of States to Promote Procedures mediation and other procedures whereby agreements are reached are standardized by the Convention on the exercise of children's rights (Article 13), and referred to these procedures, among others documents, and Council of Europe Recommendations on family mediation. (Marijanović, 2014)

In order to be able to base on the determined best interests of the child a decision that will ensure the realization of the rights of the child and optimally protect the child within the family and beyond the environment in which he or she lives, parents and authorities must ensure that the interest of the child, as a rule, should not have an absolute advantage over the interests others, both family members and other entities, and the interests of society. The Convention stipulates that the best interests of the child are of primary importance, under what nor does it imply its superior importance, its placing above all others interests. The “supreme” importance is recognized only in the provision of Article 21 relating to adoption, which states that “Articles which recognize and / or permit adoption to ensure that the best interests of the child are of paramount importance”. (Marijanović, 2014)

To ensure that the decision is truly justified in each case on proper assessment and assessment of the best interests of the child, the competent authority in the procedure of making a decision must consider, determine and justify the consequences that the decision will have per child. Of the many possible alternatives, it is necessary to identify and select

the one that will have one best effects for the child. That assessment cannot be made without including a child alone, without giving the child the opportunity to express its own views and opinions, and without respect for that position in accordance with its age and maturity (Article 12 of the Convention). Adult evaluation itself, whether it is parents or the professionals who are bringing the decision, is not enough. It is especially dangerous, starting with the view that only parents know what it is best for the child and the family, to let them determine for themselves what is in child's best interest. The Convention, of course, assumes that it is in the care of raising and the child's development parents' primary concern the best for the interest of the child. (Article 18, paragraph 1). However, it does not apply without exception. Parents most often act to insure the best interest of the child. If they are able and willing to exercise daily parental care or the fulfillment of individual responsibilities to decide in this respect interest, while also taking into account the needs of other family members and by striking a balance between interests within the family, the interests of the child will be in fully secured and protected. Still, their possibility should not be overlooked different treatment, caused by different reasons. So parents can, unknowingly and unintentionally, use the child as a means to fulfill his unfulfilled desires. Their interests may be different from the interests of the child and may not always be in the service of interests so that no action can be excluded from all actions taken by parents of their own interest. Or, the reason may be a conflict of interest between the child and the parent, u a case whose existence a parent may give priority to his or her own interest over an interest child. The danger to the child is especially present when this conflict is concealed, well competent authority, obliged to intervene to protect the interests of the child in the event of this conflict, it is not able to recognize this situation and act in the manner prescribed by law. (Marijanović, 2014)

Eliminating the stated danger and determining the content of the “best interest child “is possible, therefore, only by applying, with an objective, and subjective criterion. In addition to the objective elements, it is always necessary to take into account and respect the attitude and opinion the child himself, able to evaluate what is in his best interest. In doing so it must help the child understand the problem and participate in its solution. It happens when it often finds itself in the midst of a problem it has not caused, of whose existence it does not know, who does not understand nor can it alone influence its solution. (Marijanović, 2014)

It has, though, been introduced and accepted to ensure that decisions are made in full to protect the child, inappropriate and incorrect application of this standard may cause 4 just the opposite effect and negatively affect the child. As already pointed out, always it must be borne in mind that there is a danger that parents make the decision preference for one's

interest over one's child. There is also the danger of unlimited disposition in the determination of this interest in procedures conducted by the competent authorities. In theory rightly points out that the standard would be “the best interests of the child”, in its characteristics flexible and rich, but at the same time potentially weak, could nullify understanding the rights of the child and even be counterproductive. In order to eliminate the weaknesses present, the indeterminacy and inaccuracy of the criteria for determining it, its necessity is emphasized objectification by specifying the criteria that will be applied in each specific case. The Committee on the Rights of the Child similarly expressed the same concern, noting that the flexibility of this standard can lead to manipulations and its misuse. It is misused by many to achieve various goals: governments and other governmental ones bodies to justify racist policies; parents to protect their own interests in aging disputes; professionals to avoid liability when they are failed to evaluate the best interests of the child, finding it irrelevant. Danger triggered by the application of the principle of the best interests of the child, viewed from a legal perspective child, and which is being warned by practitioners, may be due to the fact that “it is common to affirm the power of adults over children or their possession of children at the expense of all or some of their other rights”. Therefore, requests for more cautious treatment are made and managing adults so that, when making any decision that may affect a child, must first bear in mind his best interest. At the same time being positive and I appreciate the fact that these issues are increasingly being discussed from a perspective endangering children's rights, although it is often assumed that the best interest is “actually an adult formula that will help to find a solution”. (Marijanović, 2014)

With special caution and care, applying objective and subjective criteria must to determine not only the present but also the future interests of the child, or the consequences that will a decision to have for the child in the near and far future. A child is a developing being, his abilities, needs and interest are changing, so what is in his current interest is not and need not be his long-term interest. (Marijanović, 2014) Given the vagueness of the content of the “best interests of the child” standard, It seems more understandable that in the French literature, this standard is attributed “Magical”. Thus it is referred to as a magical term, vague and suitable for favoring judicial arbitrariness, and as a key and indefinite term, as “the key which opens up indefinite space”. The most important role of the judge is not considered the assessment of interests, but determining what are the rights of one person and what of another person. When commenting on practice The Court of Cassation states that the French judges are the best in concept the child's interest was found to be a “magic potion” and to be conceptualized as a vague

concept which allows everything, I can always use, to justify any practice. (Marijanović, 2014)

It is important for the child not to bring the vagueness and ambiguity of this standard into practice to unequal treatment with another child or children in a situation similar to or identical to the occasion of the decision which concerns him. This danger exists in every legal standard, and here it is especially expressed because of his feature. (Marijanović, 2014)

The Hague Convention on the Transboundary Removal of Children is often highlighted as exceptional a successful example of international cooperation, the core value of which derives from the simplicity of the obligations it prescribes. Namely, as it was said, the whole edifice of the said international treaty rests on the assumption that the harmful effects of transboundary removal of children can be most effectively mitigate the urgent return of an illegally removed or detained child to the country where the child's habitual residence is located. In doing so, judicial or administrative the authority that makes the decision to return the child cannot interfere with the parental exercise rights because the decision to do so is left to the legal system of the state with which the child is and his family most directly connected, that is, to the state of the place of usual residence of the child. However, notwithstanding the great operational power of the Hague Convention, the said international treaty should not be judged solely on the basis of the number of children which have been returned to their countries of usual residence and the speed of their return. To others in words, one should not allow a child as a legal entity to be lost and rendered invisible within the mechanism of the Hague Convention. Namely, the basic purpose of the said Convention it is accomplished in the inevitable shadow of another goal, the protection of the “best interests of the child”. (Ponjević, Vlašković, 2013)

In the context of the “best interests of the child” principle, the speed and pragmatic nature of The Hague Conventions face a serious criterion, given that the principle stated imposes alignment or even subordination of interests of other legal entities to interests child. On the other hand, the impression that they are in the forefront of The Hague cannot be avoided Conventions of rights and interests of parents, while the interests of the child are sought, often artificially, fit into the mechanism of application of the said international treaty. Therefore, the basic problem of applying the “best interests of the child” principle in within the framework of the Hague Convention is to strike a balance between urgent return the child in the case of transboundary removal, respecting the legal order of the state the child's habitual residence, and adherence to the principle that requires adjustment interests of all other legal entities in the interests of the child. Balance is necessary in

order to in a sense, reached a compromise between the objectives of the Hague Convention and the principles the “best interests of the child” who used to be a master, not a servant in the legal relationships that in any way affect children. (Ponjević, Vlašković, 2013)

The creators of the Hague Convention have left some space where they would be inside a mechanism for the rapid return of a child anywhere and for the consideration of “the best interest child”. However, if they did not do so, the space would have to be found, because otherwise, the Hague Convention could hardly survive on the legal scene. Regardless of the the effectiveness of the Convention in the field of private international law cannot be circumvented the “best interests of the child” as the basic principle of family law in the domain of which it is mentioned an international treaty inevitably sets in. For this reason, the following section will consider what the Hague Convention offers to the principle of the “best interests of the child” and what the Hague Convention requires the said principle. (Ponjević, Vlašković, 2013) At the time of the Hague Convention, the principle of the “best interests of the child” was already present in the text of an international treaty of global significance, the Convention on the the elimination of all forms of discrimination against women, although the said international treaty still does it was not always effective. Still, the most significant formulation of the said principle contains the 1989 UN Convention on the Rights of the Child. Thus stated The Convention proclaims that “in all proceedings concerning children, no matter what whether undertaken by public or private social care institutions, courts, administrative organs or legislatures, the best interests of the child to be paramount”. In this way, the principle of the “best interests of the child” has become more and more powerful in in relation to the time when the Hague Convention was adopted. First, the reach of the above 6 of the principle has been extended from all relatively legal domains to the exercise of parental rights relationships of direct or indirect importance to the child. (Ponjević, Vlašković, 2013) Further, the principle of the “best interests of the child” has now begun to be realized in one special context, characterized by the rights of the child as a special category of human rights. Thus, the child became the central figure in family law relations, and the parent the right has been transformed into parental duty, that is, responsibility. (Ponjević, Vlašković, 2013)

3. Protective protection mechanisms

3.1 Expired

If the child has been unlawfully taken or detained within the meaning of Article on a day the commencement of proceedings before a judicial or administrative authority of a Contracting State in which the child finds that less than one year has elapsed since the day of the unlawful removal or withholding, such competent authority orders the immediate return of the child. Court or the governing body, even if the proceedings are initiated after a period of one year mentioned in the previous paragraph also orders the return of the child if it is not proved that the child has adapted to the new environment. If a judicial or administrative authority in the country to which it is sent the request has reason to believe that the child was taken to another state, can suspend the proceedings or dismiss the child's return request. It is valuable from Article 12 (1) that the starting point is within a 12-month period date of suspension. There are inherent difficulties that indicate identification retention date, locating the correct removal time, seems to be simple assessment. Nonetheless, a number of respondents showed up to identify the date on which the 12-month period will last. (Schuz, 2013)

The most significant problem with respect to the starting point of the 12-month period is related to situations where the kidnapper is hiding. Some US courts have adopted the doctrine of a fair payment under which, in cases of concealment, a period of 12 months only begins to flow after the location of the abducted child, on the basis that this doctrine would should be contained in every federal state unless Congress states otherwise. With respect, this approach, which has been done in other jurisdictions, cannot to reconcile with the clear submission of Article 12 (2) regarding the obligation of authors to take in consider the fact that the child has settled in the country in which he or she is located. The question arises whether the abandoned parent, the applicant to the central authority, at the request provides for the initiation of proceedings, termination or only filing considers the court in that state as the beginning of the proceedings. In numerous cases, it is considered that by submitting a report to the Center, the competent authority does not stop the initiation of deadlines for the purposes of 12- of the monthly period in Article 12. The term 'initiation of proceedings' in this provision refers to proceedings before an authority, which considers it to be judicial or administrative, having the right to order the return of the child. Central authorities are not authorized to give one order, while the request for it cannot be considered as initiating proceedings for the purposes of Article 12. In addition, there is usually no clear timetable for handling requests by the parties of the central organs. However, the fact is that a request made to a central authority can prevent the

child from being accepted in his new environment, if triggered negotiations between the parties or if the children are aware of the request. Moreover, the Supreme Court of Israel considered that the clock stopped working when the procedures were completed even when the abductor did not know about 7 proceedings and there is a reasonable delay before it is located and when the hearing is held on the second level. (Schuz, 2013) Several judges expressed the narrow view that young children cannot become settled, and that they are completely dependent on the abducting parents and have no independent relationship with others environment. (Schuz, 2013)

3.2 Serious risk of injury to the child

Article 13 (b) of the Convention provides for an exception to a child's return to his or her care habitual residence if “there is a serious risk to his / her return exposed the child to physical or psychological harm or otherwise placed the child in an intolerable situation.” There is much controversy in the published literature about the degree to which a member is 13 (b) can and should be applied in cases of the Convention. Hilton's reconsideration The use of heavy defense reveals that court decisions and official interpretations of the Convention they usually limit the application of this defense to cases where there is an internal conflict in the country of residence. A normal residence cannot or will not protect the child and his or her family. It contends that the serious risk was not intended to be applied to the behavior of individual parents, stating that “a particular party may cause the child to be at risk a sufficient basis for claiming serious risk”. This line reflections are transferred to existing training programs for judges and lawyers who they equate violence with women with the issue of custody and insist that it be solve in the country of your child's usual residence. (Hoff, 1997) So, Article 13 (b) The Convention allows the court to refuse the return of a child if “there is a serious risk that it would his or her re-exposure to the child would cause physical or psychological harm or to otherwise put the child in an unbearable situation”. The supporters of the Convention have always feared that this provision would be the Achilles heel of the Convention. (Weiner, 2001)

The use of heavy defense is often criticized for other reasons. For example, Skoler is wrote a sharp criticism of the use of Article 13 (b) and concluded that “the phrase of Article 13b”, “Psychological harm”, interpreted so broadly and so liberally, that often The Hague The Hijacking Convention is increasingly ineffective, undermined in its own language. (Skoler, 1998) Despite the warnings above, the serious risk defense has been raised at more broadly and supported in several court cases in the US. In fact, it seems that courts are grappling with what poses a serious risk in a series of judgments. For example, u Nunez-Escudero v. Tice Menleia was given by her mother, her parents and a

psychologist testimonies of grievous physical abuse of the mother by the father suing for the return his son from Mexico. The mother also expressed fear for her child's safety if return to his father in Mexico. The district court held that there was a serious risk to the child, but he did the district court found the claim too vague, so the case was returned to the lower court, citing that the mother must present more convincing evidence of a serious risk to the child. To Rodriguez against Rodriguez, child abuse and exposure to domestic violence were offered as part of a tough defense. That was what her daughter testified when she noticed they were her brother and her mother were beaten and feared to be beaten. The court stated, if other parent removes or retains the child to protect it from further victimization, and the parent who abused then petitions for the return of the child under the Convention, the court may deny the request. Such an action would protect the child from returning to “unbearable situation ” and to be at serious risk of psychological harm. (Shetty, Edleson, 2005)

Although domestic violence was part of the testimony, the court ruling is at serious risk and was focused on the danger of future physical abuse of the child by Rodriguez. Finally, in *Blondin v. The Dubois* court heard mother was severely beaten by father, including the time she was holding one of their children. Baby received blows when it was in her mother's arms, and father threatened on other occasions that he would kill the child and the mother. The mother testified that the father had beaten her in late pregnancy and that he later endangered both her life and the life of their children. In one of the published decisions on accepting child exposure to domestic violence as a serious risk under the Convention, the district court ruled that there was a serious risk as a result of the mother's beating the presence of a child and the direct abuse of older children. The district court upheld this one aspect of the lower court's judgment stating: “However, we emphasize that we do not disrupt nor we are obstructing or altering the district court's conclusion to expose the return to “serious risk 'of injury within the meaning of Article 13 (b). In two subsequent appeals, the courts upheld these lower court judgments. (Shetty, Edleson, 2005)

As stated earlier, these court rulings reveal judges who struggle to define the extent of physical and mental harm to children in the hands of their abandoned parents and presents a serious risk and unbearable situation under Article 13 (b) of the Convention. Judges do not appear to use the child's exposure to domestic violence as one or even the primary cause for finding serious risk, despite growing evidence social sciences that say the opposite. (Shetty, Edleson, 2005) However, there is no guidance as to what type of evidence should be provided. The courts, therefore, each case is judged on an ad hoc basis, using all evidence within the time limit prescribed Convention. The result is that

there are differences in outcomes and remedies ubiquitous in these cases. (King, 2013) Two areas of social science research clearly indicate the potential for risk and harm to a child from exposure to domestic violence. First, exposed children can be themselves exposed to a greater risk of physical damage. Numerous research reviews in common occurrences of documented child maltreatment in families in which it also occurs domestic violence for adults, revealed a 41% median coefficient for child maltreatment and domestic violence in families (Appel, Holden, 1998), and most studies are found an incidence of 30% to 60%, depending on the samples tested. (Edleson, 1999)

Second, nearly 100 published studies indicate an association between exposures domestic violence and current problems with children or later problems with adults. Numerous authors have produced partial reviews of this growing literature and its limitations. Overall, existing studies reveal that, on average, children are exposed to domestic violence show greater difficulty than those not so exposed. For example, several studies found that children exposed to domestic violence were more aggressive and antisocial behaviors (often referred to as externalized behaviors) as well as being fearful and inhibited behavior (internalized behavior) compared with unexposed children. Exposed children also showed lower social competence than other children and it turned out that show higher average anxiety, depression, trauma, symptoms and problems temperament than children who were not exposed to violence at home. (Shetty, Edleson, 2005)

Notwithstanding the above evidence in the social sciences, it seems to be so far only one published court opinion suggested that exposure to domestic violence per se presents itself with a serious risk or unbearable situation for a child under the Convention. Of course, this can lead to more questions about forensic knowledge and training than o facts. The same outcomes have long been observed in domestic family courts, where some judges have ruled that even though the abuser is hitting his mother hard, he does not attack directly children, his behavior is likely to have little effect on children. (Shetty, Edleson, 2005) Emerging social science research and changes in the attitudes of the judiciary have led to major changes in US public policy regarding appropriate response to children in the cases where there is domestic violence. Led by National Council for juveniles and family judges, many changes are underway in the way courts and social services respond to children exposed to domestic violence. (Shetty, Edleson, 2005) Certainly, the definitions of child abuse in our society and what it represents the best interests of the child have been constantly changing over the past half century. Global definitions also changing through the establishment of international treaties, such as the UN Convention on the Rights of the Child, and to the extent that at least five European countries are even defined “robbery” as a form of illegal child abuse. With the new knowledge of the impact

that exposure to domestic violence has on children, our laws are in a state of change, as well as court decisions on child welfare. It is likely that similar changes will occur and in thinking and in judgments about domestic violence against the serious risk of children under the Convention. (Shetty, Edleson, 2005)

ICARA, the implementing rules of the Convention, requires clear and convincing evidence of level of risk for a particular child. The social science literature indicates a few factors to consider when determining serious risk. First, it has to establish a level of domestic violence. Current research shows that it is known that the level of domestic violence differs greatly from the family. (Straus, Gelles, 1990) Second, it is very likely that exposing children to domestic violence and the meaning they attach vary significantly. (Peled, 1998) Third, the child's ability or lack of ability to coping with a violent environment can also affect the level of harm to a child. Too bad Children experience can be modified by a number of factors, including how the child is interprets or copes with violence. Fourth, children are likely to have different risks and the protective factors that are present in their lives. (Shetty, Edleson, 2005) Factors protections may include mom, siblings, or other adult providing child protection as well as the level of legal and social protection likely to be available to the child; and his or his mother in the country of residence. Risk factors that occur together with domestic violence may include parental substance abuse, the presence of guns in the home, maternal and male mental health issues, and more neglect. These and other factors may be combined with domestic violence in some families to create greater or lesser risk to the child. (Shetty, Edleson, 2005)

Finally, as noted earlier, the risk of exposing damage can also vary from child to child. Two additional data are important for consideration when considering harm or the risk of harm: (a) the extent to which the child is involved in violent events and (b) documented levels of child maltreatment and emotional damage. Immediate responses of children to violent situations may create an increased risk of their own well-being. Children's responses to domestic violence have been shown to vary from their active involvement in the conflict, to the attraction of themselves and their parents, or to 10 distancing. This, combined with the fact that many studies document it the common occurrence of child maltreatment and higher levels of child problems in families where domestic violence is also present, it reveals the possibility of increased risk for children in these homes. (Shetty & Edleson, 2005) All these factors are important elements to consider when assessing levels child exposure and the potential impact of such exposure.

3.3 Objections of the child

The purpose of the Hague Convention on the Civil Aspects of International Child Abduction is to protect children from the harmful effects of their unlawful removal or retention; and to establish procedures that will ensure their prompt return to their state habitual residence. So, the basic intention is to provide a quick way of returning child, without considering the merits of the case. This should be grounded, not these issues irrelevant but to be properly considered by the courts in the child's permanent residence. At the same time, it was recognized that there might be circumstances in which it would an insurmountable return was inappropriate. This is addressed in Article 13, which provides that the competent authority is not obliged to order the return of the child if those who oppose the return fortifications: (a) consent to removal or renewal, or (b) serious risk of injury child. (Sachs, 1993)

Recently, English courts have been asked to address this issue in cases where, under the provisions of the Convention, a child would have to withdraw by a short procedure into the jurisdiction of your usual residence. The question, of course, is how the courts actually interpret the Convention and the weight they attach to the views of the child in the exercise discretion. The difficulty was to balance the overall intent of the Convention - return child - with the need to pay attention to the child's attitudes, bearing in mind the usual ones problems; namely whether the views expressed are the true views of the child (as opposed to are the result of pressure or indoctrination by a party or a third party), and the risk that disable the whole purpose of the legislation by simply allowing it to be done decide based on the child's opinion. It is also clear that the child's well-being is not paramount in this context. This is consistent with the basic assumption that abduction is harmful to the welfare of the child and that status should be restored as soon as possible. (Sachs, 1993) In *Re R*, the child's mother mistakenly removed the child (aged 14) from her aunt, who was also her guardian, in Germany. Evidence suggests that the girl was quite happy in Germany, but she most strongly objected that she would be returned to Germany, even to the extent that suicide is allegedly contemplated, if be forced to return. The judge (Bracevell J) clearly had to consider the exercise of the discretion conferred by Article 13 of the Convention on the refusal of return child. (Sachs, 1993)

3.4 Serious violation of basic human rights

Case law on admissible cases alleging infringements of European law conventions in cases relating to the Hague Convention began in 2000 and shows no signs of diminishing. The Court's decisions show how the European Convention 11 should be respected in cases within the scope of the Hague Convention. It's interesting study to see how well judges

who are human rights specialists can develop understanding of international family law. Judges have the opportunity to increase the effectiveness of the Hague Convention by helping to set minimum standards in its implementation and uniform interpretation. However, this must be done not by giving an independent interpretation to the Hague Convention, but by constructing positive and the negative obligations which this Convention creates for the Contracting States of Europe and the Hague Convention under Articles 8 and 6 (1) of the European Convention. Impact of the European Court of Human Rights to execute and interpret the Hague Convention are not restricted to States Council of Europe members because its case law is easily accessible on the internet and can be read by the courts anywhere in the world. This will later be illustrated by a reference to the case in New Zealand. One example of a state improving its provisions on execution of a warrant for the return of the Hague Convention in accordance with case law The European Court of Human Rights is Switzerland. Lastly, it will consider the time that is necessary for the European Court of Justice to decide cases in relation to the Hague Convention and assess whether this is consistent with the Court's decisions on the request for urgency in The Hague cases conventions. (Beaumont, 2009) The text of Article 8 of the European Convention is as follows:

“Article 8 Right to respect for private and family life

- 1) Everyone has the right to respect for his private and family life, home and home correspondence.
- 2) There must be no interference by public authorities in the exercise of this right, except in accordance with law and which is necessary in a democratic society in the interest of the national security, public safety or economic well-being of the state, for the sake of it the prevention of disorder or crime, for the protection of health or morals, or for the protection the rights and freedom of others.”(Beaumont, 2009)

Many of the cases brought before the Court were where the courts are in the place where the child was wrongly taken or detained ordered to return the child to the country of your usual residence before unlawful removal. However, the applicant does regrets that the authorities in that country have violated his or her Article 8 family rights life without taking effective action to execute the order. Unfortunately, items on this topic that came to the European Court of Human Rights, and it must be assumed that many are not, prove real evidence of failure by authorities in several states that take effective measures to

enforce the return of the order. The omissions in decided cases see that it would be dangerous to dismiss them as a few isolated examples. (Beaumont, 2009)

4. Conclusion

Definitions of child abuse in our society and what constitutes the best interests of the child have been changing over the past half century. Global definitions are also changing through the establishment of international treaties, such as the UN Convention on the Rights of the Child, and they go to such an extent that at least five European countries even defined “robbery” as a form of illegal child abuse. With our knowledge of the impact that exposure to domestic violence has on children, our laws are in state of change, these court decisions go in the direction of the welfare of the children. It is likely that it will similar changes occur both in thinking and in judgments about violence in family in relation to the serious risk to children under the Convention on the Rights of the Child.

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Milica Kolaković-Bojović*

WRONGFUL REMOVAL OF CHILDREN

Considering a seriousness of the wrongful removal of children, but also its actuality in various forms, cultural, socio-economic and political contexts, this paper shed a light on the existing gap between the status of this phenomenon as a subject of international human rights instruments and still insufficient level of awareness of the main national stakeholders and academic community across the World. The author analyses the background of recognition of the wrongful removal of children by international treaties, but also the main aspects of this phenomenon. Among others, the author addresses this issues from the angle of guaranties provided by the International Convention for Protection of all Persons from Enforced Disappearance and the Convention on the Rights of the Child in the light of the right to the truth and personal identity. The last, but not the least, author discussing the relevant provisions of the Serbian penal and civil legislation that deal with wrongful removal of children.

Keywords: *children, right to truth, right to personal identity, enforced disappearance*

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1. Introduction

Without any doubt, the unlawful removal of children “is every parent’s nightmare”¹ (Finan, 1994:1007) It changes the identity and life attitudes of children unlawfully removed from their parents and the destiny of the whole family. The circumstances and modalities of child removal are changing throughout of time influenced by overall social, cultural and political climate. Consequently, the need for organized reaction (at the national, regional or global level) on this phenomenon is framed by its causes, seriousness and diffusion in certain period of time. Sometimes, intensity and prevalence of the problem in particular region is so high to require global reaction. This was the case with the wrongful removal of children in the context of enforced disappearances in Latin America. However, even a more than four decades since this phenomenon was detected as a widespread and recognized as a ground of the right to know the truth and personal identity, it is still out of deserved focus of academic community, especially European one. In parallel, this phenomenon is still not well known within the police, judicial, prosecutorial, health and social care systems, even in those countries which, by ratifying key international instruments that recognise the wrongful removal of children (hereinafter: WRC) as a serious crime, have committed themselves to build their normative framework, but also institutional capacity in a way that ensures prevention and effective investigation of wrongful removal of children.

The reasons for this can be traced both- to the fact that the trigger to recognise the wrongful removal of children as a problem and practice that drew the international community’s response was the situation in Latin America during the 1970s and 1980s, and the fact that the ratification of international instrument resulting from these reactions (The International Convention for Protection of all Persons from Enforced Disappearance², hereinafter: Convention on enforced disappearances, CED), most often in European countries, are not accompanied by adequate training of the target groups involved in the prevention and investigation of wrongful removal of children, but neither with the appropriate raising awareness activities to shed a light on the nature of this phenomenon.

¹ Finan, C. L. (1994) Convention on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction, *Santa Clara Law Review*, 34/3, 1007-1038.

² International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 during the sixty-first session of the General Assembly in resolution A/RES/61/177

Contrary to issue of children unlawfully removed from parents in the context of enforced disappearance, where international reaction on burning problem (more or less regionally located) resulted in the adequate response in terms of adoption of international instruments, but not followed by universal approach in terms of ratification³, an international community seems to be much more dedicated to the issue of unlawful removal of children from one parent by other one.⁴ This shows the lack of awareness of the numerous treats coming from the growing competences and complexity of the social care system as well as increased involvement of various state agents in parental and custody issues that open the room for abuse and build the “modern bureaucracy” environment for unlawful removal of children.

Therefore, in this paper, we will focus on wrongful removal of children associated with enforced disappearances as well as on the “border line cases” in the context of unlawful removal of children by state authorities who breach legal competences and procedures within the social care system.

2. International Community response to wrongful removal of children associated with enforced disappearances

2.1. The Background

More than four decades past since the first public demonstration of the organization so called *Madres de Plaza de Mayo* in the Plaza de Mayo (Buenos Aires, Argentina) in 1977. Mothers whose children were taken by military regime and grandchildren born in prison or camps were adopted soon after being born, drew the attention of the international public to the issue of wrongful removal of children. They persistently petitioned successive political regimes for information about the fate of their children and for the prosecution of those responsible for their disappearance. Some of them even refused financial and memorial reparation and requested symbolic one- the truth, official

³ CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION- The Hague Convention (*Concluded 25 October 1980*). On the July 19th 2019 the total number of contracting parties was 101. See: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, last accessed on September 9th 2019.

⁴ Article 3 of the Hague Child Abduction Convention⁴ stipulates that the removal or the retention of a child is to be considered wrongful where – a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

acknowledgement, retributive justice and the reappearance of those disappeared. (Moon, 2012:7-9) It is estimated that between 10.000 and 30.000 of persons disappeared in Argentina between 1976 and 1983 (period so called “the dirty war) depending of the sources (national institutions or independent bodies).⁵ Approx. 10% of all missing were pregnant women (Brockhus, 2014:3)⁶ Children born in captivity were adopted or sold and mostly never met their parents. As reaction to this, the organisation *Madres de Plaza de Mayo* grown up into the *Grandmothers de Plaza de Mayo*, the movement of mothers whose children gave a birth in captivity and grandmothers of wrongfully removed children. They were asking for the truth and whereabouts of those children.

Consequently, in 1978 The UN General Assembly adopted the Resolution 33/173⁷, in which it expressed concern about the reports from various parts of the world relating to enforced or involuntary disappearances, as well as about the anguish and sorrows caused by those disappearances, and called upon Governments to hold law enforcement and security forces legally responsible for excesses which might lead to enforced or involuntary disappearances of persons.

2.2. Legislative response

In 1992 it was adopted Declaration on the Protection of All Persons from Enforced Disappearance.⁸ In the Declaration, the General Assembly expressed the deep concern that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law. For the first time, in the article 20 of the Declaration, unlawful removal of children

⁵ Report of the Working Group on Enforced or Involuntary disappearances- Addendum-Mission to Argentina January, 5th 2009, UN Doc, A/HRC/10/9, Add. 1, par. 9.

⁶ Brockhus, D. (2014) The Living Disappeared and their “True Identity”, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447361, last accessed on September 5th 2019.

⁷ Resolution 33/173 of 22 December 1978 adopted by the UN General Assembly, available at: <http://www.worldlii.org/int/other/UNGA/1978/169.pdf>, last accessed on September 9th 2019.

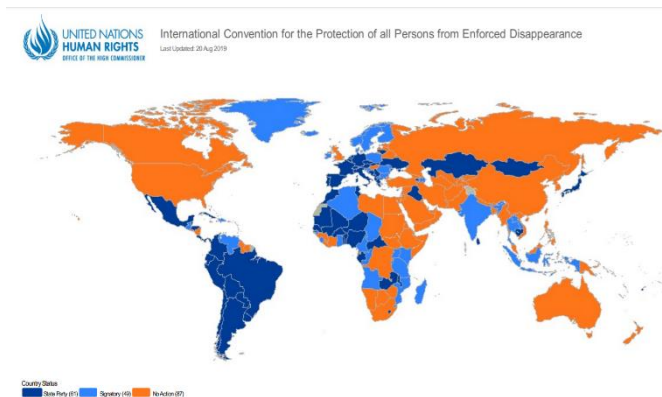
⁸ Declaration on the Protection of All Persons from Enforced Disappearance, adopted by General Assembly Resolution A/RES/47/133 at the 92nd plenary meeting 18 December 1992, available at: <https://www.ohchr.org/en/professionalinterest/pages/enforceddisappearance.aspx>, last accessed on September 9th 2019.

associated with enforced disappearances was recognised as an autonomous, serious crime. The above mentioned article obliged states to prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother’s enforced disappearance, and to devote their efforts to the search for and identification of such children and to the restitution of the children to their families of origin. In parallel with introduction of WRC, the Declaration recognised and guarantee the right to the true identity through the request that adoption procedures for such children could be annulled and altering or suppressing documents attesting to their true identity, punished as an extremely serious offence.

From both documents, especially from the Declaration, it is easy to conclude that enforced disappearances and wrongful removal of children were recognised as a widespread and serious problem in various parts of the world. Considering this, the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006, followed by establishing the Committee on Enforced Disappearances, was expected to be a final trigger to achieve universality in recognition and incrimination of the WRC all over the world. However, the number of ratifications has not grown as expected.

Even at the first glance on the map illustrating the current situation in regard of ratification of the Convention on enforced disappearances, it is easy to conclude that universal coverage remains priority in terms of promotion of ratifications, but also the more or less uniform coverage in various parts of the World.

Picture 1: International Convention for the Protection of All Persons from Enforced Disappearance- signature and ratification status



So far, 61 states have ratified the Convention, 49 states signed it and 87 states have not made any actions in this regard. When it comes to the geographical allocation of ratifications, the highest level of dedication is still in the Central and South America, West Africa and Europe. Reasons for the highest ratification rates in those regions are associated with the historical background of dictatorships and conflicts that resulted in, among others WRC (Central and South America, West Africa), but also with a human rights protection heritage in Europe. Anyhow, despite the OHCHR efforts to double number of ratification until 2020⁹, the enforced disappearances and WRC are still widespread considered to be “the Latin America issue”. Such a prejudice is closely associated with above described background of enforced disappearances, but also with the lack of knowledge of the Convention’s provisions.

2.3. Wrongful removal of children in armed conflicts

Having in mind the above mentioned approach associated with wrong perception of the WRC associated with enforced disappearances as isolated phenomenon typical for several regions, it is important to emphasize that the WRC in the context of armed conflict, as an especially serious and widespread crime should be used as an additional argument to foster ratification process and. To illustrate this, it is important to mention that, according to the official UN data (Mazurana & Carlson, 2006:1-2) in the period 1990-2006, there have been over 60 armed conflicts in 48 locations, and with the exception of four of these conflicts, all were intrastate conflicts. Of the 60 armed conflicts, more than 1,000 conflict-related fatalities per year were recorded in 57 of them. In the period 1996-2006, 2 million children have been killed in situations of armed conflict, 6 million children have been permanently disabled or injured, over 14 million children have been displaced, and *over 1 million have been orphaned and separated from their parents.*

As rapporteurs witnessed, during armed conflict, girls are subject to widespread and, at times, systematic forms of human rights violations that have mental, emotional, spiritual, physical and material repercussions. These violations include illegal detention with or without family members, abduction and *forced removal from families and homes, disappearances*, torture and other inhuman treatment, amputation and mutilation, forced recruitment into fighting forces and groups, slavery, sexual exploitation, increased exposure to HIV/AIDS, and a wide range of physical and sexual violations, including rape, enforced pregnancy, forced prostitution, forced marriage and forced child-bearing.

⁹ See: <https://www.youtube.com/watch?v=rrwqu9z0MNw>, last accessed on August 24th, 2019.

(Mazurana & Carlson, 2006:1-2) Contrary to girls, wrongfully removed boys are more likely to be exposed to recruitment for combat.

Considering the all of these it is obvious that seriousness and the widespread nature of the wrongful removal of children in armed conflicts, require the more intensive cooperation and development of a mechanisms aimed at awareness raising and promotion of the relevant international instruments in the field- on the first place the International Convention for the Protection of All Persons from Enforced Disappearances.¹⁰

3. Convention of the Rights of the Child as a framework for understanding and implementation of the CED

Adoption of the International Convention for the protection of all persons from enforced disappearance shaded a new light on the wrongful removal of children. As we earlier mentioned, the official recognition of the need to incriminate WRC in the Convention was associated with the widespread, sometimes even a systematic, wrongful removal of children was applied during some dictatorships in 20th century¹¹ as a modality of revenge to political opponents and also as a way of intimidation. (Kolaković-Bojović, 2019: 394) However, there is no doubt that the only acceptable approach to interpretation and implementation of the art. 25 of the International Convention for the protection of all persons from enforced disappearance is to interpret its provisions in the context of guaranties provided by the Convention of the Rights of the Child (hereinafter: CRC).

The Convention sanctions these serious practices in the art. 25 that recognizes two main types of wrongful removal of children:

¹⁰ The initiative than needs to be mentioned is that, in November 2018, the Special Representative opened the United Nations Liaison Office for Children and Armed Conflict (Europe) in Brussels, tasked with enhancing cooperation with European Union institutions and member States and covering relations with the Human Rights Council and other Geneva-based mechanisms and institutions, as well as non-governmental organizations. The Liaison Office provided briefings and trainings on children and armed conflict to experts from the European External Action Service, as well as to human rights and gender advisers from Common Security and Defence Policy missions of the European Union. (See ref. above) In addition to this, intensive and continuous dialogue between Special Representative and UN Treaty Bodies. in April 2019, the Special Representative signed a memorandum of understanding with the European Parliament to establish a framework of cooperation on children and armed conflict. See: Report of the Special Representative of the Secretary General for Children and Armed Conflict, United Nations doc. A/74/249, 29 July 2019, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/74/249&Lang=E&Area=UNDOC, last accessed on September 2019.

¹¹ See: Franceze, C. (2017) Balancing justice and peace: a historical and hypothetical exploration of justice during Spain's post-franco transition from dictatorship to democracy, Temple International & Comparative Law Journal, Vol. 31 Issue 2, p497-519.

- The wrongful removal of children who are subjected to enforced disappearance;
- The wrongful removal of children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance.

In order to clarify this provision of the art. 25, par 1(a) it is important to analyze them in the context of the definition of enforced disappearance from the arts. 2 and 5 of the Convention, but also in the context of the *definition of the “child”* from the article 1 of the CRC which defines that, for the purposes of this Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

The art. 2 of the Convention on enforced disappearances identifies the following elements in the definition of enforced disappearances:

- There is an arrest, detention, abduction or any other form of deprivation of liberty;
- That conduct is carried out by agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state;
- The conduct is followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
- The objective result of the conduct is that the disappeared person is placed outside of the protection of the law.

According to art. 5 of the Convention, the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

These provisions of the Convention streamline the general provision of the art. 37(b) of CRC which stipulates that States Parties shall ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily. “The arrest, detention or imprisonment of a child

shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”¹²

In addition to this, the Convention recognises as punishable the falsification, concealment or destruction of documents attesting to the true identity of the children subjected to enforced disappearances. Within the scope of the right to the true identity the Convention introduces an obligation of Each State Party to take the necessary measures to search for and identify those children and to return them to their families of origin, in accordance with legal procedures and applicable international agreements. When it comes to the right to the true identity, its very nature should be understood in light of the articles 7 and 8 of the CRC. Namely, the art. 7, par. 1, stipulate that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents, while art. 8, par 1, prescribes that the States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Par. 2 of the same article, introduces the obligation of the State Parties to, where a child is illegally deprived of some or all of the elements of his or her identity, provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Also, Convention introduces obligation of the States Parties to assist one another in searching for, identifying and locating the children subjected to enforced disappearances. This obligation corresponds to the article 11, of CRC which stipulates that States Parties shall take measures to combat the illicit transfer and non-return of children abroad and promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Convention promotes the best interests of the children as the main principle that needs to be follow in enabling child victims their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, or to review the adoption or placement procedure, and, where appropriate, to annul any

¹² In addition to this, the same article of CRC provides that (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

adoption or placement of children that originated in an enforced disappearance. (art. 25, pars. 4-5)¹³ This principle derives from “the best interest of the child” as a main, horizontal principle introduced by the art. 3 of the CRC which frames “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” This principle is additionally emphasized in the art. 21 of CRC which should be used for interpretation of the art. 25, pars 4-5 of the Convention which deals with the system of adoption. According to the aforementioned art. 21 of CRC, the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. Considering this, the State Parties shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

An importance of the right to the true identity was confirmed by the UN General Assembly Resolution on the Rights of the Child A/RES/73/155¹⁴ which “urges all States parties to intensify their efforts to comply with their obligations under the Convention on the Rights of the Child to **preserve the identity of children**, including their nationality, name and family relations, as recognized by law, to protect children in matters relating to birth registration, family relations and adoption or other forms of alternative care, recognizing that every effort should be directed to enabling children to remain in or swiftly return to the care of their parents or, when appropriate, other close family members and that, where alternative care is necessary, family and community-based care

¹³ See more in: Sunga, R.A. (2012) *On Locating the Rights of Lost*, 45 J. Marshall L. Rev. 1051-1120.

¹⁴ UN General Assembly Resolution on the Rights of the Child A/RES/73/155, 17th December 2018, par. 8-9.

should be promoted over placement in institutions.” Accordingly, the Resolution “recalls every child’s right to be registered immediately after birth, to a name, to acquire a nationality and to recognition everywhere as a person before the law, as set out in the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, respectively, reminds States of their obligation to ensure the registration of the birth of all children without discrimination of any kind, including in the case of late birth registration, calls upon States to ensure that birth registration procedures are universal, accessible, simple, expeditious and effective and provided at minimal or no cost, and recognizes the importance of birth registration as a critical means of preventing statelessness.”

3.1. Wrongful removal of children in case of emergency

The special attention CRC pays to the issue of removal of children from their parents due to necessity for the best interest of the child. As earlier mentioned, in the environment of growing competences and involvement of the state authorities in the family life and relations, a clear rules and procedures needs to be established to prevent from abuse.

No doubt that abused children should be protected from their abusers. Protection, in turn, often requires that children be physically separated from their natural guardians, who either are guilty of abuse themselves or house the abusers. (Brown, 2004:913-914) While aforementioned is not in question, the conditions, limits and procedures that should be followed by judges, enforcement officers and social workers should be well defined and properly implemented in order to prevent a harmful discretion of state agents. In attempt to investigate the likelihood that child will be injured in future, sometimes is not easy to define the borderline between abuse of official duty and incorrect assessments resulting in wrongful removal of a child from his/her parent or, likewise, leave children in harm’s way. (Littell & Shlonsky, 2010:5)¹⁵ A special attention should be pay on the situations where, due to situation of emergency, a state authorities omit to acquire permission of court and/or to follow procedure prescribe by law in order to ensure due process of law. This situation could be well illustrated by *Duchesne v. Sugarman* case from 1973, where court find violation of the due process of law made by the omission of competent

¹⁵ Littell, J. H. & Shlonsky, A. (2010) Toward Evidence-Informed Policy and Practice in Child Welfare, available at: https://repository.brynmawr.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1038&context=gsswr_pubs, last accessed on August 19th 2019

authorities to ensure parental consent or court authorization when removed two children from mother temporary placed to the hospital.¹⁶

Article 9, par. 1. of the Convention stipulates, as a general principle, that the 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, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. This general provision is further specified in a way that “such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.” It is important to mention that the Convention guaranties participation of all interested parties in any proceedings related to separation of children from their parents to make their views known. Also, the CRC emphasises in the par. 4 of the same article that “where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child.”¹⁷

4. Wrongful removal of children and Serbian legislation

Republic of Serbia was among the first countries that ratified the Convention on Enforced Disappearances within the initial few years after its adoption.¹⁸ However, an important measures to establish necessary legal guaranties and procedures to keep all children under the protection of law have been undertaken even before the ratification in order to comply with the provisions of the Convention of the Rights of the Child.¹⁹

¹⁶ *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) Decided Sep 28, 1977

¹⁷ States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

¹⁸ For more about the compliance of Serbian legislation with the Convention, see: M. Kolaković-Bojović, (2017). The Incrimination of Enforced Disappearance in the Criminal Law of the Republic of Serbia. *Journal of Institute of Criminological and Sociological research*, 2017/1, 135-148.

¹⁹ “Official Journal of the SFRY – International Treaties”, No. 15/90 and “Official Journal of the FRY – International Treaties”, Nos. 4/96 and 2/97.

4.1. Wrongful removal of children and Serbian criminal law

The approach of Serbian authorities to the criminalisation of the WRC is mostly caused by their position regarding the incrimination of enforced disappearance as an autonomous crime in the Criminal Code (hereinafter: CC). Namely, based on the statement given by the Serbian delegation during the Constructive dialogue with the CED in 2015, that amendments to the Criminal Code are being prepared in order to introduce the offence of enforced disappearance, the Committee welcomed such a position and identified this reform step as a priority to be fulfilled before 2016.²⁰ However, even a four years later an enforced disappearance is not recognized as an autonomous crime, but it doesn't mean that is unpunishable. It may constitute the commission of criminal offences prescribed by the following provisions of the Criminal Code: Abduction (article 134, paragraph 3), Abduction of Minor (article 191), Change of Family Status (article 192), Human Trafficking (article 388, paragraph 3 and 9) and Trafficking in Minors for Adoption (article 389).

When it comes to WRC in form of enforced disappearances of children or WRC of children born in captivity whose parents are victims of e.d., the last four of above mentioned crimes are relevant:

Article 191 of the CC, **Abduction of Minor**²¹ stipulates in par. 1 that “Whoever unlawfully detains or abducts a minor from a parent, an adoptive parent, a guardian or another person, i.e. an institution entrusted with care of the minor, or whoever prevents enforcement of the decision granting custody of a minor to a particular person shall be punished with a fine or imprisonment of up to three years. Par. 2. of the same article prescribe that if the offence specified in paragraph 1 of this Article is committed against a new-born, the perpetrator shall be punished with imprisonment of six months to five years.²² It is very important to mention that par. Incriminates the situation where an abduction of a minor is committed for gain or other base motives, or the offence results in serious impairment of health, care or education of the minor, or where the offence is committed by an organized criminal group, when the perpetrator shall be punished with

²⁰ Committee on Enforced Disappearances, Concluded observations on the report submitted by Serbia under article 29, paragraph 1, of the Convention (CED/C/SRB/1) at its 124th and 125th meetings (CED/C/SR.124 and 125), held on 4 and 5 February 2015, par. 10.

²¹ It is important to mention that, despite the fact that the official translation of the CC use the term “abduction”, the adequate term (following the original, Serbian text of the law) should be “removal”.

²² According to the par. 3, Whoever prevents enforcement of the decision of a competent authority setting out the manner of maintaining of personal relationships of a minor with a parent or other relative shall be punished with a fine or imprisonment of up to two years.

imprisonment of one to ten years. It seems that this par. was the right place to prescribe responsibility of agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state. In this sense it is also important to mention that provision of the par. 5 could be criticized having in mind that it allows the court to remit punishment of a perpetrator of the offence specified in paragraphs 1, 2 who voluntarily hands over the minor to a person or institution having custody of the minor, or enables enforcement of the custody order (that is understandable and could be justified especially in situations where perpetrator is relative of family member), but it could not be considered as justified for cases prescribed in par. 4 of this Article.²³

In addition to the Abduction of a Minor, Article 192 of CC incriminates the **Change of Family Status**. This crime is committed by “Whoever by substitution, replacement or otherwise changes the family status of a child. (par. 1) In this case perpetrator shall be punished with imprisonment of six months to five years. In par. 2 of the same article is recognised responsibility of the doctor of the healthcare institution who proclaims a living new-born dead for the purpose of changing the family status. According to par. 3, “whoever commits the offence specified in paragraphs 1 and 2 of this Article for gain, through abuse of position, habitually engages in committing of such an offence or if the offence is committed by an organised criminal group, shall be punished with imprisonment of one to ten years. This paragraph brings the solution that is more adequate than the abovementioned par. 5 of the Art. 191 having in mind that it recognises a responsibility of those who commit this crime by abusing the office. However, this still does not cover situation where this crime is committed by persons or groups of persons with the authorization, support or acquiescence of the state, whose responsibility is covered only by par. 1.²⁴

In cases where WRC is followed with financial or other gain, such an act may constitute a Human Trafficking or Trafficking in Minors for Adoption.

Article 388 of the CC defines Human Trafficking as a crime committed by “whoever by force or threat, deception or maintaining deception, abuse of authority, trust, dependency

²³ According to par. 6 of the same Article, if the court pronounces a suspended sentence for offences specified in paragraphs 1 through 4 of this Article, the court may order the offender to hand over the minor within a set period of time to a person or institution having custody of the minor, or to comply with enforcement of the decision granting custody of the minor to a particular person or institution, i.e. the decision stipulating the manner of maintaining personal relationship between the minor and a parent or other relative.

²⁴ In addition to abovementioned, par. 4 stipulates that whoever by replacement or from negligence changes the family status of a child, shall be punished with imprisonment up to three months.

relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person with intent to exploit such person's labour, forced labour, commission of offences, prostitution, mendacity, pornography, removal of organs or body parts or service in armed conflicts” and prescribes that perpetrator shall be punished with imprisonment of three to twelve years. (par. 1) The CC recognise the situation where this crime is committed against a minor where the offender shall be punished by the penalty prescribed for that offence even if there was no use of force, threat or any of the other mentioned methods of perpetration- with imprisonment of minimum five years. (par. 3) ²⁵ The CC incriminates habitual engagement in offences specified in paragraphs 1 and 3 of this Article and situations where the offence is committed by a group, when offender shall be punished with imprisonment of minimum five years. (par. 6) If the offence specified in paragraphs 1 to 3 of this Article, is committed by an organized group, the offender shall be punished with imprisonment of minimum ten years. (par. 7)²⁶

Trafficking in Minors for Adoption from the Article 389 of CC is applicable in situations where WRC results in adoption. According to this provision of the CC, “whoever abducts a child under sixteen years of age for the purpose of adoption contrary to laws in force or whoever adopts such a child or mediates in such adoption or whoever for that purpose buys, sells or hands over another person under sixteen years of age or transports such a person, provides accommodation or conceals such a person, shall be punished with imprisonment of one to five years.(par. 1) Qualified form of this crime is recognised in par. 2 in cases of habitual engagement in activities specified in paragraph 1 of this Article or if the offence is committed by a group, when offender shall be punished with imprisonment of minimum three years. If the offence specified in paragraph 1 of this

²⁵ (4) If the offence specified in paragraphs 1 and 2 of this Article resulted in grave bodily injury of a person, the offender shall be punished with imprisonment of five to fifteen years, and if a grave bodily injury of a minor had resulted from the offence referred to in paragraph 3 of this Article, the perpetrator shall be punished with imprisonment of at least five years. (5) If the offence specified in paragraphs 1 and 3 of this Article resulted in death of one or more persons, the offender shall be punished with imprisonment of minimum ten years.

²⁶ 8) Whoever knows or should know that the person is a victim of trafficking, and abuse its position or allow to another to abuse its position for the exploitation envisaged in paragraph 1 this Article, shall be punished with imprisonment of six months to five years. (9) If the offence specified in paragraph 8 of this Article is committed against a person for whom an offender knew or could have known to be a minor, the offender shall be punished with imprisonment of one to eight years. (10) Endorsement of persons to exploitation or establishing slavery or similar relation to it specified in paragraph 1 this Article, shall not affect the existence of crime specified in paragraphs 1, 2 and 6 of this Article.

Article, is committed by an organized group, the offender shall be punished with imprisonment of minimum five years. (par. 3)

With regard to forging, concealing or destroying documents, within the meaning of article 25, paragraph 1(b) of the Convention, the above mentioned actions may constitute the commission of the criminal offence of Forging a Document from article 355 of the Criminal Code, or the criminal act of Forging an Official Document from article 357 of the Criminal Code.

Forging a Document (Article 355 of CC) foreseeing that “whoever makes a forged document or alters a real document with intent to use such document as real or uses a forged or altered document as real or obtains such document to use, shall be punished with imprisonment of up to three years. (par.1) More serious penalty, of three months to five years is prescribed if the offence is committed in respect of a public document, testament, bill of exchange, cheque, public or official record or other record that is kept under law, the offender shall be punished with imprisonment²⁷

Forging an Official Document (Article 357 of CC) stipulates that “an official who enters false data or fails to enter important data in an official document, record or file, or who certifies by his signature or official seal an official document, record or file with false content, or who with his signature or official seal enables another to produce an official document, record or file with false content, shall be punished with imprisonment of three months to five years.” The same penalty shall also be imposed to an official who in service uses a forged document, record or file as true, or who destroys, conceals or considerably damages an official document, record or file or makes it otherwise unusable. (par. 2) The par. 3 of the same Article foresees the responsibility of the responsible officer in an enterprise, institution or other entity who commits this offence.

Depending on the concrete circumstances, the WRC could be punishable as a some of crimes against official duty. Finally, when it comes to earlier mentioned WRC in armed conflicts, it is important to mention that Serbia introduce in the Article 371 of CC- Crimes against Humanity, the enforced disappearance as an action that can constitute the Crime against humanity, when committed in violation of the rules of international law, as part

²⁷ According to par. 3 of the same article, the attempt of the offence specified in paragraph 1 of this Article shall be punished.

of a wider and systematic attack against civilian population, punishable with imprisonment of minimum five years or imprisonment of thirty to forty years.

In relation to the **State obligation to ensure efficient and immediate search, in** cases of reports on disappearances of children, the police officers of the Ministry of Interior act with utmost urgency in accordance with the provisions on the Law on Police (Article 72), the Criminal Procedure Code (Article 225 paragraph 2 and Article 566)²⁸, the Rulebook on Police Powers (Articles 61–63), in compliance with both national and international norms and standards in respect of compliance with the rights of the child. The urgency of the procedure is ruled after the tragic murder of a previously missed minor Tijana Jurić.²⁹ According to the amendments, police are no longer waiting for 24 hours to pass, but are searching for a missing child immediately after reporting their disappearance. Prior to the adoption of the law, in the practice of police work, that period was 24 to 48 hours.

The last, but not least, significant efforts are being made to establish mechanisms to assist child victims in Serbia.³⁰

4.2. Wrongful removal of children and Serbian civil law

When it comes to obligation from the Art. 25 of the Convention to ensure the procedures in place to review and, if necessary, annul an adoption, taking into account the best interest of the child is the primary consideration as well as the views of the child in accordance with his/her age and maturity, it is important to emphasize that within the system of social and family legal protection and application of all forms of family legal protection of children without parental custody, especially in case of adoption, the rights

²⁸ “Official Journal of the FRY”, Nos. 70/2001 and 68/2002 and “Official Gazette of the RS”, Nos. 58/2004, 85/2005, 115/2005, 85/2005 – amended by other law, 49/2007, 20/2009 – amended by other law, 72/2009 and 76/2010.

²⁹ The Nearly a month after the tragedy, in August 2014, professors at the Belgrade Law School wrote a proposal to amend Article 72 of the Police Act, which stipulates the time of search for children and minors. That same month, Tijana’s father, Igor Juric, formally filed an initiative to change that member. About a year later, after peaceful protests in the squares, and tens of thousands of banners and messages from citizens “Why Tijana’s Law Was Not Adopted”, MPs adopted the bill at a session held on July 16, 2015. The amended article is symbolically called “Tijana’s Law”. See more at: <https://tijana.rs/fondacija/tijanin-zakon/>, last accessed on September 14th 2019.

³⁰ See more in: Kolaković-Bojović, M., Turanjanin, V., Tilovska-Kechegi, E. (2018) Support to Victims of Crime: EU Standards and Challenges in Serbia. In: G. Ilik & A. Stanojoska (Eds.) *Towards a Better Future: The Rule of Law, Democracy and Polycentric Development*, (pp. 125-135). Bitola: University “St. Kliment Ohridski” and Kolaković-Bojović, M. (2018) Child victims in Serbia: Normative Framework, Reform Steps and EU Standards. In: I. Stevanović (Ed.) *Thematic collection of papers of international significance / International scientific conference “Child friendly justice”*, (pp. 171-182). Palić 06-07 jun 2018. Belgrade: Institute of Criminological and Sociological research.

of the child established by the Convention on the Rights of the Child are complied with as well as all the rights of the child established by the national legal regulations and by the Family Law³¹ in particular.³²

In accordance with the provisions of the Law in all proceedings, including the proceedings for establishment and termination of adoption, everyone is under the obligation to act in the best interest of the child in all activities. The state is obliged to undertake all necessary measures to protect the child from neglect, from physical, sexual and emotional abuse and from every form of exploitation (article 6, paragraph 1 and 2 of the Law).

The Family Law prescribes that a child who is able to form his/her own opinion has the right to free expression of this opinion. A child has the right to duly receive all information necessary to form his/her own opinion. Due attention must be given to a child's opinion in all issues concerning the child and in all proceedings where his/her rights are decided on, in accordance with the age and maturity of the child. A child who has reached the age of ten may freely and directly express his/her opinion within every court or administrative proceedings where his/her rights are decided on. A child who has reached ten years of age may address the court or an administrative body, by himself/herself or through another person or institution, and request assistance in realization of his/her right to free expression of opinion. The court and the administrative body shall determine a child's opinion in cooperation with a school psychologist or custody authority, family counselling service or other institution specialized in mediating family relations, and in the presence of a person that the child chooses himself/herself. The Family Law recognises the right to recognition of origin (Article 59), the right to living with parents (art. 60, par. 1) and the right of the child to identity (Article 59, par. 3).

In terms of the review and/or annulment of the adoption procedure. The provision of Article 107 of the Family Law prescribes that any adoption shall be null and void if all the conditions of its validity had not been fulfilled on the occasion of its establishment. Action for annulment of an adoption on the grounds of nullity can be initiated by the adopter, the adoptee, the parents or guardian of the adoptee, persons having legal interest in the annulment of the adoption, and the public prosecutor. The right to state the nullity does not expire. Action for annulment of an adoption on the grounds of nullity can be initiated by a person who has given a statement of consent to adoption under duress or in

³¹ “Official Gazette of RS”, no. 18/2005

³² See more at: <https://www.ljudskaprava.gov.rs/sr/node/162>, last accessed on September 14th 2019.

error, within one year from the day the duress ceased or the error was noticed (the deadline is preclusive). The judgment on the annulment of the adoption is delivered to the custody authority through which the adoption took place. The custody authority, on ground of the judgment, issues a ruling on the annulment of the ruling on the new entry of birth for the adoptee. Through this ruling, the first entry of birth for the adoptee automatically becomes valid again. After the termination of the adoption, the guardianship of the child is decided by the custody authority.³³

The Family law takes into account the best interest of the child and the child view of the adoption. Any adoption based on force or delusion shall be voidable (Article 108). Every adopted child has the right to review independently the documents on their adoption and the registry of births after the age of 15, under previous preparation: psychological consultation and support (Article 59). Adoption is established through a decision by the custody authority (administrative body), under the conditions prescribed by article 88 – 105 of the Law. Only a minor may be adopted. Minor after reaching the third month of life could be adopted, specifically: a child who has no living parents; child whose parents are unknown, or their residence is unknown; child whose both parents are fully deprived of parental right; child whose both parents are fully deprived of business capacity; child whose parents have granted consent to the adoption. Child who has reached 10 years of age and who is capable of reasoning has to consent to adoption.³⁴

Also, in compliance with international conventions, in particular with the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption,³⁵ the bodies of Republic of Serbia do not carry out adoption procedures and adoption procedures for children from foreign countries, which would be implemented during immediate war danger or declaration of the state-of-war.

³³ Ibidem.

³⁴ The proceedings for the establishment of adoption are conducted by the custody authority, which issues a written ruling on the adoption, in accordance with the provisions of article 311 – 327 of the Family Law. The procedure may be initiated by the custody authority ex officio, by future adoptive parents and parents or guardian of the child.

³⁵ “Official Gazette of RS-International Agreements”, No. 13/2013-6

5. Conclusions

Having in mind historical background, variety of circumstances that can potentially serve as an environment for wrongful removal of children, seriousness of this crime and long term consequences for victims and family members, but also still insufficient recognition of the WRC on the global level, it is obvious that further actions are needed on multiple levels.

Considering importance of the Convention on enforced disappearances, one of the most important actions aimed at combating WRC is promotion of the universal ratification of the Convention. This step is a precondition of the introduction of the WRC in national criminal legislations all around the world and building of efficient normative and institutional mechanisms for combating WRC. Further awareness raising among enforcement agents, medical and social care personnel, as in countries that have ratified the Convention, as in those that are still not parties to the Convention is still needed in order to address challenges in practice. The special attention should be paid to WRC in armed conflicts, but also to WRC associated with abuse of official duties within health care, social care and system of education.

When it comes to Serbian legal and institutional system, despite the fact that Serbia was among first countries that ratified the Convention on enforced disappearances the penal legislation still slightly deviates from requirements given in the Convention. In parallel, contrary to the obligation from the Convention, specialised training on enforced disappearances and wrongful removal of children has not been introduced. This fact prevents from comprehensive and systematic approach to prevention and combating wrongful removal of children and contributes to the lack of understanding of this issue among those who are, according to the Constitution, allowed to apply the Convention directly, regardless the insufficient alignment of the national legislation with it.

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**PROTECTION OF THE RIGHTS OF THE CHILD – NOTES
ON THE CONFLICT BETWEEN THE NORWEGIAN CHILD
WELFARE SERVICE AND IMMIGRANTS.**

In this paper the authors outline recurrent conflicts between immigrants and Norwegian authorities in cases of child protection and care measures. In its first part the authors examine the present situation, describe positions of the involved, supply relevant data and scrutinize the legal aspects. In the second part the significance of culture is considered. The authors look at reasons why immigrants fear the Norwegian Child Welfare Services and relate this to background attitudes about the family and the state. Particular attention is given to the role of trust, and the need for clear information and emphatic communication is pointed out. Finally a proposal for remedies to the situation is made, both on concrete measures to be taken on several administrative levels, and in a long term societal perspective. In conclusion the authors argue that the situation is symptomatic for interaction between immigrants and state in a pluralistic society.

Keywords: Norwegian Child Welfare Service, immigrants, child protection, foster care, child care measures.

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1. Minorities and authorities

In Norway today immigrants from all over the world are present in various numbers and for various causes. The disputes on protection of children's rights that arise in theory and practice are a striking example of encounters between these and the receiving state's authorities.

1.1. The migrants' position

According to the most recent numbers (29. March 2019) by Statistics Norway (SSB) people from Poland are the largest group of immigrants in Norway. There are registered 111 985 immigrants and Norwegian-born to immigrant parents from Poland. This number consists of 98 691 immigrants and their 13 294 Norwegian-born children (SSB 2019, Table 09817). The Poles in Norway are mainly work-immigrants, filling diverse menial jobs. They started to arrive in greater numbers after the EU was extended in 2004. Immigration peaked markedly in years 2008 and 2011. At the present, the trend is in reverse.

The corresponding numbers for immigrants from Somalia show 42 802 immigrants and Norwegian-born to immigrant parents from Somalia registered, thereof 14 160 Norwegian-born children to immigrant parents from Somalia (*ibid*). The Somalis are now, after the recently arrived Syrians, the largest non-western group of immigrants in Norway. Somalis have a relatively short duration of residence in Norway. Most of them are refugees from war and terror on the Horn of Africa; they mainly arrived after 1998, with a peak in the year 2002. Superficially, these two groups have few traits in common, but one. The Norwegian Child Welfare Service (Barnevernet) is feared and despised among both groups.

Conflicts between Polish parents and Norwegian Child Welfare Services (hereafter CWS) have escalated on several occasions and come to public attention both in Norway and Central Europe.

The Somali community in Norway has for a long time voiced fear for the Norwegian CWS. “They take away our children” has been a recurrent theme ever since significant immigration by Somalis started. Communication is mainly oral, based on word of mouth, and among immigrants from Somalia many stories circulate about the CWS interfering in family affairs.

In general, relations between minorities and the Norwegian Child Welfare Service are described as a “climate of fear”. During the last decades there has been a plethora of scandals, incidents, demonstrations and media reports. National media are exposing faults in the system and foreign media paint an unfavorable picture of the CWS and Norwegian society in general¹.

1.2. Facts and data

Conflicts between migrants and Norwegian Child Welfare Service revolve mainly around care measures (omsorgsovertakelse). By definition of SSB (2018), these are measures where a child is placed in care outside the home by the CWS, i.e. the placing of a child in foster care. In the following text, the authors will concentrate on this aspect.

Statistics show that children that have immigrated are overrepresented as recipients of measures by the CWS compared to children with ethnic Norwegian background (Bufdir 2017, updated 2019). These differences are far less marked when numbers are whittled down to children under care. By the end of 2016 the data for these children show 9.2 per 1000 children between 0-17 years of age among immigrants, and lowest of all among Norwegian born children with two immigrant parents, at 7.3 per 1000 children (*ibid*).

The statistics cited above include minors who have arrived unaccompanied in Norway. These asylum seekers in their teens are atypical clients of the system and of no consideration to this paper. When that group is statistically controlled for, the alleged over-representation of immigrant children is not confirmed by scientific research. Berg et al. (2017) find that there is hardly any difference in care measures between children with immigrant background and the rest of the population. Norwegian born children with immigrant background even score slightly lower than ethnic Norwegian children (*op.cit.* p. ix).

An interesting finding is that the groups who have received most attention do not exceed the average, and for Polish immigrants numbers are below the average for care measures (*ibid*). There is no support for allegations that families from Central Europe are especially exposed. On the contrary, it appears that care measures are rarely applied to work migrants (2 per 1000), while refugees are overrepresented at 13.7 per 1000 (*op.cit.* fig. 2).

¹ BBC (2018); Færseth (2017); Johansen (2018); Mehren, Stav (2013); NTB (2015); RT (2015);

1.3. The authorities' position

The task of protecting the rights of the child in Norway is shared between a governmental level, including the county, and a municipal level. The governmental level consists of the Ministry of Children and Families, the Directorate for Children, Youth and Family Affairs (hereafter Bufdir) and the intermediate level of the County Governor. Here the County Committee for Child Welfare and Social Affairs is located, which decides on cases of care measures. On the municipal level the CWS is responsible for supplying all children present in the municipality the help they need, and it prepares cases of compulsory care measures for consideration by the County Committee. So its tasks are twofold, the local CWS is both an investigating authority in cases of child protection and a helping agency for children and families.

On the political level Norwegian policy is summed up well in the “Address to Heads of Mission resident in Oslo. 27. February 2019” given by the Minister of Children and Families, Kjell Ingolf Ropstad (2019). This meeting was in response to the case of a Polish consul being declared *persona non grata*, due to his behavior and utterances in connection with several child care cases (Karlsen, 2019). Initially the minister underlines that children should grow up with their parents: “A child can only be placed in alternative care if it suffers neglect, violence or abuse. In addition, it is a requirement that assistive measures are considered not good enough to protect the child. Finally, a care order must be in the best interest of the child” (*ibid*). The minister underscores that “The Child Welfare Act applies to all children in Norway, regardless of their status, nationality or citizenship. In Norway, there is zero tolerance for corporal punishment” (*ibid*).

2. The law

Care order proceedings take place in a strictly legalistic area where several sources are relevant. The main conventions pertinent to the matter are the United Nations Convention on the Rights of the Child (UNCRC), the Hague Convention on parental responsibility and protection of children (Hague Convention 1996) and The European Convention on Human Rights (ECHR).

2.1. International law

Norway ratified the UNCRC on 16. November 1990. The convention entered into force February 1991. A year later a new national child care law was adopted. By law of 1. August 2003 the UNCRC and its additional protocols were incorporated into the Human rights law (Menneskerettsloven 1999), effective by 1. October 2003 (Endringslov 2003).

This implements the UNCRC and its additional protocols, giving them effect as Norwegian law.

Article 20 of the UNCRC demands that “due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.” Article 30 states that children belonging to an ethnic, religious or linguistic minority (or to an indigenous group) are entitled to special protection (UNICEF 1989).

In 2016 Norway ratified the Hague Convention (1996), which is designed to prevent and solve parental disputes and complex cross-border cases. Under this convention, the state in which the child is habitually resident can take measures for the protection of the child. The Norwegian implementation act (Lov om Haagkonvensjonen 1996), given 2015, implements the Hague Convention in Norwegian law. The law came into force on 1. July 2016 and makes Bufdir the central authority in Norway for the Hague Convention.

2.2. National law

On the national level children’ rights and the state’s duties are regulated by the Child Welfare Act of 17. July 1992 (Lov om barnevern). Care measures are based on § 4-8 and § 4-12 of this law. A child can be under care measures until 18 years old. Abuse or neglect are given as causes for intervention, after other services have failed. All decisions to place a child in care away from home are taken by the County Committee for Child Welfare and Social Affairs. Either party may appeal the decision to the appropriate District court.

2.3. Cases at the European Court of Human Rights

Legally speaking there appear to be two frameworks at cross-purposes: On the one hand international and national legislature on child protection. Furthermost stand the best interests of the child. Both the UNCRC and Norwegian law stipulate this as the primary concern in all situations. On the other hand there is the fundamental right to respect for private and family life as provided for in Article 8 of the ECHR. In addition Article 9 (Freedom of thought, conscience and religion) and Article 6 (Right to a fair trial) of the ECHR may be seen as relevant.

This conflict ultimately manifests itself in cases handled by the European Court of Human Rights (ECtHR). Currently this court has 26 cases of childcare measures in Norway under consideration (Hansen 2019). This number is exceptionally high.

Typical is the case of *I. Mohamed Hasan v. Norway* (ECtHR 2018). This case concerned the Norwegian authorities' decision to remove the applicants parental responsibility for her two children and to give consent for their foster parents to adopt them. The question was whether the Norwegian authorities' decision was a violation of the right to respect for privacy and family life under Article 8. The ECtHR concluded that there was no disproportionate violation of the appellant's right to privacy and family life under Article 8 (1). Consequently, there was no violation of Article 8 in the present case.

Similarly, the case of *Strand Lobben and others v. Norway* (ECtHR 2018) concerns whether the decisions on placement in foster homes, deprivation of parental responsibility and permission of adoption of the child of the first appellant constituted a violation of the right to family life under Article 8. The ECtHR concluded with four votes against three that there was no violation of Article 8 of the convention. This case was subsequently appealed to the Grand Chamber of the ECtHR which on 10. July 2019 announced its verdict stating that Norwegian authorities have violated the human rights of the mother when permitting adoption of her son. The verdict has now passed to the Committee of Ministers of the Council of Europe, which will decide on consequences in the specific case and in general terms. The outcome of this case will be important to further Norwegian legislation and jurisdiction, and to the practice of the CWS.

An early dispute concerning deprivation of parental responsibility, placement in foster home and adoption was the case of *Johanson v. Norway* (ECtHR 1996). The mother Adele Johanson had a history of drug abuse and was deprived of her 6 days old baby. No violation of Article 8 was found as concerned the taking into public care of the applicant's daughter. Concerning the later decision to deprive Johansen of her parental rights and her right to be with her daughter, the ECtHR stated that taking care of a child should normally be seen as a temporary measure, and that the authorities should therefore strive to create good conditions for the child reuniting with its parents. Although there were particular problems in this case, the court notes, these were not sufficient grounds for releasing the authorities from their duty to work for a reunion. In light of this decision, the deprivation of Johansen's parental rights and access rights was not well founded, and the ECtHR found, with 8 votes to 1, that there was a violation of Article 8.

3. A conflict of culture?

Most commentators read the tense situation as a conflict of cultures. The concept of culture, however, is ill defined and carries little explanatory value. Rather than referring in general terms to different cultures, the authors want to examine the concepts that are

contested. The rub of the matter clearly does not lie in cultural traits shared by people from Poland and Somalia, but in their common situation as immigrants to Norway, in meeting with Norwegian values, norms and regulations, as manifested in positive law and applied by the authorities, in this case the CWS and its understanding of the child's best interests.

Especially recent arrivals are neither familiar nor comfortable with Norwegian views on upbringing. When defending their position toward authorities, they will appeal to traditions in their country of origin and different norms concerning rearing children. Traditions are an anchor in uncertain times. The more under pressure, the more a group will withdraw to its core and perceived safe haven, the family unit.

3.1. The role of the family

There is wide consensus on the importance of the family. Both the Somalis and the Polish value family ties above all others, while the Norwegian Minister of Children and Families is leader of the Christian Peoples Party (Krf), a center/right party that cherishes the family as a fundamental institution of Norwegian culture and society.

Yet, none of the instruments for human right issues does supply a definition of 'family'. What it is and how it works varies between states and cultures and is subject to persistent change. In Norway family ties are strong but dissolving under the strains of postmodern urban society. Recent immigrants to Norway are foreign to these developments and do not want to be part of them, but rather keep things as they were 'at home'. The family represents to them ultimate refuge in troubled times, and the only place where a child is loved unconditionally.

A weighty argument advanced by immigrants is that biological descent forges bonds to family, ethnicity and culture that neither can nor should be broken. A child's best interests is to grow up with its biological parents, in its cultural and religious group, no matter what.

Immigrants argue that traditional family values are important to their identity and necessary to maintain parental authority in a foreign and changing world. Children have to obey, it is held, and to ensure this, a degree of violence is accepted in many cultures. These views on upbringing and the resulting methods are antithesis to the CWS' understanding of the child's best. CWS cannot but intervene into family situations when there is violence and a high level of conflict.

3.2. The role of the state

Neither group of immigrants, Polish or Somali, is familiar to a comprehensive welfare state as it exists in Norway, and the scope of its involvement with citizens' life. Norway was among the first countries to establish a system for the protection of children and the institution is well grounded in Norwegian normality. The Norwegian CWS is obliged to intervene when things go wrong in a family. The aim of intervention is to protect and further the child's interest. Sometimes, however, the scope of this responsibility is not fully addressed, witness the case of Johanson v. Norway in 1996.

The immigrants notion of the state's role often is a lean state that provides security, but does not interfere with private matters. In addition will many migrants, based on prior experience, hold that authorities cannot to be trusted since they pursue their own interests, divergent from the citizens': the state serves an elite, not common people and their family.

These views of the state results in a common attitude towards all authorities, to keep them at as far as possible away from private life and family. In such a setting, family matters are resolved without the involvement of officialdom. What happens in the family stays in the family and is solved (or not) by the family.

That attitude might be understandable; but it does not go well with Norwegian norms since collective interests as perceived by the family may collide with the CWS views on a child's best interest. The CWS such is frequently criticized for intervening too readily into family relations, at the expense of parents' interests (NOU 2016-16; 3.3).

4. A matter of trust

4.1. On reasons for fear

The fears of immigrants are justified to a certain degree: although only an estimated 2% of cases result in CWS placing a child in care, disproportional many of these involve immigrants and their families. Scores from end of 2016 are 9.5 per 1000 cases for ethnic Norwegians and 32 per 1000 cases for immigrants (Bufdir 2017, updated 2019).

Lack of parental skills is at 29% the most common reason for taking action given by CWS (Barnevernreform 2016–2017; 3.4.2). The concept of “lack of parental skills” however is ill defined. This gives much leeway to subjective judgements by CWS-workers. At times the CWS seems not focused on the child's needs but on parents' failure and lack of competence.

And not only is there stigma and shame attached to being investigated and aided by the CWS.

The asymmetric distribution of information and power leads to a climate of misunderstanding and mutual suspicion. This will peak in rumors and in fake news of the systematic snatching of children. The extreme examples of paranoid theories found in foreign media are obviously unfounded and their sources often pursue their own agenda. Still, these stories are believed and fuel the persistent fear reported by migrant organizations.

Connected to the fundamental fear of losing one's children is fright of their loss of identity, meaning their ethnicity, religion, language and traditions. After a child is taken into care, the parents are permitted very little contact with their children. A child may never return to its roots. Many immigrants think that CWS favors Norwegian culture; indeed the CWS takes for granted that the definition of a good childhood must conform to Norwegian norms. There are historical examples of the mistreatment of national minorities and indigenous people, times when children systematically were separated from their parents and their cultural environment, to be made into “good Norwegians”. Those policies are without doubt a thing of the past; but the missing cultural competence of Norwegian CWS noted in the White paper NOU 2016:16 chap. 3.6. is still acute. The ethnic, religious or cultural affiliation of a child is rarely taken into consideration to a sufficient degree (*ibid*).

Representatives of minorities point to a lack of cultural competence on the side of the CWS. Minorities are barely represented here; also County Committees consist mainly of ethnic Norwegians. Caseworkers show insufficient knowledge on the workings of immigrant families and may make incorrect assumptions about social and cultural practices, based on stereotyping. Immigrants also suspect that some caseworkers legitimize ethnocentric views by referring to legislation (Stokke 2013).

4.2. On the importance of trust

Good laws are a good thing. Even more important, on a deeper level than mere jurisprudence, there is need for trust in a society. An analysis published by SSB 29. March 2019 shows that “22 percent of immigrants have little confidence in their fellow human beings, while the same only applies to 6 percent in the general population.” (SSB analyse 2019/13). Immigrants from Poland show least trust at 31%, while the Somalis score 17% for low trust (*op.cit.* table 1).

There is abundant research on the matter of trust. In Nordic countries, trust traditionally is high. This is ascribed to high cultural similarity, a vivid culture of cooperation and civil organizations and to stable societal conditions in general. Trust is a lubricant for interaction in society. High levels support a strong public sector and welfare schemes based on reciprocity. Democratic institutions depend on it for their legitimacy, and the more trust the better they function.

A survey published 2018 (Bufdir 2018) shows that 34% of immigrants with Somali background have little confidence towards the CWS, and only 37% of Polish affiliation would contact the CWS if worried about a child. The role of the CWS is perceived to be antagonistic or is unknown at the least to most immigrants. The asymmetric distribution of power in encounters between CWS and a family becomes more poignant when one belongs to a minority and is unfamiliar with or afraid of the system. Missing trust leads to insecurity and low motivation.

Neither does the CWS trust the families it investigates; caseworkers are skeptical in general and to immigrants in particular. When faced with cultural challenges the CWS falls back on rules and regulations. Though dealing with deeply emotional issues, it argues solely on a legal and technical level. Attorney General Fredrik Seiersted is quoted in Hansen (2019) saying “the Norwegian regulations in this area are generally good”². That may be so, but these rules do not fathom the emotional content of the matter nor what is at stake for immigrant families.

5. Remedies proposed

Encounters between the CWS and immigrants are never happy occasions. What can be done? It may not lie within the scope of a descriptive paper to prescribe action; but as concerned citizens and social scientists we observe that there are ways towards a resolution of the situation.

5.1. Revision of laws

The existing Child Welfare Act (1992) is no longer adequate to the state of present affairs. Number and diversity of immigrants has risen steeply, and they ascertain their right to live as they please and are entitled to. This leads to conflict in certain areas as child protection and, at the moment of writing, to a plethora of legal proceedings.

² Hansen (2019), translated by the authors.

Authorities are well aware of the situation and attempting to ameliorate it. A proposal for a new child welfare law is under way and will proceed to parliament. This is a follow-up of the White paper NOU 2016:16. Here the need for consideration of the child's cultural, linguistic and religious background is emphasized in chapters 3.4.3 and 3.6.3.

Consultative hearing for the new law terminated 1. August. Among input given are comments by the Islamic council of Norway (IRN). The IRN is an umbrella organization representing 33 Muslim organizations with 65 000 members. The letter by IRN (2019) points to the statutory rights of minority children as stated in UNCRC Articles 20 and 30, and argues that the child's best is to safeguard its cultural, ethnic and religious background. There is a fear expressed that otherwise a separation of parent and child is irreversible. Therefore, as a basic rule a child under care should be placed in foster-homes with a similar background, preferably with its own kin. The IRN acknowledges the insufficient number of Muslim foster-homes available but reasons this is because a secular upbringing is the main norm for the CWS.

Another NGO representing immigrants, Norsk Innvandererforum (NIF), has responded with a similar message. It holds that foster homes should have a cultural, religious, linguistic and ethnic background similar to the child's (NIF 2019:2), and stresses that “Many children experience identity problems when their placement in the foster home or institution ceases. They experience difficulties in reconnecting and entering into a community with family and relatives because the bond is broken and they may have lost language, cultural socialization, ethnic affiliation and religion”³. No doubt this is a central concern for many immigrants.

In general there seems to be consensus about the necessity for more cultural sensitivity and competence. The discussion is rather how far to extend the scope of parental authority and ways of upbringing based on cultural justifications without jeopardizing the child's best interests.

5.2. Revision of Child Welfare Services

Experts point out that the ECtHR's massive interest for the Norwegian CWS may indicate a system failure, and see the need for a revision of the whole system. The conflicting roles of the CWS, both to help and to investigate in cases of child protection, must be

³ NIF 2019: 1, translation by the authors

reconsidered. Services should be separated into a helping and an investigative branch it is said (Hansen 2019).

The main workload in child protection is handled by the municipalities and financed by those. After the recent restructuring of the county system even more practical tasks will fall on them. Already financing is a problem. A municipality is often small and usually underfunded. An obvious conflict of interests exists; the CWS is competing for funding with other good causes. Under such circumstances it is difficult to build and maintain specialist competence locally.

Several commentators remark that protection of the child ultimately is the state's responsibility; it should carry a bigger part of the load, both administrative and financially. Some propose a strong directorate with expertise competent to handle difficult cases; others want to relief pressure on municipalities by transferring more tasks to the county level (Hansen 2019).

Child welfare workers state that encounters with minority families are challenging to them. Different languages and frames of reference are among the causes given. The role of the interpreter is undervalued. On the municipal level, to use a professional interpreter is an expenditure that is shunned. Garbled information on both sides obstructs productive dialog and good decisions. Clear and emphatic communication is of the essence in such cases. Information must be adapted to the recipients needs in form and content and must address their concerns. It might be crucial to alter the style of communication from purely legalistic argumentation to explorative dialog. Authorities have to build up the ability of CWS' caseworkers to interact across barriers of language and tradition by including minorities in their staff and augmenting its intercultural competence.

5.3. Building social capital

Positions concerning the child's best will be at cross-purposes as long as trust is lacking and communication fails. At the root of the problem is a need to create community, to replace myths and prejudice on both sides by trust in each other. This is the basic challenge of integration.

Alas, trust hardly develops by itself; in a pluralistic society its growth must be facilitated by authorities, furthered by non-governmental organizations and enacted by citizens. Long-term strategies to build social capital and trust can be attempted in a multitude of ways: by addressing social and economic inequality; by counteracting segregation of

living, and in public life through the creation and active promotion of an intercultural identity and culture.

Immigrants can be empowered by stimulating local economic development and providing adequate housing. City planning, such as the design of soft boundaries through parks, can create spaces for informal interaction between majority and minorities. The siting of infrastructure and public places is important for meeting and participating. Above all it is necessary to make available everyday meeting-places: schools, libraries, parks, recreational and sports-facilities.

6. Conclusion

Interaction between cultures and values can be demanding; one is never quite prepared for the differences encountered. Authorities make efforts to amend the situation by revising laws and regulations. Beyond legal refinements, building trust and community is required.

The perennial conflict about child protection may be seen as ongoing negotiations between minorities and society at large about which values and norms are acceptable and desirable. This friction seems symptomatic of a pluralistic society; continuous dialog is necessary to adapt institutions and norms to changing circumstances. Developing a well-functioning community requires a confident state that acts purposefully, while tolerating diversity and contested norms. There has to be leeway for other ways of living while no-go areas must be marked clearly. Emphatic communication is needed, and it includes a clear stance on basic values.

Regarding the protection of the child it is essential to avoid cultural relativism in the sense of operating with different standards for good child care, based on a family's cultural background. It falls onto both authorities and citizens to be explicit on what is not open to negotiation – i.e. protection of the child against violence and abuse as affirmed in national and international law.

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Dragan Obradović*

JUVENILE OFFENDERS WITH MENTAL HEALTH DISORDERS – SOME ISSUES IN COURT PROCEEDINGS

In all criminal proceedings against juvenile offenders, the juvenile justice system in the Republic of Serbia is linked with the social welfare system and, where appropriate, to the health care system. On occasion, juveniles with impaired mental health or those with various mental disorders also appear as perpetrators of criminal offenses. In these situations, cooperation with the health care system is highlighted in regards to juveniles in conflict with the law with mental disorders. Presented are some of the mental disorders of juvenile offenders from the perspective of a juvenile court judge and the problems encountered after identifying these health problems and when ordering an adequate educational measure in lieu of confinement in a special institution for medical treatment and acquiring of social skills. We have pointed to some data from the official statistics of juvenile justice in this regard. The ultimate goal of the implementation of each educational measure, including that of referring to a special institution for medical treatment and acquiring of social skills is to prevent juvenile offenders from recidivism.

Keywords: *minors, mental health, mental health disorders, crime.*

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Introduction

A variety of crimes are committed around the world every single day. Most of these crimes are committed by adults but a number of crimes are also committed by minors. However, some offenders have specific and various mental health problems, generally speaking. It is the same situation in the Republic of Serbia, where crimes against the person are committed (criminal offenses and misdemeanors).

The World Health Organization (hereinafter: WHO) has long ago pointed out the fact that one in four people in the world will have a mental health problem at some point in their lives (WHO, 2001). These individuals, like all other, have human rights in accordance with the applicable international standards. The WHO *Quality Rights Initiative* (WHO, 2012) is focused on improving the quality and human rights situation of people with mental disorders, and among the documents explaining the need for such an initiative, there is the photo essay *Denied citizens, mental health, and human rights*, which strikingly visualizes the current state of affairs (WHO, 2012 a).

It is also well known that violating human rights can impair or worsen mental health (Mehta N. et al., 2014), especially if we describe mental health by using the WHO definition that states that mental health is the “well-being in which every person can reach his or her potential, cope with the normal stresses of life, work productively and fruitfully, and contribute to the community” (WHO, 2014).

This paper focuses on juvenile offenders in the Republic of Serbia and their mental health status. The majority of juvenile offenders are psycho-physically healthy and inconspicuous. However, minors with a variety of mental disorders can also be perpetrators of criminal acts, or in other words, juveniles with a variety of different problems with regard to their mental health, which will be discussed in the further course of the paper. Also, the valid definition of mental disorders in domestic legislation will be pointed out.

The paper highlights who is considered a minor under the applicable criminal regulations in the Republic of Serbia - a person who is criminally responsible, as well as which educational measures (or security measures) can be ordered for that category of perpetrators. Also, we have referred to official data in this regard as well as presenting some of the most important aspects of domestic regulations related to the protection of the health of persons with mental disorders and the problems in practice encountered by the police and the judiciary in regards to juveniles with certain mental disorders in

criminal proceedings, depending primarily on the recognition of such situations in practice by the competent authorities – the public prosecutors and judges handling criminal cases. In this way, one of the guiding principles of the UN Convention on the Rights of the Child is fully affirmed - the principle of participation, which implies that children have the right to express their opinions and their views on any issues that affect them.¹ While this by no means implies that their opinion will always be accepted and acted upon, the guidelines require that the views of minors be taken seriously and given due attention, in accordance with their age, maturity and the circumstances of the case itself, as well as in accordance with internal procedural law (Vujić, 2013, 473-474). All this is directly related to the protection of individual rights of this category of persons with mental disabilities.

2. Juveniles in applicable criminal regulations

Reforms in the field of criminal legislation in the Republic of Serbia during 2005, with the adoption of the Criminal Code (hereinafter: CC) and the Law on Juvenile Offenders and the Criminal Justice Protection of Minors (hereinafter: JL), have begun to be applied from January 1, 2006² in regards to juvenile justice work and were aimed at improving the status and rights of the child in general.

According to the provisions of the JL, CC and the provisions of the Misdemeanor Law of the Republic of Serbia (hereinafter: ML),³ a minor is a person who, at the time of committing the offense, was 14 years of age and had not attained the age of 18. The provisions of the aforementioned criminal regulations preclude the ordering of criminal - misdemeanor sanctions on children - persons who, at the time of committing the unlawful act stipulated by the law as a criminal offense or misdemeanor, had not reached the age of 14.

These are the basic regulations pertaining to juvenile offenders, though the JL also relies on the provisions of the following most important laws pertaining to the perpetrators of

¹Law on the ratification of the UN Convention on the Rights of the Child, Off. Gazette of the SFRY – International contracts, no. 15/90; Off. Gazette of the SRY – international contracts, no. 4/96 and 2/97 of the UN Convention on the Rights of the Child, Article 12.

²Criminal Code of the RS, Off. Gazette of the RS no. 85/05 issued on October 6, 2005, enacted on January 1, 2006 (hereinafter: CC). Law on Juvenile Offenders and Criminal Legal Protection of Minors, Off. Gazette of the RS no. 85/05 issued on October 6, 2005, enacted on January 1, 2006.

³Misdemeanor Law of the Republic of Serbia (Off. Gazette of the RS, nos. 65/2013, 13/16, 98/16 started with enactment on March 1, 2014).

unlawful acts with the features of criminal offenses: the CC,⁴ Code of Criminal Procedure⁵ and the Law on the Enforcement of Penal Sanctions,⁶ while the ML relies in some parts on the JL.

All these regulations make a distinction in regards to the age of the juveniles committing offenses or misdemeanors, by distinguishing younger and older juveniles. A young minor is considered to be a person who, at the time of the committing of the criminal offense reached the age of 14 but is under the age of 16, while an older minor is a person who, at the time of the committing of the criminal offense, has turned 16 but is under the age of 18.

According to the provisions of the JL, different criminal sanctions can be ordered for the following offenses: educational measures, imprisonment of a juvenile and certain security measures provided for in Article 79 of the CC, but there are differences with regard to criminal sanctions that can be ordered on certain categories of juveniles. Educational measures can be ordered for younger minors, while educational measures as well as imprisonment can be ordered for older juveniles, in exceptional cases. Under the conditions provided for JL, safety measures may be ordered in respect to both minor categories.

The paper focuses on only one of all the educational measures that can be ordered for both minor categories – an institutional educational measure or a referral to a special medical institution for treatment and acquiring of social skills referred to in Article 23 of the JL. It is a specific measure of a medical character (Perić, 2005: 71).

According to Article 23, the JL stipulates that the court may order confinement and treatment in a special institution for treatment and acquiring of social skills instead of a correctional facility, and that this measure shall be ordered instead of security measures for compulsory psychiatric treatment and care in a health care facility, if care and

⁴Criminal Code (Off. Gazette of the RS nos. 85/05, 88/05, 107/05, 72/09, 111/09, 121/2012, 104/2013, 108/2014, 94/16, 35/19.).

⁵Criminal Procedure Code (Off. Gazette of the SRY 70/01 dated December 28, 2001, enacted on March 28, 2002, Off. Gazette of the RS nos. 58/04, 85/05, 115/05, 49/07, 72/09 and 76/2010). Criminal Procedure Code, (Off. Gazette of the Republic of Serbia, nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/19.)

⁶Law on the Enforcement of Penal Sanctions (Off. Gazette of the RS no. 55/14).

treatment of a minor can be provided in a separate institution and thus achieve the purpose of a safety measure.

A minor may be remanded for a maximum of three years in a special institution for treatment and acquiring skills if an educational measure has been ordered instead of confinement to a correctional facility under the provision of Art. 23. Para. 1 of the JL (Art. 23, para. 3 of the JL). If, however, this measure is ordered instead of a security measure, the minor can be incarcerated for an indefinite duration, i.e. “according to necessity,” under the condition that at the age of twenty-one, the remanding is continued in the health care institution where the safety measure of mandatory treatment and care is carried (Art. 23 para. 4 of the JL).

This educational measure has not been applied in jurisprudence, i.e. its implementation has been at the level of statistical error from the moment of the implementation of the JL to the present day, as evidenced by the official statistical data.

3. Statistics of the Judiciary

From 2010 to 2017 in the Republic of Serbia, the input of all ordered educational measures as per category of juvenile perpetrators against which, during each of the aforementioned years, an educational measure or any other sanction was ordered by the provisions of the JL ranged from 3.59% to 4.97%, and in 2013 alone, this share was over 5%, or to be exact 5.32%.

When the share of the educational measure in the same observed period was analyzed – referral to a special institution for medical treatment and acquiring of social skills - relevant for the topic of this paper, that participation was negligible according to all the stated educational measures of the institution, ranging from 0% - 1.73%, and in 2013 and 2016 it was higher.

This is confirmed by the published Statistical Office of the Republic of Serbia (hereinafter : SORS) data for the period 2010-2017 (SORS, 2011 - 2018), which can be seen from the following tables in absolute numbers.

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Table 1. Criminal convictions against juveniles and the ordered educational measures: 2010-2017.

Year	2010	2011	2012	2013	2014	2015	2016	2017
Total	1640	2290	2302	2648	2034	1926	2032	1548
Educational measures	59	104	105	141	89	74	101	75

Table 2. Ordered educational measures and the educational measures from Article 23 of the JL 2010-2017.

Year	2010	2011	2012	2013	2014	2015	2016	2017
Total	59	104	105	141	89	74	101	75
Educational measures from Art. 23 of the JL	0	0	0	4	5	1	4	1

Some authors from the ranks of juvenile judges have been pointing out this institution’s educational measures and issues in this regard for years. Thus, one of the problems that was noticed at that time was that this educational measure was not ordered due to the fact that there were no conditions for its implementation (Simonović, 2012: 303). Another author stated that confinement to a special institution for treatment and acquiring of social skills provided for in Article 23 of the Juvenile Law cannot be ordered for minors due to the fact that such an institution does not exist as of yet. This is emphasized, as Article 23, para. 2 of the JL stipulates that this measure will be ordered instead of the security measure of compulsory psychiatric treatment and care in a health facility if the care and treatment of a minor can be provided in a special institution and thus achieve the purpose of a security measure (Sofrenović, 2012: 308).

4. Mental health regulations

The rights of persons with mental disorders were not taken into consideration until the second half of the twentieth century. It was not until the 2006 United Nations Convention on the Rights of Persons with Disabilities (hereinafter: the Convention) that this issue was addressed in greater detail. The document was ratified in Serbia in 2009 and is an integral

part of our legal system.⁷ The right to health is guaranteed in Article 23 of this Convention, among other rights. However, in this, as well as in some other documents, there is a focus on violating the right to liberty during forced treatment or even voluntary treatment, as well as the right to make decisions (Kelly, 2016). Through this approach, the indirect violation of the human rights of persons with mental disorders is most associated with the health system, i.e. psychiatric help, and somewhat less with the judiciary.

The Constitution of the Republic of Serbia guarantees, among other human rights, the rights of the child and the protection of health as one of the basic human rights, which also includes the protection of physical and mental health.⁸

With respect to mental health in the Republic of Serbia since 2013 (i.e. mental health as stated in the Constitution) there is appropriate legal regulation governing this matter.

The Law on the Protection of Persons with Mental Disorders of the Republic of Serbia (hereinafter: the Law)⁹ defines a person with mental disabilities – an insufficiently mentally developed person, a person with mental health disorders, or a person suffering from addiction. Essentially, the concept of mental health disorders includes psycho-physical disability, arrested development and mental disorders in certain categories of minors for which the educational measure referred to in Article 23 of the JL is ordered. This law defines a child in the same way as the Convention on the Rights of the Child - a person who is under the age of 18.¹⁰

The aforementioned Law also contains a special chapter concerning the treatment of persons with mental disorders who are perpetrators of criminal offenses or misdemeanors. These provisions regulate the procedure for bringing in persons with mental disabilities for medical examining by competent persons, changed circumstances in the course of serving a sentence of a person with a mental disability and the measure of mandatory psychiatric home health care for persons with mental disabilities.¹¹ All of these provisions

⁷Law on Ratification of the Convention on the Rights of Persons with Disabilities, Off. Gazette of the RS, international contracts 42/09.

⁸The Constitution of the RS, Off. Gazette of the RS no. 98/06, Article 64.

⁹Law on the Protection of Persons with Mental Disorders, Off. Gazette of the RS, no. 45/2013, Article 2, item 1.

¹⁰Law on the Protection of Persons with Mental Disorders, Off. Gazette of the RS, no. 45/2013, Article 2, item 12.

¹¹Law on the Protection of Persons with Mental Disorders, Off. Gazette of the RS no. 45/2013, Article 58-60.

apply to proceedings against adult convicted perpetrators who have been sentenced to imprisonment or ordered a security measure of compulsory psychiatric treatment.

Bearing in mind the subject of this paper, even though persons suffering from addiction (most often addiction to drugs or, to a lesser extent, alcohol) belong to the category of persons with mental disabilities, we do not refer to this category of minors towards which, after the procedure, some security measure should be ordered along with educational measures - that is, penalties, as stipulated in Article 39 of the JL. Attention was focused on other categories of persons with mental disabilities referred to in the Law - insufficiently mentally developed persons or persons with mental health disorders, against which in some cases there would be criminal proceedings, taking into consideration the problems encountered in practice when these categories are juvenile perpetrators.

5. Problems in practice

In regards to juvenile offenders against which criminal proceedings are being conducted, juvenile court judges are obliged to submit (in the preparatory procedure), in addition to all other activities undertaken, a report from a competent social work center on all circumstances concerning personal and family life, the childhood, health, etc. of the minor concerned until the time of the submitted report. Regardless of the report or the information in the submitted report, if the juvenile court judge doubts the maturity of the juvenile or if this doubt is suggested by the public prosecutor or juvenile defense counsel and they can support this doubt by relevant medical or other documentation for the juvenile, the juvenile court judge can decide that the juvenile's maturity should be examined, in order to determine whether that person is mentally developed enough to participate in the criminal proceedings.

Some authors state the following: "... the legislature here, and in other places where maturity is mentioned, had in mind all its dimensions, because this is the only way to speak about the entire problem, that is, the full social responsibility and behavior. Maturity is considered to be a broader concept than the concept of mental development" (Perić, 2005: 41). This is cited by other authors from the ranks of judges, who in their work have encountered juvenile offenders in practice: "the term 'juvenile maturity' is more appropriate in legal and practical terms, less reminiscent of medical terminology and terms, and contains in addition to intellectual, emotional and social maturity - developmental and biological, physical, educational, cultural and other forms of maturity. Also, this concept is more acceptable and less formalized for the practice of centers for

social work. Namely, in our opinion, determining the degree of maturity does not require, at least in the first stage of the procedure, for the juvenile to be fully subjected to a battery of tests, in a situation where, on the basis of data already available to the center for social work (from previous records, from an earlier procedure or data obtained from a social worker working in the field, etc.). Sometimes it is sufficient to conduct a psychological interview to test for any so-called deviations, especially in first time offenders and those from a stable family, as well as in the case of minor or summary offenses or crimes. Thus, in addition to the assessment of the juvenile’s maturity, for example, by a psychologist at a center for social work, there should be no dilemmas and problems...” (Milošević, 2008: 10-11).

Namely, when making a decision in each of the criminal proceedings conducted against juveniles, the court is obliged, when choosing an educational measure, to appreciate all the circumstances stipulated in Article 12 of the JL, among which is also maturity which is not in accordance with their biological age (Obradović, 2015: 389-390). Based on the assessment of all these circumstances and depending on the stage of the juvenile proceedings in which the juvenile’s maturity is suspected and following the commission’s expert examination, if such a juvenile’s behavior is found to be inconsistent with their biological age, the juvenile court judge may suspend the preparatory procedure at the juvenile public prosecutor’s proposal and during the proceedings before the juvenile court an adequate educational measure may be ordered against such a juvenile under Article 23 of the JL, which in practice is negligible, as shown by the forementioned data. However, they may be ordered some educational measure if their age permits it, and a stipulated educational measure from the JL can be ordered, although not necessarily an adequate one.

We have also focused our attention on minors with certain mental health disorders - other types of mental disorders than those listed above, who appear as perpetrators. When a juvenile court establishes on the basis of the expert examination of certain minors by a panel of experts that they suffer from a certain type of mental health disorder and did not commit an offense due to insanity which would require a security measure of compulsory psychiatric treatment in a health care institution, judges resort to different types of “juggling” due to a lack of an appropriate facility for medical treatment and acquiring of social skills, considering the appropriate measure for the minor would be the educational measure referred to in Article 23 of the JL. Thus, some juveniles are remanded in other institutions, such as correctional institutions or facilities, although this is not an adequate educational measure for juveniles, and it is necessary to order some harsher educational measures such as enhanced surveillance. Some years ago, some authors from the ranks of

juvenile court judges pointed out this problem: “(... it should be noted that there are a large number of children and juveniles in the Juvenile Detention Centers in Belgrade and Knjaževac as well as Kruševac with various psychological problems who, in fact, need to be placed in a special institution for medical treatment and acquiring of social skills)... ” (Sofrenović, 2012: 308). Other authors point to the same problem - there are estimates that there are between 30 and 40% of juveniles with characteristic disorders and special needs who are not adequately provided for by establishing a special institution for treatment and acquiring of social skills (Jovanović, Sofrenović, 2019: 82).

Authors have different views regarding which institutions are responsible for establishing a facility for special medical treatment and acquiring of social skills.

Thus, Professor Perić considers in regards to Article 23 para. 1 of the JL that this involves a facility for social work which is not included in the list of facilities stipulated in the Law on Enforcement of Penal Sanctions – institutions, where juveniles with developmental concerns or mental disorders should be referred because the types of institutions and their activities are stipulated in the regulations related to social protection of children and youth (Perić, 2005: 292). On the other hand, some authors from the ranks of juvenile court judges claim the following: “it is unacceptable that until now some health care institution has not been designated for this purpose or a department within a specific health care” (Simonović, 2012: 303). However, it is a notorious fact that the state has not provided an adequate institutional capacity to accommodate this category of juvenile offenders.

There were a number of cases in the Valjevo High Court in the previous period, from the beginning of the implementation of the JL to the present day, whereupon certain educational measures were ordered for juvenile offenders. In fact, the most frequent one was a correctional facility; less often an educational institution. The reason for this is because there is no special institution for medical treatment and acquiring of social skills, which makes it impossible to order the educational measure referred to in Article 23 of the JL. In none of the cases when these educational measures were ordered did the court make recommendations regarding mental health treatment of minors suffering from mental disorders, although such interventions would undoubtedly have a positive effect.

6. Conclusion

The availability of quality mental health care or quality treatment, especially in the case of persons with mental disorders who have been convicted and are serving a prison sentence, is a considerable problem. The existing capacities for adequate care are hardly sufficient.

The problem is much greater when it comes to juvenile offenders with mental disorders, for which an adequate educational measure cannot be ordered. Thus, that category of perpetrators cannot be adequately taken care of due to the lack of a special institution for medical treatment and acquiring of social skills.

The Republic of Serbia has a very low birth rate and every single child is precious, whether it is a physically and mentally healthy child or a child with certain physical or mental disabilities.

It is therefore necessary to acknowledge that the state or institutions have failed in this particular case, regardless whether this involves the social or the health system, which were obliged to provide in a timely manner or at least with no delay a special institution for medical treatment and acquiring of social skills for that category of minors in conflict with the law. Therefore, in the future, it is necessary to take measures within the social system or health care system as soon as possible to create or provide within the existing systems for a special institution for the medical treatment and acquiring of social skills of minors with certain mental disorders and not to assume that future amendments to juvenile legislation will help overcome the aforementioned problem by removing the educational measure of referring to a special institution for medical treatment and acquiring of social skills, which would resolve this serious problem (which has existed for 14 years, counting from the beginning of the application of the Law on Juvenile Offenders and Criminal Defense of Minors).

In addition, it is necessary in the coming period to instruct police officers, as well as representatives of the judiciary - public prosecutors or juvenile court judges who deal with the most delicate cases (namely, the cases of juvenile offenders) about some of the most common mental health problems or some the mental disabilities typical for minors and to provide training for them in interaction techniques with minors in crisis. It is also necessary to inform health care employees, especially in the field of mental health, of human rights and the rights of persons with mental disabilities.

Such a systematic treatment is bound to have a positive impact on the protection of human rights and the mentioned categories of children, as well as on the prevention of discrimination against these persons, but will also have an indirect effect on their families and act in the best interests of the child, which is the basic commitment of the Convention on the Rights of the Child.

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Silvia Signorato*

**IP ADDRESS AND THE FIGHT AGAINST CHILD SEXUAL
OFFENDER AFTER THIRTY YEARS SINCE THE ADOPTION
OF THE CONVENTION ON THE RIGHTS OF THE CHILD:
THE NEED FOR EU REGULATION**

Sexual abuse and sexual exploitation of children, including child pornography, are very serious crimes, which must be combated to the highest degree. At present, however, there are still too many legal obstacles in the prevention and prosecution of these crimes. One of the main obstacles is the difficulty in the collection of IP addresses, which are very important evidences. Each Member State has its own legislation, and there are no clear EU indications about the retention period of IP address. In this article a four year retention period for the IP address is proposed in order to balance the needs of the protection of fundamental rights and of the investigative activity. This suggested retention period comes from the analysis of the regulations regarding data retention and the data on the investigative practice of all the Member States, taking into account the need to protect the fundamental rights.

Keywords: *IP address, data retention, sexual abuse and sexual exploitation of children, child pornography, cyber investigations.*

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1. Introduction

This article is aimed at evaluating the significance of IP address in fight against child offender in European Union. Such a topic is analysed from the point of view of data retention law¹.

In Europe, the proportion of children sexually assaulted during their childhood² is between 10% and 20%. Sexual abuse and sexual exploitation of children, including child pornography, constitute serious violations of fundamental rights. In particular, they are violations of the rights of children to the protection and care necessary for their well-being, as provided for by United Nations Convention on the Rights of the Child³. Moreover, Article 34 of such a Convention provides that “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse”.

These *crimes* are particularly cruel and lead to huge suffering to the victims. Unfortunately, this phenomenon continues to grow, mainly because of four factors: the Internet (in particular, the Darknet)⁴; easiness of international travels aimed at child sex tourism; the business related to this kind of crime; the lack of an adequate legal framework. These factors are described in detail.

1. The Internet facilitates the commission of serious crimes such as sexual abuse and sexual exploitation of children, including child pornography⁵. This is because the Internet makes these actions easier: grooming⁶; solicitation of children for sexual purposes; production, distribution and use of child pornography; arranging and booking trips aimed at child sex tourism (CST); incitement and aiding such crimes. Furthermore, the use of anonymisation

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¹ The term “data retention” states for storing of non-content data by Internet Service Providers (ISPs) in order to meet legal and business data archival requirements.

² See https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/child-sexual-abuse_en.

³ See preamble of such a Convention. See also Article 24 Charter of Fundamental Rights of the European Union.

⁴ According to Meter, 2018: 17, these different types of paedophiles which use the Internet can be identified: Closet collector; Isolated collector; Cottage collector; Commercial collector; Pedo-crime (organized).

⁵ See Torretta, Bonucchi, Cotroneo, D’Amato, 2016, 10-25.

⁶ Grooming is the process by which an adult befriends a child in order to commit sexual abuse. See McAlinden, 2012; Ost, 2009: XIII-273.

programs or of the Darknet⁷, which makes investigations more difficult, helps to guarantee the anonymity of those who commit crimes.

2. The fact that there are organized international travels aimed at child sex touring is extremely worrying. This phenomenon started in the second half of the 20th century⁸ and shows no signs of abating. On the contrary, it is increasingly organized and difficult to combat.
3. The gain related to sexual abuse and sexual exploitation of children is enormous and constitutes a real business on an international scale. For this reason, such cruel crimes have become attractive even for organized crime networks, which have an increasing role in their commission.
4. Finally, the legal framework does not seem entirely adequate and its improvement appears urgently needed. Sexual abuse and sexual exploitation of children are increasingly transnational crimes. They can only be prosecuted on the basis of a fast and effective investigative cooperation between states. At European level, some acts aimed at improving investigative cooperation were issued. Among these acts, there is the one that established the European Investigation Order (EIO)⁹. However, investigators still tend to use this tool too little¹⁰. Furthermore, although the EIO speeds up the evidence collection time, the e-evidence collection is still generally too slow. Since an e-evidence is characterized by a potential instability and therefore can quickly undergo alteration, degradation, or loss¹¹, its collection must be timely¹².

⁷ The Darknet is an application and protocol layer riding on the Internet where the user navigates in a completely anonym way. See e.g. Pace, 2017.

⁸ See Commission of the European Communities, 1996: 2, which states that “The sexual exploitation of children in tourism is perpetrated not only by paedophiles, who constitute the hard core of child sex abusers, but also by preferential abusers and occasional abusers. (...) However, the distinction should in no way disguise the unacceptable nature of any such practices”.

⁹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

¹⁰ There are cases where the Judiciary prefers not to request evidence by means of EIO. This because several reasons. For example, some judiciaries do not know how to request an EIO; in some cases the judiciary finds the procedure to obtain the EIO too difficult or the preliminary authorization by his/her head is required and this is an obstacle.

¹¹ See Signorato, 2017a: 60.

¹² At present, there are two proposals for Community act aimed at improving speed and effectiveness of e-evidence collection. The first one is the Proposal for a regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM/2018/225

The sexual abuse and sexual exploitation of children, including child pornography, are very serious crimes, which must be combated to the highest degree. Therefore, it is necessary and urgent to remove the legal obstacles to the persecution of these crimes. In particular, the diversity of the regulations of the various Member States about the IP Address retention is a significant legal obstacle. This problem is examined in this article, where a possible solution is also suggested.

2. The IP address: basic technical knowledge

The term IP address means Internet Protocol address. An IP address is a numerical label connected to a computer network that uses the Internet Protocol for communication. It serves two main functions: host or network interface identification and location addressing. Therefore, on the one hand it enables devices to communicate with each other, and on the other it is a sort of fingerprint of the device. Each device connected to the network has a specific IP address, different from the one used by all other devices¹³.

There are currently two versions of IP address: IPv4 and IPv6. An IPv4 is a string of four dot-separated numbers between 0 and 255, therefore encoded with 8 bits, for a total of 32 bits¹⁴. A typical IPv4 address is 192.0.2.53. Version 4 allows the definition of just over four billion of unique IP addresses, which are now largely assigned, leading to the risk of their exhaustion¹⁵. To overcome this problem, version 6, i.e. IPv6, was introduced. An IPv6 is a string of eight colon-separated groups of 4-bit hexadecimal digits, for a total of 128 bits. An example of IPv6 is 2001:0db8::53¹⁶.

Every time a user sends an email, visits a site, participates in a video conference, or performs any online operation, its IP address can be stored by the server¹⁷. This happens, of course, also in the case of automatic access to the Internet by a device.

final - 2018/0108 (COD). The second one is the Proposal for a directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings COM/2018/226 final - 2018/0107 (COD).

¹³ It should be noted that the development of the Internet of Things leads to a significant increase of the number of devices that are connected to the network. See Fortino, Trunfio, 2014.

¹⁴ ICANN, 2011: 5.

¹⁵ ICANN, 2011: 5.

¹⁶ Two colons side by side in an IPv6 address means that all the segments between them contain only zeros. If the two colon notation is not used, the address shown in the example becomes 001:0db8:0000:0000:0000:0000:0000:0053.

¹⁷ In several European states a service and content provider within the internet industry can contact, on voluntary basis, an institutional contact point in order to report either the existence of child sexual abuse material or

The IP address retention is very important for investigation purposes. For example, in the case of a child pornography website, the identification and prosecution of its users is critically based on the knowledge of the IP addresses of those who have connected to it¹⁸. This is because the IP address allows the unique identification of the device from which the connection to the network occurred.

It should be noted that the IP-based identification of the device does not necessarily mean that of those who used it for criminal purposes. This is because the device may be available to several users or may have been stolen, or a hacker may have performed IP spoofing¹⁹. A further investigation is therefore necessary to identify the offender. In any case, the IP address always is a very important evidence.

3. Retention of IP addresses and fundamental rights

As mentioned above, an IP address can constitute really important evidence. For this reason, the rules of the Member States generally require that the servers store the IP addresses for a specific period of time for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

information relating to child sexual abuse related to its services. The complete list is shown here state by state: Austria: Austrian C4-Cybercrime Competence Centre; Belgium: Central Trafficking in Human Beings, Belgian Federal Police; Bulgaria: Intellectual property and illegal content on Internet; Cyprus: Office for Combating Cyber Crime; Czech Republic: Police Presidium, Bureau of Criminal Investigation Service, Cybercrime Department; Germany: German Federal Criminal Police Office (Bundeskriminalamt); Denmark: Danish National Cyber Crime Centre; Estonia: Police and Boarder Guard Board, Intelligence Analysis Division; Spain: Bureau de Investigacion Technologica, Policia Judicial; Finland: Cyber Intelligence Unit, National Bureau of Information; France: O.C.L.C.T.I.C; Greece: Hellenic Cyber Crime Unit; Hungary: National Bureau of Investigation High-Tech Crime Unit; Ireland: Paedophile Investigation Unit, Domestic Violence and Sexual Assault Investigation Unit, National Bureau of Criminal Investigation; Italy: Postal and Communication Police Agency - National Centre for Combating Child-pornography Online – CNCPO; Malta: Malta Police Cyber Crime Unit; Netherlands: Dutch Child Exploitation Team of the National Police of the Netherlands; Poland: Department for Trafficking in Human Beings; Romania: General Inspectorate of the Romanian Police - Countering Organized Criminality Directorate - Countering Computer Crimes Service; Sweden: National Bureau of Investigation; Slovenia: General Police Directorate, Criminal Police Directorate; Slovakia: Slovak Safer Internet Centre; United Kingdom: NCAT Bureau, United Kingdom National Crime Agency; Norway: KRIPOS, National Criminal Investigation Service; Switzerland: CYCO, Federal Criminal Police. Further details about these contact points, in particular their email and phone, can be found in: <https://www.europol.europa.eu/report-a-crime/industry-reporting-of-child-sexual-abuse-material>.

¹⁸ See Davidson, 1988.

¹⁹ IP address spoofing, or simply IP spoofing, is an attacking technique where the *hacker creates* a false source IP address for the purpose of impersonating another computing system. See Bandy, Mathang, 2015: 344-351.

However, this poses problems concerning the respect of fundamental rights, with particular reference to privacy²⁰ and the Freedom of expression²¹. The fact of being able to identify those who have entered certain information on the Internet, besides being a violation of people's privacy, can give rise to restrictions on the freedom of expression. Furthermore, the fact that data storage causes costs for Internet Service Providers should be taken into account.

The preservation of IP addresses is important for both prosecution and defence purposes. As above mentioned, it serves to prevent and combat crimes. Furthermore, it can also be useful for defence purposes because an IP address could also be used by the suspect to prove his innocence.

The need to balance the various rights together makes it difficult to identify the better data storage time of the IP address in accordance with the principle of proportionality. The risk is to lean towards extremes. On the one hand, the exclusive protection of security could lead to the threat of a totalitarian drift. On the other hand, the exclusive attention to privacy could prevent or seriously hinder the prosecution of serious crimes such as sexual abuse and sexual exploitation of children.

At European level there are no directives or regulations establishing a well-defined retention period for the IP addresses. Article 6 of Directive 2006/24/EC generically provided that the period of retention should be “not less than six months and not more than two years from the date of the communication”. However, Court of Justice, 8 April 2014, *Digital Rights Ireland and Others*, declared Directive 2006/24/EC invalid for violation of the principle of proportionality. This important judgement contributed to creating greater sensitivity at European level about the respect for fundamental rights, in particular the right to Protection of personal data.

However, this judgement of the Court of Justice also caused an unforeseen and unwanted consequence, due to the fact that some Member States introduced or interpreted the regulations about data retention too restrictively. The corresponding national regulations

²⁰ The Right to privacy was initially conceived as the right to be let alone (See Warren, Brandeis, 1890:193). Subsequently, this right was extended to include the right to have control over access to personal information. In essence, a dynamic meaning of privacy was added to the static one. The European Convention on Human Rights provides in Article 8 (Right to respect for private and family life) the protection for both the meanings of privacy. Instead, the Charter of Fundamental Rights of the European Union separately protects the private and family life (Article 7) and the personal data (Article 8).

²¹ See Court of Justice, 8th April 2014, *Digital Rights Ireland and Others*, Joined Cases C-293/12 and C-59412, paragraph 28.

were such as to hinder or even prevent the right of defence or, more often, investigative activities. In particular, some investigations aimed at combating sexual abuse and sexual exploitation of children were hindered by the fact that the state to which the IP address was requested had already deleted this data due to the too short retention period provided by its own acts. Section 113b German Telecommunications Act is a significant example, worthy of being described in detail. It requires data to be retained for only ten weeks²². Such a short retention period has an admirable purpose, namely the protection to the highest degree of fundamental rights, including the right to the protection of personal data. However, European investigative practice has shown that this law causes the violation of other fundamental rights such as the protection of the child by hindering the prosecution of crimes.

The experience gained with this German law should be the starting point for serious reflections on the subject. It is necessary to take into account the fact that data retention is an extremely sensitive issue and that privacy is a right to be protected to the highest degree. However, this right must be balanced with security and other relevant rights, such as the right of defence.

4. Searching for a balance between retention period of IP address and fundamental rights.

The Treaty of Lisbon²³ enhances the protection of the right of privacy in many respects. First of all, Article 6 of such a treaty provides that the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (CFR), which assumes the same legal value as the Treaties. In particular, with the Treaty of Lisbon also Article 7 CFR (Respect for private and family life) and Article 8 CFR (Protection of personal data) reached a stronger value. Moreover, the data protection is dealt with a horizontal subject in Article 16 of the Treaty of Functioning of the European Union (TFEU), which provides that “Everyone has the right to the protection of personal data concerning them”.

Directive on data protection in the police and justice sectors²⁴ emphasizes the unescapable significance of the protection of personal data also in these sectors. Moreover, such a

²² In case of location data the retention period is even shorter, i.e. four weeks.

²³ See De Busser, 2014: 215 – 216.

²⁴ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal

directive states that an adequate regulation of the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties contributes to the accomplishment of an area of freedom, security and justice²⁵. The fact that the directive seeks to ensure a protection of personal data in the case of data processing for the purpose of prevention and repression of crimes appears appreciable. This is because also in this subject it is possible to state that “The biggest threat to individual freedom and dignity stems from the excessive informational power of certain companies, or controllers, and the wider, incompressible ecosystem of trackers, profilers and targeters that are able to gather and use this information”²⁶.

In the light of the above, the basic problem is to answer the question: what could be an IP address retention period that guarantees both the protection of personal data and other needs, in particular security?

In order to answer the question, the author of this article conducted two analyses at European level. First of all, the regulation on the retention of IP address of each Member State was examined. This analysis showed that retention periods are extremely different between countries and are often too short. This fact causes many difficulties in case in which it is necessary to carry out the collection of the IP address in a different state from the one carrying out the investigations. It is not infrequent that the State that receives the IP address request has already deleted it on the basis of its own data retention rules. Moreover, it was examined how much time typically passed between the commission of the crime and the request for IP addresses by investigators. This study showed that IP addresses are often required even after many years from the commission of the crime. On the basis of this research it emerged that the retention period of the IP address compatible with the investigative needs is in the range between six and ten years.

The obtained value is very long and, therefore, could cause a significant violation of the right to protection of personal data. For this reason, a further analysis was carried out. In particular, it was assessed whether the need to request the IP address after many years from the commission of the crime was related to the crime itself or due to other factors. In this way it was found that, in many cases, such dilated times were due to investigative

penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. See Signorato, 2017b: 417-428.

²⁵ Directive (EU) 2016/680, recital 2.

²⁶ European Data Protection Supervisor, 2018: 8.

dysfunctions (e.g. reduced investigator staff, difficulties in coordination between investigators, difficulties in investigative cooperation between States, inadequate legal framework, lack of funds to meet investigative needs). However, it is important to emphasize that the retention period cannot be adapted to investigative dysfunctions. Instead, the investigative dysfunctions must be eliminated or at least reduced also taking into account the laws on data retention.

On the basis of the results of these analyses, it is proposed a retention period of IP address of at least three years or, preferably, four years. This value seems such as to balance the various fundamental rights without compromising the outcome of possible future investigations.

5. Conclusions

Sexual abuse and sexual exploitation of children, including child pornography, are very serious crimes, often transnational, that cause enormous suffering to the victims. Furthermore, they also violate the United Nations Convention on the Rights of the Child. This Convention provides on the one hand the rights of children to the protection and care necessary for their well-being and on the other that the States Parties take the necessary measures to protect the child from all forms of sexual exploitation and sexual abuse. These crimes must therefore be combated to the highest degree. At present, however, the effectiveness of the investigations is often weakened by certain legal obstacles.

Since these crimes generally cross the border of the single States, as well as that of the European Union, their effective prevention and combat require international rules. In the absence of such rules, it is necessary at least to introduce as soon as possible a legal act of the European Union that allows a rapid collection of evidence between Member States, suitable to guarantee the integrity of evidence and its admissibility in a Criminal Trial. In addition, new rules on IP address retention are urgently required. This is because the IP address can be a very important evidence for combating these crimes.

However, the drafting of a new regulation on IP address is complex because the corresponding data retention, which is necessary for the prevention and fight against crime, causes a violation of fundamental rights. In order to establish a retention period that respects both the investigative needs and fundamental rights, the law on data retention and the investigative practice of each Member State were analysed. The aim seems to be reached with a retention period of IP address of three or, better still, four years.

It would be appropriate the introduction of a legal act of the EU aimed at regulating not only the IP address retention, but the data retention in general, providing a specific retention period for each type of data. This is because an effective fight against crime can only be achieved through the existence of adequate legislation on data retention common to all Member States. For this reason, the European legislator should intervene in the subject with a regulation and not with a directive²⁷.

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²⁷ A directive is a legislative act that sets out a goal that all EU countries must achieve. A regulation is a binding legislative act. See e.g. Kostoris, 2018: 25.

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DEPRIVATION OF LIBERTY AND INTERROGATION OF THE JUVENILE BY POLICE IN CRIMINAL PROCEEDINGS

Juveniles are particularly vulnerable categories of persons when it comes to the criminal proceedings. In light of this, it is necessary to treat them cautiously in order to secure their freedom. It is important to take it into account when detention or hearing occur since such measures are quite intrusive. International standards and accepted practice in respected area indicate the obligation to apply milder measures to a minor as a substitute for deprivation of liberty that could be regard as an ultimate solution and only applied exceptionally. With regard to the interrogation of juveniles in criminal proceeding, it could be only carried out in accordance with strict legal procedures, taking into account the specificity of the every single juvenile. The goal is not to endanger the personality and development of the minor.

This paper is designed in a way to reflect the international and European standards in this field after introductory considerations. Subsequently, an overview of the situation in Montenegro is also given in light of the substantive and procedural regulations governing the respected area. The focus of the paper are the methods and techniques of interrogation juvenile in as a defendant.

Keywords: deprivation of liberty, hearing, preliminary enquiries, juvenile, criminal offense.

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1. Introduction

Juvenile delinquency has always been a significant social problem that has taken on new and more dangerous dimensions in recent years and decades. Primarily it refers to the modus operandi of the offenses and the attitude towards the victim which is most often cruel and reckless. The wave of violence in which the minors are involved is rapidly increasing and that situation needs to generate a huge concern. Just a few days ago, one, among the series of serious crimes, was committed by a young juvenile who killed an elderly juvenile with a knife and then tossing her into a canal near a lake in one city in the north of Montenegro. The perpetrator was fifteen and the victim seventeen years old. The investigation has so far shown that the crime was committed with a base motives. It would take a great deal of space to list all the crimes committed by juveniles who are committing crimes today, relying on experienced delinquents. It is not a rare situation that they commit the crime with firing from an automatic weapon at the victim in a public place (which has recently been the case). Recently, the use of explosive devices of high destructive power by minors for the criminal activities appears to be significant problem.

It should be underlined that according to the Montenegrin legislation, a minor means a person who was between 14 and 18 years of age at the time of the crime. There are two age groups within this population. First group consist of younger juveniles, ie. persons who were between 14 and 16 years old at the time when the crime was committed and the second group consist of older juveniles, ie. persons who were between 16 and 18 years old. Educational measures can be imposed on younger juveniles for the most serious crimes, while juvenile prison sentence can be imposed on the older juvenile for the most serious criminal offences. Montenegrin legislation provides that persons under 14 years of age are not criminally responsible, while younger adults, ie persons between 18 and 21 years of age, cannot be given the most severe sentences, such as long-term imprisonment.

2. Deprivation of liberty and interrogation of juveniles in light of international law

The international community has adopted a large number of documents dealing with the protection of the child and the need to preserve its best interest. One of the key documents in this field is the Convention on the Rights of the Child.¹ The first international document to deal with this issue is the Geneva Declaration on the Rights of the Child in 1924. The United Nations has thirty-five years later, adopted the Declaration of the Child, which

¹ The Convention on the Rights of the Child, adopted by the General Assembly of the UN, 20.11. 1989.

stipulates special care for the child as well as legal protection. The provisions of this Declaration are incorporated in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. In this paper we analyze the specific provisions of the Beijing rule as a very relevant to juvenile justice.

The Convention on the Rights of the Child in its first Article defines child as every human being below the age of eighteen years, with the possible exception of getting legal age before, according to the law. For the purpose of this paper it will be useful to comment upon Article 37 and 40 of the mentioned document governing the treatment of juveniles in criminal proceedings. According to the Article 37 all forms of inhumane treatment of the child such as a torture, cruel or degrading treatment, or punishment are strongly forbidden. It is important to emphasize that this document provides a ban on the death penalty and life imprisonment in case where there is no possibility of release for persons who commit crimes before the age of eighteen. The Convention explicitly prohibits the deprivation of liberty of a child contrary to the provisions of the law, without any arbitrariness and arbitrariness. Any deprivation of liberty of movement, or the arrest and detention was prescribed as a ultima ratio measure and its duration has been reduced to the minimum time of period. Official structures bears the responsibility, first to think of police, to treat every child deprived of liberty with the respect for human dignity. A child deprived of liberty is necessary to ensure contact with the family and staying in prison separately from adult if it is in his best interest. Provides for the legal and other forms of assistance and make a decision as soon as the procedure by an independent and impartial judiciary, among other, member 37. to treat each child detention shall with the respect of human dignity. A child deprived of liberty is necessary to ensure contact with the family and stay in prison separately from adult if it is in his interest. Provides for the legal and other forms of assistance and make a decision as soon as the procedure by an independent and impartial judiciary, among other, member 37. to treat each child detention shall with the respect of human dignity. A child deprived of liberty is necessary to ensure contact with the family and stay in prison separately from adult if it is in his interest. Legal and other forms of assistance was provided and also decision should be made in a shortest procedure by an independent and impartial judiciary.

Article 40 provides guarantees for a child suspected or accused of having committed a crime. In line with this, presumption of innocence was established alongside with the all the rights after taking official actions toward him with respect of his personality and human dignity. Also, there is a child's right to be immediately informed of the charges, to have legal assistance in the preparation and presentation of the defense, independent and impartial judiciary without delay to made a decision in the presence of a parents. Any

form of coercion that the child testify or confess guilt is expressly prohibited according to the Article 40 of this international document.

UN Standard Minimum Rules for the Juvenile Justice (the Beijing Rules)², were created in order to protect the interests of the child in criminal proceedings, including mandatory guidelines for treatment of a child from the moment of his detention to the moment of release. The principle of the child welfare and the principle of proportionality were underlined. For the purpose of this paper is optimal to analyze the second and third part of the document. It is provided that a parent of the child shall be immediately notified of the arrest and a court of competent jurisdiction to urgently consider the possibility of releasing the child. It is the very emphasized need to resolve cases without resorting to formal trial or to use any model of diversification. It is particularly important provision on the need for specialization of police officers for minors. They have to be trained as a service to perform in a way that effectively implement laws on the juvenile judiciary.

3. Montenegrin legislation in the field of juvenile delinquency

Until 2011. the proceedings against juvenile offenders in Montenegro was regulated under specific provisions of the Code of Criminal Procedure which define the position of minors. As a result of an effort to regulates the materia in question, the Act on the treatment of juveniles in criminal proceedings was enacted.³ The quality of this regulation is that it is edited in a way to deal with all age youngsters and children who can be found in the criminal proceedings, from perpetrator to victims of crime, emphasized the obligation of competent authorities to take into account the maturity of these young persons, stage of development, personal characteristics and severity of the crime. The purpose of the official structure response is rehabilitation and reintegration taking into account the urgency and need to respect international standards that we have previously quoted.

In article 64 of this Act, provisions on the collection of information and the hearing when it comes to the juveniles was contained. It was provided that in the cases of collecting information of a minor by a police officer for juvenile to act in accordance with the Criminal Procedure Code and perform action in the presence of a legal representative of the minor or representatives of social social center. The hearing of juvenile has to be

² Beijing Rules, Resolution 40/33 of the UN General Assembly 29.11.1985.

³ The law on the treatment of juveniles in criminal proceedings, Official Gazette of Montenegro, br.064 / 11 of 29.12.2011. and SL. Gazette no. 001/18 of 1.4.2018.

conducted by prosecutor for juveniles in the presence of juvenile counsel and legal representative of the minor. It is important to emphasize that there is a possibility of the hearing of the minor by a police officer for under age youngsters. The conditions for the examination are similar to the examination of the suspect by the police during the preliminary investigation, in accordance with the Code of Criminal Procedure. Hearing of the minor will have the form of evidence in criminal proceedings if several legal conditions are fulfilled. The first one is that the hearing needs to be approved by the public prosecutor for juveniles. The second condition is that a minor has to consent to a hearing. The third condition is that the hearing has to be conducted with the consent of the legal representative of the juvenile and with the presence of the juvenile counsel and juvenile legal representatives.

The norm provided in Article 10 of the cited Act governing one of the alternative measures for the juveniles and this is a warning that may be imposed against a juvenile offender for the crimes punishable by a fine or imprisonment up to three years. This measure could be imposed by a police officer with special knowledge in the field of protection of rights of juveniles.

4. Deprivation of liberty by police

Deprivation of liberty of a minor by the police is based on the same legal basis as well as deprivation of liberty of adults but with the differences in tactics. According to Article 264 of the Code of Criminal Procedure of Montenegro⁴ police officers can deprive a person of liberty if there are some of the reasons for detention. The reasons for detention are laid down in Article 175 of the CPC and this is the most serious measure for ensuring the presence of the defendant that have a facultative character. This means that in case of reasonable suspicion that a person has committed a criminal offense detention may be imposed if there are several groups of reasons. One group of reasons for detention exist if the person is hiding or if it can not establish his identity or if there are circumstances that point to escape. This form of detention is determined in order to ensure the presence of the accused in criminal proceeding. The second group of reasons for detention exist if circumstances indicate that he will destroy, alter or falsify evidence or traces of the crime or that would interfere with the process by influencing witnesses etc. This group of the reasons for the detention was determined by in order to prevent the obstruction of the proceeding. The third group of reasons for detention under paragraph 3 Article 175. CPC exist if circumstances indicate that he will repeat the criminal offense or complete the

⁴ The Code of Criminal Procedure of Montenegro, Sl. Gazette of Montenegro, No.28 / 2018

criminal offense. This type of detention is determined on a preventive reasons. The fourth group of reasons for detention exist in relation to the gravity of the offense. This means that the detention may be ordered against criminal offender for the crimes punishable by a imprisonment up to ten years or more and that is especially difficult because of the manner of execution or the result and if there are exceptional circumstances. Detention may be ordered if defendants avoids appearing at the main trial.⁵

After the detention of a minor the police are obliged to inform the competent public prosecutor as soon as possible. The detention must be followed with the official note in which, inter alia shall state the time and place of the arrest. Police delate an official note of the arrest to the State Prosecutor, while the public prosecutor in the statement shall record the time and place of the arrest. A person deprived of liberty must be aware of their rights and immediately informed in their native language or language which he understands of the reasons for the arrest. Police can detained juvenile for up to 12 hours and if they fails to brin in the juvenile to the state prosecutor, the defendant must be released. It is important that the same defendant could not be deprived of liberty again for the same offense.

The legislator provides for detention of a person caught committing a criminal offense prosecuted ex officio, that can make every person with duty to brin in that person immediately to the stete prosecutor or the police and if they do not do so they must notify one of these bodies provided for in Article 265 of the CPC.

The United Nations has adopted rules on the protection of juveniles deprived of their liberty, also known as “Havana rules”.⁶ The largest range of this document is that it ensures the protection of juveniles deprived of freedom from discrimination and physical and psychological abuse. This document guaranteed the juvenile respect for religious and cultural rights and ensured communication with the outside world. With this a uniform treatment of juveniles deprived of their liberty was ensured. Minors are guaranteed the right to appeal which allows these persons to uncensored statements appeal, get the help of family or legal representative.

During the period of work with juvenile delinquents ofone of the authors of this text, it was the practice to a deprivation of a minor for the most serious crimes was carryng out with as little trauma as possible. Therefore, we usually called the parents of minors to

⁵ More in Milan Škulić Comment Code of Criminal Procedure of Montenegro, Podgorica, 2009 sdr.567-587.

⁶ Adopted by General Assembly resolution, nr. 45/113 of 14.12. 1990.

bring in the if there is no risk of avoiding. For bringing in minors we never used official vehicles, but we are for this purpose used a civilian vehicle with certified police officers and they have not worn a police uniform. We did not use to accommodate minors in detention facilities for adult, but we detained them in a specialized institution for delinquent minors.

5. Hearing of juveniles by police

The hearing of the defendant minors by police provided in Article 261 paragraph 5 of the Code of Criminal proceeding is an exception to the rule that this has to be conducted by state prosecutor. This act has probative force unless they cumulatively met at least three conditions. The first requirement is the obligatory presence of the defense counsel of the suspect hearing. The presence of counsel is not required only when the act of hearing, but in the moment of consent suspect that he heard the police and in writing. The second condition is that the hearing approve the state prosecutor. In practice there are cases when police asked the public prosecutor that she heard the suspect, particularly in cases of new forms of crime for which the public prosecutor does not have the necessary expertise. The State Prosecutor should attend the hearing and when to permit the police to interrogate suspects. The third condition is that the suspect agrees to hear police, foreseen in Article 261 paragraph 5 of the CPC. Hearing of the minor by police have the form of evidence in criminal proceedings if cumulatively met at least three conditions. The first requirement is the obligatory presence of the defense counsel of the suspect hearing. The second condition is that the hearing has to be approved by the state prosecutor. In practice there are cases when police asked the public prosecutor to conduct hearing instead of him, particularly in cases of new forms of crime for which the public prosecutor does not have the necessary expertise. The State Prosecutor should attend the hearing even he permit the police to interrogate juvenile. The third condition is that the juvenile has to agree to be heard by police, provided by Article 261 paragraph 5 of the CPC.

Before the hearing the standard procedure must be take on which involves informing the defendant about the offense that he is suspected in particular that does not have to answer the questions and that any statement he makes may be used against him as evidence in criminal proceedings. Defendant must be informed of the right to have a defense attorney who may be present at his hearing. In addition, he has the right to a confidential interview with defense attorney just before the hearing.

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HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHTS OF THE CHILD
“30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”

Contact with family members must be ensured in order to establish contact with defense attorney and in the case of a mandatory defense, defense attorney will be officially appointed. A hearing of the suspect shall be followed by an official note.

The hearing of a child or minor is very different from a hearing adult because younger should regain mental stability that was endangered with police detention and should be continuously maintained at the hearing. Parent, psychologist and other experts should attend the hearing with the aim of empowering minors particularly in conflict situations.

Many times in practice we had an opportunity to see that the first contact with a minor supposed to be the crucial one. The most important period is the first minutes of communication to gain the trust of these individuals. After that, it is important to motivate juveniles to talk and create optimal conditions for the continuation of the hearing.

Once established communication at the introductory part of the hearing, which was formally personal nature, the juvenile has the opportunity to freely communicate about the offense for which he is suspected. He must be able to comment on all circumstances against him and facts that are in line with his favor. When it comes to minor, special attention is paid to respect his personality.

After defendant exposure next step is asking only allowed issues that must be clearly and distinctly set to make minor understand it. When asking questions must be taken into account the cognitive and conative aspect of the personality of minors. It is very important that a minor can not ask suggestive questions that contained the answer. It is forbidden to set up suggestive questions with imputed content that is not important. Expective question as well as all types of disjunctive and attaching question are also forbidden.

A hearing of the suspect shall be recorded in the form of storytelling, and the questions and answers are entered if related to a case. In practice, it is unlikely that a minor entered his statement into the record by his own. The statement can be audiovisual recorded in order to achieve a higher degree of authenticity. Video testimony is an integral part of the minutes of the hearing of the defendant

6. Conclusion

Juvenile delinquents are specific and highly sensitive categories of persons to whom it must provide special criminal legal protection. In order to apply international standards and improve the position of minors in criminal proceedings, Montenegro adopted a law on the treatment of juveniles in criminal proceedings and thus created normative preconditions for ensuring the best juvenile interest in criminal proceeding. It is important to emphasize the necessity of dealing with the increased level of sensitivity to juveniles at all stages of the criminal proceedings and in particular during the arrest and interrogation. In these situations must come to the the principles of humane treatment and professionalism.

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Adrian Stan*

**TO PREVENT OR TO PUNISH?
THE PREVENTIVE MEASURES APPLIED TO MINORS
IN ROMANIAN PROCEDURAL CRIMINAL CODE**

The legal treatment of juvenile delinquency raises serious difficulties. First, because since old times, the minority was sometimes a cause of non-liability or only a reason for a lower punishment. Second, because international instruments can only draw some general rules, but states have to choose, following them, the specific solution.

The legal aspects and difficulties of juvenile justice are nowadays even more on debate than the same aspects regarding adults offenders. The option between a liberal or a repressive model is not easy.

In our paper, first we made some brief observations about the general status of juvenile justice from a historic perspective and nowadays, in some european countries. After that, we observed the new Romanian criminal code provisions regarding the educational system. Passing threw the general conditions that regard aplying the preventing measures, especially the deprivating ones, we will fiind that Romanian procedural legislation does not make serious differences and derogations for the minors. We will try to answer if this is fair, and if we need more derogations, regarding the special situation of accused juveniles. In the end, we will present the position of Romanian Constitutional Court, faced wits some criticism regarding the problem.

Keywords: minors, juvenile justice, educational measures, preventive arrest, sanctions

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1. Preliminary remarks

Everyone knows the famous saying: “*the law of minors, minor law*”. Numerous authors consider this branch of the penal sciences as derogatory of the criminal common law, strongly influenced more by social than juridical considerations, applying to subjects dependant upon the state of minority and discussed by a specialized category of professionals quite different from the ordinary judicial personnel (Ottenhof, 2004).

The creation of separate procedural institutions for the treatment of juveniles who engage in illegal or imoral behaviour is a recent historical development (Elrod, Ryder, 2005, p. 2). Not the same conclusion has to be made regarding the substantial law. Even begining from the Antiquity, minors were not treated fully as an adult.

Old Roman laws, used in Europe until the middle ages, considered that the minority partially protects from the ordinary punishments. We talk about *infans* or *infantiae proximus*, the age of 7-8 years. Up to this age, the problem was only the punishment applied, not the responsibility¹.

In late middle ages, in the laws² edicted under the rule of Emperor Charles the V in the German area (1533), a distinction was made between children and immatures. Children who did not reach the age of 7 were presumed to be not criminal liable. Under the influence of Roman law, beyond this age the problem was only gradation of the punishment, not irresponsibility itself. Usually, the death penalty (very frequently applied in that period) was not ordered for minors, although in cases of serious crimes only the question of the manner of execution was raised (Carpzow, 1677, q. CXLIII).

As in the old systems the pre-trial detention was rarely used, there were no differences between arresting an adult or a minor. We will observe that even nowadays the differences are insignificant, and that is our central criticism idea.

The United Nations decided in 1989 to enact a convention regarding the rights of juveniles, in the context of many violations of their rights around the globe, especially in poor countries, but not only there. Late 80's and early 90's were prolific in international documents, because, some monts later, Minimum Standard Rules of for non-privation

¹ There is an old rule that says: “*malicia supplet aetatem*” (malice/bad faith is more important than the age)

² *Constitutio Criminalis Carolinae*, that was called the first European criminal codification, in force more than 200 years in the states under rule of the German Emperor.

measures, also known as the Rules of Tokyo were adopted by the General Assembly as the Resolution 45/110 on 14 December 1990 (Platek, 2001).

United Nations adopted several other documents of great importance for the criminal judicial status of juveniles. The most important are the Standard Minimum Rules of UN for Juvenile Justice (The Beijing Rules) from 1985, UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) from 1990 and UN Rules for the Prevention of Juveniles Deprived of their Liberty (The Havana Rules) from 1990 (Pavlović, Sarapa, 2018, p. 16).

Very important international documents are the reports of European Committee for the Prevention of Torture. The report from 2012 presents country reports regarding rights of detained juveniles³.

According to article 37 par. b of Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 44/25 of 20 November 1989, “States Parties shall ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

This is the only place in the Convention where it refers about the deprivation of the child, and his rights regarding the difficult situation.

Article 1 of the Convention defines that child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. In almost all criminal systems, the criminal liability for the minor begins around age of 14 and finishes at 18. Below this last age the preventive measures are applied as for a fully responsible person.

2. The educative system or reducing the punitive element. Some models

In comparative criminal law, the response of the states facing juvenile delinquance gravitates between some different models (Pradel, 2016, p. 608). First and the most repressive can be called an anticipation of the future adult: the minor will be treated as an

³ Children’s rights and the European Committee for the Prevention of Torture, 2012, accessed at <https://rm.coe.int/168045d229> at 23.08.2019

adult (or a half-adult). In the United States for example, in many states, the child aged over 15 that committed a serious crime is considered an adult. In Netherlands, the minor aged over 16 is also treated as an adult and the same is in the Belgian criminal system.

The second model regards that the punishments for juveniles are less severe than the applied to adults. This is the English law model. So, Powers of Criminal Courts Act (2000) dictates detention and training order, supervision order, community punishment order, youth rehabilitation order, reparation order, action plan order or behaviour orders⁴.

Also, in Italy, the juveniles aged over 14 that are criminal liable will be punished with the ordinary punishments, but diminished with a third part. The prison sentence will be executed in special places – “*carceri minorili*” (Marinucci, Dolcini, Gatta, 2008, p. 425).

The third model is more influenced by liberal or restorative justice. It regards the existence of a double sanctioning system: punishments and security (educational) measures. This system is enforced by Swiss and French criminal law. For example, in France, in 1945 a criminal ordinance enacted a diversity of protective, educational measures. But even nowadays the French Code maintains partially the punishments for minors, reduced than the ones applied to adults (Bouloc, Matsopoulou, 2018, p. 185, Bouloc, 2017, p. 414).

The last model, which is more and more used by the states, is the *non-criminal* model, based exclusively on educational measures. Formally, it is the Romanian system, as we will see, because the term *conviction* or *punishment* are not accepted.

In Serbia, the educative measures are as well autonomous penal measures, that, next to some sort of a coercive function have mainly and preponderantly an educative function, being applicable only to minors that can bear criminal responsibility (M. Đorđević, Đ. Đorđević, 2012, p. 90, according to Rakitovan, 2016, p. 90). The criminal laws of the Republic of Serbia enacted a specific form of deprivation of liberty, which purposes are closer to educational measures. It can not be imposed to any juvenile and also not for any criminal offence (Jovašević, 2018, p. 48).

The specific of minors' situation has thus imposed, in most European states, a special sanctioning system, made up partially of punishments and most of educational measures.

⁴ <https://www.sentencingcouncil.org.uk/about-sentencing/young-people-and-sentencing/types-of-sentences-for-young-people/>, consulted at 26.08.2019

This was the system adopted in 1969 by Romanian legislator (Niță, 2017). On the one hand, minors, with certain derogations, were applied penalties in limits reduced by half to those applicable to major offenders, and on the other hand there could specific sanctions, called educational measures.

The new Romanian system has undergone a commendable evolution with the adoption of the new penal code in 2009 (Stănilă, Stan, 2018, p. 32). Thus, minors can no longer be convicted to criminal punishments, but only there can be applied educational measures. Moreover, a sentence of conviction is not imposed to the minor who has committed a crime, but only a decision to apply an educational measure. Although, apparently, the difference is only one of denomination, the impact and stigma that a convicted minor may suffer is considerably lower if this harsh term is not used.

The non-custodial educational measures are, in increasing order of gravity: the civic training stage (in a regulation close to that of art. 15-1 para. 91 point 6 of the French Ordinance of February 2, 1945); the supervision; the weekend registration; the daily assistance. The last three measures have a regulation close to that given by art. 7 lit. g), h) of the Spanish Law no. 5/2000. The necessity of these measures is justified by the lack of life experience of the minor, the misunderstanding of the meaning of his conduct, the deficiencies of education, the negative influence of some major perpetrators, the insufficiency of the classical social reaction (Zaharia, 2018, p. 227).

From the point of view of the content of these measures, an explanation related to supervision and daily assistance is required. The first of these measures does not imply a direct involvement of the Probation Service in carrying out the activities of the minor's program, the role of this Service being only to monitorize how the minor respects his usual program (attendance of courses, sports, recreational activities, etc.).

In contrast, the daily assistance involves an active intervention of the Probation Service, which prepares the child's daily program, including in this - together with the usual elements in relation to the child's age and school or professional situation (for example, attending school courses). and those imposed by the court - any activity necessary to achieve the purpose of the educational measure (for example, participation in social-educational actions, meant to facilitate the social integration of the minor).

The obligations that the court can impose on the minor concurrently with one of the non-custodial educational measures (art. 122) cover, in general, an area similar to that of the obligations imposed on the major offender who benefits from a non-detention sentence,

but their content will be adapted according to the personality and the conduct of the minor and the specificity of the crime committed.

The Romanian penal code provides for two educational depriving of liberty measures - the admission to an educational center for a period of one to 3 years and respectively the admission to a juvenile detention center, for a duration from 2 to 5 years or, only exceptionally, from 5 to 15 years.

The measure of depriving in a juvenile detention center is ordered, as *exceptio exceptionis*, for a period of 5 to 15 years, only in the case of committing very serious crimes, for which the law stipulates the sentence of life imprisonment or the sentence of imprisonment for at least 20 years (in most cases, we talk about homicide). The duration of the measure is compatible with international regulations and practices (for example, the Resolution of the Congress of International Criminal Law Association adopted in Beijing in 2004 recommends not to stipulate in the case of minor imprisonment more than 15 years).

Law no. 253/2014⁵ emphasizes the role of Probation Services in coordination of the process of monitoring the non-custodial educational measures and enforcement of obligations imposed by the court in charge of minors.

Coordinating the supervision of the minor in one of the educational measures is carried out by the probation officer-case manager. During the execution of one of the non-custodial educational measure, the probation officer-case manager shall exercise supervisory control over the process, both with respect to execution of the measure by the minor and of the fulfillment of duties by the person exercising supervision (Muțiu, 2014, p. 125)

3. The general aims of the preventive measures

In a study that has the finality to criticize some dispositions regarding the preventive measures applying to juveniles, there is necessarily, we think, to observe some general conditions of this special measures.

⁵ Law no. 253 of July 19, 2013 regarding the execution of punishments, educational measures and other non-deprivation measures ordered by the judicial bodies during the criminal trial, published in the Official Monitor no. 513/14 august 2013

Romanian scholars (Mateuț, 2019, p. 739) defined the procedural measures as coercive legal means applied by the judicial bodies in the criminal proceedings in order to ensure the fulfillment by the parties or other procedural subjects of their obligations and to ensure the efficiency of the criminal procedures.

From the procedural measures, it is obvious that the most important but at the same time the most compelling are the preventive measures. We will not try to deal with this subject at large, on which it has been written particularly consistently, but we will point only to the general aims of the preventive measures, as a preliminary aspect necessary for our analysis. Therefore, we think that, in order to understand why minors may be faced to these measures, we must understand why the law sometimes considers them necessary.

Preventive (named also provisional) measures are considered as means of depriving or limiting some fundamental rights of citizens, through which the judicial bodies ensure the normal course of the criminal proceedings or prevent the commission of new antisocial acts.

The Romanian Criminal Procedure Law provides for five preventive measures: the 24 hours retention, judicial control, bail, home arrest and preventive arrest.

The 24 hours retention is the preventive measure with the shortest duration, which can be ordered by the prosecutor or the police officer. If we look at the succession in which these measures are provided in the code, we could say that it is the less severe preventive measure, but the statement is false. The measure is the first one stipulated in the law because, as a rule, it precedes the other measures in the criminal proceedings, being the closest to the moment the crime was committed. From the point of view of the impact it has on the defendant, the measure is particularly severe. We are sure that the perpetrator would prefer many months of judicial control than a single day spent in police detention. If we consider the juvenile delinquent, things are even more serious. One day spent in arrest can sometimes compromise the future of a child.

Judicial control and bail are ordered by the prosecutor or the judge, for periods of 60 days. Usually, the judge orders this restrictive measure when requested to take a more severe one, but he considers that it is not necessary. During this restriction, the defendant must present and sign at the Office of judicial supervision according to a schedule (usually twice a week), must present to the investigation officers, prosecutor, or the judge and not to exceed a certain territorial limit.

The house arrest is the prohibition of the person not to leave his home (including the enclosing yard), for a period of 30 days, which can be extended. The measure can only be ordered by a judge, at the request of the prosecutor. The practice of the Romanian courts has proved that very rarely the house arrest is proposed by the prosecutor, usually the judge accepting it only as an alternative to pure, prison arrest, initially, or after the latter has reached an unreasonable length.

The preventive arrest has similar conditions for applying with the house arrest⁶, both being considered deprivation of liberty measures, although the real difference between the execution is overwhelming.

As a rule, the pre-trial detention is applicable for high gravity offences, provided with the maximum sentence of more than 5 years imprisonment. Also, the arrest is ordered, irrespective of the seriousness of the crime, if there is a danger of absconding, the risk of pressure being brought to bear on the witnesses, destruction of evidence, recidivism or the preservation of public order⁷. In practice, for some charges of medium gravity, the arrest is used, especially at times very close to the criminal act, by reference to the reaction present within the community.

All preventive measures, to be ordered, must meet certain conditions and must be applied only for the achievement of certain purposes.

Thus, the preventive measures are ordered, first, if there is evidence that comes to the reasonable suspicion a crime has been committed. The evidence do not have to reach the same level, or of the same consistency as those required for a conviction decision (we understand here any judgment finding the guilt, because, as we have shown above, the judgments regarding juveniles are not called convictions).

⁶ See Buzadji vs Republic of Moldova, 23755/07, decision from 5 July 2016

⁷ Letellier vs France, decision from 26 June 1991: “*The Court accepts that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused’s release would actually disturb public order. In addition detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence.*”

Then, the measures are taken to ensure the proper conduct of the criminal trial. But nowhere the procedural code does not explain what is this meaning. It is about the presence of the defendant in court, (although, as a rule, this is only an option), the efficiency of the proceedings (although the reasonable term is analyzed according to several criteria, including due diligence of authorities), about offering statements - which also can be regarded as a right, not an obligation?

It is considered that the proper evolution of the criminal trial could be affected by the misconduct of the accused - the attempt to influence the other offenders, witnesses, victims or experts, attempts to destroy or alter material evidence or other such activities.

The prevention from committing another crime is the third common purpose of the restrictions that can be taken against individuals, a situation that takes into account the danger manifested by the suspect. This state originates from the fact that, being the object of judicial procedures, being suspected of committing crimes, by his behaviour before or after the moment of the alleged criminal acts, he proves the real risk of reiterating the crime.

Justification of the preventive measures for other purposes than the express and limited ones provided by the law is not allowed, a conclusion derived from the exceptional character of the preventive measures, from the necessity that they should be ordered only under the conditions of the law, a law that can be interpreted - in this matter - only restrictively.

The law also states a general condition, that the measure is necessary to achieve the above purposes, but also proportional to the seriousness of the accusation drafted against the person.

So, concluding, the aims of these measures, even they are only restrictive or regarding deprivation, are to prevent, not to punish.

4. The preventive measures for minors in Romanian criminal procedure

International human rights law instruments underline that child detention should take place only under very exceptional circumstances. However, children involved in criminal proceedings do face pre-trial detention; placement in special educational or correctional institutions, where restrictions of liberty or movement apply; and even penal sentences

imposing on child offenders custodial sanctions (imprisonment/detention). All of these measures restrict or deprive children of their liberty.

The Chart of Fundamental Rights of the European Union encompasses, in Article 24, the idea of children as persons in their own right and rights holders. Article 24 (1) specifies in particular “age and maturity” as criteria for balancing protection of children’s rights and child participation. It states: “Children shall have the right to such protection and care as is necessary for their wellbeing. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.”⁸

In ECHR jurisprudence, the minors' assistance and procedural rights are highly protected. In *Salduz vs. Turkey*, Court held that there had been a violation of Article 6 § 3 (c) taken together with Article 6 § 1 of the Convention. It noted in particular that one of the specific elements of the instant case was the age of the applicant – a minor at the time of the offence. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody, it stressed the fundamental importance of providing access to a lawyer where the person in custody is a minor (see paragraph 60 of the judgment)⁹.

Regarding the minors, firstly we have to point out that the general purposes are applicable, with no derogation. Then, it was stipulated as a general rule, the possibility of depriving the minor only if the effects of such a measure on the personality and development of the minor are not disproportioned compared to the legitimate objective aimed at by having taken the above mentioned measure.

Article 243 of Romanian CPC rules:

(1) Preventive measures against the juvenile defendant can be arranged according to the provisions in sections 1-7 of this chapter, with the derogations and additions provided in this article.

⁸ European Union Agency for Fundamental Rights, Children’s rights and justice, Minimum age requirements in the EU, accessed at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-minimum-age-children-rights_en.pdf, accessed on 23.08.2019

⁹ *Salduz vs. Turkey*, 36391/02, judgement from 27 November 2008

(2) Preventive detention and 24 hours detention may be ordered against a minor, exceptionally, only if the effects that deprivation of liberty would have on his personality and development are not disproportionate to the purpose pursued by taking the measure.

(3) When determining the duration for which the measure of preventive arrest is taken, the age of the defendant shall be taken into account from the date on which the measure is taken.

(4) When the detention or 24 hours arrest of a minor has been ordered, the information provided in art. 210 and 228 must be made also to his legal representative or, as the case may be, to the person in the care or supervisio the minor is.

Therefore, a single legal provision which requires a closer analysis regulates the exceptions regarding minors in the matter of preventive measures.

The derogation refers only to 30 days pre-trial detention and 24 hours arrest. Normally, it should also refer to house arrest, because it also constitutes a deprivation of liberty. Of course that as it is an alternative to pre-trial detention, detention at home is desired, sometimes even requested by the accused. However, the ECHR has imposed a careful analysis of the conditions of its disposition.

It is to be noted that the old Romanian Code of Criminal Procedure of 1969 provided for many more derogations, being, we believe, more efficient in this respect. The current legislation leaves too much power in the hands of the judge.

Thus, it was stipulated in the old provision that the minor between 14 and 16 years could be arrested only if the punishment provided by law for the act he was charged was at least 10 years prison or more. For the minor between the ages of 16 and 18, the arrest could be ordered for less serious acts, but for a period of only half the duration of the adult arrest.

Returning to the present, it is observed that the duration of the preventive arrest is the same as for adults (30 days) respectively maximum 180 days during the investigation, and at most half of the maximum punishment provided by law, during the trial. Same is the situation of the house arrest.

The effects of the deprivation of liberty measures must be analyzed on two levels: the interest of the minor and the public interest of the society. In fact, finding this balance is the essential element and challenge of all preventive measures. In order to agree, the

judicial body needs factual elements to take into account when choosing the measure that must be the most appropriate for the purpose pursued. Also, the restriction should not affect the personality of the minor (Volonciu, 2017, p. 637).

But how can the prosecutor, when evaluating the 24 hours detention, or the judge, evaluating the 30-days arrest proposal, know the personal condition of the minor?

Art. 506 RCPC provides that in the cases where the accused is underaged, the criminal investigation office may request the Probation Service to draw a report to assess the personality of the minor.

The following paragraph stipulates that the judge, after being notified with the trial of a case with a minor defendant, will necessarily request the evaluation report.

There are some disadvantages and practical problems. Since the report is not mandatory in the criminal investigation phase, there is the possibility of taking a preventive measure without knowing the aspects regarding the child's personality. So, can the prosecutor or judge take a fair decision? We don't think so. The difficulty exists especially because, as a rule, the 24-hour detention is ordered immediately after the criminal act is committed, as a quick reaction to its seriousness, and drawing the report is not possible.

The problem was also observed by specialists (Mateuț, 2019, p. 888). It was said that the evaluation report, essential for assessing the situation of the juvenile accused of committing a crime, should be mandatory as a prerequisite for granting even the judicial control, the alternative measure of arrest. It is said that the text of the law should be modified, in the sense that it should have expressly provided for the obligation to request this evaluation report before taking the decision on deprivation of liberty. Otherwise, the reference in the law to the special analysis of proportionality and the impact on the minor is lacking in content.

So, the possibility to arrest a juvenile without evaluating his special personality by specialists is an important problem regarding minor's rights in pre-trial proceedings.

5. Do we need a more “specialized” preventive system for minors?

As we have seen, criminal law statements increasingly renounce to apply punishments in the classical sense of the term for offenders who commit criminal acts as juveniles, in favor of educational measures, with a strong reintegration nature.

However, it was not possible to enact a system of correspondent preventive measures, a kind of educational preventive measures that would balance this gap. We admit that this is a challenge for juvenile criminal justice.

Thus, it is certain that the minors get to execute educational measures with deprivation only in extreme cases, as *ultima ratio*, in the situation of committing some very high seriousness acts, where the judge considers that maintaining in the community is not sufficient. So, deprivation of liberty is by far the exception, not the rule.

However, sometimes, the prosecutor or the judge considers that the detention or preventive arrest of the minor is required, although the alleged act committed is not particularly serious. Obviously, the reason for the preventive measure and the punishment cannot be omitted, as it is known that the grounds that can sometimes justify the preventive detention should not be of the same intensity as those which would justify a subsequent conviction. But we believe that arresting a minor is sometimes too much.

In order to understand why we believe that the Romanian law is too permissive for the authorities in taking the most severe measures against a minor, it is necessary to turn to the material legal provisions contained in the Criminal Code.

So, regarding the sanctions applicable to minors, we have a certainty. If we are not in the situation of reiterating the criminal behavior (the so-called recidivism of the minor), when the act for which the minor is accused is provided for a maximum sentence of 7 years imprisonment, there can never be ordered a detention educational measure against him. In this case, the legislator imposes a prohibition that does not exist regarding the adults, even when the maximum penalty is particularly low, or alternatively with the fine.

We will thus have an absolute ban on deprivation, which even being educational, is considered the last option. However, even the juvenile who is sure he will not be sentenced to special educative prison may be arrested. Do we need this balance between the preventive measure / final deprivation (in reality an educative punishment), or, being different in reason and purpose, the two institutions could not be alike?

We believe that, although pre-trial detention has different purposes than those of punishments (in general) or of the educational measure in the present case, without anticipating the future deprivation, a parallel cannot be avoided. We think that, if the substantial law presumes, in case of committing certain offences, that the minor does not

present a danger that can bring him to the special prison, neither can a preventive measure be considered proportional.

So, we consider that the regulation of a better determined derogatory system is necessary, because the current system allows a too wide margin of appreciation for the one who decides on the freedom of the minor. Thus, it can be made to abuses and arbitrary.

A limit on the maximum punishment provided by law under which the child should not be arrested would be a filter for the severity of the measure he is risking. We believe that it is not natural for a juvenile who cannot be placed in any form of detention to be considered so dangerous as to be preventively arrested, which is, in fact, a detention before trial.

6. Constitutional Court of Romania about “special” preventive system for minors

Regarding this unfair situation, some critics were made in front of the Romanian Constitutional Court. The authors criticised the law text that permits the judge to arrest a minor, even if the maximum of the punishment that an adult risks for that offence is less than 7 years.

The ordinary judge who received the critics argued that the unconstitutionality is justified, but only from the point of view of applying the provisions of art. 114 paragraph (2) lit. b) of the Criminal Code, in the sense that the arrest cannot be ordered against the minor who committed an offense for which the law stipulates the sentence of imprisonment under 7 years.

The judge observed that the regime of criminal responsibility of the minor has a specific character, the rule being the educational measure that does not deprive of liberty, and the exception the privative educational measure. The latter can be ordered in two cases, only if the minor has committed a crime for which an educational measure has been applied before or the law provides, for the act committed, the sentence of imprisonment of 7 years or higher or life imprisonment.

The author of criticism proposed to the Court to complete the provisions of art. 243 of the CPC with a new paragraph, which stipulates that the preventive detention cannot be ordered against the minor defendant accused of a crime punished with the prison sentence

of less than 7 years. But, in fact, we have to admit that Constitutional Court has not that possibility, it is only the legislative that can adjust the law.

Court, in its decision¹⁰, stated that the purpose of the preventive arrest is that of carrying out the criminal investigation, preventing the commission of new offenses by the accused, preventing its escape from the criminal proceedings or from the trial, preventing the destruction of the evidence, the influence on the witnesses, etc.

Thus, the Court observed, art. 243 of the CPC does not provide, with regard to the application of the measure of preventive arrest against minors, special conditions regarding the crimes they committed, such as those regarding the maximum limits of the punishments, only showing that the detention and preventive arrest can be applied, exceptionally, only if the effects that the deprivation of liberty would have on his personality and his development are not disproportionate to the purpose pursued by taking the measure.

Therefore, in the conditions of ensuring the proportionality between the effects that this measure can have on the personality and the development of the minor and the purpose pursued, the preventive arrest can be ordered against the minor offender whenever the criminal investigation authorities or the judge consideres it necessary .

This aspect, the non-conditioning the disposition of the preventive arrest in the case of the minors Court finds to be justified in relation to the purpose pursued by applying the preventive arrest, that of carrying out the criminal investigation.

More recently, a similar criticism has been brought, and the Court has maintained its position¹¹, showing that, on the one hand, there are some guarantees established by the CPC in the matter of preventive arrest of the juvenile defendant, and, on the other, the fact that the release of a minor defendant can create a state of danger for public order.

The Court argued that the provisions of art. 1 paragraph (3) of the Constitution regarding the rule of law, in its components regarding the defense of public order and public security, claims that the judge of rights and freedoms (during the criminal prosecution), the judge of preliminary chamber (in the preliminary chamber procedure) or the judge (during the trial) to be able to assess if there are grounds that justify taking the measure

¹⁰ Decision 50/2016, published in Official Monitor n. 336/3 may 2016

¹¹ Decision n. 438/2018, published in Official Monitor n. 942/7 november 2018

of preventive arrest of the minor and to be able to apply such measure, under the conditions regulated by the provisions of art. 243 of the Code of Criminal Procedure.

As such, Court stated, the provisions of art. 243 para. (2) of the Code of criminal procedure and of art. 127 of the Criminal Code related to art. 114 of the Criminal Code are without prejudice to the provisions of art. 23 of the Constitution, since there are situations that justify the arrest of the minor, and, in the case of solving the criminal case by taking an deprivation educational measure, the provisions of art. 72 of the Criminal Code regarding the computation of the preventive measure.

7. Concluding remarks

As a conclusion, we tried, without pretending to carry out a complete analysis of the minors' judicial rights and obligations, to point some problems regarding the preventive arrest of the juveniles. Although the Romanian new regulations had brought some welcomed novelties, the criminal procedural safeguards for minors are, in our opinion, not sufficient.

The reality, on the one hand, that a juvenile can be arrested almost in all the situations an adult can, and on the other hand the possibility to be arrested without an evaluation report, proves that the legislator has to make some changes, extending the procesual guaranties for the minor offenders.

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Dino Pivac*

VIOLATIONS OF THE CHILD'S RIGHT TO BE REPRESENTED BY A SPECIAL GUARDIAN AND OF THE CHILD'S RIGHT TO EXPRESS AN OPINION AS REASONS FOR ANNULMENT OF FIRST INSTANCE DECISIONS IN APPELLATE PROCEDURES BEFORE THE SPLIT COUNTY COURT, REPUBLIC OF CROATIA (GŽ OB AND GŽ OVR OB REGISTERS IN THE PERIOD 1/1/2016 – 31/8/2019)

Exercise of child's procedural rights is of the highest importance for achieving the best interests of the child, as stated by UN Convention on the Rights of the Child. The task of this research was to collect data from second instance court competent for adjudicating on family law matters and to determine what share of annulment decisions would be caused by violation of subject procedural rights of the child in the total number of annulment decisions, as well as what is the significance of the same violations in terms of the appellate court powers and his limits in examining first instance decisions. County courts in Split, Zagreb and Pula are the only appellate courts in Republic of Croatia in family law matters. The research has collected data from the Split County Court for the period 1/1/2016 – 31/8/2019, which is presented and analyzed through tabels and charts in order of verifying research questions.

Keywords: *right of the child to be represented by a special guardian; right of the child to express an opinion; convention on the rights of the child; second instance annulment decisions; violations of child's procedural rights*

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Introduction

There are multiple reasons for choosing referred procedural rights of the child as the research subject. The right of the child to express his/her views in proceedings deciding his/her rights and interests, and later the right of the child to be represented by a special guardian, were taken over into the legal order of the Republic of Croatia from the United Nations Convention on the Rights of the Child¹ from 1989, Council of Europe Convention on Contact concerning Children² from 2003 and the Council of Europe Convention on the Exercise of the Children's Rights³ from 1996.

The exercise of the child's rights in court and administrative proceedings is of paramount importance for the decision to be based on the “*best interests of the child*”⁴ in proceedings where there is a dispute between the child's parents or a conflict of interest between the child and one or both parents as his legal representatives.

This is the main reason why the Family Law⁵ in all proceedings in which his rights and interests are decided guarantees to a child the following rights:

- the right to express an opinion, which will be taken into account in accordance with his age and maturity (Article 360),
- the right to be represented by a special guardian, in which case the parents are no longer authorized to represent the child in these proceedings and to take action beside the special guardian (Article 240),
- the position of the party in all proceedings, regardless whether are initiated by the child (Article 358),

¹ SFRY Official Gazette no. 15/90, Official Gazette - International Treaties no. 12/93, 20/97; hereinafter: the UN Convention

² Official Gazette - International Treaties no. 7/2008; hereinafter: Contact Convention

³ Official Gazette - International Treaties no. 1/2010, 3/2010; hereinafter: Exercise Convention

⁴ Article 3 of the UN Convention

⁵ Family Law (Official Gazette 116/03, 17/04, 136/04, 107/07, 57/11, 61/11, 25/13; hereinafter: FL/03);

Family Law (Official Gazette 75/14, 5/15; hereinafter: FL/14); Family Law (Official Gazette 103/15; hereinafter: FL/15)

- the procedural capacity which to a child of the age of 14 (fourteen) years may be given by a court decision with the obligatory prior opinion of the social welfare center (Article 359).

Although the exercise of the aforementioned rights is prescribed as a duty of the judicial and administrative authorities conducting the proceedings, in many cases these rights continue to be violated, in whole or in part.

The task of this research is to present and analyze data from one court of second instance competent for adjudicating on family law matters over specified period of time and to determine what proportion of annulment decisions would be caused by violation of the child's procedural rights in the total number of annulment decisions, as well as what is the significance of the same violations in terms of the appellate court powers and his limits in examining first instance decisions.

If it is a substantial violation of the civil procedure law provisions⁶, it is extremely important to determine whether it is a violation of relative meaning (the court of second instance does not attend *ex officio*) or a violation of absolute meaning (the court of second instance on some violations attends *ex officio* and on some does not). On the other hand, the court of second instance never attends *ex officio* to wrong and/or incompletely established facts.

Furthermore, in the section of this paper under the ordinal number 3, research questions that are raised correspond to the goals that this research sets out for itself. At the same time, theses that seek to prove themselves through this research are defined.

The first thesis is very low share of annulment decisions due to the violation of the child's procedural rights in the total number of annulment decisions in family law matters where there is an obligation to secure the subject rights of the child. The real question is the reasons why this is so, and it is reflected in the answer to the question whether there is an appeal on the appeal grounds of substantial violations of the civil procedure provisions and, if so, which violation or on the appeal ground of wrong and/or incompletely established facts of the case.

⁶ Civil Procedure Law (Official Gazette SFRY 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27 / 90, 35/91; Official Gazette 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14; hereinafter: CPL/14)

The second thesis is that the violation of the child's right to express an opinion does not in any case constitute a reason for the appellate court to observe *ex officio*, but for its exercise is a prerequisite for the child to be represented by a special guardian (or by a parent if he or she is not named) makes an appeal precisely for the reason that the child was not allowed by the court to express his/her opinion and/or that the child's opinion was not taken into account when making the first-instance decision. Namely, the same violation according to the available case law may constitute the appeal ground of incompletely established facts, or an absolutely substantial violation of the civil procedure provisions (Article 354, paragraph 2, item 11 of the CPL/14), or a denial of hearing in court proceedings (Article 354, paragraph 2, item 6 of the CPL/14). While the appellate court does not *ex officio* take into account the violation from item 6, either before or after September 1st 2019, when the significant amendments to the Civil Procedure Law come into force, an appellate court will no longer look after *ex officio* on the violation from item 11 from that date on.

The third thesis of this research is that within the annulment decisions due to the violation of 2 (two) procedural rights of the child, a greater share belongs to the established violations of not-enabling the child to express an opinion than to the violation of non-representation of the child by a special guardian.

The sample on the basis of which the research was conducted is represented by the data of the Split County Court, which is explained in part of the paper under number 4. Namely, the Split County Court, with the Zagreb County Court and the Pula County Court, after the change of court regulations in 2014 and in 2018, are the only courts competent to rule on appeals against decisions of all first instance courts in the Republic of Croatia in family law cases. In this regard, the research, as the verification method of the raised questions, has collected data from the Split County Court for the period from January 1st 2016, ending August 31st 2019. The observed time period is relevant for two reasons. The first is that the valid and unaltered FL/15 has been in force since November 1st 2015, and the second is that on September 1st 2019, major amendments to the Civil Procedure Law⁷ enter into force, which will have implications for family law proceedings as well.

In the part of this paper, under number 5, the data collected are presented in tables and charts, and correspond to the court registers of the Split County Court - Gž Ob and Gž Ovr Ob - as of 31st August 2019. At the same time, this part data collected and results

⁷ Law on Amendments to the Civil Procedure Law (Official Gazette 70/19; hereinafter: CPL/19)

achieved by individual years and aforementioned registers has been analyzed, and their connection with the research questions raised.

Finally, in the conclusion under number 6, the results achieved by the analysis of both registers in all years of the observed period are repeated and summarized individually and in aggregate in the average percentage ratio. It is then determined whether or not the set research thesis have been proven.

First of all, and with an aim of better understanding of the central parts of this paper (ordinal numbers 3, 4, 5 and 6), the regulations and relevant provisions governing the respective procedural rights of the child, their exercise and protection, are presented below.

2. Legal framework for the exercise of subject procedural rights of the child

As stated above, the right of the child to express an opinion and the right of the child to be represented by a special guardian represent the acquisition of international organizations conventions of which Republic of Croatia is a member - the United Nations and the Council of Europe.

The right of the child to express his/her opinion in any proceedings the outcome of which may affect his/her rights and interests is prescribed by Article 12 of the UN Convention⁸, Article 6 of the Contact Convention⁹ and Article 3 of the Exercise Convention¹⁰.

⁸ 1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

⁹ Article 6 –The right of a child to be informed, consulted and to express his or her views

A child considered by internal law as having sufficient understanding shall have the right, unless this would be manifestly contrary to his or her best interests:

to receive all relevant information;

to be consulted;

to express his or her views.

Due weight shall be given to those views and to the ascertainable wishes and feelings of the child.

¹⁰ Article 3 – Right to be informed and to express his or her views in proceedings

A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:

On the other hand, a child's right to a special representative is prescribed by the Exercise Convention:

Article 4 – Right to apply for the appointment of a special representative

- 1) *Subject to Article 9, the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter.*
- 2) *States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.*

Article 9 – Appointment of a representative

- 1) *In proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child in those proceedings.*
- 2) *Parties shall consider providing that, in proceedings affecting a child, the judicial authority shall have the power to appoint a separate representative, in appropriate cases a lawyer, to represent the child.*

The Constitution of the Republic of Croatia¹¹ guarantees state protection¹² and prescribes mutual duties of parents and children¹³.

to receive all relevant information;

to be consulted and express his or her views;

to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

¹¹ Official Gazette 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14; hereinafter: Constitution

¹² The state protects motherhood, children and youth and creates social, cultural, educational, material and other conditions that promote the right to a decent life. (Article 62)

¹³ 1) Parents are obliged to raise, support and educate their children and have the right and freedom to make their own decisions about the upbringing of children.

The basic legal framework for adjudicating in family law matters are the provisions of the Family Law. The provisions of the FL/15 relevant to the research subject can be divided into 4 (four) groups:

1) The right of the child to be represented by a special guardian

Special custody is regulated in FL/15 by the provisions relating to the establishment, organization, financing and supervision of the Center for Special Custody (Articles 544 to 550) and by the provisions on special custody for children and adults, including the powers and duties of a special guardian in proceedings (Articles 240-246).

Parents do not represent the child in cases where the child is appointed a special guardian¹⁴.

The obligatory appointment of a special guardian to a child by a court or social welfare center is prescribed by the provisions of Article 240 (1)¹⁵, where the data collected by this research at the Split County Court primarily relate to marital disputes (parental care disputes), other procedures deciding on parental care, particular contents of parental care

2) It is the responsibility of the parents to ensure that the child has the right to complete and harmonious development of his or her personality.

3) The physically and mentally disabled and socially neglected child is entitled to special care, education and care.

4) Children are obliged to care for elderly and infirm parents.

5) Special care is given by the state to minors without parents and to those who are not cared for by their parents.

¹⁴ Article 99, paragraph 6; Article 414, paragraph 3; Article 487

¹⁵ In order to protect personal and property rights and interests of the child, the social welfare center or court will appoint a special guardian:

1. to a child in marital disputes and in proceedings to challenge maternity or paternity

2. to a child in other proceedings in which parental care is decided, certain contents of parental care and personal relations with the child when there is a dispute between the parties

3. to a child in the procedure of imposing measures for the protection of the personal rights and well-being of the child within the jurisdiction of the court when prescribed by the provisions of this Law

4. a child in the proceedings of making a decision that replaces the consent to adoption

5. a child when there is a conflict of interest between him and his legal representatives in property proceedings or disputes, or in the conclusion of certain legal affairs

6. children in the event of a dispute or legal transaction between them when the same person exercises parental care over them

7. a child of a foreign citizen or a stateless child who, unaccompanied by a legal representative, finds himself in the territory of the Republic of Croatia

8. in other cases when it is prescribed by the provisions of this Law or special regulations or if it is necessary for the protection of the rights and interests of the child.

and personal relationships with the child when there is a dispute between the parties, and in procedures for imposing measures to protect the personal rights and well-being of the child within the jurisdiction of the court.

The proceedings before the first instance courts in the respective family law cases are recorded as contentious (P Ob), non-contentious (R1) and enforcement (Ovr Ob).

In connection with one of the stated research aims, and in the absence of specific provisions of the FL/15 on this matter, it is to point out the provision of Article 82 of the CLP/14¹⁶ on the duty of the first instance court to observe on the party capacity of the persons appearing in the proceedings and their proper representation, as well as the appeal procedure provisions referred to in Article 354 (2), item 8, in conjunction with Article 365 (2) of the CLP/14, on the basis of which the infringement in question constitutes an absolutely substantial violation of the civil procedure provisions, which the second instance court observes *ex officio*.

2) A child as a party to the proceedings

A child is a party to all proceedings before a court in which his/her rights and interests are decided¹⁷, regardless of whether he/she initiated it. In addition to the cited general provision guaranteeing the child the position of a party, special provisions are laid down in the sections on special contentious proceedings¹⁸, special non-contentious proceedings¹⁹ and special enforcement proceedings²⁰.

3) Procedural capacity of a child

In matters deciding the personal rights and interests of the child, the court will, at the request of the child, by a decision allow a child who has reached the age of 14 (fourteen) to present facts, present evidence, file remedies and take other actions in the proceedings if he is able to understand the meaning and legal consequences of these actions, and before

¹⁶ Throughout the proceedings, the court will, of its own motion, make sure that the person appearing as a party can be a party to the proceedings and whether he or she has a litigation capacity, whether the litigant who is incompetent represents his legal representative, and whether the legal representative has special authority when necessary.

¹⁷ Article 358

¹⁸ The child is a party to proceedings of exercising parental care and the personal relations of the child with the parent and of child support, regardless of whether it has initiated it. (Article 414 paragraph 1)

¹⁹ Article 486

²⁰ Article 513 (surrender of a child) and 521 (exercise of personal relations with a child)

rendering this decision the court is obliged to seek an opinion of the social welfare center²¹. In addition, a child who has attained the age of 14 (fourteen) has the right to initiate proceedings before the competent authorities on the exercise of his or her rights and interests²².

4) The right of the child to express an opinion

The basic provisions governing the exercise of this right of the child are contained in Article 360 FL/15 and in the Rules on the manner of obtaining the opinion of the child²³.

In proceedings in which the child's personal and property rights and interests are decided, the court will allow the child to express his or her opinion, unless the child objects. The court will allow the child to express an opinion in a suitable place and in the presence of a professional, if he or she deems it appropriate in the circumstances of the case, and a child under 14 (fourteen) years of age will be allowed to express an opinion through a special guardian or other professional.

The court conducting the proceedings is not obliged to determine the child's opinion when there are particularly justified reasons for this, which must be explained in the decision.

The child must be informed of the subject, course and possible outcome of the procedure in a manner appropriate to his age and maturity and if this does not present a risk to the development, upbringing and health of the child. The obligation to inform the child is the responsibility of the child's special guardian, court or expert of the social welfare center, depending on the circumstances of the case, which the court is obliged to take into account.

In addition, Article 86 lays down general provisions on the right of the child to express an opinion. Parents and other caregivers are required to respect the child's opinion in accordance with his or her age and maturity. In all proceedings in which a child's right or interest is decided, the child has the right to know in an appropriate manner the relevant circumstances of the case, to seek advice and to express his opinion, and to be informed

²¹ Article 359 paragraph 1 and 2; article 130 paragraph 2

²² Article 87 paragraph 1

²³ Official Gazette 123/15; hereinafter: Rules

of the possible consequences of following his opinion. The child's opinion is taken into account in accordance with his age and maturity.

In the procedural section of FL/15, the subject right of the child is also governed by the provisions on special litigation proceedings²⁴, special enforcement procedures^{25 26} and special insurance procedures²⁷.

3. Setting the research questions

After outlining the legal regulatory framework governing subject procedural rights of the child, the questions to be answered by this research are defined as follows:

- a) What is the share of cases in which it is mandatory to appoint a special guardian to the child (Article 240 FL/15) and to allow the child to express an opinion (Article 360 FL/15) within the total number of resolved cases recorded in the Gž Ob and Gž Ovr Ob registers?
- b) What is the share of second-instance annulment decisions for reasons of violation of subject procedural rights of the child within the total number of second-instance annulment decisions?
- c) Does the violation of guaranteed procedural right of the child to be represented by a special guardian constitute an absolute or relative substantial violation of the civil

²⁴ Before rendering a decision on which parent will reside with the child, on parent's care and the child's personal relations with the parent, the court will:

1. enable the child to express his/her opinion, in accordance with the provisions of this Law
2. determine how each parent spent time with the child and how he/she exercised parental care for the child prior to the deterioration of family relations;
3. obtain, if necessary, the findings and opinion of a social welfare center or an authorized court expert. (Article 416 paragraph 1)

²⁵ The court may refer the child to an expert interview given the circumstances of the case during the enforcement proceedings. (Article 517 paragraph 2)

The court shall, before rendering the enforcement order, schedule a hearing at which it will personally hear the parties in order to ascertain the facts and assess all the circumstances and will enable the child to express his or her opinion in accordance with the provision of Article 360 of this Act. (Article 522 paragraph 1)

²⁶ (1) Given the circumstances of the case, the court may refer the child to an expert interview during the enforcement proceedings on personal relations with the child.

(2) If a child who has attained the age of fourteen years has a personal objection to a parent, or to another person who, by virtue of a execution document, is entitled to have a personal relationship with a child and after speaking with a professional person as directed by the court, the court shall reject the motion for enforcement. (Article 525)

²⁷ Provisions on the provisional security measure about with which parent or other person will reside with the child and on the establishment of personal relations with the child (Article 536 paragraph 5)

procedure provisions as a reason for the annulment of the first-instance decision referred to in Article 369 of the CLP? If it constitutes an absolutely substantial violation, which item from Article 354 (2) of the CLP is it about and is this a violation that second instance court observes ex officio on?

d) Does the violation of guaranteed procedural right of the child to express an opinion constitute the reason for the annulment of the first-instance decision referred to in Article 370 of the CLP in order to establish the facts correctly and completely?

4. Sample formation and research methodology

The data collected by the analysis of family law cases within the jurisdiction of the Split County Court are a relevant account of the first instance cases of all municipal courts in the Republic of Croatia which are handling this type of matters, with respect to the provisions of the Law on Areas and Seats of Courts²⁸ and the Law on Areas and Seats of Courts²⁹.

Namely, in accordance with the provisions of Article 4, paragraph 2 of LASC/18³⁰, only 3 (three) county courts have been designated to deal with these matters, including the Split County Court.

The sample of the research is the data from the register of Gž Ob and Gž Ovr Ob of the Split County Court, recorded in the period January 1st 2016 ending August 31st 2019.

The subject data will be presented in tabular and graphical form in section 5, separately Gž Ob for 2016, 2017, 2018 and 2019, as well as Gž Ovr Ob for the mentioned years individually. In conclusion, the result of the entire observed period, presented as a percentage, will be noted regarding the answer to the question what is the share of annulled decisions due to the violation of subject procedural rights of the child in the total number of annulled decisions.

²⁸ Official Gazette 128/14; hereinafter: LASC/14

²⁹ Official Gazette 67/18; hereinafter: LASC/18

³⁰ To decide appeals against decisions of all municipal courts in cases under the law governing family relations, the County Court in Pula - Pola, the County Court in Split and the County Court in Zagreb are determined.

The new Rules of Court³¹, which entered into force on April 1st 2014, for the first time introduces mandatory and uniform record keeping of court records throughout the Republic of Croatia. The provision of Article 188 of the RC stipulates that county courts shall keep, *inter alia*, the registers for second instance family cases Gž Ob and Gž Ovr Ob.

In the register of Gž Ob county courts register civil cases submitted on the basis of appeals filed against decisions of municipal courts in family cases in which they decide in the second instance, except for enforcement and insurance cases under the Family Law, which they enter in the register of Gž Ovr Ob³².

In addition to being a court that is one of only three courts in the Republic of Croatia to receive decisions of first instance courts from across the national territory on appeal, the sample of research is also relevant because of the time period considered. It can assess the quality of the application of the child's procedural rights in question since the effective date of FL/15 (November 1st 2015), and does not contain data after September 1st 2019, when significant amendments to the civil procedure will enter into force, subsidiary in family law matters.

5. Presentation and analysis of data relevant to the verification of research questions

Split County Court – Register Gž Ob

Table 1. Register Gž Ob (January 1st 2019 – August 31st 2019)

Total number of family law matters	502
Number of family law matters requiring the appointment of a special guardian to the child and enabling the child to express an opinion	200
Total number of annulment decisions in subject family law matters	30
Number of annulment decisions on grounds of violation of subject procedural rights of the child	9

³¹ Official Gazette 37/2014, 49/2014, 8/2015, 35/2015, 123/2015, 45/2016, 29/2017, 33/2017, 34/2017, 57/2017, 101/2018, 119/2018; hereinafter: RC.

³² Article 227.c. RC

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Violations of the obligation to appoint a special guardian to the child	2
Violations of the obligation to enable the child to express an opinion	5
Violations of both subject procedural rights of the child	2

Table 2. Register Gž Ob (January 1st 2018 – December 31st 2018)

Total number of family law matters	632
Number of family law matters requiring the appointment of a special guardian to the child and enabling the child to express an opinion	265
Total number of annulment decisions in subject family law matters	46
Number of annulment decisions on grounds of violation of subject procedural rights of the child	5
Violations of the obligation to appoint a special guardian to the child	1
Violations of the obligation to enable the child to express an opinion	3
Violations of both subject procedural rights of the child	1

Table 3. Register Gž Ob (January 1st 2017 – December 31st 2017)

Total number of family law matters	622
Number of family law matters requiring the appointment of a special guardian to the child and enabling the child to express an opinion	232
Total number of annulment decisions in subject family law matters	37
Number of annulment decisions on grounds of violation of subject procedural rights of the child	2

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Violations of the obligation to appoint a special guardian to the child	1
Violations of the obligation to enable the child to express an opinion	1
Violations of both subject procedural rights of the child	0

Table 4. Register Gž Ob (January 1st 2016 – December 31st 2016)

Total number of family law matters	686
Number of family law matters requiring the appointment of a special guardian to the child and enabling the child to express an opinion	251
Total number of annulment decisions in subject family law matters	50
Number of annulment decisions on grounds of violation of subject procedural rights of the child	5
Violations of the obligation to appoint a special guardian to the child	2
Violations of the obligation to enable the child to express an opinion	3
Violations of both subject procedural rights of the child	0

Share of family law matters requiring the exercise of subject procedural rights of the child within the total number of family law matters:

- in 2019 (until August 31st) – $200 / 502 = 40 \%$
- in 2018 – $265 / 632 = 42 \%$
- in 2017 – $232 / 622 = 37 \%$
- in 2016 – $251 / 686 = 37 \%$

Share of annulment decisions on grounds of violation of subject procedural rights of the child within the total number of annulment decisions in subject family law matters:

- in 2019 (until August 31st) – $9 / 30 = 30 \%$
- in 2018 – $5 / 46 = 11 \%$
- in 2017 – $2 / 37 = 5 \%$
- in 2016 – $5 / 50 = 10 \%$

Structure of the appellate reasons for annulment decisions on grounds of violation of subject procedural rights of the child

- in 2019 - 7 substantial violations of civil procedure provisions (1 from item 8.), 2 irregularly established facts;
- in 2018 – 1 substantial violation of civil procedure provisions (item 6.), remaining 4 decisions without stated grounds for annulment;
- in 2017 - 1 substantial violation of civil procedure provisions, 1 irregularly established facts;
- in 2016 - 2 substantial violation of civil procedure provisions (1 from item 6.), 3 irregularly established facts.

Regarding the question under a), it can be stated that there is approximately equal inflow of cases, without significant fluctuations, which also relates to the total number of family law cases in a calendar year, as well as to the share of subject family law matters in the total number of family law matters.

Regarding the question under b), there is a remarkably high increase in the number of annulment decisions due to violation of subject procedural rights of the child in 2019. Moreover, by August 31st, there were 9 such decisions, while in the previous 3 years until December 31st of each year there were 2 (2017) and 5 (2016 and 2018).

Concerning the issues under c) and d), it is concluded that the number of substantial violations of the civil procedure provisions outweighs the number of incorrectly established facts. Among them are non-representation by an authorized person (item 8) and failure to discuss in court (item 6). The analysis of the sampled court decisions confirms that improperly established facts refer to established violations of the child's

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right to express their opinion, which are found to be less than the violation of the child's right to be represented by a special guardian.

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Table 5. Register Gž Ovr Ob (January 1st 2019 – August 31st 2019)

Total number of family law matters	92
Number of family law matters requiring the appointment of a special guardian to the child and enabling the child to express an opinion	37
Total number of annulment decisions in subject family law matters	9
Number of annulment decisions on grounds of violation of subject procedural rights of the child	2
Violations of the obligation to appoint a special guardian to the child	1
Violations of the obligation to enable the child to express an opinion	1
Violations of both subject procedural rights of the child	0

Table 6. Register Gž Ovr Ob (January 1st 2018 – December 31st 2018)

Total number of family law matters	96
Number of family law matters requiring the appointment of a special guardian to the child and enabling the child to express an opinion	30
Total number of annulment decisions in subject family law matters	16
Number of annulment decisions on grounds of violation of subject procedural rights of the child	5
Violations of the obligation to appoint a special guardian to the child	0
Violations of the obligation to enable the child to express an opinion	3
Violations of both subject procedural rights of the child	2

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Table 7. Register Gž Ovr Ob (January 1st 2017 – December 31st 2017)

Total number of family law matters	63
Number of family law matters requiring the appointment of a special guardian to the child and enabling the child to express an opinion	24
Total number of annulment decisions in subject family law matters	9
Number of annulment decisions on grounds of violation of subject procedural rights of the child	2
Violations of the obligation to appoint a special guardian to the child	0
Violations of the obligation to enable the child to express an opinion	2
Violations of both subject procedural rights of the child	0

Table 8. Register Gž Ovr Ob (January 1st 2016 – December 31st 2016)

Total number of family law matters	33
Number of family law matters requiring the appointment of a special guardian to the child and enabling the child to express an opinion	11
Total number of annulment decisions in subject family law matters	4
Number of annulment decisions on grounds of violation of subject procedural rights of the child	1
Violations of the obligation to appoint a special guardian to the child	1
Violations of the obligation to enable the child to express an opinion	0
Violations of both subject procedural rights of the child	0

Share of family law matters requiring the exercise of subject procedural rights of the child within the total number of family law matters:

- in 2019 (until August 31st) – $37 / 92 = 40 \%$
- in 2018 – $30 / 96 = 31 \%$
- in 2017 – $24 / 63 = 38 \%$
- in 2016 – $11 / 33 = 33 \%$

Share of annulment decisions on grounds of violation of subject procedural rights of the child within the total number of annulment decisions in subject family law matters:

- in 2019 (until August 31st) – $2 / 9 = 22 \%$
- in 2018 – $5 / 16 = 31 \%$
- in 2017 – $2 / 9 = 22 \%$
- in 2016 – $1 / 4 = 25 \%$

Structure of the appellate reasons for annulment decisions on grounds of violation of subject procedural rights of the child:

- in 2019 – 1 for not-enabling the child to express an opinion, 1 for not-appointing a special guardian to the child;
- in 2018 – 3 solely for not-enabling the child to express an opinion, and 2 for violation of both procedural rights of the child;
- in 2017 – 2 for not-enabling the child to express an opinion;
- in 2016 – 1 for not-enabling the child to express an opinion.

Regarding the question under a), the results from Gž Ob register are significantly different from the results from Gž Ovr Ob register. While in the register of Gž Ob there is a constant in the total inflow of cases and in the inflow of subject cases, in the register of Gž Ovr Ob there is a significant increase in the total number of family law enforcement matters in 2018 (96) and 2019 (92 until August 31st) compared to 2016 (33) and 2017 (63). Percentage ratios established do not show any significant differences both in comparison of one and the other register and within Gž Ovr Ob registers by individual years.

The difference in the results of both registers is also evident regarding the question under b). Gž Ob register showed a big jump in 2019 (from 11% to 30%) of the share of subject annulment decisions in total annulment decisions. On the other hand, the achieved results of Gž Ovr Ob register show a continuity of this share, ranging from 22% to 31%. Total number of annulment decisions shows an upward trend.

Unlike the Gž Ob register where appeals against P Ob judgments (marital disputes in which parental custody is also decided) prevail over appeals against the R1 decisions (non-contentious proceedings), the Gž Ovr Ob register only contains appeals against the Ovr Ob rulings. In view of the above, the appellate court did not refer to the individual grounds of annulment under Article 369 (substantial violation) or Article 370 (facts) but to the provision of Article 380 (3) CPL/14 without indicating the basis on which the first-instance decision was revoked.

Continuing on and answering the question under c) and d), the reasoning structure in the annulment decisions in the register of Gž Ovr Ob is not presented through appellate reasons, but through violation of the child's rights in question as determined by the second instance court in the sampled decisions. Violations of the right to express an opinion overwhelmingly prevail over violations of the right to a special guardian - 7 to 1 - while in 2018, there are two annulment decisions in which it has been found that the trial (first instance) court violated both subject procedural rights of the child.

Although the appellate court has not expressly determined which appellate reason constitutes a violation of the procedural right of the child, by the reasoning of the sampled rulings it is concluded that appellate court, in most cases, regards the violation as an irregularly factual finding why the case is remanded for re-trial. Only in one case (2018) did the appellate court identify this violation as an absolutely substantial violation of the civil procedure provisions referred to in Article 354 (2), item 11 of the CPL/14/19.

Following all of the above, the second thesis on the coincidence of the violation of the child's right to express an opinion with the appellate ground of irregularly established facts was confirmed by the analysis of the sampled decisions and data from the Gž Ob register and the Gž Ovr Ob register.

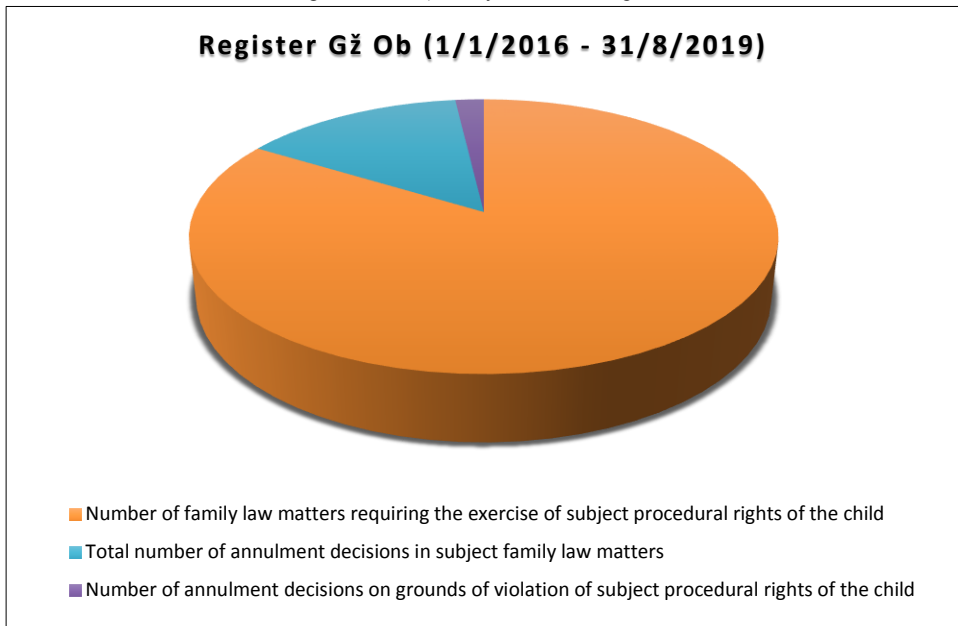
Finally, the third thesis on the greater number of violations of the right to express an opinion in relation to the number of violations of the right to a special guardian should be considered. Determining the results for the whole observed period, in the Gž Ob register this ratio is 12 to 6, while in the Gž Ovr Ob register the ratio is 6 to 2. The above gives

the total ratio of results from both registers and for the whole observed period - 18 to 8 - which means that the third thesis has been confirmed and that the first violations are more than 50% higher than the second violations.

6. Conclusion

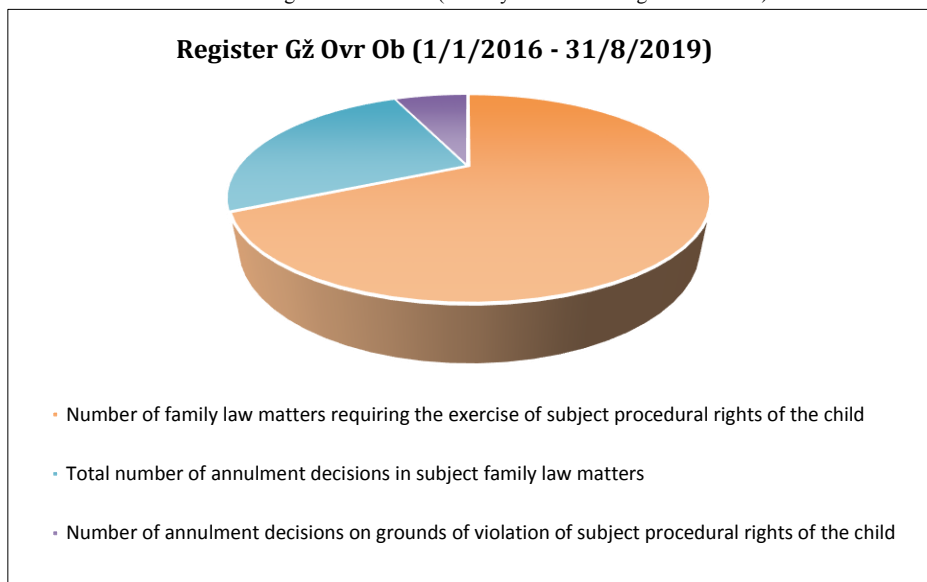
Answering the main question of this research on the share of annulment decisions due to violation of subject procedural rights of the child within the total number of annulment decisions in the respective family law matters, and further to the previous tabular representations of individual register in individual years, the final three charts show the results for the whole observed almost four-year period for both registers (individually and collectively) maintained by the Split County Court.

Chart 1. Register Gž Ob (January 1st 2016 – August 31st 2019)



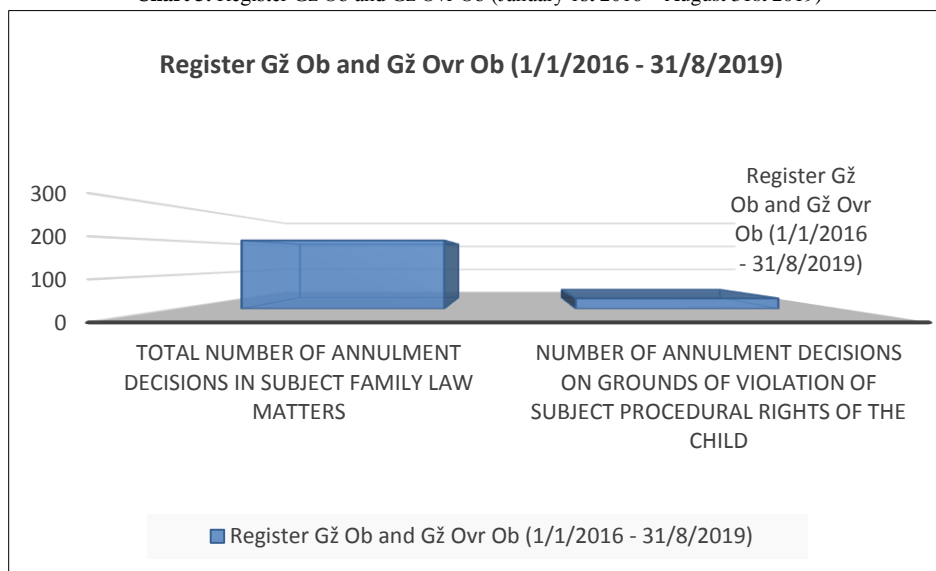
Result: 21 / 163 = 13 %

Chart 2. Register Gž Ovr Ob (January 1st 2016 – August 31st 2019)



Result: 10 / 38 = 26 %

Chart 3. Register Gž Ob and Gž Ovr Ob (January 1st 2016 – August 31st 2019)



Result: 31 / 201 = 15 %

Since the verification of the research questions, including the second and third thesis was performed in part 5 of this research, it is necessary to consider the first thesis on the small share of annulment decisions due to violation of subject procedural rights of the child in the total number of annulment decisions.

Charts 9, 10 and 11 confirm the accuracy of the first thesis. The final result of the research is that subject share in all family-law cases (both registers) and in the whole observed period (almost four years) is only 15%.

The analysis of the achieved research results and the analysis of the annulment decisions themselves (a sample of 201 annulment decisions, of which 31 account for the established violations of subject procedural rights of the child) concludes the possible reasons for such a low proportion.

The appellate court assesses the violation of the child's right to express his or her opinion, in most cases, as a violation of a irregularly established facts, on which the appellant must explicitly invoke. As noted above, the third thesis was that the aforementioned violations outweigh the violation of the right to a special guardian and this thesis was confirmed by this research.

The appellate court assesses the violation of the child's right to be represented by a special guardian in a very different way, with different assessments having their own repercussions on the results achieved by the research. The same violation is most often found to be an absolutely substantial violation of the civil procedure provisions referred to in Article 354 paragraph 2 item 8, and the appellate court shall look into such violation of its own motion. The violation referred to in item 6 of the same article and paragraph of CPL, to which the appellate court is called in a large number of decisions, is not *ex officio* attended by the appellate court. Equally it refers to the violation from item 11, for which can once again be noted that from September 1st 2019 no longer will be attended *ex officio* by second instance courts.

Taking a legal view that this is a substantial violation of the civil procedure provisions that an appellate court is observing of its own motion (item 8), which, in the author's view, would be a correct assessment, could result in an increase in the number of annulled decisions. An analysis of the sampled decisions content it is found that in some of the confirmed decisions the child was not represented by a special guardian or even had the position of a party to the proceedings, which would mean that the appeals did not invoke that violation.

On the other hand, in the context of confirmed third thesis on the greater number of established violations of the right to express an opinion than violations of the right to be represented by a special guardian, it is concluded that the appellants are nevertheless more aware of this child's right, and, in the case of the violation, more often refer on it as an appellate ground. It is important to point out that, in addition to a child who is not allowed to express an opinion in court proceedings, it is for this reason that parents - who have conflicting interests in a particular proceeding and, ultimately, interests that often do not coincide with the interests of the child - can file an appeal as well.

Bibliography

Regulations

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- Constitution of the Republic of Croatia (Official Gazette no. 56/90, 13/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14);
- Convention on the Exercise of the Children's Rights, Council of Europe, Strasbourg, January 25th 1996 (Official Gazette – International Treaties no. 1/10, 3/10);
- Convention on Contact concerning Children, Council of Europe, Strasbourg, May 15th 2003 (Official Gazette – International Treaties no. 7/08);
- Convention on the Rights of the Child, United Nations (SFRY Official Gazette no. 15/90, Republic of Croatia Official Gazette – International Treaties no. 12/93, 20/97);
- Family Law (Official Gazette no. 116/03, 17/04, 136/04, 107/07, 57/11, 61/11, 25/13);
- Family Law (Official Gazette no. 75/14, 5/15);
- Family Law (Official Gazette no. 103/15);
- Law on Amendments to the Civil Procedure Law (Official Gazette no. 70/19);
- Law on Areas and Seats of Courts (Official Gazette no. 128/14);
- Law on Areas and Seats of Courts (Official Gazette no. 67/18);
- Rules of Court (Official Gazette no. 37/2014, 49/2014, 8/2015, 35/2015, 123/2015, 45/2016, 29/2017, 33/2017, 34/2017, 57/2017, 101/2018, 119/2018);
- Rules on the manner of obtaining the opinion of the child (Official Gazette no. 123/15).

Research sample

Gž Ob i Gž Ovr Ob registers of the Split County Court, as of August 31st 2019.

Mirela Župan*

IDENTITY OF A CHILD IN CROSS-BORDER LEGAL TRANSIT (NAMING LAW AT FOCUS)

A child as an individual is identified in a society, among other, with its name. Naming law was traditionally perceived as a reflection of sovereign powers of the state over its nationals. Contemporary cross-border migrations challenge this static perception of personal status matters. Moreover, they shift the emphasis to another legal disciplines besides personal status of civil and administrative law: human rights law and private international law. This paper explores the motives and the ratio of child naming law and policy in global, regional and national context. It questions if national systems are adapting to contemporary mobile society, particularly due to limitations of sovereign powers of the states in child naming policy imposed by international community. Mosaic of international and European obligations undertaken by the state preserve the right of a child to a personal name, right to its family, right to an identity, right to move and reside freely in the EU. These rights have to be placed to a fair balance with the powers of the states to use the name as an identification tool, a tool to preserve national naming tradition and language. ECtHR and CJEU set guidelines to safeguard and achieve balance among these diverging rights and interests. Analyses of relevant judgements serves to reveal whether the rights of the child in the naming law are perceived in the context of preservation of identity of a child as well.

Keywords: *child, identity, name, nationality.*

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1. Introductory remarks

A child as an individual is identified in a society, among other, with its name. ¹ Naming issues are traditionally been perceived as a reflection of sovereign powers of a state over its nationals. Naming law and policy traditionally form part of legal discipline of personal status. Contemporary cross-border migrations challenge this static perception. Moreover, they shift the emphasis to another legal disciplines: human rights law and private international law. Legal domain the child's name becomes more complex due to several factors: increased globalization and migration trends expose the naming law and policy to a multinational context; accepting the concept of the right to a name as a fundamental human right to personal and family life as well as expansion of the European regional integration process and the transnational *acquis* to the area.

This paper explores the motives and the ratio of child naming law and policy in global, regional and national context. Paper gives a broad overview of mosaic of legal sources in child naming matters. It further elaborates basic typical situations where a child is given a name, or its name has been changed or its name given in one state haven't been recognized abroad. These situations reveal that national naming law and policy may presents an obstacle to achieving full identity of a child that moves across the border. In its substantial part paper questions the relevance of naming issue to a cross-border movement of a child. It also questions if national systems are adapting to contemporary mobile society. Paper speaks of the limitations of sovereign powers of the state in child naming policy. Mosaic of international and European obligations undertaken by the state preserve the right of a child to a personal name, right to its (family) identity, right to move and reside freely in the EU. These rights still have to be placed a fair balance with the powers of the states to use the name as an identification tool, a tool to preserve national naming tradition, language.² Safeguard of these diverging rights and interest are the ECtHR and CJEU. Analyses of relevant judgements serves to discover if the legislation and judicature perceive the right of a child to a name as a tool of identification, and/or promote its role in preserving the identity of a child that moves across border.

¹ The word personal name has different meanings in legal science and in onomastics Onomastics consider only a person's first name, not his last name. (Frančić, 2006:76). For the purpose of this paper we refer to a name and surname of a child.

² Cultural rights in the case-law of the European Court of Human Rights (2017), Council of Europe / European Court of Human Rights, January 2011 (updated 17 January 2017), pp. 23-24.

2. What's in a name?

The significance of the name in society and, consequently, law is multiple (Bureau, Muir Watt, 2007:27). It is an expression of the identity of an individual, but also a reflection of his or her belonging to a particular family, or to society as a whole. G.W. Allport (1961) notes that “The most important anchorage to our self-identity throughout life remains our own name.” (Allport according to Aksholakova 2014:467). Personal name of a child indicates it is a holder of rights and obligations in legal transactions (Hlača, 1996:68, Winkler 2013). In addition to these private aspects, personal naming is under a significant influence of the public interest of the state to use the name as a tool of identifying individuals, but also preserving historical roots, national language and national identity. State is stemming primarily for legal certainty, hence it prescribes the preconditions for determining, using and changing a personal name for the permanent identification of the person using it. Naming law traditions are different. Personal name matters are based on firm rules and are strictly regulated in some countries, particularly of continental Europe. In some other, particularly common law countries, it is a relatively free area (Varenes, Kuzborska, 2015: 978). The stability, or invariability, of a personal name is necessary in order for it to fulfil the function of identifying an individual. Name changes are possible in certain situations and under certain assumptions that vary from state to state. Special status changes in family law, such as marriage or adoption, have as a consequence a change of personal name.

For an individual, the right to a personal name is his or her personal right. The personal name raises legal issues: it is subject to legal regulations, prerequisites for acquiring, changing and protecting the name are determined by compulsory regulations, and the state obliges the individual to use his real name (Sommer, 2009:112).

Name and identity are surely complex interrelated issues seeking for a holistic theoretical and practical approach (Peternai Andrić, 2019:88ff). Personal identity relates to the identity of a person on the basis of special characteristics that set her/him apart from other persons (age, gender, marital status, physical characteristics). Personal identity is determined by public documents (Pravni leksikon, 2007:429).³ The right to a personal identity is every person's right to be what they are; every person has the right not to be presented differently than he or she is. The name is one of the basic determinants of personal identity.

³ Pravni leksikon (2007), Leksikografski zavod Miroslav Krleža, Zagreb.

3. Legal sources

The right to persons name is explicitly regulated by national naming legislation. Traditional perception of civil status law (including naming law and policy) as a domain of the sovereign power of the state has been an obstacle to a law unification in this area. This attitude influenced also the private international law unification of names, lacking serious achievement.

Legal protection of the child, and more specifically the right to a personal name and right to the identity of the child, is drawn from several legal sources of international, regional (European) and national level. Given the multi-layered nature of the issues we are dealing with, we are talking about a mosaic of intertwined legal sources. At universal level The *International Commission on Civil Status* has been working on conventions aimed at facilitating international cooperation in civil status matters. Among its 30 conventions only several deal with the name issues.⁴ However, their effects are negligible due to the small number of Contracting Parties.

Several international multilateral treaties focus specifically on issues of protection of the right to a personal name. *UN International Covenant on Civil and Political Rights* (ICCPR) of 1966⁵ deal in explicit with a right to have a name (Joseph, 2004). Its Article 24(2) states that “Every child shall be registered immediately after birth and shall have a name.” *Convention on the Rights of Persons with Disabilities* of 2006⁶ indicates with Article 18 that children with disabilities must be registered after birth and must have the right to a name.

Shifting towards universal framework on child related naming issues one has to take into account universal treaties on fundamental rights. Naming issues have in the birth math of human rights been left outside their scope. The reason for disagreement on how to handle the topic of the identity of an individual in the context of early human rights treaties was a very diverse naming policy through the globe (Varenes, Kuzborska, 2015:978-979).

⁴ Convention on the issue of a certificate of legal capacity to marry, signed at Munich on 5. September 1980., CIEC Convention no. 20., Convention on changes of surnames and fornames, signed at Istanbul on 4. Semptember 1958., CIEC Convention no. 4., Convention on the recording of surnames and fornames in civil status registers, signed at Berne on 13. September 1973., CIEC Convention no. 14., Convention on the recording of surnames, signed by General Assembly in Antalya on 16. Semptembar 2005., CIEC Convention no. 31., Convention on the recording of surnames, signed by General Assembly in Antalya on 16. Semptembar 2005., CIEC Convention no. 31., URL: www.ciec1.org/CIECenBref-EN-16-1-2009.pdf

⁵ G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 24 (2), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

⁶ G.A. Res. 61/106, U.N. GAOR, 61th Sess., art. 18, U.N. Doc. A/RES/61/106 (2007)

An important role in protecting the fundamental rights of children, including the right to a personal name and identity, can be found in Article 7 and 8 of the *UN Convention on the Rights of the Child* (hereinafter CRC).⁷ CRC in its Article 7 states that “the child shall be registered immediately after birth and shall from the birth have the right to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” Deeper insight in intentions of treaty makers reveals that they had no other intentions beyond the necessity of the registration of a name for identification purposes.⁸ The CRC omitted to tackle who should be entitled to determine this name. A new concept of developing parallel rights appeared at global level in late 1980s. The identification purpose of the right to a name was upgraded with the right to an identity! Article 8 of the CRC guarantees “the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”. Article 8 is not directly connected to the right to a name of Article 7, as it refers to a separate children’s right to the preservation “of their identity.”⁹ However, Article 8 became a provision of generally acceptable importance of the individual identity as a core value in international human rights. Right to a name read in conjunction to a rights deriving out of Article 8 of the CRC confirm that the State has an obligation to protect, and if necessary, re-establish basic aspects of the identity of a child, including his or her name.

Although the CRC is celebrating its 30th birthday, some older international treaties have highly influenced children’s rights. It happened despite the fact they sometimes lack provisions referring expressly to children. The most prominent example is a general human rights instrument: *The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950* (hereinafter ECHR) (Kilkelly 1999). Article 8 of the ECHR has been mostly used in relation to children (Florescu, Liefwaard, Bruning, 2015:451). Under Article 8 the European Court of Human Rights (hereinafter ECtHR) has dealt with diverse aspects of children’s rights, including the right to personal identity.¹⁰ ECHR makes no specific reference to the right to one’s name. Progressive interpretation of ECtHR has placed the right to a name and identity under the umbrella of Article 8.

⁷ G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 8, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3.

⁸ General Comment No. 17: Rights of the child (Art. 24), adopted 35th sess., Hum. Rts. Comm. (7 Apr. 1989).

⁹ General Comment No. 11: Indigenous Children and Their Rights Under the Convention, U.N. Doc. CRC/C/GC/11 (2009).

¹⁰ Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence (2019) Council of Europe/European Court of Human Rights, p. 7, 45.

Another convention from the framework of the Council of Europe may be important to naming law and policy. Regulation on the spelling of names of national minorities is set by the Council of Europe Framework *Convention for the Protection of National Minorities* (FCNM) (Weller 2005). Its Article 11(1) states that “Every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them”. The Explanatory Report of the Framework Convention clarifies that the right in question is regulated according to modalities provided for in the legal system of the contracting state. Hence, states parties to a convention are permitted to “use the alphabet of their official language to write the name(s) of a person belonging to a national minority in its phonetic form”.¹¹

The European Union has very limited powers to render legislation in matters of personal status (Hlača 2013:110). European Union is not party to any of previously listed international conventions. Despite general EU competence in private international law, in civil justice arena only a regulation providing for free movement of status public documents¹² has been rendered (Župan 2019). Although personal status and naming law has remained outside EU competences, national rules on the spelling of EU citizens’ names and recognizing a name rendered in another Member State may constitute an obstacle to exercising their free movement rights. General principles of EU law come to forefront here. Firstly, the Article 6(2) of the Treaty on European Union upgrades the fundamental human rights to a core of the EU. Article 21 of the Treaty of Functioning of the European Union assures that “every citizen of the Union have the right to move and reside freely within the territory of the Member States”.¹³ Nowadays the Charter of Fundamental Rights¹⁴ with Article 7 (parallel to Article 8 of the ECHR) becomes also relevant. If we look more closely to child naming matter, Article 24(2) serving as a general best interest corrective of any action relating to a child, comes to the arena as well. European child agenda nowadays attribute him an individual status in relation to its primary career (Petrašević, 2018:71ff).

¹¹ Explanatory Report to the Framework Convention for the Protection of National Minorities, Strasbourg, 1.II.1995, European Treaty Series - No. 157, p. 9.

¹² Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, OJ L 200, 26.7.2016, p. 1–136

¹³ Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390

¹⁴ Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407

4. Child naming policy in cross-border context

Global migrations affect socially acceptable forms of living. An adult and a child are more often mobile across borders than static within the territory of one state. Consequently, the personal status issue often has a cross border element mark. The complexity of the name issue in an internationally characterized situation stems from the substantial diversity of substantive and conflicting national regulations. The rules in the field of personal name in national substantive law differ in several key elements: determining the name of the child where the differences are most pronounced in out-of-wedlock solutions, situations where a change of personal name occurs, such as marriage or adoption, and where, in terms of the admissibility and extent of a voluntary change of name (Sturm, 2000:214).

When personal status of citizens and respective family-law relations are at stake, national states wish to maintain a recognizable legal history and cultural and religious models inherent in its group national identity. As a consequence substantive differences exist between the regulations of individual states, bringing migrant individuals and families into unenviable situations. In a cross-border situation, the personal and property relations of family members are legally inconsistent, and legal uncertainty is also reflected in the rights and obligations towards third parties. Statuses created subject to law of one state do not produce effects in another state automatically. In legal discourse we speak of “limping” status relationships, which are an unintended consequence of contemporary globalization.

In the area of private international law personal name of a child constitutes one of the fundamental questions in the field of personal statute in the strict sense. Although cross-border naming law is long known doctrinal topic (Giesker-Zeller, 1915; Glenn 1975; Scherer, 2004; Heuer 2006; Živković 2016) it has been actualized with contemporary migration, particularly within EU (Gerard-René, 2004). The close relationship of status with the country in whose civil status registry the person is enlisted influences the approach of private international law to this issue. The complexity of the internationally characterized personal name situation is further compounded by the diversity of conflicts of law. In private international law, the question arises as to which of the potential legal orders connected to the person concerned is most appropriate to regulate the matter. By default the nationality law is applied to conflict of law resolution (Živković, 2014; Živković, 2016; Župan, 2012). At the same time, the dilemma arises as to whether states in this domain should also relinquish protectionism and open enrolment in domestic civil registers of a personal name that is not exactly the same as that envisaged for domestic situations. This is particularly relevant for dual or multiple citizenship. Strong

territorialism in this domain is the cause of numerous “limping” legal relationships. Recently the party autonomy is introduced to choice of law, as a possible corrective to it.

Discussion on the issue of personal name can be directed by thinking about the typical situations of assignment or change of a name abroad that are not recognized by the country of origin of the person's nationality. Particular problems arise with dual citizenship, where national private international law tends to apply the exclusivity of domestic nationality. Unless status is regulated and unified in both countries, identity doubts can arise. Identity doubt may appear equally in any types of procedures. Typically, a name registered in one country does not comply with the national regulations of another country and cannot be registered in the civil status registry. Common scenario is the first registration or/and change of the name of a child with dual nationality, the definition of a name in the case of international adoption; the problem of changing the name of a transgender person; identification of persons as potential heirs or decedents in international successions proceedings.¹⁵ All status issues in internationally marked situations are characterized by the potential limping scenario: a person's name is recognized by his or her legal order, but is not recognized by another. Or, more specifically, under one substantive law, the mother and the father may choose to name their child by their both surnames, while under substantive law of a country they wish to obtain a recognition of that status, the parents joint surname is not permitted form of a child surname. Consequently, the same person has two different surnames in two legal orders. Although *comitas gentium* assures international cooperation, national states reserve a right to use the public policy clause as a delimitator of acceptance of foreign legal order. Public policy clause determines the limit on the protection of the rights of individuals and families, the tolerance on foreign substantive solutions, the occasion of exceptional exclusion on the application of foreign law that may violate domestic values, the occasion on exceptional refusal of a recognition of a foreign decision that is contrary the foundations of domestic order. In this context, personal, national and cultural identity will play a role. In European Union context the mutual values enshrined by the *acquis* determine the mutual tolerance threshold among the Member States. Still, migration is not only of a regional scope, it is a worldwide phenomenon. The greater the spatial distances, the more distinct national legal, cultural and religious identities are. Reconciliation of the status acquired in distant states is even more difficult. In this sense, the child and his / her personal identity are exposed (Rossolillo 2009).

¹⁵ See the reasoning of the ECHR in *Mennesson v. France*, Application no. 65192/11, 26.09.2014., § 98.

5. Personal name of a child in rulings of the ECtHR

As already set, naming law is under the scrutiny of ECtHR in the context of Article 8 of the ECHR. The primary purpose of Article 8 is of a negative kind, aiming to protect a child against arbitrary interferences with private and family life. However there is additionally a positive obligation for a state to ensure that Article 8 rights are respected.¹⁶

Article 8 guarantees certain rights to an individual, but those rights are not absolute. Public authorities may validly interfere in certain circumstances and limit the individual's Article 8 rights. Interference which is in accordance with the law, necessary in a democratic society to pursue one or more of the legitimate aims, may be considered to be acceptable. In naming matters certain collective rights might be jeopardized, such as a right to protect national tradition and heritage with family naming, right to protect a language, abolition of nobility titles to ensure full equality of all of the citizens, or even minority rights. Administrative authorities and courts at all levels are faced with numerous situations where individual rights of a child and family naming may be questioned towards states. States employ their sovereign interests desiring to protect their own values. However, state also has an obligation to protect internationally accepted values enshrined in fundamental rights treaties (Varenes, Kuzborska 2015: 981ff). State is afforded a certain degree of discretion - margin of appreciation (Kilkely 2003: 6-7). In event of a complain of an individual that the State has overstepped that margin of appreciation, the final ruling is with the European supervision of the Strasbourg court. The ECtHR has ruled that “where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted”.¹⁷

First application to the ECtHR relating to a personal name dates back to 1990. Despite the lack of provision dealing specifically with the name and the identity, in *Burghartz v Switzerland*¹⁸ the ECtHR places the right to a name under the ambit of ECHR. Moreover, the identification of an individual with his name becomes an element in evaluation of the proportionality of interference of a state. The ECtHR has clearly indicated with the *Stjerna v. Finland*,¹⁹ that the fact that there may exist a public interest in regulating the use of names is not sufficient to remove the question of a person's name from the scope

¹⁶ Guide on Article 8 of the European Convention on Human Rights.

¹⁷ S.H. and Others v. Austria GC, Application no. 57813/00, 3 November 2011, § 94.

¹⁸ Burghartz v Switzerland, Application no. 16213/90, 22 February 1994.

¹⁹ Stjerna v. Finland, application no. 18131/91, 25 November 1994.

of private and family life. ECtHR upheld that names retain a crucial role in a person's identification (§ 39).

European Court of Human Rights had a chance to deal with personal name of a child in several applications. *Guillot v. France*²⁰ related to a refusal of the French authorities to register the applicant's daughter with the name “Fleur de Marie” as it was not listed in the Saints' Calendar. ECtHR clarified that the choice of a child's forename by parents amounts to a personal, emotional matter and therefore comes within their private sphere. The case of *Johansson v. Finland*²¹ related to a refusal of Finnish authorities to enlist to a Population Registration a child born in 1999. Authorities argued that a name chosen by his parents and here applicants “Axl Mick” did not comply with the law, whereas the “naming practice followed in a State was closely linked to the cultural and linguistic history and identity of that State”(§24). The Names Act gives a possibility to depart of traditional names if a person proves it is appropriate due to the nationality, family relations, connection with a foreign name or similar. However, administrative adjudication instances upheld the first instance court opinion that applicants have failed to prove that exception would be justified. On the contrary, applicants found that their fundamental parental rights guaranteed by the ECHR have been violated. ECtHR arguments in relation to a child may be of our interest: although the court does not exactly refer to the “best interest of a child”²² it conducts an analyses of the given name reaching the conclusion that “The name cannot therefore be deemed unsuitable for a child” (§38). Here the ECHR found that there are already 3 persons enlisted to register with the name Axl, hence the states haven't balanced properly the intervention to private life.

Rights of a child in relation to preservation of its identity concern other specific areas of status issues. Arguments of the Strasbourg court in specific cases of surrogacy,²³ adoption and kafala²⁴ cases are mostly very carefully structured. Majority of the landmark cases lack any reference to identity aspect of a child. Identity and best interest of a child were

²⁰ *Guillot v France*, Application no. 22500/93, 24 October 1993.

²¹ *Johansson v Finland*, Application no. 10163/02, 6 September 2007.

²² “The name was not ridiculous or whimsical, nor was it likely to prejudice the child, and it appears that it has not done so. It was also pronounceable in the Finnish language and used in some other countries. ... The name cannot therefore be deemed unsuitable for a child” (§38).

²³ In *Paradiso and Campanelli v. Italy [GC]* (Application no. 25358/12, 24 January 2017) it is self evident that a child identity was uncertain for its first three years, as due to ongoing legal proceedings against intended parents it was not given a name (§ 51).

²⁴ In *Harroudj v France* the ECtHR argued that a state is obliged to establish legal safeguards that enable the child's integration in his family, ones the existence of a family tie has been established. Neither is the identity as such taken into consideration. *Harroudj v France*, Application no. 43631/09, 4 January 2013.

though much debated in the surrogacy application of *Mennesson*.²⁵ Court placed identity of a individual and a legal parent-child relationship in direct link, stating that “The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced” (§ 80). Here the legal parent-child relationship of the applicants was established under Californian law, but not recognised under the French legal system. “In other words, although aware that the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children’s identity within French society.” (§ 96). ECHR further reminds of previously established practice that a nationality is an element of a person’s identity. ²⁶ Uncertainty as to the possibility of obtaining recognition of French nationality “is liable to have negative repercussions on the definition of their personal identity.” (§ 97). Interestingly the Court strikes a balance among legitimate interest of France wishing to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory, impact of the non-recognition of a legal parent-child relationship status acquired abroad on the identity of a child, and the best interest of a child. Strasbourg court here concluded that a respondent State overstepped the permissible limits of its margin of appreciation, claiming that “a serious question arises as to the compatibility of that situation with the children’s best interests, respect for which must guide any decision in their regard” (§99).

6. Personal name of a child in rulings of the CJEU

The jurisprudence of the court relating to a name dates back to 1993 *Konstantinidis* judgement.²⁷

Although the judgment does not relate a child, this case reflect the perception of a broader function of a name in contemporary society and law. Reasoning of the Advocate General and the court relies on numerous references to national constitutions in the aspect of dignity, which are interconnected to individuals name. Eventually a right to a name is declared a common constitutional tradition, indistinctly associated to human dignity (Dagilyte, Stasinopoulos, Łazowski, 2015:7-8). *Dafeki*²⁸ judgement established that

²⁵ *Mennesson v. France*, Application no. 65192/11, 26 September 2014.

²⁶ *Genovese v. Malta*, Application no. 53124/09, 11 October 2011, § 33.

²⁷ ECLI:EU:C:1993:115, C-168/91, *Christos Konstantinidis v Stadt Altensteig-Standesamt*, 30 March 1993.

²⁸ ECLI:EU:C:1997:579, C-336/94, *Eftalia Dafeki and Landesversicherungsanstalt Württemberg*, 2 December 1997.

entire personal status of an individual has to be respected on the EU territory (Winkler, 2013: 137-138).

The landmark child personal name judgment of the CJEU is the one in *Garcia Avello* case.²⁹ A dispute arose in Belgium over the surname borne by children of dual Belgian-Spanish nationality residing in Belgium. Children were registered before Belgian birth registry by fathers surname, and in Spanish Embassy in Brussels by Spanish model of surname consisting of the surname of the father and the mother. The opted for a Spanish model as a unique surname, and requested a modification at Belgian authority. Since in Belgium children bear their father’s surname, their request was denied. The Supreme Administrative Court referred to the CJEU seeking for an interpretation of possible violations of primary *acquis*, more particularly prohibition of discrimination based on nationality. The CJEU argued that Article 12 and 17 TEC [now 20 TFEU] prevent a Member State from imposing exclusively national standards to its nationals, who are at the same time nationals of some other Member State. In such a situation they ought to permit its own nationals to adopt surnames consistent with the laws of the second Member State. The court did recall to the identity aspect, but referring to the objections of the applicants. The Court held that, „every time the surname used in a specific situation does not correspond to that on the document submitted as proof of a person’s identity, or the surname in two documents submitted together is not the same, such a difference in surnames is liable to give rise to doubts as to the person’s identity and the authenticity of the documents submitted, or the veracity of their content.“ (§ 28).

Equally interesting child naming judgment came with the *Grunkin Paul*³⁰ case. The reference to the CJEU was made in the course of proceedings between Mr Grunkin and Ms Paul against the Registry Office of German Niebüll, in relation to a refusal to recognize the surname of their son Leonhard Matthias as determined and registered in Denmark. Both parents and a child were solely German nationals, with habitual residence in Denmark. Commission gave more weight to the perspective problems the child in a limping situation may face. ”As the child (..) has only German nationality, the issuing of that document falls within the competence of the German authorities alone. If those authorities refuse to recognize the surname as determined and registered in Denmark, the child will be issued with a passport by those authorities in a name that is different from the name he was given in Denmark (§ 25). Consequently, every time the child concerned has to prove his identity in Denmark, the Member State in which he was born and has

²⁹ ECLI:EU:C:2003:539, C-148/02, *Carlos Garcia Avello v. Belgian State*, 2 October 2003.

³⁰ ECLI:EU:C:2008:559, C-353/06 *Stefan Grunkin*, 14 October 2008.

been resident since birth, he risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the surname he has always used on a day-to-day basis, which appears in the registers of the Danish authorities and on all official documents issued in his regard in Denmark, such as, inter alia, his birth certificate, and the name in his German passport. (§ 26) The CJEU acknowledges the ratio of German naming legislation, but finds that seriousness of inconvenience in the case is proved and hence “Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognize a child’s surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth.” (§ 40).

Several of the CJEU naming law rulings related to nobility title. The applicant of a German noble title *Sayn-Wittgenstein*’ was refused its recognition in Austria where nobility titles are prohibited.³¹ Although the applicant claimed the nobility title is part of their identity, it was not upheld by the court. The Court reconsidered the situation the applicant is in daylife: “every time the applicant in the main proceedings, holding a passport in the name of ‘Sayn-Wittgenstein’, is obliged to prove her identity or her family name in Germany, her State of residence, she risks having to dispel suspicion of false declaration caused by the divergence between the corrected name which appears in her Austrian identity documents and the name which she has used for 15 years in her daily life, which was recognized in Austria until the correction in question and which is given in the documents drawn up in her regard in Germany, such as her driving licence.” Still, the CJEU upheld that EU is obliged to respect the national identities of the member states, even when they impose derogations from fundamental freedoms in the name of objectively enforcing public policy. Although not explicitly, the court advocates that identity with a family is expressed through the surname, and not through a nobility title.

The CJEU has clearly placed civil status record (internal) situations under EU umbrella, if they are in direct connection to free movement of persons. In *Malgožata Runevič-Vardyn*³² it has stated that a procedures initiated in order to change the certificates of civil status issued to a person by the competent authorities of her Member State of origin, fall under the ambit of European law, if a person is seeking for those certificates changed in

³¹ ECLI:EU:C:2010:806, C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, 22 December 2010.

³² ECLI:EU:C:2011:291, C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilnius*, 12 May 2011.

order to facilitate her exercise of the right of freedom of movement and residence conferred on her directly by Article 21 TFEU (§58).

The CJEU added a test on „reason for name change” to the naming matter with *Bogendorff* case.³³ In this case a person of double nationality voluntarily made several changes to the name which contains a number of tokens of nobility, allowed under the national law of one of the Member States. The resulting name was refused recognition in the other, whose nationality he also holds. Court argues that if a change of a name rests on a purely personal choice by the individual, and “the difference in name which follows therefrom cannot be attributed either to the circumstances of his birth, to adoption, or to acquisition of British nationality...” other Member State may not be imposed an obligation of its full recognition (§38). On the contrary CJEU obliges national authority of the Member State of recognition to ascertain if such a refusal of recognition is justified on public policy grounds, in that it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law (§ 85). The CJEU held that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, while its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Consequently, “public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society”.³⁴

Currently the last naming reference is the *Mircea Florian Freitag*.³⁵ Proceeding concerned a recognition and the entry in the civil register in Germany of a change of surname to one legally acquired in Romania.³⁶ CJEU acknowledged “there is a real risk — because he bears two different surnames, namely Pavel and Freitag — of being obliged to dispel doubts as to his identity and the authenticity of the documents submitted, or the veracity of their content, which, as the Court has ruled, is such as to hinder the exercise of the right which flows from Article 21 TFEU” (§ 38). CJEU found a violation of Article 21 TFEU in the act of the registry office which refused to recognize and enter in the civil register the name legally acquired by a national of that Member State in another Member State, of which he is also a national. CJEU adds to the analysis the facts

³³ ECLI:EU:C:2016:401, C-438/14 Nabil Peter Bogendorff von Wolffersdorff, 2 June 2016.

³⁴ ECLI:EU:C:2004:614, C 36/02 Omega, 14 October 2004 (§ 30).

³⁵ ECLI:EU:C:2017:432, C 541/15, *Mircea Florian Freitag*, 8 June 2017.

³⁶ ECLI:EU:C:2017:432, C-541/15, *Mircea Florian Freitag*, 8 June 2017.

that it was his birth name and that that name must have been acquired during a period of habitual residence in that other Member State (§ 48).

7. Personal name a child – an issue of identification or identity?

There is no universal solution that would allow an individual child automatic continuity and stability of his or her status in all countries of the world, or even throughout the European Union. The reason lies in the diversification of state legislatures, poor unification and limited powers of international organizations. Migrating child however comes under different legal orders, each of which reserves the right to subject his or her actions to their own regulations.

Naming practice must be in accordance with national, European and international law, taken as a mosaic legal package (Dagilyte, Stasinopoulos, Łazowski, 2015:1-45). Sovereign rights of a state over its national may be limited, as European and international law determine the requirements or restrictions that a state may impose on the name of an individual. This paper has inspected the naming matter through the cross-border loupe, meaning it focused on naming issues arising ones a child or a person in general moves across the border. The cross-border naming issues are primarily a private international law matter. In the absence of uniform conflict of law rules, the general principles of European and international law come to forefront. The question remains to what extent national systems are prepared to accept that the state, in the context of sovereign rights, has restrictions that stem from the individual's right to preserve and protect his or her identity stemming from internationally overtaken obligations of mere state. Analysis of the relevant CJEU and ECtHR court decisions conducted here are in a search of the answer if the name and identity are perceived as inseparable category. Although the inspected European courts had an occasion to deal with child naming issues in only several occasions, the rulings concerning name in general, can be used as a valuable source of argumentation. Views of the two European court are however argued differently, as the legal foundation is partly different (Winkler, 2013:142).

Right to a personal name in general terms triggers the right to private and family life, the right to human dignity, the right to cultural-ethnic identity in conjunction to non-discrimination on the grounds of ethnic origin, freedom of expression. Additionally in respect of a naming of a child, it triggers the protection of the best interest of a child (Župan, 2015:213ff; Medić, 2019:9ff).

Issue of personal name of a child is one of the status issues being affected by contemporary evolution of human rights. The matter became part of human rights agenda ones placed under the umbrella of wide interpretation of Article 8 of the ECHR. ECtHR confirmed that the issues of a name are an issue of identity. Naming issues cannot be limited to the interest of a state in identification. A person identifies with his name, it is a sign of his recognition, part of his person, and denying it violates his fundamental human rights. Rights deriving out of Article 8 fall into a category of qualified fundamental rights: rights that can be limited if they are in conflict with the rights of others. Convention’s qualified rights main feature is that their application requires a balancing exercise between the protection of human rights and the Contracting States’ margin of appreciation (Roagna, 2012:6).

In EU context, CJEU followed dual pathways: naming matters are part of EU citizenship and fundamental rights agenda. The European Union is investing another trump card in comparison to ECHR: can the national naming practice hinder the free movement of people, a fundamental freedom in terms of which all states have agreed to remove legal obstacles! Garcia Avello case shows how far reaching the implications of EC law can be (Pintens, Dutta, 2016:21ff). Exclusivity of domestic nationality has been abandoned: when a person holds more EU citizenships the effective one would count. What are the implications, what are the benefits for citizens and what is the loss for nation states?

CJEU aims to avoid the limping relationships in the European legal space (Liakopoulos, 2018:263). Judgements before the CJEU in naming matters departure of the aspect of everyday life of a European citizen. ... “it must be borne in mind that many daily actions, both in the public and in the private domains, require a person to provide evidence of his or her own identity and also, in the case of a family, evidence of the nature of the links between different family members.”³⁷ As the CJEU found a motive for action, the legal ground aspect emerged. The CJEU repeatedly notes “that a person’s forename and surname are a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter of Fundamental Rights of the European Union (‘the Charter’) and in Article 8 of the... ECHR. Even though Article 7 of the Charter does not refer to it expressly, a person’s forename and surname, as a means of personal identification and a link to a family, nonetheless concern his private and family life.”³⁸

³⁷ Judgements Runevič-Vardyn, § 73; Bogendorff von Wolffersdorff, § 43, Freitag, §37.

³⁸ Judgements Sayn-Wittgenstein, § 52; Runevič-Vardyn, § 66.

CJEU tried to bring both aspects of personality and freedom of movement into line. CJEU tried to find a fair balance on multiple nationality as well, giving more credit to the autonomy of the will.

The CJEU uses the test of Article 8 of the ECHR. Refusal to accept a name as it appears on the certificates of civil status issued by the Member State of origin, complying with the rules of that State, may be refused if such a refusal does not give rise to serious inconvenience, for those Union citizens, at administrative, professional and private levels. The margin of discretion in the notion of “risk of serious inconvenience” is a matter for the national court to decide. National authorities refusing the recognition must have clear arguments that national rules that were given primacy are designed to secure and is proportionate to the legitimate aim pursued. AG Jacobs’ Opinion in *Konstantinidis* is based on a wider reading of Article 8 of the ECHR, arguing that naming matters are within the scope of EU law. Charter has later introduced additional child related provision (Iglesias Sánchez 2012). As far as the personal scope is concerned, this was enlarged to encompass non-economically active citizens, including minors, who now have non-derivative, express rights. This idea was introduced in *Zhu Chen* and later re-emerged in *Ruiz Zambrano* (Petrašević, 2019; Dagilyte, Stasinopoulos, Łazowski, 2015: 29).

The underling motive of the CJEU is that non-recognition of a name given in another member state must be placed under a loupe of general EU principles, particularly prohibition of discrimination based on nationality and employment of free movement. Circumstances in each and particular case must indicate the child would face real risk and serious inconveniences in cross-border movement, as its identity would be questioned. Discrepancy in names leads to doubts as to one’s identity, is such as to hinder the exercise of the right which flows from Article 21 TFEU. according to the Court’s case-law, in order to constitute a restriction on the freedoms recognized by Article 21 TFEU, the refusal to amend the forenames and surname of a national of a Member State and to recognise the forenames and surname which he has acquired in another Member State must be liable to cause him ‘serious inconvenience’ at administrative, professional and private levels.³⁹

The CJEU added to the analyses several other factors. Firstly the closest connection test - if the person deprived of recognition has substantial connection to the members state of origin (either a nationality, habitual residence). Other aspect relates to behavior of the individual - has the individual caused the situation on its own. While it acknowledged

³⁹ ECLI:EU:C:2011:291, *Runevič -Vardyn and Wardyn*, C 391/09, § 76.

that the different spelling of Ms Runevič-Vardyn’s name did cause inconveniences related to the proof of identity in her daily life, it stressed that this situation was the result of the conscious behaviour of the applicant herself.

In the sequence of judgments one may read out the CJEU effort to promote and protect one’s right to a name, as a means to self-determination and personal identity (Lehman 2008) Despite the fact that right to a name and right to a identity are perceived as rights afforded to a child, they are by EU court not taken in conjunction. Any child related right should be in correlation to the best interest of a child. There is a missing link in relevant child naming judgments: the “best interest” criterion, deriving either of the CRC Article 3 or the Article 24 of the Charter, has not been employed.

Conclusion

This paper imposes a simple standing conclusion: in naming matters the national states had lost the full power over its citizens, despite the fact states refused to negotiate and enter treaties specifically to that effect. Interpretative power of ECtHR and CJEU courts has partly abstracted the naming matter from national to supranational level. To reach that effect, fundamental rights deriving of the ECHR have been used, combined with the fundamental freedom of movement and prohibition of discrimination based on citizenship, in the EU context.

That simple standing conclusion has to be upgraded when it comes to a margin of appreciation left for the state. Name of an individual and possible infringement of his identity by sovereign act of a state would be questioned on a case to case bases. A serious inconvenience caused by identity dilemma has to be proven. The intensity of a name usage signals if intervention of a state is exaggerated. In more specific child naming matters the best interest criterion could have taken more substantial place, as a backup to preservation of a child’s status stability and continuity of identity while crossing borders.

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YEARBOOK
HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHTS OF THE CHILD
“30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”

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PROTECTION OF THE SEXUAL MORALITY OF CHILDREN IN HUNGARY

*“Every time he says to me,
if I tell someone, he will cut my throat. “
(Lilla 13 years old girl)l*

Sexual morality is one of the legal subjects protected by the legislature at any level, from the appearance of criminal law to the present day. However, criminal law also depends on the current moral judgment of society, both in its content and in the language of the law (see, for example, the words “anti-nature” or “lust” in the previous laws that are no longer in the current Criminal Code.) they are constantly changing and going through. Sexual violence can affect anyone, regardless of gender, age, national, ethnic or religious, political affiliation. However, statistics confirm that it is sexual perpetrators of violence are men (almost 95-98%), and most victims (85%) are women and children. This is not a coincidence and it is not only explained by the difference in physical strength between men and women and children.² In this research we mostly focus on the crimes against children which are insult their healthy sexual development. This are the following crimes: sexual exploitation, sexual violence, sexual abuse, child pornography, exploitation of child prostitution.

Keywords: children, protection, sexual morality, crimes

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¹ https://birosag.hu/sites/default/files/2018-08/13_dok.pdf

² Anna Betlen – Enikő Pap: Módszertani ajánlások a szexuális erőszak áldozataival foglalkozó szakemberek számára 6-7. o. http://mona-alapitvany.hu/wp-content/uploads/2012/12/KERET_Modszeretani_ajanlasok.pdf
idézi: https://birosag.hu/sites/default/files/2018-08/13_dok.pdf

Introduction

The protection of the smooth sexual development of children in the 1978 Criminal Code was implemented in a complex regulatory system. However, the new Criminal Code did not simplify the situation but made it even more complicated. Here are some crimes which protect children from sexual insult: sexual exploitation, sexual violence, sexual abuse. Different age groups of children appear in the crimes, where the appearance of the 18-year-old is a novelty and a consequence of international attachment.³

Our new Criminal Code changes the title of the chapter, XIV. Chapter of the former Criminal Code was “Crimes against Sexual Morality”, the new Criminal Code regulate it in different chapter it is XIX. chapter and the new title is ' Sexual Freedom and Sexual Offenses'. In doing so, our new law expresses that protection of sexual morality is not the primary and only protected subject matter, but that of sexual integrity, sexual self-determination, sexual freedom.

At the time of writing our new Criminal Code, we were paying close attention to the provisions of the relevant international conventions when codifying crimes against sexual freedom and sexual morality.

Children as a victim

Sexual violence against children is much more common than what the society think about this. Contrary to popular belief, the family is not only loving and a protective community, but also the most brutal physical and the scene of violence. According to R. Gelles and S. Straus: except the police and the army, maybe the family as the social group is most affected by violence, home is the most violent social sub-system.”⁴ According to surveys, one in four women and one in six a man was molested in his childhood, according to other researchers the number of the victim is much higher.⁵Examining the age group of perpetrators, it can be concluded that the majority of the perpetrator of violent sexual crimes are in the age group of 25-59 years. When looking at the history of offenders, it

³ Zsolt Szomora: Megjegyzések az új Büntető Törvénykönyv nemi bűncselekményekről szóló XIX. Fejezetéhez. In: Péter Hack (szerk.): Új Büntető Törvénykönyv: Hagyomány és megújulás a büntetőjogban. ELTE Bibó István Szakkollégium, Budapest, 2013. 19.o.

⁴ Klára Kerezi: A védtelen gyermek (Erőszak és elhanyagolás a családban), Közgazdasági és Jogkönyvkiadó, Budapest, 1995. 51.o.

⁵ Éva Horváth: Szexuális erőszak, információk áldozatoknak, túlélőknek és segítőknek. 21.o. <https://mek.oszk.hu/13900/13907/13907.pdf>

can be seen that the majority of offenders have not got a criminal record. Examining the relationship between offenders and victims, two thirds of known sex crimes in Hungary committed by people who are personally known by the victim.⁶ The most common type of attack is when the victims' spouses, partners, friends, schoolmates, colleagues or former spouses or partners of the offenders.⁷ Victims of sexual violence often do not talk about what happened with them. They do not report it. Numerous research already indicate that the majority of sexual acts involving children are not known to anyone. The reason for silence is that victims are ashamed of what has happened, they are afraid that they may be blamed for what they have suffered.⁸ Therefore, these crime has a high latency.⁹ The early, unknown sexuality forced upon the child results in a high level of aggression, which is exacerbated by their fear and anxiety. What has happened greatly pushes the stamp on their future sexual and emotional lives and relationships, and may even make it impossible to establish a normal relationship.¹⁰ In the case of child victims, open violence is rarely needed, that's why we use the terms “abuse” when we are talking about child sexual abuse. The perpetrator generally uses his own position of power and the child's addictive position for some sexual activity.¹¹

Furthermore we would like to highlight the most typical crimes against sexual morality of children in Hungary.

⁶ Dr. Gyula Kovács: Az erőszakos közösetülés a számok tükrében In.: Magyar Bűnüldöző 2011/3- 4 45-47. o.: idézi: https://birosag.hu/sites/default/files/2018-08/13_dok.pdf

⁷ György Virág: A szexuális erőszak áldozatai a társadalomban és a büntetőeljírásban. In.: Belügyi Szemle 1998/3. szám, 39–50. oldal (Belügyminisztérium, Budapest, 1998) idézi: https://birosag.hu/sites/default/files/2018-08/13_dok.pdf

⁸ Schultz, L. G.-Jones, P.: Sexual Abuse of Children: Issues for Social Service and Health Professionals. Child Welfare, March/April 1983.p. 99-108. idézi: https://birosag.hu/sites/default/files/2018-08/13_dok.pdf

⁹ WORLD REPORT ON VIOLENCE AND HEALTH chapter 6 Sexual violence 150.o. http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf idézi: https://birosag.hu/sites/default/files/2018-08/13_dok.pdf

¹⁰ Anna Betlen – Enikő Pap: Módszertani ajánlások a szexuális erőszak áldozataival foglalkozó szakemberek számára 6-7. o. http://mona-alapitvany.hu/wp-content/uploads/2012/12/KERET_Modszerntani_ajanalasok.pdf idézi: https://birosag.hu/sites/default/files/2018-08/13_dok.pdf

¹¹ Éva Horváth: Szexuális erőszak, információk áldozatoknak, túlélőknek és segítőknek. 21.o. <https://mek.oszk.hu/13900/13907/13907.pdf>

Sexual Exploitation

Section 196

(1) Any person who forces another person to perform or tolerate sexual activities is guilty of a felony punishable by imprisonment between one to five years.

(2) The penalty for sexual exploitation shall be imprisonment between two to eight years if committed:

a) against a person under the age of eighteen years;

b) by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from, such family member, or if abuse is made of a recognized position of trust, authority or influence over the victim.

(3) The penalty shall be imprisonment between five to ten years if sexual exploitation is committed against a person under the age of fourteen years.¹²

a) Legal subject

The offense regulates sexual blackmail, considered a special case of coercion in the former Criminal Code, in a separate factual situation. The legal subject of the crime is sexual freedom. The IV of 1978 Pursuant to the Act, the judicial practice found coercion when violent sexual intercourse or public violence could not be established for any reason (for example, the threat was not direct or non-life-threatening, bodily harm), but forced the victim to commit sexual intercourse. According to the the effective Criminal Code it is a form of sexual coercion that threatens the perpetrator with a higher penalty rate than general coercion.

b) Subject of the crime

The subject of the crime can be anyone, the same or the opposite sex as the offender. The crime can only be committed intentionally. Starting from the fact that the offending behavior is two-fold and the sexual act is a purposeful act, intentionality can only mean direct intent.

¹² Act C of 2012.

c) Conduct of the perpetrator

The conduct of the perpetrator is twofold. The instrumental act is coercion, which is an activity which is capable of overcoming the resistance of a passive subject, whereby the victim does not behave in accordance his/her own will. He will act according to but with the will of the offender. Sexual activity is a purpose of the perpetrator, which is regulated in a new Criminal Code: “*sexual act’ shall mean sexual intercourse and any gravely indecent and obscene act primarily for sexual purposes, intended to stimulate or satisfy sexual desire.*”¹³

d) Aggravating circumstance

An aggravated case occurs if the victim has not reached the age of eighteen. More and more international documents consider the age of 18 to be the upper limit of childhood, and the legislator will respond to this by providing for a higher degree of criminal protection. Even more aggravated the case if the victim was under the age of fourteen.

It is also aggravating circumstances if the offender is a family member or against a person who is in the care, custody or supervision of or receives medical treatment from, such family member, or if abuse is made of a recognized position of trust, authority or influence over the victim.¹⁴

Sexual Violence

Section 197

(1) Sexual violence is a felony punishable by imprisonment between two to eight years if committed:

a) by force or threat against the life or bodily integrity of the victim;

b) by exploiting a person who is incapable of self-defense or unable to express his will, for the purpose of sexual acts.

¹³ Act C of 2012.

¹⁴ Act C of 2012.

(2) Sexual violence shall also include, and the penalty shall be imprisonment between five to ten years if the perpetrator commits a sexual act upon a person under the age of twelve years, or forces such person to perform a sexual act.

(3) The penalty shall be imprisonment between five to ten years if the criminal act described in Subsection (1) is committed:

a) against a person under the age of eighteen years;

b) by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from, such family member, or if abuse is made of a recognized position of trust, authority or influence over the victim; or

c) by more than one person on the same occasion, in full knowledge of each other's acts.

(4) The penalty shall be imprisonment between five to fifteen years if:

a) the criminal offense defined in Subsection (2) is committed

aa) in the manner defined in Subsection (1),

ab) against a victim provided for in Paragraph b) of Subsection (3), or

ac) in the manner defined in Paragraph c) of Subsection (3); or

b) the provisions of Paragraph b) or c) of Subsection (3) also apply to the criminal offense defined in Paragraph a) of Subsection (3).

(4a) The punishment shall be imprisonment between five to twenty years if Subparagraph ab) or ac) of Paragraph a) of Subsection (4) also applies to the criminal offense defined in Subparagraph aa) of Paragraph a) of Subsection (4).

(5) Any person who provides the means necessary for or facilitating the commission of sexual violence is guilty of a felony punishable by imprisonment not exceeding three years.¹⁵

¹⁵ Act C of 2012.

a) Legal subject

The legal subject of the crime is primarily sexual freedom, furthermore the sexual development of children under the age of 12 can also be considered as a secondary legal subject. Actually this act is merging two previous crimes of the Act of 1978 with a modern content and with a special modify. The re-regulation is primarily due to the fact that Hungary signed the Lanzarote Convention on 29 November 2010 and that the Member States of the European Union adopted Directive 2011/93 / EU in December 2011, which must be complied with by 18 December 2013 at the latest. According to the Lanzarote Convention and the Directive 2011/93 / EU punishable: - sexual activity with a child where the child is in a situation of particular vulnerability, in particular mental or physical disability, or of a situation of dependence,

- sexual activity with a child where coercion, violence or threats are used,
- inducing a child to engage in sexual activities with a third party by means of coercion, force or threats.¹⁶

b) Subject of the crime

Anyone, male or female¹⁷, can be the subject of a crime, as much as a perpetrator. It can only be done intentionally, and by its very nature it is purely intentional. However, the turn (3) in Section 197 (2) can also be made with intent.

c) Conduct of the perpetrator

There are two turns in the conduct of the offense, which are contained in Article 197 (1) (a) and (b). The offense's conduct in the first turn (Section 197 (1) (a)) is twofold: instrumental act is coercion, target act is sexual act. The second turning point (b) only includes sexual acts as an offense. However, the experts of literature generally agrees that there are three basic cases of sexual assault under the new Criminal Code, namely: 1) sexual violence committed by violence or “qualified” threat, ie the Criminal Code. § 197 (1) (a); 2) sexual violence to the detriment of passive subjects who are incapable of defending or expressing their will, that is, Article 197 (1) (b); and 3) below the age of

¹⁶ Based on the justification for the proposal of Act C of 2012.

¹⁷ We would like to emphasize that until Act of LXXIII. came into force on 15 September 1997, it was not an offense for a woman to rape a male victim as a felon. And we have not encountered such a fact in legal practice ever since.

twelve sexual violence to the detriment of children, ie the Btk. Section 197 (2).¹⁸ This turn has its own legal subject: healthy sexual development of children under 12 years of age. In this turn, there is no violence or threat, and a sexual act committed or committed with a child under the age of 12 will in itself accomplish this crime.

d) Aggravating circumstance

The new Criminal Code contains three aggravating circumstances. An aggravated offense is the cumulation of qualified cases, ie when the victim has not reached the age of twelve and the crime is committed by violence or by imminent threat to life or bodily harm, or by a relative of the offender, etc., or, at the same time as the victim, knowingly committed sexual violence against one another. It is also more serious if the victim is a relative of the perpetrator, etc., who is under the age of eighteen, and more people commit sexual violence at the same time as the victim.

Sexual Abuse

Section 198

(1) Any person over the age of eighteen years who engages in sexual activities with a person under the age of fourteen years, or persuades such person to engage in sexual activities with another person is guilty of a felony punishable by imprisonment between one to five years.

(2) Any person over the age of eighteen years who attempts to persuade a person under the age of fourteen years to engage in sexual activities with him or with another person is punishable by imprisonment not exceeding three years.

(3) If the victim is a family member of the perpetrator, or is in the care, custody or supervision of or receives medical treatment from, the perpetrator, or if the sexual abuse is made of a recognized position of trust, authority or influence over the victim, the penalty shall be:

a) imprisonment between two to eight years in the case defined in Subsection (1);

b) imprisonment between one to five years in the case defined in Subsection (2).

¹⁸ Nagy Alexandra: A tizenkettedik életévüket be nem töltött személyek szexuális cselekményekkel szembeni büntetőjogi védelme http://www.mjsz.uni-miskolc.hu/201702/14_nagyalexandra.pdf (2019.09.09.)

(4) Any person over the age of eighteen years who engages in sexual activities with a person over the age of fourteen years and under the age of eighteen years where abuse is made of a recognized position of trust, authority or influence over such person is punishable by imprisonment not exceeding three years.¹⁹

a) Legal subject

The legal subject of the crime is the healthy sexual development of children. The factual situation replaces the crime regulated in the former Criminal Code under the heading of defamation with slightly modified content.²⁰

b) Subject of the crime

The subject of the crime may be a special person, both as perpetrator and accomplice, only at the age of eighteen. (Thus, the effective Criminal Code decriminalized the cases where a perpetrator of 14-18 years of age committed a defamation against a person of 12-14 years of age according to the previous regulation.) In our opinion the crime can only be committed intentionally, and persuasive conduct always implies intent, and in the case set forth in paragraph (4), of course, it is only intentional conduct. The passive subject of a criminal offense may, in the case covered by paragraph 1, be a person who has reached the age of 12 but has not reached the age of 14. The victim is considered to have reached the age of twelve on the day following his twelfth birthday (midnight on his birthday), and on his fourteenth birthday the offense is still factual until midnight on that day. The passive subject of the reversal in paragraph 2 shall be every person below the age of fourteen, without minimum age. (The attempt to persuade him to do so is a preparatory act (call) which is not punishable by the facts of sexual violence, so that there is no minimum age for the victim in this turn. The passive subject in the case referred to in paragraph 4 may be a person who has reached the age of fourteen but has not attained the age of eighteen. (The legislature intends to place this age group under enhanced criminal protection, while complying with relevant international conventions.)

c) Conduct of the perpetrator

The offending behavior is sexual assault and persuasion as well as attempts to persuade. This crime actually punishes so-called non-violent, consensual sexual acts. It should be

¹⁹ Act C of 2012.

²⁰ István László Gál: Szempontok a nemi erkölcs elleni bűncselekmények új szabályozásához, In.: Büntetőjogi Kodifikáció, 2002. évi 4. szám

noted in this circle that kissing a passive subject is not considered a serious insult by judicial practice. (BH2007.108.)

d) Aggravating circumstance

A special case is the special relationship between the victim and the offender, *If the victim is a family member of the perpetrator, or is in the care, custody or supervision of or receives medical treatment from, the perpetrator, or if the sexual abuse is made of a recognized position of trust, authority or influence over the victim.*

Exploitation of Child Prostitution

Section 203

(1) Any person who endeavors to profit from the exploitation of the prostitution of a person under the age of eighteen years is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any person who gives money or any other form of remuneration for sexual activities with a person under the age of eighteen years is punishable in accordance with Subsection (1).

(3) Any person who is supported partly or wholly by profiting from the exploitation of the prostitution of a person under the age of eighteen years is punishable by imprisonment between one to five years.

(4) Any person who maintains or operates a brothel, or provides material assistance for the operation of a brothel where the exploitation of the prostitution of a person under the age of eighteen years takes place is punishable by imprisonment between two to eight years.²¹

a) Legal subject

The legal subject matter of the crime is the social interest in the prosecution of organized criminal groups based on child prostitution and the suppression of child prostitution. The crime is partly new because there was no separate fact in the former Criminal Code that ordered the child prostitution industry to be polished

²¹ Act C of 2012.

b) Subject of the crime

Anyone can be the subject of a crime. The offense can only be committed intentionally and the turn in paragraph 1 is only with intention.

c) Conduct of the perpetrator

The offending behavior of the crime is related to prostitution. Prostitution shall mean where money or any other form of remuneration is given as payment in exchange for sexual activities.²²

The essence of the conduct is as follows:

- a) profit-making: purposeful behavior but not a condition for realizing the profit, engaging in sexual activities with a person below the age of eighteen: the manner in which the offense is committed is very important, ie conduct in return for consideration (as a person of the age of fourteen, in principle,
- b) perseverance: the third turn is special compared to § 202, based on the age of the victim,
- c) maintenance of a brothel: here too, the age of the passive subjects, that is, the prostitutes, can be distinguished from the related crime (Article 201 (3))

d) Aggravating circumstance

There are four basic cases of crime and there are no qualified or privileged cases.

Child Pornography

Section 204

(1) Any person who:

- a) obtains or have in his possession pornographic images of a person or persons under the age of eighteen years is punishable for a felony by imprisonment not exceeding three years,*

²² Act C of 2012.

b) produces, offers, supplies or makes available pornographic images of a person or persons under the age of eighteen years is punishable by imprisonment between one to five years,

c) distributes, deals with or makes pornographic images of a person or persons under the age of eighteen years available to the general public is punishable by imprisonment between two to eight years.

(2) The penalty shall be imprisonment between two to eight years if the criminal offense defined in Paragraph b) of Subsection (1) is committed against a person who is in the care, custody or supervision of or receives medical treatment from, the perpetrator, or if abuse is made of a recognized position of trust, authority or influence over the victim.

(3) Any person who provides material assistance for the criminal act defined in Paragraph c) of Subsection (1) shall be punishable by imprisonment between one to five years.

(4) Any person who:

a) persuades a person or persons under the age of eighteen years to participate in a pornographic production is punishable by imprisonment not exceeding three years,

b) gives a role to a person or persons under the age of eighteen years in a pornographic production is punishable by imprisonment between one to five years.

(5) Any person who:

a) offers to a person or persons under the age of eighteen years to participate in a pornographic material;

b) participates in a pornographic production in which a person or persons under the age of eighteen years also participate;

c) provides material assistance for the involvement of a person or persons under the age of eighteen years in a pornographic production;

is punishable by imprisonment not exceeding three years.

(6) Any person who provides the means necessary for or facilitating the production or distribution of or trafficking in pornographic material on a person or persons under the age of fourteen years is guilty of a misdemeanor punishable by imprisonment not exceeding two years.

(7) For the purposes of this Section:

a) ‘pornographic material’ shall mean any video, movie or photograph or other form of recording that displays sexuality in a gravely indecent manner of exposure specifically for arousing sexual demeanor,

b) ‘pornographic production’ means an act or show to display sexuality in a gravely indecent manner of exposure specifically for arousing sexual demeanor.²³

a) Legal subject

For more than a decade and a half before the creation of the new Criminal Code, the misuse of the prohibited pornographic material was punished by Hungarian criminal law. In Hungary, the misuse of illicit pornographic material has been an independent fact in the Criminal Code since 1997, when the legislator ordered the production of pornographic material for persons under the age of 18 to be punished as a separate act in view of the promulgation of the UN Convention on trading and its placing on the market.²⁴ The range of misconduct is constantly expanding, and the new Criminal Code continues to expand this range.

The legal subject of the crime is the social interest in the healthy development of persons under the age of 18 and in the fight against organized crime groups based on child pornography.

b) Subject of the crime

Anyone can be the perpetrator of a crime, but if a person under the age of 18 makes a prohibited pornographic image of themselves, then in our opinion, the crime does not occur because of the lack of danger to society. The crime can only be committed

²³ Act C of 2012.

²⁴ Pál Sinku: A család és a gyermek büntetőjogi védelme. HVG-Orac Kiadó, Budapest, 2000. 157. oldal

intentionally, and it is extremely important that the offender is aware of the age of the victim. Without such awareness, the crime cannot be identified.

c) Conduct of the perpetrator

The offending conduct can be found in paragraphs (1) to (6). Acquiring, holding, making, offering, transferring, etc. is punishable. committing behavior similar to the previous Criminal Code. It is a novelty to rethink the dangerous nature of committing behavior, such as making the new Criminal Code less punishable than Act IV of 1978. law. In practice, most of the offending behavior is now Internet-related, so it is typically a computer-related crime. The law lists the conduct of the offender in the order of their danger to society. On the basis of these, the crime can be committed by the following behaviors:

- a) acquisition: shall mean the acquisition or disposal from another people.
- b) holding: continuous, long-term possession, preceded by acquisition.
- c) making: recording, recording on any medium,
- d) offering: in this case, the perpetrator invites another person to take the picture, but this invitation remains unsuccessful.
- e) extradition shall mean any conduct which results in the transfer of the offender from possession of the offender to another person.
- f) making available: making it possible for another person to obtain, copy, or take possession of the recording, that is to say, to allow another person to know it,
- g) placing on the market: supplying it, whether free of charge or for a cost, to a number of persons, which may be indefinite;
- h) trading: the sale of images on a (regular) basis for profit,
- i) making it accessible to the general public: creating the possibility of widespread publicity for the image (this is now practically done exclusively by uploading it to the Internet),

- j) pornographic performances: the effective inducement of passive subjects to appear in pornographic performances,
- k) solicitation of pornographic programs: ineffectual inducement of passive subjects to appear in pornographic programs,
- l) participation in pornographic performances: shall mean participation in any form (not necessarily in the form of specific participation in sexual acts, whether by a “bystander” or “mere spectator”, provided that intentionality and the underlying consciousness can be established)
- m) provision of financial resources: any financial assistance with the production of illicit pornographic programs.

Summary

According to the new Criminal Code we collected and analyzed the crimes against healthy sexual development of children. We make a compare between these crimes furthermore we focused on mostly 4 aspect of the crimes: 1) Legal subject 2) Subject of crime 3) Conduct of the perpetrator 4) Aggravating circumstance. The new legislation did not provide a “legal profile clean-up” that clearly separated the offenses of coercion of adults to the offense of coercion of children.²⁵ Crime statistics are not the same as actual crimes. We have pointed out that latency is very high in relation to crimes against sexual morality. To reduce this, the legislator seeks to introduce various tools, such as an interrogation room for children. Victims are afraid of being stigmatized by society. To our aspects for the reduce of the crimes against children also the society have to be more attention in the details, mostly parents has a huge responsibility in this cases.

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²⁵ Zsolt Szomora: Megjegyzések az új Büntető Törvénykönyv nemi bűncselekményekről szóló XIX. Fejezetéhez. In: Péter Hack (szerk.): Új Büntető Törvénykönyv: Hagyomány és megújulás a büntetőjogban. ELTE Bibó István Szakkollégium, Budapest, 2013.19.o.

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Farah Fazlagić**

PROTECTION OF THE CHILD’S RIGHTS IN BOSNIA AND HERZEGOVINA

EX Yugoslavia, (Republic of Serbia, Republic of Croatia, State of Bosnia and Herzegovina and others ...) as parties to the Convention, they have become one of the most advanced countries in the world that have undertaken internationally and constitutionally the obligation to safeguard and protect human rights and fundamental human freedoms. That is why respecting, protecting and enforcing human rights is a task that stems from the Constitution of each state, and the security / security and well-being of a democratic society and its citizens, as well as future generations, depends on its realization. In order to contribute to strengthening democracy and a society in which every citizen will enjoy basic human rights, each state is through the Institute for the Protection of the Family, Maternity and Youth published the text of the Convention on the occasion of several significant anniversaries: November 20 - International Children's Day and the day when 1959 The UN General Assembly adopted the Declaration on the Rights of the Child, and on the day it adopted the Convention on the Rights of the Child thirty years later. Children are born with basic freedoms and rights that belong to all human beings.

In Bosnia and Herzegovina, (BiH), the last census was done in 1991, after which the demographic picture of the population has been substantially changed, so there are still no statistics on the number and situation of children. According to official data, there are 3 828 397 inhabitants in Bosnia and Herzegovina, of which about one-third are children, 1 250 000. An estimated 2 000 children are without parental care, but unofficial estimates indicate between 3 000 and 4 000 children. The exact number is unknown, as statistics and a single database are missing, and the legal definitions that determine the category of children without parental care are unclear. Of particular concern is the large number of children up to 3 years of age residing in institutions, which is devastating for the psychophysical and emotional development of children.¹

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¹ The capacities of institutional accommodation in BiH are significantly increased compared to the situation in 1991, when there were 5 large institutions for placement of children without a parent. Today, there are 11

Foster care development activities are mainly carried out in cooperation with non-governmental organizations. Few children go for adoption, on average, about 30-40 children per calendar year. The majority of children without parental care come from families with different socioeconomic problems, but a significant number of children abandoned immediately after birth are in most cases children of minor mothers and children from extramarital affairs.

Keywords: *protection, law, child, parental care, principle, institution, convention.*

Introduction²

Considering the physical and psychological incapacity and immaturity of the child, there was a need to emphasize the protection of the special rights of the child arising precisely from the above facts. This is precisely the basic reason and position of the Convention on the Rights of the Child. The Convention on the Rights of the Child is an international instrument adopted at the United Nations General Assembly on November 20, 1989, and contains universal standards that must be guaranteed by each State party to the Convention (ie, signed and ratified) by every child born. The Convention addresses, first and foremost, the obligations of adult citizens in relation to the child, as well as the obligations of many social members in relation to the protection of the child. It is the first document in which a child is approached as a subject of a rights society and not just as a person in need of special protection. Unlike the Declaration of the Rights of the Child (1959), which has a moral obligation and power, the Convention on the Rights of the Child is a legal act that has the force of law and obliges the parties, or each state, to comply with its provisions and includes the right to monitor and monitor enforcement in the states. which have accepted and ratified it. The convention is unique.

1.Universal standards of guaranteed rights signed and ratified by the Convention on the Child³

- Comprehensive and the only one that ensures the civil, political, economic, social and cultural rights of children;

institutions and 4 family forms of care, with 10 more institutions caring for other categories of children, including children without parental care.

² https://www.unicef.hr/wp-content/uploads/2017/05/Konvencija_20o_20pravima_20djeteta_full.pdf

³ *Ibide.*

- Universal and applicable to all children, in all situations, in almost the entire community of nations;
- Unconditional and also requires governments with weaker sources of resources to undertake activities related to the protection of the rights of the child;
- Holistic, meaning that it advocates the view that all rights are fundamental, indivisible, interdependent and equally important.

The UN Committee on the Rights of the Child has established four general principles underpinning all the rights enshrined in the Convention on the Rights of the Child:

- The principle of non-discrimination that children should not be discriminated against, “regardless of race, color, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status a child, his or her parents or legal guardians.”
- Children have the right to life and development in all aspects of life, including physical, emotional, psychosocial, cognitive, social and cultural.
- In making all decisions or executing actions that affect the child or the children as a group, the best interests of the child should be paramount, based on the principle of “The best interests of the child”. This applies both to decisions taken by government, administrative or legislative bodies, and to decisions made by the family.
- Children must be allowed to actively participate in addressing all issues affecting their lives and be allowed freedom of expression and psychic reasoning. They have the right to express their views, which must be taken seriously. The Convention on the Rights of the Child contains 54 articles. The preamble to the Convention explains the background and reasons for adopting the document. Members since 1. to 41. They are based on basic definitions of the concept of a child, (a person up to the age of eighteen) and the commitments that countries assume when their parliaments ratify the Convention, (thereby making the parties a party to the Convention). Articles 42 to 45 set out the procedures for monitoring the application of the Convention. Articles 46 to 54 contain formal provisions regarding the entry into force of the Convention.

1.1. Members of the Convention classified into the following types of rights⁴

1.1.1. Survival rights

They include those articles of the Convention that ensure that the child meets the basic needs for his or her life support. For example, these are: the right to life, the right to an adequate standard of living, the right to diet, the right to housing, the right to health care.

1.1.2. Development rights

They include those articles of the Convention that provide the child with the best possible life path and development. For example, they are: the right to education, the right to play, the right to leisure, the right to cultural activities, the right to information, the right to freedom of thought and expression (religion).

1.1.3. Protective rights

They include those articles of the Convention that ensure the protection of the child. For example, they are: the rights to protection against abuse, neglect and exploitation, the prohibition of child labor, protection against drugs, alcohol, tobacco, the protection of refugee children, children in armed conflicts, children in prison.

1.1.4. Participation rights

They include those articles that allow the child to participate actively in their environment, regional / national / world, social, which prepare them for being an active citizen in the future. For example, they are: the right to express their thoughts freely and the right to associate.

2. Protection of the rights of the child in Bosnia and Herzegovina

The Human Rights Ombudsman⁵ Institution is an independent institution that deals with the protection of the rights of natural and legal persons, with particular regard to the

⁴ *Ibide.*

⁵ The BiH Human Rights Ombudsman's assessment is that children's rights are most often violated due to the poor economic and social situation in the country. In the period January - October 2009, the Ombudsmen received 25 cases concerning violations of children's rights, mainly related to child abuse and neglect and begging. (electronic media, December 11, 2009) NGOs recommend to the BiH authorities, "to set clear goals in fulfilling the obligations arising from the signed international protocols, to realize the undertaken obligations regarding the establishment and functioning of institutions for the protection of the rights of the child, prevent segregation and discrimination against children in education, health care protection and other areas, provide money for prescribed forms of child protection and reinstate all institutions that were intended for children and protect their rights." (informal group of non-governmental organizations dealing with the protection of children,

protection of the child, and in accordance with the Constitution of Bosnia and Herzegovina and international agreements included in the annexed part of the Constitution. Thus, the Human Rights Ombudsman Institution of Bosnia and Herzegovina is reviewing cases relating to poor functioning or human rights violations committed by any authority of Bosnia and Herzegovina, its entities and the Brcko District. Cases are formed on the basis of individual complaints by legal or natural persons or ex officio.

The Institution of Human Rights Ombudsman of BiH may be approached by any natural or legal person having a legitimate interest, regardless of nationality, race, gender, religious or national origin. An appeal made to an institution shall not give rise to any criminal, disciplinary or any other sanction against its complainant. The complaint shall be submitted in writing, by mail, fax, e-mail or in person. The appeal should contain a brief description of the events, facts or decisions that led to the appeal. The complaint must be signed by the person filing the complaint or by an authorized proxy. It is advisable to attach photocopies of the relevant documentation, if any, with the complaint. The Institution may refuse to consider anonymous complaints that it considers to be malicious, unfounded, unsubstantiated, damaging to third parties, or presented to the Institution within 12 months of the occurrence of the events, facts or decisions complained of.

The BiH Ombudsman Institution, if it finds a violation of rights, issues recommendations to the competent authorities to take measures to correct human rights violations or poor functioning of the administration. Also, the Institution advises citizens on how to use the most appropriate remedies or refer them to the appropriate institutions.

We do not change the decisions of the public authorities, nor do we assume the role of the bodies acting on appeal. The institution cannot interfere with the decision-making process of the courts. Also, we do not represent complainants before public authorities, nor do we make submissions or complaints on their behalf. The BiH Ombudsman Institution cannot award compensation for identified human rights violations

Sarajevo, 2009), POSITION OF CHILDREN IN BOSNIA AND HERZEGOVINA Analysis of the situation of children without parental care and / or children at risk of loss of parental care based on children's rights Sarajevo, August 2010.

3. Monitoring the rights of the child⁶

3.1. Every child has the right to life, health, non-discrimination and the development of their full potential

3.2. Challenge

Bosnia and Herzegovina is a signatory to the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Relevant national authorities in Bosnia and Herzegovina seek to promote children's rights under these conventions. However, there are still shortcomings that need to be addressed. Understanding these shortcomings is hampered by the lack of a coherent mechanism for collecting information on the rights of the child in the country.

Mechanisms for the coordination and monitoring of children's rights in Bosnia and Herzegovina exist and need to be strengthened and harmonized for their functioning throughout the country in order to strengthen the rights of all children in Bosnia and Herzegovina, including vulnerable children, such as children with disabilities, Roma children, children living in poverty, children of refugees and migrants, children without parental care, children at risk of separation from their families and children in emergency situations.

3.3. Solution

UNICEF supports the strengthening of the mechanism of monitoring and coordination of children's rights across Bosnia and Herzegovina and provides an opportunity to exchange experiences, lessons learned and other information in the field of children's rights.

UNICEF supports the competent authorities in Bosnia and Herzegovina in producing reliable data for monitoring the SDGs and SDGs for children. For example, Multiple Indicator Research (MICS) is currently planned for implementation in Bosnia and Herzegovina in 2019/2020. for the total population of Bosnia and Herzegovina and the Roma population in Bosnia and Herzegovina. The MICS results serve to track trends in a range of areas, including child health, social care, child protection and education.

⁶ <https://www.unicef.org/bih/monitoring-prava-djeteta>

UNICEF supports the conduct of research, studies, evaluations and evaluations, including emergencies, which provide valuable data for planning and programming of the law. Recently, UNICEF supported the development of Guidelines for Bosnia and Herzegovina to identify and evaluate the best interests of the child, a tool that service providers and lawmakers will use in multiple sectors to advance children's rights in Bosnia and Herzegovina.

4. Convention on the Rights of the Child⁷

4.1. Children need special protection

4.1.1. highlighted

Children need special protection. In dealing with them, so to speak, we show our true face. This is true for adults, but also for societies and states. There is no period in which children have not been abused and exploited, and this is a form of particularly grave violation of human rights.

That is why the United Nations has taken over this problem from the very beginning. One year after the organization was founded, the United Nations General Assembly, on December 11, 1946, established the Children's Aid Fund - UNICEF.

5. Justice for every child⁸

5.1. UNICEF promotes the strengthening of all aspects of the child protection system, including equal access to justice through child-friendly procedures. We are actively monitoring the implementation of child-friendly laws and policies and are working to establish a system of accountability.

5.2. Challenge

“Justice for every child” is a term that covers all the ways in which children are confronted with the justice system - whether as victims, witnesses, alleged perpetrators, or in cases involving care, custody or child protection.

Every day, children in Bosnia and Herzegovina face many challenges in exercising their rights. Unfortunately, there are rarely reactions to cases of violation of the rights of the

⁷ <https://www.unicef.org/bih/izvje%C5%A1taji/konvencija-o-pravima-djeteta>

⁸ <https://www.unicef.org/bih/pravda-za-svako-dijete>

child, and even less often an effective remedy is applied. Comprehensive rights guaranteed to children under the Convention on the Rights of the Child remain a mere form unless countries have adequate legal frameworks to make children aware of their rights, to have legal remedies available and to seek protection or redress for a wide range of rights violations that they might experience.

To date, reform efforts in BiH have focused largely on the reactions of the judiciary in juvenile delinquency cases. Much less attention has been paid to the ways in which the justice system supports children whose rights have been violated in cases where they are victims of crime.

Data on child victims of crime are often neither comprehensive nor easily accessible. However, data provided by the High Judicial and Prosecutorial Council on cases involving at least one child victim indicate that hundreds of child victims are involved in criminal justice processes each year, and that the number of reported crimes in BiH is increasing. It is difficult to define adequate conclusions on child abuse without comprehensive data broken down by type of crime, sex and age of the victim. Data collection systems should be coordinated between child protection systems and criminal justice, where possible.

5.3. Solution

There are numerous standards that promote and demand equal access to justice for children. Judicial systems should have child-friendly procedures in place that advocate for child development, rehabilitation and reintegration into society.

UNICEF BiH has created a Justice for Children program to support efforts by BiH authorities to improve access to legal protection and social services for at-risk children, minors, child victims / witnesses and children in civil proceedings. The main objective is to protect the rights of children, promote prevention and reduce violations of rights.

UNICEF also supports training for police, prosecutors, judges, lawyers, social services and health professionals in order to ensure effective child protection. UNICEF encourages the establishment of child-friendly judicial and investigative procedures in which the child's primary right to protection is in accordance with the Convention on the Rights of the Child and other legally non-binding international standards, guidelines and rules.

The number of juvenile offenses in BiH has dropped by about 10% overall since 2010. The fall was larger in Tuzla and Zenica, where the UNICEF program “Justice for Children” (16% and 30%) was implemented.

5.4. Justice for Every Child Project

Since 2010, UNICEF BiH has been actively working to promote the rights of children in the justice system, with the support of the Government of Switzerland and the Swedish International Development Agency.

The Justice for Every Child project came at a good time as the BiH justice system for the child was undergoing important reforms, both in terms of law and practice. The adoption of the Law on Protection and Treatment of Children and Juveniles in Criminal Procedure (2010 in Republika Srpska, 2011 in Brcko District and 2014 in the Federation of BiH) created opportunities for UNICEF to strengthen the protection of the rights of children in the justice system, both for children who have been charged with criminal offenses and children who are victims and witnesses of criminal offenses.

The first phase of the Justice for Every Child project (2010-2013) focused on supporting the implementation of the Law on Protection and Treatment of Children and Juveniles in Criminal Procedure in RS and on supporting the adoption of such laws in the FBiH and BD.

The second phase of the project, which took place between 2013 and 2017, paid more attention to child victims / witnesses in criminal proceedings and children in civil proceedings, and also focused on secondary and tertiary prevention.

The project involved a large number of partnerships with government actors at the state, entity and municipal levels, and UNICEF also cooperated with the non-governmental sector.

5.5. Project results:

- Supported the establishment of municipal working groups as a mechanism for implementing secondary and tertiary prevention at the local level with the aim of encouraging cooperation between different sectors and implementation of alternative measures

- Deficiencies in by-laws and policies were identified and necessary reforms supported
- Developed and implemented training program for experts in the justice sector, police and social workers
- Monitoring, data collection, research and analysis of secondary and tertiary prevention measures have been improved
- Activities undertaken to advance views on justice for children among all key actors
- Implemented prevention programs for at-risk children developed in selected areas
- Supported reintegration of children who have been in contact with the justice system, and especially those who have served prison time, through improved care plans
- Institutions are equipped for children at risk or in conflict with the law, which enables better service delivery
- Access to more efficient child support services for victims / witnesses in litigation has increased
- Systemic deficiencies in services for child victims / witnesses in litigation have been identified
- The use and monitoring of gender-sensitive and child-friendly procedures is supported and monitored
- Legal aid centers are trained to identify the legal needs of children involved in court proceedings as victims or as witnesses, and to provide assistance, advice or guidance on appropriate service
- Information materials on access to justice are child-friendly, developed and distributed

Building on past achievements, UNICEF aims to continue to support the strengthening of children's access to justice. We believe that this will help to increase the number of prosecutors' offices and municipal courts applying child-friendly procedures, and increase the use of alternative measures for children in conflict with the law.

6. The most common causes that lead to a violation of the Convention on the Rights of the Child

The right to non-discrimination, as defined in Article 2 of the Convention on the Rights of the Child, is violated in numerous and different ways in BiH. The most common causes of infringement are: insufficient care and investment of the state and state or entity institutions in child protection, non-harmonized laws that are often not adequately enforced, under-trained educational staff, unprepared and supported biological and surrogate parents, insufficient number of professional staff working on child care who unable to protect them from various forms of discrimination, strategically insufficient monitoring of child care, presence of prejudices and stereotypes, patriarchal and unenlightened population, lack of information about children's rights, non-sanctioning of violations of rights and irresponsible behavior etc. The most common forms of violation of rights are reflected in various forms of stigmatization, the consequences of long-term institutionalization, discrimination in adoption, discrimination on national and religious grounds, as well as discrimination due to belonging to marginalized groups, (IDPs, refugees, returnees, children with disabilities). . In Bosnia and Herzegovina, various types of prejudices and stereotypes are still evident, partly due to the traditional and patriarchal attitude towards single mothers, single-parent families, extra-marital families and marginalized population groups. Adequate sanctions / penalties are rarely imposed on violators of children's rights in this area, and even in the process of proving guilt, additional harm is done to children, especially through the media.

7. The situation of children in Bosnia and Herzegovina without parental care

Analysis of the situation of children without parental care and / or children at risk of loss of parental care based on children's rights.

There is evidence that many poor and vulnerable children come from vulnerable groups, differing by ethnic and religious background, disability, gender or rural / urban divide. Given that the classification of at-risk families and family interventions are not clearly defined and monitored, the existing statistics on social care services do not indicate

whether prevention of separation of children from parents is adequately represented in the activities of social work centers in BiH. On the basis of all available data, it is concluded that, so far, Bosnia and Herzegovina has not systematically invested in the development of quality and effective early interventions in families that are unable to provide adequate child protection for some period.⁹

Concluding considerations in terms of general recommendations

At the time of writing, the increasing lack of financial and human resources is also a major obstacle to the implementation of the legal framework and strategic documents, or in general, to the implementation of reforms in the field of social and child welfare in BiH. The increasing inconsistency of legislation at the state level, (due to a dysfunctional political structure), the non-standardized work of social protection institutions, the absence of a defined minimum of social security / safety and regular monitoring of respect for children's rights, do not create conditions for quality protection of children.¹⁰ The inability to enforce existing legal provisions is evident, often denying many children rights, most often the right to a standard of living, growth, development, social, health care and education.

The state, as an institutional parent, does not attach sufficient importance, often turns out to be a neglectful parent, because the people who make up the child care system are not intellectually empowered and supported enough to act in the “best interests of the child”), Which has been accepted as a basic principle within the framework of juvenile justice. For juveniles committing criminal offenses and other phenomenological forms of criminal activity there are developed and adapted norms within the criminal procedure law, *legs specialis*¹¹. Align the domestic legal framework governing the care of children without parental care with the provisions of the Convention on the Rights of the Child, the Guidelines for the Alternative Care of Children, the 2005 Recommendations of the UN Committee on the Rights of the Child, Standards for the care of children without parental care (Q4C) in Europe. Create conditions for the implementation of existing legal provisions. Ensure implementation of adopted policies and strategies for the protection of

⁹ <http://www.msb.gov.ba/dokumenti/AB3874.pdf>

¹⁰ A Department for Children's Rights has been established within the Ombudsman Institution in RS, but there is no official initiative yet to establish a similar institution at the state level, nor is it known that any other institution has exclusive competence to protect and monitor respect for children's rights.

¹¹O. N. Jašarević, (2012.), Criminal procedural law I i II (second amended edition, University of Travnik str. 345,346

children without parental care, with an annual review of progress. Ensure implementation of the developed minimum standards of care services for children without parental care, with regular monitoring, evaluation and necessary changes in order to improve. *f* Redirect child care resources so that the funds accompany the child. Introduce regular compulsory vocational training of staff working with children, as well as regular supervision. Establish an independent mechanism for monitoring respect for children's rights at national and lower levels of government. Prohibit the establishment of new institutions for the care of a large number of children on a permanent or long-term basis (according to EU standards, each institution accommodating more than 12 children is considered large). Access to the deinstitutionalization and transformation of large institutions for the placement of children.

Establishing co-operation and partnerships with government at various levels to actively implement policies and reforms in the field of child protection for children without parental care and children at risk of separation. Establish advocacy partnerships with UNICEF and civil society organizations in the field of child protection for children without parental care and children at risk of separation. Work on awareness campaigns on the rights of children without parental care and children at risk of separation, against the stigmatization of children, while promoting an approach based on children's rights and inclusion as a contrast inclusion and pity. Further promote the status of an organization providing family care for children without parental care until their independence.

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ON CRIMINAL PROCEEDINGS OF CHINESE JUVENILE

China has a tradition of special protection for minors, and the criminal justice system is no exception. At present, China's criminal justice system adheres to the principle of education and punishment as a supplement to the criminal cases of juvenile criminal cases. Therefore, the special trial procedure for minors will be laid down in the Criminal Procedure Law. Inquiries about juvenile criminal suspects must be accompanied by appropriate adults, conditional non-prosecution system, non-public trial system, juvenile crimes not applicable to the death penalty system, minor crime file storage system. All of the above systems are for minors only and are not applicable to adult defendants. The many criminal policies of China against juvenile defendants are designed to give unaccompanied criminal suspects a fair trial and to be more easily reintegrated into society.

Keywords: *Suitable adult Undisclosed trial File storage Death penalty Restrictions apply*

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1. Introduction

The idea that institution can remedy the defects of societies, that national progress is the consequence of the improvement of institutions and governments.¹ With the changes of the times and the improvement of the economic level, China's judicial field has also made considerable progress. In the legal systems of countries around the world, the criminal punishment of juvenile delinquency is the core content of its criminal policy. Considering the purpose of criminal policy and the particularity of minors, the punishment policy for minors is mostly different from those adults. At present, when dealing with juvenile crimes, China has given a wide range of convictions, sentencing, and treatments, embodying the criminal policy concept of “education-based and punishment-assisted”.

2. Current Situation of Juvenile Criminal Policy Model in China

In our country, a minor in the legal sense refers to a person who has reached the age of 14 and under the age of 18.² As a special social group, minors are the future of the country and the hope of the nation. They need special protection and attention from the whole society. Today's social environment is more and more complicated, and the bad social phenomenon makes the crime rate of minors. Gradually rising, criminal justice policy has become an important system for restraining and protecting minors. In the traditional Chinese juvenile crime regulation, the salient features of China's treatment methods are: "Ethnic education is the foundation, punishment is the use, mutual complement and complement each other."³ At the same time, the first paragraph of Article 277 of the new Criminal Procedure Law has specifically stipulated this policy: the principle of education, probation, and salvation for minors who commit crimes, and the principle of adhering to education and supplementing punishment. As a criminal policy against juvenile delinquency, on the one hand, we must pay attention to the particularity of "juvenile offenders", emphasizing education and correction, on the other hand, we must also grasp the crime of juvenile delinquency as a "crime" and cannot deviate from the consequences of crime. It is the basic rule of punishment (penalty). In response to juvenile delinquency, the corresponding conviction policies of the law are also different because of the different ages. According to the provisions of our criminal law, the age of complete criminal responsibility is 16 years old, and the minors between the ages of 14 and 16 are relatively criminally responsible. This age group is only for intentional homicide, intentional injury,

¹ Gustave Doré. *The Crowed* [M]. Central Compilation Press, 2017:67.

² 陈光中. *刑事诉讼法*[M]. 北京大学出版社, 2016 : 435

³ 张晋藩. *中国法律的传统与近代转型*[M]. 法律出版社, 2009 : 17.

rape, drug trafficking, etc. 8 The crime is criminally responsible. Less than 14 years of age is an age that does not require criminal responsibility. This is a conviction policy based on the full consideration of the nature of the crime of the minor, the root cause and the legal status of the criminal law. It is an effective protection for minors. At the same time, the law also imposes severe penalties on the use of juvenile delinquency and crimes committed by minors, that is, strict punishment, thus curbing the use of criminal law to criminalize special policies of minors. In order to protect the fairness of the society and the seriousness of the law while protecting the minors.⁴ "Criminal law is an insurmountable barrier to criminal policy." Only within the framework of criminal law, the purpose of criminal policy and the pursuit of value of utilitarianism are reasonable. Juvenile delinquency is no exception. The special nature of juvenile status requires the criminal legal system to treat it differently from adults in legislation and judiciary. However, this distinction should still be within the framework of criminal law and should not break through the criminal law. The barriers to the norm.⁵

3. The Appropriate Adult System in Criminal Cases of Minors

3.1. Theoretical Basis

In 1970, American scholar Griffith proposed the family model theory. He believes that the family model is based on the reconciliation of love and contradiction, and regards the relationship between the state and the defendant as the relationship between parents and children within the family. Within the family, if the child makes a mistake, the parent will punish him, but the punishment is not to give revenge or hostility, but to care and love. Therefore, the family model proposed by Griffith emphasizes the respect and concern for the offenders and focuses on the educational function of criminal justice. That is, the purpose of the trial should not be to increase the number of crimes, but to make the society regain a good and useful a member of. In criminal proceedings, if the concept of the family model is adopted, the litigation will not evolve into a fierce struggle. Prosecutors and defenders will assist the court in fair refereeing. Those who commit crimes will not be excluded by society. The educational function of the criminal procedure itself. It will also be reflected to the maximum extent.

In addition to Griffith's family model, the state of parental rights has also become the basis of the protection system for minors. The theory has three basic connotations: first,

⁴ 王丽. 未成年人犯罪的刑事政策解读[J]. 法制博览, 2017 (03) : 239.

⁵ 苏青. 未成年人犯罪“教育为主、惩罚为辅”刑事政策重述[J]. 青少年犯罪问题, 2018(4):8.

the state is in the position of the ultimate guardian of the minor, has the responsibility to protect the minor, and should actively perform this duty; secondly, emphasize that the state's parental authority is higher than the parent's parental authority, even The parents of minors are alive, but if they lack the ability to protect their children and do not perform or improperly perform the duties of guarding their children, the state can override the parental rights of the parents and impose mandatory intervention and protection on the minors; When the state is serving as a “parent” of a minor, it should act for the benefit of the child, that is, it should be based on the welfare of the minor.⁶

Therefore, in the Criminal Procedure Law amended in 2012, the system of suitable adult presence was first stipulated, and it was clear that the legal agent or other suitable adult has the right to intervene in the interrogation and trial procedures of minors. It is an important progress in China's legislation to establish the litigation purpose of the family model advocated by Rifas. It is in line with the special protection of minors by the state's parental theory.

3.2. Theoretical Exploration

The legal agent participation system is a system in the criminal justice of traditional minors and plays an important role in protecting the legitimate rights and interests of minors involved in crimes. However, there are still some areas for improvement in the system. For example, in many cases the legal representative of a minor (ie, his or her parent or guardian) is unable or unfit for various reasons. Therefore, the law introduces a The new term – “appropriate adult” replaces “legal agent.” This makes some scholars believe that the extension of the scope of adult subject is greater than that of the legal agent, but in the logical context of the relationship between the two rights, the subjective qualification of the legal agent is not necessarily sufficient for the adult's eligibility. Unnecessary conditions do not recognize the equivalence of the two in the field of rights.⁷

In essence, the distinction between a legal agent and other suitable adults is made under the concept of a suitable adult. The premise is that although the legal agent and other suitable adults are recognized as being in the same concept of suitable adults, both Different rights connotation, mainly reflected in the superiority of legal agents and enjoy a deeper level of rights, which is involved in the eight provisions of China's Criminal

⁶ 姚建龙. 国家亲权理论与少年司法——以美国少年司法为中心的研究[J]. 法学杂志, 2008(3): 92.

⁷ 谢登科. 合适成年人在场制度的实践困境与出路[J]. 大连理工大学学报(社会科学版), 2015(3): 111-112.

Procedure Law.⁸ The eight provisions can be broadly summarized into three basic rights, namely, the right to apply, the right to object and the right to support. The right to apply includes the application for avoidance and change of compulsory measures; the right of dissent includes the right of recourse to evade rejection, the right of appeal of the effective referee, and the right of dissent without conditional prosecution; the auxiliary rights mainly include independent appeal, presence help, opinion, and reading. Pen recording rights and supplementary statement rights. So how to limit the boundaries of rights for suitable adults other than legal agents?

According to the principle of litigation, the ratio of the strength of the complaining party to the strength of the defending party is 1.1. The strength of the defense party consists of the prosecutor and the defense lawyer. However, in the criminal case of minors, if the strength of the accused and the defense lawyer is constant, the juvenile prosecutor's defense strength is lower than the ideal value, which is difficult to achieve. The expected prosecution is equal. Therefore, in order to achieve a balance between prosecution and defense, suitable adults must necessarily represent the interests of minors. At the same time, some of the legal rights of the legal agent have morphological attributes that transcend the rights of the defense lawyer, such as the right to appeal on behalf of the exercise, the final supplementary statement, etc. These are strong guarantees for the implementation of the principle of due process, so the rights of legal representatives Form is not vacant for juvenile prosecutors. In summary, the scope of rights of other suitable adults and legal agents in the context of role substitution is consistent.⁹

3.3. Theoretical Dilemma

Although Article 281 of China's Criminal Procedure Law stipulates that when a legal agent cannot be present, it is replaced by other suitable adults, but the provisions of the law are still not perfect. First of all, mandatory is insufficient. The law stipulates that other suitable adults are only "can" be notified to the scene, and "can" give the investigators a lot of discretion. In practice, based on the consideration of handling convenience and the purpose of punishing crimes, the investigators in judicial practice often lax in exercising their notification obligations; secondly, the protection is not sufficient. The law does not determine the corresponding rank relationship, affinity relationship and subject nature among other suitable adults, which is different for the willingness and protection of

⁸ For details, see Criminal Procedure Law of the People's Republic of China, Law Press, No.29, 31, 97, 99, 227, 252, 281, 282.

⁹ 李承阳. 我国合适成年人到场制度分析[J]. 河南司法警官职业学院学报,2017(9):81.

minors. In the absence of a specified level relationship, the case handler has a great degree of arbitrariness for other suitable adults, and it is highly probable that the candidate will be determined from the perspective of facilitating the investigation, and part of the function of the appropriate adult will be vacated; The scope of the law for the appropriate adult is too narrow. For some minors who commit crimes and commit crimes in the field, there is a legal gap in the subject of suitable adults, and such minors cannot be effectively protected. Finally, the law applies to ambiguity. The law does not stipulate whether other suitable adults can be present at the same time when the legal agent is present. If both are present, then the definition of the appropriate adult in the legal norms is based on the Criminal Procedure Law. “Article 281 is also the provision of Article 285” If, according to Article 281, an appropriate adult can only participate in the case as a substitute for the legal representative, and cannot participate in the trial at the same time as the legal representative; but if it is in accordance with Article 285, The identity of the authorized representative is defined in the second half of the law. As the first half of the book does not openly hear the provisions of the book to explain, according to the legislative intent, the school and the representative of the minor protection organization only have the right to hear, the purpose is to supervise the juvenile case not to hear the trial, does not enjoy the case Participation rights, therefore do not have the appropriate adult subject status. Therefore, the legal relationship of suitable adults needs to be further clarified and clarified, otherwise it will be ambiguous in the application of law.¹⁰

4. Penalties for Juvenile Delinquency: No Death Penalty

From the special protection of minors in international conventions, the special legislation of countries against crimes committed by minors and even the independent judicial system, it can be seen that juvenile crimes have special characteristics and need to be distinguished from adult crimes. This has been done in modern countries. A consensus is reached.¹¹ In general, this particularity is manifested in the particularity of the juvenile

¹⁰ 李承阳. 我国合适成年人到场制度分析[J]. 河南司法警官职业学院学报,2017(9):82.

¹¹ 1985年召开的联合国预防犯罪和有关罪犯待遇问题大会上通过的《联合国少年司法最低限度标准规则》（即《北京规则》）为使未成年人免于刑事审判，要求成员国立法对刑事责任年龄不应规定过低、对未成年人的处罚必须符合其罪行的严重程度等。1989年第44届联合国大会通过的《儿童权利公约》是在联合国主持下历时十年制定的旨在最大限度地保护儿童权益的国际公约，其中第40条规定了缔约国在儿童被指控触犯刑法时，应当采取措施来保证其尊严和价值感并增强其对他人的人权和基本自由的尊重。美国政府从19世纪中期即已建立少年矫正机构，包括家庭式少年教养所和机构式少年教养所，1899年伊利诺伊州建立了世界上第一个少年法院，这一少年司法模式很快被其他州效仿并推广至世界其他国家。1905年英国建立了少年法院，制定了针对少年的特别法案；1908年德国也建立了少年法院，并于1923年制定了专门的少年刑法。日本从1923年开始，也陆续出台了一系列专门的青少年法规，

offender and the special treatment given by the state in the overall guiding ideology, criminal policy, legislation, judiciary and law enforcement in response to juvenile delinquency. On the whole, it shows the “tolerance” of juvenile delinquency and the “smoothness” tendency of punishment.

The provisions of criminal law in China on criminal liability of juvenile offenders are concentrated in the provisions of Articles 17 and 49 of the Criminal Code. These provisions cooperate with each other and constitute the legal mechanism for the criminal responsibility of juvenile offenders in China. Considering that the minor is determined by its physiological and psychological characteristics, it is easy to be affected and attracted to the criminal path, and has a plasticity, easy access to education and transformation. Therefore, from the fundamental purpose of applying the penalty in China And in view of the characteristics of juvenile offenders, the death penalty is not applied to the handling of juvenile crimes. Article 17 of the Criminal Law stipulates that a person who has reached the age of 16 shall be criminally liable for committing a crime. A person who has reached the age of 14 and is under the age of 16 commits criminal responsibility for intentional homicide, intentional injury, serious injury or death, rape, robbery, drug trafficking, arson, explosion, or poisoning. A person who has reached the age of 14 and under the age of 18 shall be punished with a lighter or mitigated punishment. If he is not criminally punished if he is under 16 years of age, his parents or guardians shall be ordered to be disciplined; if necessary, the government may also be educated. Article 49 stipulates that the death penalty shall not apply to persons who are under the age of 18 at the time of the crime and women who are pregnant at the time of the trial. The person who is seventy-five years old at the time of the trial does not apply the death penalty, except for the death caused by special cruel means. According to the above provisions, juvenile delinquency, no matter what kind of crime, no matter whether the crime is bad or not, the death penalty is not applicable.¹²

5. China's Juvenile Trial System

5.1. Conditional non-Prosecution System

China's 2012 Criminal Procedure Law established a conditional non-prosecution system for minors, which is the first time China has established such a system.

包括《少年法》《少年审判规则》等。参见王宏玉、杨少峰.《我国未成年人犯罪刑事政策探析》[J].中国人民公安大学学报(社会科学版),2012(2).

¹² For details, see Criminal Procedure Law of the People's Republic of China, Law Press, No.17, 49.

The system has the following characteristics:

First, it initiates the uniqueness of the decision body. Conditional non-prosecution is the exclusive power granted by the law to the procuratorial organ, and the procuratorial organ's liberty power is expanded. Only the procuratorial organ is the sole starting body and the sole determining body of the conditional non-prosecution system. The procuratorial organ independently exercises this right *ex-officio*. Power cannot be initiated on application.

Second, the specificity of the scope of the object is applied. Conditional non-prosecution is only applicable to minors who have sufficient and sufficient evidence to prove that they have constituted a specific crime, and that they should file a public prosecution according to law, but the crime is not serious and they really regret it.

Third, the final result is to be determined. After the conditional non-prosecution decision is made by the procuratorate according to law, it does not mean that the proceedings are terminated, that is, whether the effectiveness of the re-indictment is pending, and the juvenile suspect who is not subject to the lawsuit is required to test. During the period, the decision to file a public prosecution or not to prosecute is made.

The application of this system must meet the following conditions:

First, limit the applicable objectives. The system is only for minors who have reached the age of 14 and under the age of 18 at the time of the crime.

Second, limit the types of crime. The conditional non-prosecution system is only applicable to the three types of crimes committed by minors in relation to the personal, democratic, property rights and nuisance of social management order in the Chinese Criminal Law. Other crimes cannot be applied regardless of the circumstances and penalties.

Third, the limitation of penalties The system stipulates that criminal responsibility for defamation of minors is “may be sentenced to a term of imprisonment of one year or less”,¹³ including possible seizure of control, criminal detention, and imprisonment of one

¹³ For details, see Criminal Procedure Law of the People's Republic of China, Law Press, No.282

year or less (including one year), fines, confiscation of property, deprivation of political power, etc.

Fourth, it meets the conditions of public prosecution. The procuratorate's decision to apply the conditional non-prosecution case must be the criminal facts of the juvenile criminal suspect has been found out, the evidence is true and sufficient, the criminal responsibility should be pursued according to law, and the suspect in the minor is not subject to the lawsuit. Before, it should be prosecuted in accordance with the law.

Fifth, there is indeed a performance of repentance. The performance of penitence should be manifested by the juvenile suspects through some objective behaviors, such as actively cooperating with truthful confession, sincerely apologizing, actively compensating for losses, and obtaining victim understanding.

Sixth, the minor party agrees to apply. The Criminal Procedure Law stipulates that the precondition for the application of the system is that the delinquent minor and his legal representative agree that the procuratorate cannot make a unilateral application decision.

Seventh, set the test time. The test time prescribed by the Criminal Procedure Law is six months to one year.¹⁴ Juvenile criminal suspects who fully comply with the regulations of the procuratorate during the test period will not be prosecuted.

Eighth, observe the additional conditions. The Criminal Procedure Law stipulates that (1) comply with laws and regulations and obey supervision; (2) report its activities according to the regulations of the inspection organs; (3) to leave the city or county where it resides or to move, it shall be reported to the inspection authority for approval. (4) Accepting correction and education in accordance with the requirements of the inspection agency.¹⁵ During the test period, juvenile criminal suspects must strictly abide by the above conditions, and if they violate, they will be prosecuted again.

5.2. Non-public Trial System

Article 11 of the Criminal Procedure Law of China stipulates: "The trial cases of the people's courts shall be openly conducted except as otherwise provided in this Law."¹⁶ Judicial disclosure, as the name implies, is the process and judgment of the people's courts

¹⁴ For details, see Criminal Procedure Law of the People's Republic of China, Law Press, No.283

¹⁵ For details, see Criminal Procedure Law of the People's Republic of China, Law Press, No.283

¹⁶ For details, see Criminal Procedure Law of the People's Republic of China, Law Press, No.11

that are subject to trial, except for special provisions. Allow the public to listen, media reports, not secretly conducted in private. Judicial disclosure is an inevitable requirement of natural justice and an important measure to satisfy the public's right to know. In modern democratic society, judicial openness has become an important legal system, reflecting to a certain extent the degree of democracy of a country.

However, certain special interest requirements must be considered in the issue of whether or not to open trials. The interests of minors are one of such special interests. The juvenile criminal case does not open the trial system. It is a special system for the psychological and physiological characteristics of minors in the criminal trial process. It protects minors from "spiritual harm" from outside and judicial personnel in criminal proceedings.

In China, there are three reasons for juvenile crimes not to be publicly tried:

First, the non-public trial is conducive to the return of minors to society. Minors live in society, and juvenile delinquency also occurs in society and has a great negative impact on social order. The transformed minors are bound to return to society, while juvenile criminal cases are not public. The trial system is also subordinated to the social system in a broad sense. Therefore, it is necessary to put the juvenile case non-public trial system into the social system for consideration.

Second, the juvenile criminal case does not openly meet the basic human nature. Minors have always been regarded as a vulnerable group in society. Their litigation capacity and psychological endurance are weak relative to adults, and their rights in law are not as large as those of adults. Freedom is also restricted. Therefore, minors have The right to special justice protection. In modern society, equal treatment includes two situations: equal treatment in the same situation and different treatment in different situations.

As long as certain special rules are followed and exercised within a certain scope, the application of special protection principles will not only form a reverse discrimination against the majority, but will also alleviate social conflicts and spears. Shield will promote the stability and development of society and achieve the equality of society as a whole in a more just sense. Therefore, the different provisions on minors in the criminal trial procedure are in line with the requirements of distribution justice.

Third, the non-public trial of juvenile criminal cases can make the trial more smoothly. Minors have low psychological tolerance and immature mental development. Public trials are also very stressful for a normal adult, not to mention minors under the age of 18, so a

less open trial is a better choice for minors. Without the attention of the outside media, without the public's attention, minors will have a better state to accept the court's investigation, and draw closer to their distance from the judges, so that they can deeply understand their mistakes and cooperate. The procuratorate and the court jointly found out the facts of the case.

China's Criminal Procedure Law stipulates: "At the time of trial, if the defendant is under 18 years of age, it will not be heard in public."¹⁷ This shows that the legislation imposes stricter requirements on minors' non-public hearing, namely: as long as the defendant does not by the age of 18, the court cannot openly hear the case, and there are no exceptions; if it is violated, it is a violation of the trial procedure, which constitutes the reason for the higher court to revoke the original judgment in the second instance or retrial procedure.

At the same time, Law of the People's Republic of China on Prevention of Juvenile Delinquency stipulates: "In juvenile crime cases, news reports, film and television programs, public publications shall not disclose the name, residence, photos of the minor and may infer the minor."¹⁸ And Law of the People's Republic of China on the Protection of Minors also stipulates: "No organization or individual may disclose the personal privacy of a minor."¹⁹ "In the case of juvenile crimes, news reports, film and television programs, public publications, networks, etc. shall not disclose the name, domicile, photos, images of the adult and the information that may be inferred from the minor."²⁰ It can be seen that our attitude towards the media reports of minors is clear, that is, the absolute prohibition is adopted.

5.3. Criminal File Storage System

China's 2012 Criminal Procedure Law stipulates the system of juvenile criminal file storage: "If the crime is under the age of 18 and is sentenced to five years' imprisonment, the relevant criminal record shall be sealed. The criminal record shall be sealed."²¹ It shall not be provided to any unit or individual, except for the judicial organs who need to handle

¹⁷ For details, see Criminal Procedure Law of the People's Republic of China, Law Press, No.285

¹⁸ For details, see Law of the People's Republic of China on Prevention of Juvenile Delinquency, Law Press, No.45, 3

¹⁹ For details, see Law of the People's Republic of China on the Protection of Minors, Law Press, No.39

²⁰ For details, see Law of the People's Republic of China on the Protection of Minors, Law Press, No.58

²¹ For details, see Criminal Procedure Law of the People's Republic of China (2012 Amendment), Law Press, No.275.

the case or the relevant units to make inquiries according to laws and regulations. The unit that inquires according to law shall keep the sealed criminal record confidential.

This is the first time that the Chinese criminal procedure law establishes a system of juvenile delinquency, aiming to weaken the criminal labels of juvenile offenders and weaken the resistance of their return.

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**THE RIGHTS OF THE PERSON REQUIRING
SPECIAL TREATMENT UNDER THE AGE OF 14
AND 18 DURING THE INVESTIGATION PERIOD
OF THE CRIMINAL PROCEEDINGS**

The hearing of child and juvenile victims during the criminal proceedings poses special questions and problems, irrespectively of the child's procedural position. Even the first hearing of the victim, the result of which establishes the subsequent proceedings, is of particularly great importance in these cases. Directive 2012/29 of the European Parliament and Council contains special provisions on the protection of persons requiring special treatment, since the need for differentiation among victims was recognized at an international level. The new Act on the Criminal Code, entering into force on 1 July 2018 in Hungary, classifies child and juvenile persons, on account of their age, into the category of persons requiring special treatment, as required by the Directive and they are included in it by the power of law. In this study I will give information about their rights and the application of the special measures applicable to them in the course of the investigation.

Keywords: *child and juvenile persons, persons requiring special treatment, the Hungarian Act on Criminal Proceedings.*

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1. Introduction

Nowadays more and more criminal offenses against children become known and such cases are picked up by the media, therefore they provoke broad social interest. This increased attention will later extend to the work of the determining authorities.

In these cases the first hearing of the victim, the result of which establishes the subsequent proceedings, is of particularly great importance, too. At such times the interrogator has to get a child meeting the authority for the first time in his/her life in most cases - and not an adult declaring on his/her honor -to speak. By then, the child is rather ashamed of what has happened to him/her due to the immediate surroundings, in some cases to such an extent that he/she develops a sense of compunction because of the crime against him/her. He/she regards himself/herself as being responsible for what has happened and even seek excuses for the perpetrator.

2. The significance of the concept of childhood in criminal law

The perpetrator's criminality is excluded or restricted by childhood.²²

No penalty shall be imposed upon a person who was under the age of 14 when he or she committed a criminal offense, except when the person was over the age of 12 when committing homicide (Subsections (1) and (2) of Section 160), voluntary manslaughter (Section 161), battery (Subsection (8) of Section 164)²³, acts of terrorism (Subsections (1) to (4) of Section 314)²⁴, robbery (Subsections (1) to (4) of Section 365)²⁵ and plundering (Subsections (3) and (3) of Section 366)²⁶ and had the capacity to understand

²² 15. § Act C of 2012.

²³ if the battery is life-threatening or results in death

²⁴ Act of terrorism was incorporated in Act C of 2012. By Act LXIX of 2016 amending certain acts regarding counter-terrorism measures. According to the Memorandum to Section 61, whereas the act of terrorism exceeds the hazard to society of the criminal offenses listed, experiences in recent years have demonstrated that younger and younger persons join terrorist organizations, which gives grounds for an amendment. Without an amendment, a situation may arise, in which the perpetrator over the age of 12, committing the act of terrorism, shall not be liable even if he/she wounded several persons or took their life.

²⁵ robbery and aggravated robbery

²⁶ Aggravated plundering, which are: in respect of a substantial value, in a gang or in criminal association with accomplices, furthermore the aggravated cases in Subsection (3): if the plundering involves a particularly considerable or greater amount of money; or is committed in respect of a substantial value, in a gang or in criminal association with accomplices.

the consequences of the crime when the crime was committed.²⁷

In the European Union, as in Austria, Bulgaria, Cyprus, Denmark, Estonia, Germany, Italy, Kosovo, Latvia and Spain, the minimum age for criminality is usually 14 years. A different regulation is in force in the Netherlands, where the minimum age for criminality is 10 years or in France, where it is 13 years, while it is 15 years in the Czech Republic, Finland and Norway, and 18 years in Belgium. The minimum ages of criminality are 8 and 16 years in Scotland, which considers the type of the crime²⁸, 10, 12 and 16 years in Ireland and 14 and 16 years in Croatia, Lithuania, Romania, Russia, Serbia, Slovenia or the Ukraine. (Csemáné Váradi, 2010: 157.)

2.1. Childhood characteristics

The child considers a mistake as a lie, because that is not true (Popper, 2015: 9.), says Peter Popper, but there are many things that are not true, for example exaggerating or illuminating something, but in the strict sense of the word, they are not lies, although they may seem to be lies to the child.

Another emotional characteristic is that children, especially teenagers, cannot stand emotional discrepancies. They want clear emotions, in most cases they are willing to accept only unambiguous emotions, while adults act differently. (Popper, 2015: 15.)

Children, especially teenagers, experience extreme emotions. Curiously enough, this is why they can become extremely desperate or obsessed to some idea or task over enthusiastically. There is no doubt about it. Therefore they will be filled with bitterness, resentment and sorrow. (Popper, 2015: 17.) A teenager can easily become a fanatic and from there it is a short step to become aggressive. Hence, a fanatic does not tolerate thinking differently or feeling differently. (Popper, 2015: 17.)

According to Balázs Elek, minimal knowledge of the child's development is needed to acquire appropriate information from him/her. The information acquired is different in early childhood, at school age and in case of teenagers. Those who are aware of the different stages of development are better able to judge whether a child of a certain age

²⁷ 16. § Act C of 2012.

²⁸ The Law takes into account some offenses, for example offenses against traffic regulations or aggravated violence against persons.

have understood the questions and whether he/she is able to convey his/her thoughts and feelings successfully. (Elek 2007: 75.)

It is generally known that children can be influenced, believe in adults without doubts and accept what they hear from them without criticism. It is their parents, their kith and kin, or even their playmates who can have a great influence on them. The influence itself can be unintentional or carried out in a light-hearted way. (Elek, 2007: 76.)

In case of an offense against children, it is very unlikely that there is an eye-witness, provided it is not a felony endangering welfare of a child, which is usually committed by a member of the family. The other members of the family either suffer from, watch the domestic violence passively or, very seldom their behavior aims at preventing the crime. It is particularly true in case of an indecent assault on a child, when there are two conflicting testimonies: one by the child and the other one by the adult who denies everything. If there is no medical documentation supporting the child's statement, the so-called 'stalemate', known from chess, evolves and it is difficult to get off on either way.

3. International conventions, directives

The two key concepts of child-friendly justice are *the child* and *child-friendly justice*.

The two concepts are determined by international documents, therefore the Convention on the Rights of the Child²⁹ states that *a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.*³⁰

In Hungary this concept means a *child* -under the age of 14 - and an *juvenile person* - under the age of 18.

The Convention on the Rights of the Child is an international agreement ratified by most countries in the world. Practically it can be considered as a human rights regulation and only two countries, the United States of America and Somalia, have not ratified it. Except for these two countries, it aims to guarantee a special protection and assistance without any form of discrimination for every person under the age of 18 everywhere. (Herczog, 2009: 129.)

²⁹ Convention on the Rights of the Child, which was adopted by General Assembly of the UN on 20 November 1989, Hungary signed it too and notified it in Act LXIV of 1991

³⁰ Convention on the Right of the Child, Article 1.

After the Convention’s entry into force in 1989, two, so-called supplementary protocols were implemented in 2000. These protocols contain the issues that are not stated in the Convention, but are of particular importance and the impacts of which can be felt. One of them is the Document on the Involvement of Children in Armed Conflict (which was issued in CLX Act of 2009 in Hungary), while the other one is the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (which became part of the legal system by the CLXI Act of 2009 in Hungary). (Herczog, 2009: 131.)

The concept of child-friendly justice itself was first published in a Declaration adopted on the 28th Conference of the European Ministers of Justice in October 2007. The Directive of 2010 deals with it comprehensively. (Gyurkó, 2012: 222.)

Under the Guideline of the European Council, *“child-friendly justice” refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.*”³¹(cited by: Solt 2018: 47.)

Accordingly, child-friendly justice can be interpreted by the following principles and keywords: participation in justice, best interests of the child, human dignity, protection against discrimination and rule of law. These are to be applied before (mainly in connection with the police), during and after the proceedings (for the sake of understanding the binding decision and the enforcement). (Gyurkó, 2012: 222.)

Directive 2012/29/EU of the European Parliament and of the Council³² (hereinafter referred to as “Victim Protection Directive”) establishing minimum standards on the rights, support and protection of victims of crime, replaced Council Framework Decision 2001/220/JHA, the recipients of which were the member states of the EU. They had to

³¹ Directive of the European Parliament and of the Council

³² The Directive was adopted on 25 October 2012, published in the Official Journal of the European Union on 14 November 2012 and entered into force on the next day, 15 November 2012.

transpose the provisions of the Directive into their national legal systems by 16 November 2015. (Lencse, 2016)

The Directive contains special provisions for *the protection of the so-called victims requiring special treatment*, because the need for differentiation among victims was recognized at an international level.

Under Directive (9) [...] “Crime is a wrong against society as well as a violation of the person rights of victims. As such, victims of crime should be recognized and treated in a respectful, sensitive and professional manner without discrimination of any kind.” “Victims of crime should be protected from secondary and repeated victimization, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.”

The Directive compulsorily stipulates the member states that “particularly vulnerable victims shall be provided with the most appropriate treatment due to their special situation.”

Under Directive (14) “In applying this Directive, children's best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child adopted on 20 November 1989. Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise those rights in a manner that takes into account their capacity to form their own views.”

A given person must be regarded as a victim, irrespective of whether the perpetrator has been identified, caught, indicted or sentenced and regardless of the family relationship between the perpetrator and the given person.³³

Under the provisions of the Directive, victims of a crime have the right to the following, among others (in a non-exhaustive way):

- interrogation without delay

³³ 2012/29/ Directive of the European Parliament and of the Council (19)

- minimizing the number of interrogations (even by means of video recording the interrogations and giving permission to use the recordings in the course of the court proceedings)³⁴
- making the contact with the interrogator avoidable, for example by summoning the victims and the perpetrators for interrogation at different times³⁵
- a legal representative and supporter
- minimizing the number of medical examinations and
- the protection of private life.

4. The Hungarian regulation

Under Subsection (5) of Section XV of the Fundamental Law of Hungary, Hungary protects families, children, women, the elderly and those living with disabilities by means of separate measures. Moreover, under Subsection (1) of Section XVI, “Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development.”

The right to have a fair trial for everyone involved in the criminal proceedings – not only as defendants- guaranteed in Subsection (1) of Section XVIII should be recognized as determinative.

The Parliament adopted the Victim Protection Directive in Act CLI of 2015, which amended Act XIX of 1998 on Criminal Proceeding in force at the time and included Sections 62/B and 62/C “on special provisions for victims in the regulation.

The two inserted Sections *imposed additional obligations upon the determining authorities*, such as the fact that the victim and the defendant should not meet needlessly, and the procedural action on which the victim’s participation is mandatory and which has to be prepared in a way that a repeated action should not take place unnecessarily.

³⁴ 2012/29/ Directive of the European Parliament and of the Council (53)

³⁵ 2012/29/ Directive of the European Parliament and of the Council (53)

The court, the prosecution and the investigating authority had to *endeavor to use simple and accessible language* with the persons involved in the criminal proceedings during the written and oral communication. The *information* on rights and the *warning* about obligations should be conveyed to the person involved in a *comprehensible way, taking into account the state and personal characteristics of the person involved*.³⁶

Section 62/C introduced the concept of a victim requiring special treatment, which the determining authority had to examine continuously from two sides: one side was the victim's personality and their relationships and the other was the nature of the crime and the circumstances of the perpetration.

In Hungary, Act XC of 2017 on Criminal Proceeding came into force on 1 July 2018 . It guarantees that those involved in the criminal proceedings should exercise their rights and obligations in an appropriate manner and are informed about their obligations and rights -taking into account the rules of personalization, in an appropriate way, as expressed in the Fundamental Law.

The rules of personalization are related to the age and legal capacity of the persons under the age of 18.

5. The concept of persons requiring special treatment in the new Act on Criminal Proceedings

The victim can be *the natural or non-natural person*, whose right or legitimate interest was violated or jeopardized directly by the offense³⁷, and those persons may be heard *as a witness* who may have knowledge of the fact to be proven.³⁸

Under Subsection (1) of Section 81 of Act XC. of 2017, a victim requiring special treatment can be a *natural person* victim or a witness who is hindered in

³⁶ Under Subsections (1) and (2) of Section 62/A of Act XIX of 1998: The court, the prosecutor and the investigating authority shall ascertain during the communication that the person concerned has understood what was said to him/her, or failing that, they explain the information or the warning.

Subsection (3) When applying Subsection (1) and (2), if the person involved

a) is under the age of 18, enhanced caution shall be exercised, taking into account his/her age and maturity.

³⁷ 50. § Act XC. of 2017

³⁸ 168. § (1) Act XC. of 2017

- a) understanding and being understood,
- b) exercising the rights or fulfilling the obligations determined by this Act
- c) participating in the criminal proceedings effectively
- on the grounds of their personal characteristics or
- the nature and the circumstances of the offense subject to the proceedings.

*A victim and a witness requiring special treatment can only be a natural person.*³⁹ In case of a legal person or any other non-natural person, providing extra guarantees is unavailable. (Kiss, 2018: 105.)

Under the current regulation, the subjective data regarding the victim and the witness requiring special treatment (the victim’s personality, age, disability, etc.) and the objective data regarding the offense are determining. Both of them had to be examined - through the amendment- under the former Act on Criminal Proceedings too.

Such causes *from the victim’s side* are, for example:

- his/her age (under 18 or elderly),
- his/her mental, physical or health status.

From the side of the offense:

- the particularly violent nature of the offense subject to the proceedings,
- the relationship of the person involved with the other person involved in the criminal proceedings.

The regulation regarding the age applies to both the victim and the witness, while the nature of the offense can be considered as a condition with regard to the victim exclusively. (Ibolya, 2018: 223.)

³⁹ 81. § (1) Act XC. of 2017

It is unanimous that children can be placed in the category of the victim and the witness requiring special treatment, based on his/her person characteristics and the nature of the offense committed against them. However, it is a “well-known fact” that an person under the age of 14 or 18 is hindered in understanding and being understood in the criminal proceedings. It is “far from being natural” for a child to get involved in a criminal proceedings, in which the rules are incomprehensible for him/her, in which the duty of the members of the authority is to ascertain whether the elements of the statutory definition of the offense regulated in the Special Part of Act C of 2012. have been realized, whether they have actually been committed by the suspect and the child thinking and judging in his/her childish way is to answer questions which he/she does not understand, or if he/she does, he/she does not know how to answer them adequately.

In case of an person under the age of 18, the Principle presumes the existence of special protection needs, which Subsection(a) of Section 82 of Be. defined as *the person under the age of 18 is considered an person requiring special treatment, without a special decision* -that is by the power of law.⁴⁰

When applying Section 82 of Act XC. of 2017., it is the current age of the child or juvenile person, at the start of the criminal proceedings or at the time of the performed procedural action, that is governing. If the victim or the witness reaches the age of 18 during the criminal proceedings, applying special treatment *is not mandatory* any more under Section 82, although retaining special treatment is not excluded under general rules.

In summary, persons under the age of 18 are classified as persons requiring special treatment *by the power of law*. In his/her case, “personalization” should not be applied and the condition establishing special treatment should not be kept under constant review. It is sufficient to ascertain that he/she is under the age of 18. Moreover, if the person in this age group is classified as disabled and maybe a victim of sexual freedom or a sexual morals at the same time, it can be ascertained unambiguously and “repeatedly” that he/she is classified as a person requiring special treatment.

⁴⁰ Section 82. Without a special decision,

a) a person under the age of 18

b) a disabled person defined by Act on the Rights and Equal Opportunities of Persons with Disabilities and those who may be qualified as such, and

c) the victim of an offense against sexual freedom and sexual morals

is considered to be a person requiring special treatment.

According to the explanatory memorandum of the Act, “Section 82 lists the cases in which the authorities determining in the case should apply special treatment and special treatment applies without a special decision”. At the same time, ascertaining the application of special treatment does not mean applying all the elements of the set of instruments compulsorily or without any discretion, hence the determining authority makes a decision on the particular measures based on the special characteristics of the person requiring special treatment in accordance with *the principle of necessity and proportionality* compulsorily. Only the provisions of Section 87 containing regulations applicable for the procedural actions in case of children, of Section 88 containing regulations applicable for the procedural actions in case of persons under the age of 14 and of Section 89 containing regulations applicable for the procedural actions in the case of victims of sexual freedom and sexual morals constitute an exception to this discretion. They are mandatory legislative provisions⁴¹, from which no derogation is permitted by the Act itself.

6. Special treatment measures

The legislator listed the scope of “necessary” measures to be taken for the authorities determining in the criminal proceedings in Paragraphs (a) to (k) of Subsection (1) of Section 85 of Be.

These measures ensure the rights of the person requiring special treatment to be exercised, the fulfillment of his/her obligations to be promoted, his/her *tolerance* and *protection*.

The measures listed in Paragraphs (a) to (k) of Subsection (1) of Section 85 of Act XC. of 2017 are aimed to ensure the tolerance of the victim requiring special treatment, therefore the court, the prosecution and the investigating authority:

- a) ensures that the person involved may properly exercise his/her rights and duties under this Act in the face of the obstacles stemming from the conditions established by special needs,
- b) act with enhanced *caution* in their communications,

⁴¹ <https://www.google.hu/search?q=2017.+%C3%A9vi+xc.+t%C3%B6rv%C3%A9ny+indokol%C3%A1sa&oq=2017.+%C3%A9vi+XC.+t%C3%B6rv%C3%A9ny+&aqs=chrome.5.69i57j69i61j0l4.18435j0j7&sourceid=chrome&ie=UTF-8> accessed on 1.10.2018

- c) act with enhanced *caution* in the course of the criminal proceedings for the sake of tolerating the private life of the person involved,
- d) provide enhanced protection for the person’s particulars, especially the health data of the person involved, which are related to the conditions establishing special treatment,
- e) *promote* that the person involved may apply for an interdetermining assistant,
- f) *act* taking account of the personal needs of the person involved during the planning and the fulfillment of the procedural action and *immediately conduct* the procedural actions requiring the participation of the person involved,
- g) *prepare* the procedural action requiring the participation of the person involved in a way that *it can be conducted without being repeated*,
- h) ensures that the person involved *shall not meet* any other person involved in the criminal proceedings *needlessly on the scene of the procedural action* during the procedural action, especially if the special treatment is based on the relationship with this person,
- i) *take the procedural action in the premises designed* or adapted for this purpose provided that no other measure may promote or tolerate the rights of the person involved to exercise his/her rights and duties in any other way ,
- j) *are allowed to record images and sounds* of the procedural action requiring the participation of the person involved,
- k) *are allowed to ensure* the participation of the person involved in the procedural action through a telecommunication device.

The protection of the person requiring special treatment takes place only if his/her life, physical safety or personal freedom related to his/her participation in the criminal proceedings is jeopardized or for the purpose of his/her being enabled to exercise their right and duties in the criminal proceedings without intimidation and interference.⁴²

⁴² 86. § (1) a) b) Act XC. of 2017

The measures for the effective protection are listed in Paragraphs (a) to (i) of Subsection (2) of Section 86 of Act XC. of 2017

In particular, this includes the use of a telecommunication device for the sake of maintaining the confidentiality (anonymization) of the identity of the victim or the witness requiring special treatment, the distortion of the personal characteristics by using a technical device and recording images and sounds. The rules on making a copy of the person characteristics suitable for determining the identity of the person involved are set in Paragraphs (a) and (b) of Subsection (2) of Section 86 of Act XC. of 2017

In addition, there is another protection-like provision under which the law may restrict the right of the defendant or the defender to participate in the procedural action. Furthermore, it may restrict the right of the persons participating in the procedural action, involving the person involved, to ask questions by making the proposal of asking questions possible.⁴³

7. Rules applicable for the investigation to persons under the age of 18 years in the new Criminal Procedure Act.

The Law establishes three separated rules and even special ones for cases when establishing special treatment is required. These are:

- persons under the age of 18⁴⁴
- persons under the age of 14 in which the rules relating to persons under the age of 18 are required to apply⁴⁵, and
- in case of a victim of an offense against the freedom of sexual life and sexual morals. In this respect, the law establishes additional mandatory detailed rules in case the victim is under the age of 18.⁴⁶

⁴³ 86. § (2) c) d) Act XC. of 2017

⁴⁴ 87. § Act XC. of 2017

⁴⁵ 88. § Act XC. of 2017

⁴⁶ 89. § Act XC. of 2017

In.:<https://www.google.hu/search?q=2017.+%C3%A9vi+xc.+t%C3%B6rv%C3%A9ny+indokol%C3%A1sa&oq=2017.+%C3%A9vi+XC.+t%C3%B6rv%C3%A9ny+&aqs=chrome.5.69i57j69i61j0l4.18435j0j7&sourceid=chrome&ie=UTF-8> accessed on : 1.10.2018

The procedural actions involving the person under the age of 14 are usually surrounded by numerous uncertainties (the issue of the ability to apprehend, mental and verbal maturity, a skill and ability to express oneself, the lack of criminal responsibility regarding to perjury, etc.). The obvious consequence of this is the continuous, repeated exposure to additional procedural actions with regard to those involved (continuous interrogation, peer review) and the undesirable effects of the criminal proceedings. Therefore such procedural actions are highly expected to take place only if they are irreplaceable. It is the duty of the determining authority to consider this condition. (Ibolya, 2018: 234.)

Under Subsection (1) of Section 87 of Act XC. of 2017., the court, the prosecution and the investigating authority:

- a) record images and sounds, if possible,
- b) may order the participation of a forensic psychologist in the procedural action,
- c) ensures the effectiveness of the rights of the child enunciated in the Fundamental Law of Hungary, Act LXIV of 1991 on children’s rights, act on the protection of children and guardianship and other acts in connection with the criminal proceedings.

The statement of the witness under the age of 18 shall not be examined by an instrumental checking of the statement.⁴⁷

7.1. A separate interrogation room, image and sound recording

The person under the age of 14 may be interrogated as a witness, *if the evidence expected from his/her statement cannot be replaced*⁴⁸ and the warning about the consequences of perjury should be avoided in case of his/her interrogation. The procedural action concerning a child *should be carried out designed or adapted for this purpose*, provided that facilitating and tolerating the person involved to exercise his/her rights cannot be ensured in any other way or by any other measure.⁴⁹

⁴⁷ 87. § (2) Act XC. of 2017

⁴⁸ 88. § (1) a) Act XC. of 2017

⁴⁹ 88. § (1) b) Act XC. of 2017

Returning to the provisions of the directive, the interrogation of the victims with special protection needs - for example children- should be carried out with the assistance of trained professionals in the premises designed for this purpose. However, the ministerial memorandum of Act XC. of 2017 refers to the fact that the law does not apply the concept of “the child interrogation room” as in previous years, because applying the isolation room for ensuring the tolerance of the person involved may not be connected only to age.

The current regulation terminated the so-called primacy of the investigation judge in connection with witnesses under the age of 14.

In case of an person under the age of 14, Subsection (1) of Section 88 of Act XC. of 2017 does not apply “if possible”, but “total order” concerning the fact that the court, the prosecution and the investigating authority *record images and sounds* of the procedural action, which happens in the interest of the juvenile person involved in the criminal proceedings undoubtedly.

In this regard, there is no governing jurisprudence decision in relation to Criminal Procedure Act. of 1998. However, in the light of Subsection (5) of Section 167 of Act XC. of 2017 its failure itself does not mean using the result of the procedural action as evidence, whereas the recording is primarily a device tolerating the person involved. (Ibolya, 2018: 235.)

Balázs Elek proposed to the forward-looking practice according to which it would be important to have the interrogation recorded on a video or audio cassette from the start of the investigation. It would ensure the full documentation of the conversation and register what has been said, the proceedings applied and the data acquired correctly. The video recording would make the observation of the non-verbal references possible. The legislature fulfilled this desire.

It is an important ascertaining of the Be. that the person requiring special treatment may waive the extra guarantees provided for him/her, except for those the law prohibits since in some cases the Criminal Procedure Act renders the enforcement of these rights mandatory. This means that the judicature should carry out certain measure. In some cases the Criminal Procedure Act contains mandatory procedural provisions beyond the control of the person involved, the failure of which should not take place. For example, *image and sound recording of the procedural action requiring the participation of the victim or the witness under the age of 18* should not be refused. It must be noted, that *this obligation should be applied if the defendant is under the age of 14*. The right of the person involved

to dispose is similarly restricted in case of some additional, specific legal instruments⁵⁰, when refusing a given provision would endanger the adaptability of the legal instrument for the person involved.

7.2. The participation of a psychologist

It is a major novelty that the Act on Criminal Proceedings makes it possible for a psychologist expert to participate in a procedural action requiring the participation of the person under the age of 18, since the members of the authorities proceeding in criminal cases could acquire some information about whether what the child or juvenile person had said was experience-based and reasonable and whether any tampering in what he/she had said could be felt, on the grounds of the psychologist's expertise.

A psychologist has a different approach to the person involved in the criminal proceedings than a member of the authority. This specific openness, interest can provide a lot of useful information. The expertise of a psychologist makes it possible, that, for example the questions to the child be expressed in a comprehensible way or the answers given to them be interpreted adequately by the authority. The psychologist can assistance recognize whether the statement is rehearsed, mainly in cases when some kind of inconsistency can be observed between the structure of the statement and the mindset, the standards of the confessor related to other areas.

The participation of a forensic psychologist expressly ensures the adequate execution of the procedural action and the effective conduct of the peer review ordered irrespectively of the procedural action. The expert may be involved in the determining authority's conducting the procedural action in an appropriate way and by tolerating the person involved and assist in conducting the communication, taking the age and other personal characteristics of the victim or the witness. In the latter case, the peer review and the procedural action take place in parallel, during which the expert shall act in accordance with the applicable rules. Therefore, the expert can make his/her peer review without a further examination, tolerating the person involved. (Ibolya, 2018: 233.)

It is fairly common to involve a psychologist expert in cases where the victim is an person under the age of 14 or 18.

⁵⁰ these include: the prohibition of instrumental verification of the testimony, limitation of consent to line-up, prohibiting the participation of the defendant and the defender, restricting the right of the persons present to ask questions, obligation to exclude the public, etc.

The judicial practice acknowledges experience-based performance as one credible criterion of the statement.

What is said before the psychologist should not be evaluated as evidence or form the basis of the prosecution, although in my opinion, the current regulation, under which a psychologist may be involved in the procedural act, means that what is said during the hearing are recorded in the presence of the determining authority. The hearing is conducted by a member of the determining authority, the psychologist “only” assists in understanding the child’s “meta-communication”, or in other words, he/she actually acts as an “interpreter”.

In some member states of the European Union it is an established practice that in the criminal proceedings persons under the age of 18 are involved in one, video-recorded peer review in order to minimize the extent of repeated (psychological) traumatization. If further questions should be necessary during the proceedings, the expert -or even another expert- can use this video-recorded material. The video ensures analyzing the non-verbal communication (intonation, tone, posture, mimics, gestures, etc.) and metacommunication elements, which could not be reconstructed by any other detailed, typed minutes.

The law does not indicate whether the investigative step conducted in the presence of a psychologist takes out a psychological examination or not. If a psychologist’s peer review appears to be justified before or after the hearing or interrogation, the child or the juvenile person has to say what has happened several times. It can be detrimental for him/her, since he/she has to “relive” what has happened. In my opinion, the statement of the child or juvenile person before the investigating authority refers to the criminally relevant facts of the case exclusively, the questions by the psychologist are broader in scope. Moreover, if we include tests and drawings in the peer review, it cannot be carried out on one occasion.

7.3. *The interrogator*

All the interrogations of the victim should be conducted by the same person, if it is not contrary to the effectiveness of the proceedings. Moreover, *on request* of the victim, the interrogation should be conducted by a person of the same sex *in some offenses*⁵¹. All

⁵¹ sexual offenses

the interrogations of the child victim should be recorded with an audiovisual device that may be used as evidence, as observed above.

In case of a procedural action requiring the participation of an person under the age of 14, the investigating authority shall ensure that the procedural action be conducted by *the same person on each occasion*⁵², if it does not jeopardize the effectiveness of the procedural action. According to the explanatory memorandum of the law, taking account of the victim’s interests makes it possible that the procedural action be conducted by another person or by a person of the other sex on the grounds of the victim’s consent or explicit motion.

Under Paragraph (c) of Subsection (2) of Section 23 of the Victim Protection Directive, “the interrogation of the victim shall be conducted by experts trained for this purpose or by their help”, although the statement of the person involved shall be taken into account in this respect. The rejecting statement shall be interpreted as an objection to the person conducting the proceedings, rather than an objection to the provision. In such cases, the investigating authority shall provide a proceedings conducted by another member of the determining authority, acceptable for the person involved, if possible. (Ibolya, 2018: 235.)

7.4. The right of the defendant and the defender to participate in the investigation step

It is a further rule that at the location of the proceedings, when the participation of a person under the age of 14 years is required, the defendant and the defender may not be present in person,⁵³ which may violate the rights of the defendant to defense.

In the investigation period, the presence of the defendant and his/her defender may be restricted, but this rule should not be abused, restricting the rights of defense unduly. [...] Restriction of presence does not include the right for information of the defendant and the defender and right to access to the documents. Restriction of presence is not only a restriction of presence in person, thus, when ordered, the presence of the defendant or the defender cannot be granted by means of telecommunication either. (Ibolya, 2018: 231.)

When a hearing of a witness under the age of 14 is requested by the defendant or the defender, the court, the prosecution or the investigating authority may grant the right of

⁵² 88. § (1) c) Act XC. of 2017

⁵³ 88. § (3) Act XC. of 2017

presence in person to the defendant and his/her defender, who have made such a proposal, when the participation of the witness is required in the proceedings.⁵⁴

At this point, Section 6 of the European Convention on Human Rights is worth mentioning, which provides details of the binding rules of the right to a fair trial. Paragraph (d) of Subsection (3) of Section 6 states that “everyone charged with a criminal offense has the following minimum rights ... to examine or have examined witnesses against him/her and to obtain the participation and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her.”

Thus, restriction of the presence of the defendant and the defender can in general be applied during the investigation, especially in the inspection period, while a general restriction of presence throughout the whole proceedings is only assured in the case of specially protected witnesses, in harmony with the principles of necessity and proportionality, and the legal practice of the European Court of Human Rights with respect to anonymous witnesses. (Ibolya, 2018: 231.)

The question is if we can find the balance between protecting a victim or a witness under the age of 14 or 18 years, who requires special treatment, to become a victim again and to protect him/her from having to meet the person who committed a crime against him/her, while the rights of the defendant and the defender not to be restricted, because measurements within the scope of special treatment may not violate the rights of other persons who take part in the proceedings. (Kiss, 2018: 104.)

7.5. Lineup

According to the Subsection (2) of Section 88 of Act XC. of 2017, lineups involving witnesses under the age of 14 are prohibited – for the defendant, an approval is required to enforce the defendant’s right to defense –, and for witnesses between 14-18 years of age, their approval is required. In case of crimes against the freedom of sexual life and sexual morals, lineups involving the victim can only be ordered and carried out if the victim’s approval has been obtained, regardless his/her age.

This provision of the Act on Criminal Proceedings seems somewhat worrisome, especially with respect to persons between 14 and 18 years of age, when lineup is allowed if their approval is obtained.

⁵⁴ 88.§ (4) Act XC. of 2017

Persons between 14 and 18 are children and youngsters and with respect to criminal acts which were committed against them, and the defendant is to be punished upon a complaint has been lodged, such a complaint can be lodged by their legal representatives, guardians etc. If a complaint lodged by a young person cannot be considered effective, why do we think that he/she is able to make a valid statement with respect to his/her approval to lineup?

The victim or witness is a child or a juvenile person---who, as I earlier discussed, can be influenced---may not be aware of what lineup means, and what would we expect if he/she has to “face” the person who committed a violent or sexual crime against him/her, especially if this person is his/her relative, like his/her father? Should we watch as a father influences his daughter during lineup and says to her face that “my daughter, you presented a striptease dance, you were provoking me, and as a man, unfortunately, I couldn’t resist!”. And what would we expect from a young aged girl, who is happy not to be pregnant from her own violent father? Can we expect her, aged 15, shaking in fear, say her father that he raped her?

In my opinion, lineups not only involving persons under 14 years of age, but also those between 14 and 18 should be banned by law rather than being allowed after obtaining approval, because such lineups are carried out between unequal parties, and a lineup offers a wide range of possibilities to influence the victim, who previously made an incriminating statement. This may even influence the final outcome of the investigation.

8. Summary

For a long period of time, the “protagonist” of the criminal proceedings was obviously the defendant and the rights of the defendant were in the highlight. In our days, both the law-makers and the authorities involved in criminal proceedings are required to meet international demands to an increasing degree, and the victim is gaining more focus rather than the defendant.

The aim of providing special treatment to victims under 14 and 18 years of age is to protect them from becoming secondary victims or victims again, being threatened, and revenge.

Hearing of children in a criminal proceedings – independently from the child’s position in the proceedings – raises special questions and problems. In criminal proceedings, in which a child is exposed to violence, sexual and other type of abuse, a child usually meets

legal systems, legal solutions, which were created keeping adults' characteristics and attributes in mind, and whose rules a child does not understand in most if the cases (Parti-Solti-Virág, 2018: 63), so, in my opinion, questioning a child does not only require well prepared investigators, prosecutions, defenders, and judges, but thoughtful, coherent and special regulations are also needed as far as the the lawmakers are involved.

I hope that my study has reasonably suggested that children and youngsters, as victims or witnesses, make up a *special category* – because of their age, they do not think, speak or behave like adults. Their hearings and questionings should therefore be conducted by persons who are experts of this field, they are trained and have a good sense for doing this, and have empathy. The number of hearings should be minimized, because the more often the crime is recalled, the more dysfunctional effects can be expected. This may even lead to challenging the credibility of the person who is being questioned, which may create a disadvantageous situation both for the person questioned and the authority involved in the proceedings.

The change of approach has taken place, but it seems that some particular rules still have to be elaborated on. It can be stated that regulations of the Act on Criminal Proceedings, related to special treatment, need improving, but attempts are made to implement the expectations of the international norms, especially those of the European Union. The rest is up to us.

A world organisation called “Save the Children” states in a publication, published in 2009 on the 20th anniversary of the UN’s Convention on the Rights of the Child [Rights in real life. How the UNCRC has improved the situation for children. Save the Children, Stockholm, 2009. (cited by: Herczog, 2009: 129), that according to their analysis, decision makers had made their decisions and acted according to their best belief in favour of the children, however, they had hardly consulted the communities involved.

Thus, *children seemed like belongings of adults*, and not independent persons. In the past two decades, there has been an opportunity to look at the world like children do, to listen to them, what they think of their own problems and their possible solutions. (Herczog, 2009: 129)

It is 2019 now, the 30th anniversary of the UN’s Convention on the Rights of the Child. It has been a long time since the Convention was passed and we have done a lot for enforcing children’s rights, but still there is a lot to do, especially in the field of criminal proceedings. Enforcing children’s rights is not only a task for a nation or a country, but it

is a task for the adult community of the whole world, so I conclude my paper with a few words by Maud de Boer-Boquicchio⁵⁵, who said the following:

“The European Council works for promoting children’s rights, to protect and to strengthen children, and to prevent violation of their rights. The European Council does not only do this because children are “our future”, but also because obviously we are responsible for their present.”⁵⁶

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⁵⁵ Since 2002 Deputy Secretary General of the Council of Europe

⁵⁶ Prava deteta-priručnik za poslanike Skupštine APV, Novi Sad, 2018. 15. p.

YEARBOOK
HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHTS OF THE CHILD
“30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”

Rights in real life. How the UNCRC has improved the situation for children. Save the Children, Stockholm, 2009. (cited by Herczog, M. (2009) *A gyermekjogi egyezmény érvényesülése*, OKRI Szemle 2.kötet, Szerkesztő: Virág Gy. 129. p.)

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АЛЬТЕРНАТИВЫ УГОЛОВНОЙ ОТВЕТСТВЕННОСТИ НЕСОВЕРШЕННОЛЕТНИХ ПО РОССИЙСКОМУ УГОЛОВНОМУ ПРАВУ

В статье анализируются положения Уголовного кодекса Российской Федерации, определяющие порядок применения к несовершеннолетним, совершившим преступление, мер, альтернативных уголовной ответственности. Таковыми являются меры воспитательного воздействия, назначаемые при освобождении несовершеннолетнего от уголовной ответственности. Представлен комментарий оснований освобождения от уголовной ответственности, раскрыто содержание мер воспитательного воздействия, определены последствия неисполнения таких мер, дана характеристика процессуального порядка освобождения от ответственности с применением мер воспитательного воздействия.

Ключевые слова: уголовная ответственность несовершеннолетних; альтернативы уголовной ответственности, освобождение от уголовной ответственности; меры воспитательного воздействия.

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Введение

Наличие в российском уголовном законе специальных правил об ответственности лиц, совершивших преступления в несовершеннолетнем возрасте, является важным свидетельством отражения в нем идей справедливости и гуманизма, признания интересов ребенка приоритетным объектом уголовно-правовой защиты.

Такой подход основан на предписаниях ч. 1 ст. 38 Конституции РФ и непосредственно вытекает из положений ряда международных правовых актов, составляющих часть российского права: Конвенции о защите прав человека и основных свобод (1950), Конвенции о правах ребенка (1989), Минимальных стандартных правил Организации Объединенных Наций, касающихся отправления правосудия в отношении несовершеннолетних (Пекинских правил, 1985), Миланского плана действий и Руководящих принципов в области предупреждения преступности и уголовного

правосудия в контексте развития и нового международного экономического порядка (1985), Руководящих принципов Организации Объединенных Наций для предупреждения преступности среди несовершеннолетних (Эр-Риядских руководящих принципов, 1990).

Согласно этим документам, правосудие в отношении несовершеннолетних правонарушителей должно быть направлено на то, чтобы применяемые к ним меры воздействия обеспечивали максимально индивидуальный подход к исследованию обстоятельств совершенного деяния и были соизмеримы как с особенностями их личности, так и с обстоятельствами совершенного деяния, способствовали предупреждению противозаконных действий и преступлений среди несовершеннолетних, обеспечивали их ресоциализацию, а также защиту законных интересов потерпевших.

В соответствии с Минимальными стандартными правилами ООН, касающимися отправления правосудия в отношении несовершеннолетних:

- 1) меры воздействия всегда должны быть соизмеримы не только с обстоятельствами и тяжестью правонарушения, но и с положением и потребностями несовершеннолетнего, а также с потребностями общества;

- 2) решение об ограничении личной свободы несовершеннолетнего должны приниматься только после тщательного рассмотрения вопроса и ограничение должно быть по возможности сведено до минимума;
- 3) несовершеннолетнего правонарушителя не следует лишать личной свободы, если только он не признан виновным в совершении серьезного деяния с применением насилия против другого лица или в неоднократном совершении других серьезных правонарушений, а также в отсутствие другой соответствующей меры воздействия;
- 4) при рассмотрении дела несовершеннолетнего вопрос о его или ее благополучии должен служить определяющим фактором.

Обязательным условием полноценной реализации таких рекомендаций выступает установленный в законе весьма широкий спектр уголовно-правовых последствий совершения преступления несовершеннолетним, которые обеспечивают ступенчатое сокращение объема репрессивных мер в отношении виновных. Они включают различные виды освобождения их от уголовной ответственности и ее реализации, предполагают как назначение уголовного наказания с определением различных вариантов его отбывания, так и неназначение уголовного наказания с заменой его иными мерами уголовно-правового характера или без таковой. При этом закон предусматривает возможности разрешения уголовно-правового конфликта с участием несовершеннолетнего не только на различных этапах уголовного судопроизводства, но и на досудебных стадиях уголовного процесса.

Устанавливая правила реализации уголовной ответственности несовершеннолетних и освобождения от нее, законодатель конструирует особенные нормы в качестве дополнительных, сохраняя возможность применения к подросткам общих нормативных предписаний. Так, освобождение от уголовной ответственности несовершеннолетних происходит как на основании общих норм (ст. 75 – 78 УК РФ, примечаний к некоторым статьям особенной части УК РФ), так и в соответствии со специальными правилами (ст. 90 УК РФ); реализация уголовной ответственности также предполагает применение общих (ст. 79 – 83 УК РФ) и специальных (ст. 92 УК РФ) правил. Это положение приобретает особое значение при выборе уголовно-правовых последствий совершения преступления, так как дает в руки правоприменителю дополнительные инструменты, позволяющие максимально их индивидуализировать.

Множество вариантов определения уголовно-правовых последствий совершения преступления подростком отражает адекватность уголовного закона задаче дифференциации уголовной ответственности, воплощение принципов гуманизма и личной ответственности. Оно же требует от правоприменителя глубокого погружения в уголовно-правовую ситуацию, возникшую в связи с преступлением несовершеннолетнего, для того, чтобы выбрать наиболее оптимальный вариант его правового разрешения.

Понятие несовершеннолетнего в уголовном праве

Согласно ч. 1 ст. 87 УК РФ, несовершеннолетними признаются лица, которым ко времени совершения преступления исполнилось четырнадцать, но не исполнилось восемнадцати лет. Эта дефиниция носит ограничительный характер и применяется только и исключительно для применения положений уголовного закона об ответственности несовершеннолетних. Она не распространяется на нормы Особенной части УК РФ, ориентированные за защиту прав и интересов лиц, не достигших 18 лет.

Согласно Минимальным стандартным правилам ООН, касающимся отправления правосудия в отношении несовершеннолетних (1985), несовершеннолетним является ребенок или молодой человек, который в рамках существующей правовой системы может быть привлечен за правонарушение к ответственности в такой форме, которая отличается от формы ответственности, применимой к взрослому. Примерный максимальный возраст несовершеннолетнего – восемнадцать лет – определен Конвенцией ООН о правах ребенка (1989).

Российская Федерация в определении возрастных границ несовершеннолетия в уголовном праве следует международным стандартам и национальным правовым традициям. Несовершеннолетним признается лицо, достигшее 14, но не достигшее 18 лет. Минимальный возраст ответственности при этом установлен с учетом рекомендаций Минимальных стандартных правил ООН, касающихся отправления правосудия в отношении несовершеннолетних, которые в п. 4.1 предписывают, что “в правовых системах, в которых признается понятие возраста уголовной ответственности для несовершеннолетних, нижний предел этого возраста не должен устанавливаться на слишком низком уровне, учитывая аспекты эмоциональной, духовной и интеллектуальной зрелости“. Он определяется, в том

числе с учетом способности ребенка перенести связанные с уголовной ответственностью моральные и психологические аспекты.

В соответствии со ст. 19, 20 УК РФ, п. 1 ч. 1 ст. 421, ст. 73 УПК РФ

установление возраста несовершеннолетнего обвиняемого (подсудимого) обязательно по каждому делу, поскольку возраст входит в число обстоятельств, подлежащих доказыванию и является одним из условий его уголовной ответственности.

УК РФ не признает за лицами, не достигшими 14 лет, способности к осознанному выбору социально полезной модели поведения и виновной ответственности, тем самым выводит их за рамки уголовно-правовых отношений, утверждая неопровержимую презумпцию их безответственности, даже если до достижения этого возраста они достигли уровня развития, позволяющего оценивать свое поведение с общесоциальных позиций и осуществлять выбор между позитивной и негативной моделью поведения.

Недостижение установленного законом возраста на момент совершения преступного деяния свидетельствует об отсутствии одного из обязательных признаков субъекта преступления, исключает возможность возбуждения уголовного дела и влечет обязательное прекращение возбужденного уголовного дела за отсутствием состава преступления¹.

Календарный возраст несовершеннолетнего устанавливается на основании документов о рождении. При этом лицо считается достигшим возраста, с которого наступает уголовная ответственность, не в день рождения, а по его истечении, т.е. с нуля часов следующих суток. При отсутствии документов, установление возраста несовершеннолетнего происходит судом с учетом заключения судебно-медицинских экспертов о биологическом (функциональном) возрасте. В данном случае днем рождения несовершеннолетнего считается последний день того года, который определен экспертами, а при установлении возраста, исчисляемого числом лет, правоприменитель обязан исходить из предлагаемого экспертами

¹ Обзор кассационной практики судебной коллегии по уголовным делам Верховного Суда РФ за 2004 год (определение по делу Абрамова) // БВС РФ. – 2005. – № 8.

минимального возраста такого лица. Установленный на основании экспертизы биологический возраст, имеет такое же значение, что и возраст календарный.

Положения закона о возрасте несовершеннолетия требуют толкования во взаимосвязи с предписаниями ст. 20 УК РФ, определяющими возрастные границы субъектов преступлений и общие условия уголовной ответственности несовершеннолетних, в частности, предписывающих выяснять уровень психического развития и социальной зрелости несовершеннолетнего (его социальный возраст) для решения вопроса о возможности привлечения к уголовной ответственности.

Презумпция о совпадении календарного и социального возраста относится к числу опровержимых. Вменяемое лицо, не в полной мере осознающее характер своего поведения и руководящее им в силу несоответствия фактического (социального) возраста календарному, не подлежит уголовной ответственности².

При наличии данных, свидетельствующих об отставании в психическом развитии несовершеннолетнего, в силу ст.ст. 195 и 196, ч. 2 ст. 421 УПК РФ следует назначать комплексную психолого-психиатрическую экспертизу в целях решения вопроса о его психическом состоянии и способности правильно воспринимать обстоятельства, имеющие значение для уголовного дела. При этом перед экспертами должен быть поставлен вопрос о влиянии психического состояния несовершеннолетнего на его интеллектуальное развитие с учетом возраста.

Правовые последствия совершения преступления несовершеннолетним

В ч. 2 ст. 87 УК РФ перечисляются предусмотренные в законе уголовно-правовые последствия совершения преступления несовершеннолетним. К несовершеннолетним, совершившим преступления, могут быть применены принудительные меры воспитательного воздействия либо им может быть назначено наказание, а при освобождении от наказания судом они могут быть также помещены в специальное учебно-воспитательное учреждение закрытого типа.

² Обзор кассационной практики судебной коллегии по уголовным делам Верховного Суда РФ (определение по делу Шевченко) // БВС РФ. – 1999. – № 11; Определение Судебной коллегии Верховного Суда РФ от 24.02.1998 по делу Бабушанова // БВС РФ. – 1998. – № 12.

В данном случае принципиальное значение имеет порядок расположения мер воздействия, который ориентирует правоприменителя на приоритетное использование мер, не связанных с назначением уголовного наказания и (или) его отбытием (исполнением). Он отражает в более общей форме правило, предусмотренное в ч. 1 ст. 60 УК РФ, известное как принцип экономии уголовной репрессии: более строгое уголовно-правовое последствие совершения преступления может быть назначено только в том случае, если менее строгое не обеспечивает достижения целей уголовного права в отношении несовершеннолетних.

В соответствии с этим освобождение несовершеннолетних от уголовной ответственности и от уголовного наказания, в том числе с применением принудительных мер воспитательного воздействия, являются (при прочих равных условиях) наиболее предпочтительными мерами воздействия, чем назначение и отбытие уголовного наказания. Пленум Верховного Суда на этот счет прямо предписывает: “Суды не должны назначать уголовное наказание несовершеннолетним, совершившим преступления небольшой или средней тяжести, если их исправление может быть достигнуто путем применения принудительных мер воспитательного воздействия”.

Важно обратить внимание и на используемый в ч. 2 ст. 87 УК РФ оборот “могут быть применены”, который демонстрирует возможность, но не обязательность применения к несовершеннолетним мер уголовно-правового характера. Это обстоятельство также отражает принцип экономии мер уголовной репрессии. Практическое значение он приобретает в тех случаях, когда перед правоприменителем возникает ситуация выбора между применением к несовершеннолетним общих норм (например, ст. 75, 76, 82 УК РФ), не предполагающих возложения на них каких-либо мер, и специальных (ст. 90, 92 УК РФ), связанных с реальным применением особых воспитательных средств. Косвенно рассматриваемое положение закона

свидетельствует также о внедрении в уголовно-правовое регулирование отношений с участием несовершеннолетних начал целесообразности, согласно которым разрешение уголовно-правового конфликта должно быть подчинено приоритетной задаче наилучшего обеспечения интересов несовершеннолетнего.

Освобождение несовершеннолетнего от уголовной ответственности

Согласно положениям ч. 1 ст. 90 УК РФ, несовершеннолетний, совершивший преступление небольшой или средней тяжести, может быть освобожден от уголовной ответственности, если будет признано, что его исправление может быть достигнуто путем применения принудительных мер воспитательного воздействия.

Применение принудительных мер воспитательного воздействия является приоритетной формой разрешения уголовно-правового конфликта, в котором участвует несовершеннолетний. Это положение продиктовано принципами гуманизма, справедливости и экономии мер уголовной репрессии. Оно непосредственно вытекает из требований Пленума Верховного Суда РФ, согласно которым, “суды не должны допускать случаев применения уголовного наказания к несовершеннолетним, совершившим преступления небольшой или средней тяжести, если их исправление и перевоспитание может быть достигнуто путем применения принудительных мер воспитательного воздействия, предусмотренных статьей 90 УК РФ”.

Ст. 90 УК РФ определяет особенности применения принудительных мер воспитательного воздействия в порядке освобождения несовершеннолетних от уголовной ответственности³. Это специальное основание освобождения от ответственности дополняет общий перечень оснований, установленных Главой 11 УК РФ. В связи с этим в каждом случае рассмотрения уголовного дела в отношении несовершеннолетнего необходимо обсуждать вопрос о возможности применения к нему положений ст. ст. 75 – 78 УК РФ и статей 24 – 28 УПК РФ об освобождении от уголовной ответственности. С учетом конкретных обстоятельств дела и личности несовершеннолетнего общие основания могут обладать приоритетом по отношению к положениям ст. 90 УК РФ, поскольку предусматривают безусловное и необратимое освобождение от уголовной ответственности.

³ Принудительные меры воспитательного воздействия применяются к несовершеннолетним, совершившим преступление, и подлежащим уголовной ответственности, на основании двух норм уголовного закона: на основании ст. 90 УК РФ в порядке освобождения от уголовной ответственности и на основании ст. 92 УК РФ в порядке освобождения от уголовного наказания. Правовая природа, процессуальный порядок назначения в данном случае являются принципиально различными, несмотря на одинаковое содержание самих мер уголовно-правового характера.

Основания освобождения несовершеннолетнего от уголовной ответственности с применением принудительных мер воспитательного воздействия определены в ч. 1 ст. 90 УК РФ. В соответствии с ней освобождение от уголовной ответственности возможно, если одновременно наличествуют следующие условия:

- лицо, совершило преступление до достижения совершеннолетия, при этом не важно совершено ли преступление впервые, было ли лицо ранее осуждено, применялись ли к нему ранее принудительные меры воспитательного воздействия (Законом не урегулирован вопрос о возможности применения ст. 90 УК РФ в отношении лица, совершившего преступление до достижения 18 лет, но в момент принятия решения по уголовному делу уже достигшего совершеннолетия. Однако представляется, что освобождение такого лица от уголовной ответственности на основании ст. 90 УК РФ невозможно);
- несовершеннолетний совершил преступление небольшой или средней тяжести; при этом неважно, совершено ли такое преступление впервые или нет (Категория преступления, по общему правилу, определяется законом на момент совершения деяния, с учетом правил действия УК РФ во времени. Если при рассмотрении уголовного дела в отношении несовершеннолетнего, суд найдет основания для изменения категории совершенного им преступления на основании ч. 6 ст. 15 УК РФ, применение ст. 90 УК РФ, с учетом правовой природы освобождения от уголовной ответственности, становится невозможным, что, однако не исключает применения принудительных мер воспитательного воздействия в порядке ч. 1 ст. 92 УК РФ);
- признано, что исправление несовершеннолетнего может быть достигнуто путем применения принудительных мер воспитательного воздействия.

Если первые два требования являются формализованными, то в последнем заложен значительный оценочный компонент. Соответствующий вывод может быть сделан правоприменителем при надлежащей оценке всех обстоятельств совершенного преступления, личности несовершеннолетнего, условий его жизни и воспитания, механизма совершения преступления, постпреступного поведения и иных факторов, свидетельствующих о том, что несовершеннолетний для своего исправления не нуждается в применении мер уголовной ответственности.

Освобождение от уголовной ответственности на основании ст. 90 УК РФ возможно на любой стадии уголовного процесса с момента вынесения постановления о привлечении несовершеннолетнего лица по делу в качестве обвиняемого и до удаления суда в совещательную комнату.

При наличии оснований следователь с согласия руководителя следственного органа, а также дознаватель с согласия прокурора вправе вынести постановление (единое) о прекращении уголовного преследования и возбуждении перед судом ходатайства о применении к несовершеннолетнему обвиняемому принудительной меры воспитательного воздействия, предусмотренной ч. 2 ст. 90 УК РФ, которое вместе с уголовным делом направляется руководителем следственного органа или прокурором в суд (ст. 427 УПК РФ).

Суд, не делая вывода о виновности несовершеннолетнего, должен убедиться на основании материалов дела, что преступление действительно было совершено, что оно совершено несовершеннолетним, что это несовершеннолетний может быть исправлен мерами воспитательного воздействия. Оставление судом без оценки и проверки этих обстоятельств должно расцениваться в качестве существенного нарушения уголовно-процессуального закона (ч. 4 ст. 7 УПК РФ), влекущее отмену постановления о применении мер воспитательного воздействия.

Рассмотрев постановление органа предварительного расследования, суд выносит свое мотивированное постановление (единое) о прекращении уголовного дела в отношении несовершеннолетнего, освобождении его от уголовной ответственности и о применении к нему принудительной меры воспитательного воздействия.

Если суд придет к выводу о том, что из материалов дела усматривается непричастность несовершеннолетнего к совершенному преступлению, отсутствуют доказательства события преступления, если к моменту рассмотрения материалов дела преступность деяния была устранена вступившим в силу новым уголовным законом, суд выносит на основании общих норм УПК РФ постановление о прекращении уголовного дела или уголовного преследования без применения мер воспитательного воздействия.

Если суд придет к выводу о том, что органами предварительного расследования неправильно установлены предусмотренные ст. 90 УК РФ основания освобождения от уголовной ответственности, он вправе в соответствии со ст. 237

УПК РФ вернуть материалы дела прокурору для устранения препятствий к его рассмотрению по существу. При наличии процессуального повода, в соответствии с правилами ст. 125 УПК РФ, суд вправе также признать постановление о прекращении уголовного преследования незаконным или необоснованным, и направить свое постановление руководителю следственного органа для исполнения.

В этом случае расследование уголовного дела в отношении несовершеннолетнего продолжается; закон не исключает возможности повторного обращения органов расследования в суд с ходатайством о применении принудительной меры воспитательного воздействия.

Субъектом освобождения от уголовной ответственности на основании ст. 90 УК РФ может быть и суд. Получив уголовное дело с обвинительным заключением или обвинительным актом, суд вправе, при наличии к тому оснований, вынести постановление (единое) об освобождении несовершеннолетнего от уголовной ответственности и применении к нему принудительной меры воспитательного воздействия. Такое решение может быть принято как на стадии подготовки к судебному заседанию по результатам предварительного слушания, так и по итогам судебного разбирательства.

Принимая во внимание, что ст. 90 УК РФ устанавливает нереабилитирующее основание освобождения от уголовной ответственности, принятие решения о прекращении уголовного преследования или уголовного дела возможно только при согласии на то несовершеннолетнего обвиняемого или подсудимого. Если несовершеннолетний или его законный представитель возражает против освобождения от уголовной ответственности, уголовное дело должно быть расследовано и рассмотрено в обычном порядке, что не исключает для суда в дальнейшем возможности применить принудительные меры воспитательного воздействия на основании ст. 92 УК РФ при освобождении несовершеннолетнего от уголовного наказания.

Меры воспитательного воздействия при освобождении несовершеннолетнего от уголовной ответственности

Меры воспитательного воздействия являются принудительными. При освобождении от уголовной ответственности они применяются вне зависимости от желания или согласия несовершеннолетнего или его законного представителя (кроме передачи под надзор родителей).

Исполнение этих мер также обеспечено государственным принуждением. Принимая решение о применении принудительной меры воспитательного воздействия на основании ст. 90 УК РФ, суду должен разъяснить несовершеннолетнему и его законному представителю положения ч. 4 ст. 90 УК РФ о том, что в случае систематического неисполнения этой принудительной меры воспитательного воздействия она подлежит отмене с направлением материалов дела в установленном порядке для привлечения несовершеннолетнего к уголовной ответственности. Факт такого разъяснения следует отразить в протоколе судебного заседания.

В постановлении о применении к несовершеннолетнему принудительной меры воспитательного воздействия суд на основании ч. 4 ст. 427 УПК РФ вправе возложить на специализированное учреждение для несовершеннолетних контроль за исполнением требований, предусмотренных принудительной мерой воспитательного воздействия. Вид такого учреждения или органа законом не определен. Пленум Верховного Суда РФ признает таковым участковую комиссию по делам несовершеннолетних и защите их прав.

Закон устанавливает исчерпывающий перечень принудительных мер воспитательного воздействия. Учитывая многоаспектность воспитательного процесса и необходимость обеспечения эффективности применяемых мер воспитательного воздействия, законодатель установил правило, согласно которому несовершеннолетнему может быть назначено одновременно несколько принудительных мер воспитательного воздействия. Сами меры при этом не подразделяются на основные и дополнительные.

Мерами воспитательного воздействия являются: предупреждение, передача под надзор родителей или лиц, их заменяющих, либо специализированного государственного органа на срок, определяемый судом, возложение обязанности

загладить причиненный вред, ограничение досуга и установление особых требований к поведению на срок, определяемый судом.

А) Предупреждение состоит в разъяснении несовершеннолетнему вреда, причиненного его деянием, и последствий повторного совершения преступлений. Судья доводит до сознания несовершеннолетнего ценность нарушенных им правовых благ, значимость социально ответственного поведения, роль права в охране порядка и регулировании ответственности, роль и значение суда, смысл официального, государственного порицания поведения, ответственность несовершеннолетнего за свое будущее, правовые последствия совершения новых преступлений и т.д. Цель такого разъяснения – помочь несовершеннолетнему осознать неправильность своего поведения и необходимость в последующем сознательно и добровольно соблюдать правовые нормы. Специалисты рекомендуют объявлять предупреждение в каждом случае применения принудительных мер воспитательного воздействия.

Б) Передача под надзор заключается в возложении на указанных в законе субъектов обязанности по воспитательному воздействию на несовершеннолетнего и контролю за его поведением. Таковыми субъектами выступают: родители; лица, их заменяющие (усыновители, опекуны, попечители); специализированный государственный орган (комиссии по делам несовершеннолетних и защите их прав). Перечень таких субъектов является исчерпывающим. В связи с чем суд не вправе передать несовершеннолетнего под надзор, например, родственников, не оформивших опеку или попечительство, либо под надзор администрации воспитательного или образовательного учреждения, под надзор органов внутренних дел или уголовно-исполнительных инспекций.

Содержание воспитательного воздействия и контроля, оказываемого этими лицами, законом не устанавливается. Оно избирается ими самостоятельно, с учетом личности несовершеннолетнего и особенностей педагогической ситуации. В практическом плане такое воздействие может состоять в воспитательных беседах, оказании помощи в получении образования, правовом просвещении, привлечении к общественно полезному труду, организации досуга и т.д.

Передача под надзор не наделяет родителей или лиц, их заменяющих, какими-либо иными правами и обязанностями по отношению к ребенку, чем предусмотрено СК РФ, она лишь должна побуждать их к более активному воспитательному воздействию на подростка, устранению или нейтрализации криминогенных

условий, служить предупреждением о необходимости усиления контроля за его свободным временем.

Решая вопрос о передаче несовершеннолетнего под надзор родителей или лиц, их заменяющих, суд должен убедиться в том, что указанные лица имеют положительное влияние на него, правильно оценивают содеянное им, могут обеспечить его надлежащее поведение и повседневный контроль за ним. Для этого необходимо, например, истребовать данные, характеризующие родителей или лиц, их заменяющих, проверить условия их жизни и возможность материального обеспечения несовершеннолетнего. При этом должно быть получено согласие родителей или лиц, их заменяющих, на передачу им несовершеннолетнего под надзор.

Передача под надзор как мера воспитательного воздействия имеет срочный характер (ч. 3 ст. 90 УК РФ). Ее продолжительность может составлять от одного месяца до двух лет при совершении преступления небольшой тяжести и от шести месяцев до трех лет – при совершении преступления средней тяжести. Применение этой меры в любом случае прекращается по достижении ребенком совершеннолетнего возраста, в связи с чем суд, принимая решение о ее применении, должен прогностически оценить реальный срок пребывания несовершеннолетнего под надзором для достижения целей его исправления.

В) Обязанность загладить причиненный вред возлагается с учетом имущественного положения несовершеннолетнего и наличия у него соответствующих трудовых навыков. Законодатель не ставит цели полной компенсации или устранения причиненного вреда; не определяет и вид вреда (имущественный, моральный). С учетом этого, под заглаживанием вреда следует понимать имущественную, в том числе денежную, компенсацию морального вреда, оказание какой-либо помощи потерпевшему, принесение ему извинений, а также принятие иных мер, направленных на восстановление нарушенных в результате преступления прав потерпевшего, законных интересов личности, общества и государства.

Принимая решение об имущественной компенсации причиненного вреда, суд в постановлении должен определить ее размер в денежном выражении. Размер компенсации не обязательно должен совпадать с подтвержденным материалами делами размер причиненного вреда. С учетом фактических обстоятельств дела, компенсация может быть и больше, и меньше, чем причиненный вред.

Суд должен выяснить наличие у несовершеннолетнего реальной возможности загладить вред с учетом получаемых им заработной платы, стипендий, пенсий, пособий и т.п., а также с учетом наличия у него трудовых навыков. Суд определяет и способы возмещения вреда (в денежной сумме, в натуральной форме, исправление собственными силами). Такие способы должны носить законный характер и не ущемлять права третьих лиц, они не должны провоцировать несовершеннолетнего на совершение нового корыстного преступления.

Деятельное раскаяние несовершеннолетнего и примирение его с потерпевшим не являются обязательными условиями освобождения от уголовной ответственности в порядке ст. 90 УК РФ с применением меры воспитательного воздействия в виде заглаживания вреда. В отличие от правил ст. 75, ст. 76 УК РФ, заглаживание вреда является не условием, а последствием освобождения от уголовной ответственности, в связи с чем оно может быть произведено и после принятия решения судом. В данном случае, несмотря на отсутствие прямых указаний в законе, суду следует определить срок, в течение которого несовершеннолетний обязан исполнить возлагаемую на него меру воспитательного воздействия.

Рассматриваемая мера носит личный характер и ее исполнение, по общему правилу, не может быть переложено на родителей или иных лиц, их заменяющих. Однако, представляется, что в исключительных случаях, когда у несовершеннолетнего отсутствуют или недостаточно доходов или имущества, необходимых для возмещения вреда, вред может быть возмещен полностью или в недостающей части его родителями или лицами, их заменяющими, если они не будут против этого возражать.

Г) Ограничение досуга и установление особых требований к поведению несовершеннолетнего может предусматривать запрет посещения определенных мест, использования определенных форм досуга, в том числе связанных с управлением механическим транспортным средством, ограничение пребывания вне дома после определенного времени суток, выезда в другие местности без разрешения специализированного государственного органа. Несовершеннолетнему может быть предъявлено также требование возвратиться в образовательное учреждение либо трудоустроиться с помощью специализированного государственного органа.

Список ограничений законом не ограничивается, он может быть существенным образом расширен с учетом конкретных обстоятельств совершения преступления,

окружения подростка, его участия в неформальных объединениях антиобщественной направленности, условий, характера учебы или трудовой деятельности и т.д. Смысл всех ограничений и требований в данном случае состоит в замещении негативных факторов социального окружения позитивными, в формировании у подростка механизмов защиты от криминогенного влияния, развитии его самостоятельности и ответственности, что находит свое выражение в ограждении несовершеннолетнего от криминогенного и иного негативного влияния микросоциальной среды, отстранении его от деятельности, которая может причинить вреда его психоэмоциональному и социальному здоровью, привитии ему навыков социально активной и полезной деятельности и т.д. Как и передача под надзор родителей, эта мера носит срочный характер (ч. 3 ст. 90 УК РФ).

Последствия неисполнения мер воспитательного воздействия

Законом установлены правовые последствия систематического неисполнения несовершеннолетним назначенной ему принудительной меры воспитательного воздействия.

В случае систематического неисполнения эта мера по представлению специализированного государственного органа отменяется, и материалы направляются для привлечения несовершеннолетнего к уголовной ответственности.

Органом, который вправе обращаться в суд с представлением об отмене принудительной меры воспитательного воздействия в случаях систематического ее неисполнения несовершеннолетним, является комиссия по делам несовершеннолетних и защите их прав.

Под систематическим неисполнением несовершеннолетним принудительной меры воспитательного воздействия следует понимать неоднократные (более двух раз) нарушения в течение назначенного судом срока применения принудительной меры воспитательного воздействия (например, ограничения досуга, установления особых требований к его поведению), которые были зарегистрированы в установленном порядке специализированным органом, осуществляющим контроль за поведением подростка. Совершение в период исполнения срочной меры воспитательного воздействия нового преступления само по себе не означает неисполнения этой меры и не влечет ее отмены.

Если несовершеннолетнему назначено одновременно несколько принудительных мер воспитательного воздействия и в течение определенного срока он допустил единичные нарушения (не более двух раз по каждой из них), такие нарушения не могут быть признаны систематическими, дающими основание для применения судом положений ч. 4 ст. 90 УК РФ об отмене принудительных мер воспитательного воздействия.

Рассматривая представление комиссии по делам несовершеннолетних и защите их прав об отмене принудительной меры воспитательного воздействия, назначенной на основании ст. 90 УК РФ, суд в порядке, предусмотренном ст. 399 УПК РФ:

- в случае, когда меры воспитательного воздействия применялись по ходатайству органа предварительного расследования, выносит решение об отмене постановления суда о прекращении уголовного дела и направляет его вместе с материалами дела руководителю следственного органа или начальнику органа дознания для выполнения следователем (дознавателем) действий, связанных с окончанием его расследования и необходимостью составления обвинительного заключения (обвинительного акта);
- в случае, когда меры воспитательного воздействия применялись непосредственно судом при рассмотрении или подготовке к рассмотрению уголовного дела, отменяет решение суда о применении принудительной меры воспитательного воздействия и направляет уголовное дело в отношении несовершеннолетнего на новое судебное рассмотрение в суд первой инстанции со стадии судебных прений.

Закон в порядке ст. 399 УПК РФ не предусматривает для суда возможности изменения или продления принудительных мер воспитательного воздействия либо замены их иными мерами правового воздействия.

При расследовании и рассмотрении уголовных дел в случае отмены решения о применении принудительной меры воспитательного воздействия на основании ч. 4 ст. 90 УК РФ следует обращать внимание на сокращенные сроки давности привлечения несовершеннолетнего к уголовной ответственности (ст. 94 УК РФ).

Судья, вынесший постановление о применении в отношении несовершеннолетнего принудительных мер воспитательного воздействия, в последующем отмененное на

основании ч. 4 ст. 90 УК РФ, не может повторно принимать участие в рассмотрении уголовного дела в отношении этого же несовершеннолетнего.

Pudovochkin Yury Evgenievich*
Genrikh Natalya Viktorovna**

ALTERNATIVES TO THE CRIMINAL LIABILITY OF MINORS IN RUSSIAN CRIMINAL LAW

The article analyzes the provisions of the Criminal Code of the Russian Federation that determine the procedure for applying to minors who have committed a crime, measures alternative to criminal liability. These are the educational measures that are prescribed when a minor is released from criminal liability. A comment is provided on the grounds for exemption from criminal liability, the content of educational measures is disclosed, the consequences of non-implementation of such measures are identified, a characterization of the procedural procedure for exemption from liability using educational measures is given.

Keywords: *criminal liability of minors; alternatives to criminal liability; exemption from criminal liability; educational measures.*

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Technical instructions for the authors

1. The article should be up to 20 pages long with double space. The authors should use Times New Roman font size 12.

2. The first page should include: **the title of the paper, the name and surname of the author, abstract** (up to 150 words) and **4-5 keywords**.

2.1 Right after the surname of the author (on the first page) there should be a footnote with the name of the institution the author is employed at, the title of the author and E-mail address. In the event that the paper is written in collaboration with other authors, these data should be provided for each of the authors.

Example: Jovan JOVANOVIĆ*

2.2 The abstract should include a clearly stated subject, research goals and the main topics which will be covered in the paper.

3. Headings should be written in the following style:

1. The title of the chapter (Times New Roman, 12, Bold)

1.1. Subtitle 1 (Times New Roman, 12, Italic)

1.1.1. Subtitle 2 (Times New Roman, 12, Regular)

Example: **1. Services Supporting Victims**
 1.1. *Categories of Users*
 1.1.1. Women and Children

4. Authors should use the **Harvard Citation Style**. The quotation should be followed by the reference in the brackets containing the author's surname, the year of publication and the page number.

Example: (Stevanović, 2009: 152).

If there are two or three authors, the surnames should be divided with a comma (example: Knežić, Savić, 2012).

If there are more than three authors, there should be only the first author's surname followed by the "et. al" (example: Hawley i dr., 2013).

If two authors have the same surname, name initials should also be included (example: I. Stevanović, Z. Stevanović, 2015).

When referencing a secondary source, the reference should include "according to" (example: Ćopić according to Nikolić-Ristanović, 2011).

If a single reference contains several books or papers, they should be separated with a point comma. (example: Hannah-Moffat, 2005; Kemshall, 2002). In this case, surnames of different authors should be in alphabetical order.

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4.1. Footnotes should include only following comments, articles of laws and official gazettes.

4.2. Foreign names should be written with original spelling.

5. If the paper includes images or charts, they should also be referenced. For example (Chart 2).

Captions should be written above the images or charts.

Example: **Chart 1.** Gender structure of victimization

6. It is obligatory to supply a list of references or **bibliography** at the end of the paper. It should include all the quoted references in the alphabetical order of surnames. A bibliography unit should include:

For books: author's surname, the name initial, the year of publication in the brackets, the title of the book (in italics), the location of publishing, the name of the publisher.

Example: Milutinović, M. (1977) *Penology*. Belgrade: Savremena administracija.

For book chapters: author's surname, the name initial, year of publication in the brackets, the name of the chapter, in: editor's name initial, editor's surname, eds. (in the brackets), the book title (in italics), the location of the publication, the name of the publisher, first and last page of the chapter.

Example: Blagojević, M. (2013) Transnationalization and its Absence: The Balkan Semiperipheral Perspective on Masculinities. U: Hearn, J., Blagojević, M. & Harrison, K. (ur.) *Transnational Men: Beyond, Between and Within the Nations*. New York: Routledge, str. 261-295.

For articles in magazines: author's surname, name initial, year of publication in the brackets, the name of the article (in italics), volume (in italics), the number of the magazine in the brackets and first and last page number.

Example: Ivanović, M. (2015) Drugs, Art, Crime. *Journal of the Institute of Criminological and Sociological Research*, 34(4), pp. 193-202.

For documents downloaded from the internet: web page, date of access.

Example: <http://webrzs.stat.gov.rs/WebSite/Public/PageView.aspx?pKey=2>, accessed on 5.10.2012

The name of the author and the title of the article can be written before copy/pasting the web page. In this case, before the web address, there should be added: "available at:"

For laws: the source or publication where the law was published should be added after the name of the law.

Example: Law on Criminal Proceedings, Official Gazette RS, No.58/04.

For reports from scientific conferences: surname, name initial, year in the brackets, the title, the title of the conference (in italics), the page number in the book of abstracts in the brackets, the location of publication, publisher.

Example: Petrušić, N, & Stevanović, I. (2011) Legal Protection of Children in Serbia. *First Annual Conference of the Victimology Society of Serbia – The Rights of Victims and EU* (pp. 87-102). Belgrade: Victimology Society of Serbia.

For newspaper articles: surname, name initial, year of publication and the date in the brackets, the title of the article, the name of the newspaper, page number.

Example: Jovanović, A. (2012, December 5th) Plagiarising Scientific Papers, Blic, p. 5.

The author can also reference a web edition of a newspaper and in this case, the reference should include “available at” followed by the web address and the access date.

Additional remark: The list of references must not contain units which are not quoted in the paper and must contain all the units which are quotes including laws, reports and web pages (web pages should be under the section *Online Sources* within bibliography).

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