

PROTECTION OF THE RIGHTS OF THE CHILD WITHIN THE HUMAN RIGHTS SYSTEM AND THE NATIONAL FRAMEWORK

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Abstract: The rights of the child are an achievement of the modern age. The rights of the child as human rights in international law are recognized and protected through special international documents that represent the institutional framework for protection of the rights of the child from the point of view of humanity. The child has various rights whose purpose is to protect the child in the course of growing up and maturing. Standards adopted by the international community that are or should be implemented in the European and national system of protection of the rights of the child also apply to the rights of the child. Bearing in mind that generally accepted rules of international law and ratified international agreements are an integral part of the legal system of the Republic of Serbia, and that the regular practice of applying ratified international agreements in courts has not yet been adopted, it is necessary to make the national legal framework more effective.

Keywords: protection of the rights of the child; international standards; national protection framework

INTRODUCTION

Established legal standards in universal documents on human rights in terms of ensuring the rights of the child, and the protection and promotion of the rights of the child in the European and national framework, are the objective of this research. The contemporary view on the rights of the child goes beyond the simplified interpretation of regulations related to children, as children's rights represent an area of legislation that includes several departments in both international and European, as well as domestic law. As far as the rights of the child are concerned at the global and regional level, the

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research focusses its attention on primary sources of law and the European case law, primarily on the case law of the European Court of Human Rights, with special reference to the case law of the Court of Justice of the European Union, and key strategic documents and guidelines, i.e. other non-binding instruments.

The rights of the child were first specially laid down by the Family Law of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, No. 18/2005, 72/2011, 6/2015). In the field of protection of the rights of the child, established international standards are sought to be achieved through the adoption of legal and other regulations. In a series of attempts to complete the normative system of protection of children's rights, and three decades following the ratification of the UN Convention on the Rights of the Child, the Preliminary Draft Law on the Rights of the Child and the Children's Rights Commissioner (2019) was passed. Even though it regulates the content of the rights of the child, improvement and exercise of the rights of the child in all areas of life for each child, it is not adequate and does not offer any new mechanism for protecting the rights of the child in relation to the existing law², which is why its adoption should be seriously reconsidered; this is necessary due to the fact that this Preliminary Draft Law is a clumsy attempt at unifying earlier solutions of special proposals of legal texts on the rights of the child and on the rights of the child Commissioner. The area of children's rights in our country is regulated by around a hundred laws that are not mutually harmonized, as there are legal gaps in the regulations, which all together deepen legal uncertainty. The reason for this, on the one hand, resides in the fact that the process of harmonization and improvement of legislation is not carried out in a coordinated and comprehensive manner, whereas on the other hand, the effects of the law on children and application of basic principles of children's rights are insufficiently taken into account. (Situational analysis of children and adolescents in Serbia 2019: 57). According to the professional public, activities focused on the areas where the problems of children are most pronounced are of the essence in terms of protection of the rights of the child, such as prevention and protection of children from violence in all environments where children live (family, pre-school, school ...), protection of children in the media, the child's right to culture and education and the availability of cultural content adapted to their age, which would be better applied through strategic documents in this matter.³

LEGAL PROTECTION OF THE CHILD IN INTERNATIONAL LAW

Assuming that human rights are of moral origin and that the legislator cannot abolish them at will, states, as international entities, are obliged to legally regulate the field of human rights, i.e. to refrain from violating rights and create conditions for exercising human rights (Cranston, 1991: 29-34). Human rights belong to all people irrespective of origin, gender, race, religion, or other affiliation. Unlike positive law, which arises from the act of a certain social force that passes its own laws and results from social convention, human (natural) rights spring from the very nature of things, as they exist as objective reality, possessing its psychological and moral coercion (Perović, 2004: 9).

2 Ombudsman's opinion on the Draft Law on the Rights of the Child and the Commissioner of the Rights of the Child sent to the Ministry of Labor, Employment, Veterans' Affairs and Social Affairs on 25 September 2019, <https://www.pravdeteta.com/> (2.08.2020).

3 Agreement on Cooperation and Understanding in the Field of Protection of the Rights of the Child, the Ombudsman and Network of Organizations for Children of Serbia (MODS), Belgrade 2019, <https://www.ombudsman.rs/>; Proposed strategy in the field of prevention and protection of children from violence for the period 2020-2023, Belgrade 2020, <https://www.pravdeteta.com/> (2.08.2020).



In the field of human rights of the child, the basic question is whether human beings have different degrees of rights in accordance with their own specific qualities (rights of embryos, fetuses, infants, the mentally ill, people in coma or future generations), or what makes children's rights special and whether the nature of these rights is the same or different from human rights (Winston, 1988: 6-7), having in mind cultural differences and the establishment of common values (Vučković-Šahović, 2000: 29-30). The child is a subject of law; however, due to the fact that the child depends on adults, the relationship of equivalence between the rights of the child and the rights of adults is conditioned by the scope of exercising the rights in accordance with the child's developmental possibilities and his/her best interest.

States and international organizations participate in the process of recognizing the rights of the child through standardization, protection and promotion of these rights. Children's rights are protected by universal human rights instruments adopted under the auspices of global intergovernmental organizations, the most famous of which is the United Nations, thereby confirming the attitude of most countries, which provides credibility and strength to the adopted international instrument (Vučković-Šahović, Petrušić, 2015: 38). The UN conventions on human rights, which were adopted under the auspices of the UN also apply to children, where some of them attribute special provisions to the child, while others contain provisions that concern all people and thus also apply to children. The United Nations human rights program commenced following the adoption of the Universal Declaration of Human Rights (1948), which forms the basis for subsequent international human rights treaties. The universal system of human rights protection has been supplemented by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966). Regulation of the child's right to non-discrimination, the right to a name and registration in the register of births, the right to citizenship (Article 24 of the ICCPR) represents the first significant step in creating binding norms of international legal protection of the child. The provisions of the International Covenant on Economic, Social and Cultural Rights recognize the right of all (people) to the highest standard of mental and physical health that can be achieved, as well as measures taken by states to reduce mortality at birth and measures to ensure healthy child development.

A special international law on the rights of the child has been discussed since the adoption of the UN Convention on the Rights of the Child (1989). Widespread discrimination against children, endangering their physical and mental development, insufficient protection of children are reasons for specifying the obligations of UN member states regarding respect for the rights of the child. The Convention sets standards of crucial importance for the social and legal position of the child by regulating civil, social, economic, cultural and political rights, given that in the human rights conventions adopted so far, civil and political rights have been separated from economic, social and cultural ones (Vučković-Šahović, 2000: 66).

The Convention on the Rights of the Child is the legal basis for the process of harmonizing national regulations governing the availability and protection of fundamental rights of the child, together with the Optional Protocol on Child Prostitution and Pornography and the Optional Protocol on the Participation of Children in Armed Conflicts. Promotion of the protection and exercise of the rights of the child has been expanded by the Third Optional Protocol to the Convention on the Rights of the Child on Complaints, which provides the child with access to justice through the newly adopted appeal procedure to the Committee on the Rights of the Child (an independent international body monitoring the implementation of the Convention and its Optional Protocols), provided that the state has accepted the proceedings and that the remedies in the national State have been exhausted (Article 5 of the Protocol). The signatory states, including the Republic of Serbia, should ratify it in order to be bound by the provisions contained in this document.



PROTECTION OF THE RIGHTS OF THE CHILD IN EUROPEAN LAW

The rights of the child in the European framework tie in with the existing international standards. Regional (European) organizations have also concluded human rights agreements and set up systems to monitor the implementation of member states' obligations. A single system of protection in the field of human rights was formed within the Council of Europe through the adoption of the European Convention on Human Rights (1950) and through the case law of the European Court of Human Rights. In terms of creating common standards for the protection of human rights through the implementation of other Council of Europe conventions, such as the Convention on the Adoption of Children (1967, 2008), the Convention on the Legal Status of Children Born Out of Marriage (1975), the Convention on Contact with Children (2003) and the Committee of Ministers Council of Europe, and the recommendation of the Parliamentary Assembly of the Council of Europe 874 (1979) on the European Charter of the Rights of the Child, resolutions, declarations, charters, recommendations, strategies play a vital role in the field of the rights of the child, and are respected by member states without any formal legal obligations to do so, as these instruments are not subject to ratification and are not binding. As a rule, they precede international agreements or represent their supplement. The list of sources is lengthy and is constantly updated with new instruments that have a strong moral and political impact on member states.

The CoE's strategic activity in the field of promotion and protection of children's rights expressed through the Strategy for the Rights of the Child 2012-2015 ("Monaco Strategy") is of key importance for directing and undertaking activities in the field of children's human rights. However, it has not been revised since 2015. This document envisages four strategic goals: promotion of services and systems in the field of justice, social and health care systems; elimination of all forms of violence against children, including sexual violence, trafficking in human beings, corporal punishment and violence in schools; guaranteeing the rights of children with disabilities, children in detention, children in alternative care institutions, migrant children and Roma children; promoting children's participation (access to information and the right to express opinions in public and private life). At the end of the implementation period of the Strategy, the issue of determining the goals on which the activities of the Council of Europe in the field of children's rights should be based in the short-term, medium-term or long term period has remained open.

The European Union as a political organization that significantly contributes to the promotion of human rights and in cooperation with the Council of Europe responds to the challenges and threats faced by European citizens. During 2014, these two most influential European organizations established the framework for cooperation in the field of promotion of human rights, democracy and the rule of law, based on binding international conventions of the Council of Europe, supervisory bodies and assistance programs. Most EU member states protect the rights of the child through special legislation on the rights of the child, whereas in countries where this is not the case, the area of children's rights is regulated by lower legal acts and special laws pertaining to family, social rights, education, health care, i.e. certain legislations established *Commissioner for Child Rights*.⁴³

The protection of children's rights in the EU is a part of a coordinated program based on three pillars. The first pillar is the EU Charter of Fundamental Rights (2000)⁵⁴ and it contains the first references to the rights of the child at the EU constitutional level: recognition of the child's right to free compulsory

4 ³ *European Centre for Parliamentary Research and Documentation: Request 1407 - Violence against children, by the National Assembly of the Republic of Serbia, Request 866 Bill on Youth (Children), by Slovak National Council.*

5 ⁴ EU Charter of Fundamental Rights, SL 2012 C 326.



education (Art. 14 para. 2), prohibition of age discrimination (Art. 21), and prohibition of exploitation of children for work (Art. 32). The content of the provision of Art. 24 of the Charter encompasses basic principles of the rights of the child: the child's right to freedom of expression in accordance with age and maturity, protection of the best interests of the child in all matters concerning them, and the right to maintain personal relations with both parents. The second key element is the Lisbon Treaty (2009),⁶⁵ an instrument that introduced significant institutional, procedural and constitutional changes to the EU, strengthening the potential for protection of children's rights as a general objective of the EU, through the adoption of directives in the most sensitive areas of child rights (prevention of child pornography, prevention of trafficking in human beings and protection of victims of trafficking). The third pillar of the EU's strategic policy pertains to internal cooperation between Member States through the "EU Guidelines for the Promotion and Protection of the Rights of the Child"⁷⁶, while in relation to external issues the European Commission has adopted Communication Protocol on Special Position of Children so that the rights of the child could be included in all EU⁸⁷ external activities in which non-EU countries also participate. In 2011, the European Commission also adopted the EU Program on the Rights of the Child,⁹⁸ which set out key priorities for improving the law and development of children's rights policy in all EU Member States, and focusing on legislative processes that are important for the protection of children. Proceeding from the fact that the EU can legislate only in areas where it has competence in accordance with the treaties, and bearing in mind that children's rights cover several sectors, the competence of the EU is determined in each specific case. The areas of children's rights in which the EU has adopted a significant number of regulations are as follows: data and consumer protection, asylum and migration, cooperation in civil and criminal matters (*Handbook on the Rights of the Child in European Law*, 2015: 20).

The rights of the child within the European judicial system

The role of the European Court of Human Rights in protecting the rights of the child is reflected in a very broad jurisdiction. Although the Court's case law to date has shown that the largest number of petitions were filed for violations of Art. 8 of the ECHR - the right to respect for private and family life - considered from the point of view of the rights of parents and not children, cases resulting from violations of other convention provisions are not predominant, but are more clearly focused on children's rights: the right to protection from inhuman and degrading treatment (Article 3 of the ECHR) or the right to a fair trial (Article 6 of the ECHR). When the applicant is a child, the European Court of Human Rights often refers to the UN Convention on the Rights of the Child when deciding, and in some cases the Convention's principles on the rights of the child have had a significant impact on the Court's opinion (the right to a fair trial). In the case *T. v. United Kingdom*¹⁰⁹: "where a child was faced with a criminal charge and the domestic system required a fact-finding procedure with a view to establishing guilt, it was essential that the child's age, level of maturity and intellectual and emotional capacities be taken into account in the procedures followed. It is considered that the public trial process in an adult court with attendant publicity must be regarded in the case of an eleven-year-old child as a severely intimidating procedure and concluded that, having regard to the applicant's age, the application of the full rigours of an adult, public trial deprived him of the opportunity to participate effectively in the determination of the criminal charges against him, in breach of Article 6 § 1" (paragraph 82).

In other areas, the Court's approach differs somewhat from the conventional approach as, for example, in the case of freedom of expression and information, which is best illustrated by the decisions in the cases *Handyside v. United Kingdom*¹¹⁰ and *Gaskin v. United Kingdom*.¹²¹¹ In

11 10 App. no. 5493/72, 7.12.1976, paragraph 50, [https://hudoc.echr.coe.int/\(6.08.2020.\)](https://hudoc.echr.coe.int/(6.08.2020.)).

12 11 App. no. 10454/83, 7.07.1989, paragraph 52-53, [https://hudoc.echr.coe.int/\(6.08.2020.\)](https://hudoc.echr.coe.int/(6.08.2020.)).



the case *Handyside v. United Kingdom*, which refers to receiving information appropriate to the age and maturity of the child, in the Court's view, prohibition of the book entitled *Little Red School Book* (translated from Danish and written for school-age children, which examines social phenomena such as sexuality and drug use), imposed by the British authorities, is in line with the exception set out in the provision of Art. 10 para. 2 of the European Convention on Human Rights regarding the protection of morality. At a critical stage of development, young people could interpret certain passages of the book as an incentive for actions for which they are not mature enough and which could be detrimental to them (paragraph 49).

The case of *Gaskin v. United Kingdom* refers to a person who spent most of his childhood in an orphanage when the local authorities kept records that were confidential. When the applicant requested access to the documentation, he was denied it. The decision was justified through the guarantee of confidentiality of public records, which is necessary for the proper functioning of the social welfare service for children. The court concluded that the provision of Art. 10 of the ECHR was not breached and reiterated its interpretation that in accordance with the right to information public authorities are prohibited from denying information transmitted to an individual, but does not oblige the state to transmit that information to an individual (paragraph 52).

The extensive case law of the European Court of Human Rights also contains decisions in which it explicitly relies on the Convention on the Rights of the Child. In the case of *Maslov v. Austria* the Court has taken the view that the implementation of a measure of expulsion of juvenile offenders, in addition to protecting the best interests of the child, includes an obligation to reintegrate the child which would not be achieved by severing the child's family or social ties by expulsion. Therefore, the measure of expulsion of a minor constitutes a disproportionate interference with the right to respect for the applicant's family life (Article 8 of the European Convention on Human Rights).

As a rule, the Court of Justice of the European Union in cases involving children considers proceedings when the national court requests interpretation of primary legislation (contract) or secondary legislation (regulation, directive) from the Court of Justice of the European Union (Article 267 TFEU), which is important for an ongoing case before a national court (Handbook on the Rights of the Child in European Law, 2015: 28). With the development of the idea of promoting and protecting the rights of the child at the EU level, and despite the adoption of a number of legal measures and programs in the field of children's rights, most cases in CJEU practice so far concern children's rights in the context of freedom of movement and citizenship. While deciding regarding the abovementioned cases, the CJEU took the view that children enjoy all privileges related to EU citizenship, including the right to independent residence, social and educational rights based on EU citizenship. The CJEU case *Dynamic Medien GmbH v. Avides Media AG*¹³, which is most cited in the literature because the CJEU directly applied the UN Convention on the Rights of the Child and thus established a standard for how European law should be interpreted in relation to children. The CJEU referred to Art. 17 of the Convention on the Rights of the Child, which obliges member states to take appropriate measures so as to protect children from information and media material that endangers their well-being (paragraphs 42 and 52).

Nevertheless, in other cases, the CJEU referred to general convention principles in its decisions, especially in cases of cross-border child abduction. Namely, the rule is that the relevant EU legal instruments are to be interpreted in accordance with the provisions of the EU Charter of Fundamental Rights. In connection with the abduction of children, the provision of Art. 24 of the Charter, the content of which was clarified by the CJEU in the *Aguirre Zarraga* case and Regulation no. 2201/2003 (Bruxelles

13 ¹³ C-244/06. Judgment of the Court (Third Chamber) 14.02.2008. [https://eur-lex.europa.eu/\(7.08.2020.\)](https://eur-lex.europa.eu/(7.08.2020.)).



II bis), is of special importance¹⁴¹⁴. The CJEU is of the opinion that the child's right to be heard requires that the procedure and conditions that allow the child's free expression of opinion be available, and that it take place in court (Handbook on the Rights of the Child in European Law, 2015: 85). According to the CJEU in this case, the court of the member state to which the child was taken (Germany) cannot oppose the return of the child on the grounds of violation of the right to be heard in the home country (Spain), or the execution of the court decision ordering the return of the child, because the assessment of the violation of these provisions falls within the exclusive jurisdiction of the state from which the child was taken (Handbook on the Rights of the Child in European Law, 2015: 86).

In the field of protection of children's rights, the EU is very cautious when attaching overriding importance to the Convention on the Rights of the Child, and above all in politically sensitive issues (e.g. immigration issues).¹⁵¹⁵ Since the adoption of the EU Charter of Fundamental Rights, in cases concerning the protection of the rights of the child the CJEU has referred to its provisions which are the same or similar to the provisions of the Convention on the Rights of the Child.

2. NATIONAL FRAMEWORKS FOR PROTECTION OF THE RIGHTS OF THE CHILD

As mentioned in the introductory part of this paper, ratified international treaties are applied directly in domestic law, i.e. the laws on ratification of international treaties are listed right after the Constitution (*Official Gazette of RS*, No. 98/06). The direct application of international agreements exposes certain limitations, so it is necessary to harmonize the existing legal texts with the confirmed agreements as well as the adoption of new laws.

In the field of children's rights, the established standards are divided into the following thematic units:

- children in the family protection system;
- children in non-litigious, administrative and executive proceedings;
- inheritance rights of the child;
- children in the criminal justice system;
- children in conflict with the law;
- prohibition of discrimination against children;
- children in the education system;
- children in the health care and public health system;
- children in the social protection system (Banić, Petrović, Stevanović, 2011:6).

The Family Law of the Republic of Serbia is a reference framework for the application of standards and principles on the rights of the child. This law specifically prescribes the rights of the child, namely: the child's right to know his/her origin, the child's right to live with his/her parents, the child's right to personal relations (contact) with a parent with whom he/she does not live, the child's right to proper and complete development, the child's right to education, the child's right to freely express his/her opinion and the child's right to undertake legal affairs (Articles 59-65 of FLRS). In addition, laws in the field of labor, social and health care, information, public records, laws in the field of criminal and civil law are also significant for the exercise of the rights of the child. (Vučković-Šahović, Petrušić, 2015:69).

The exercise and protection of the rights of the child in every state requires a good legislative framework. There are regulations that are directly or indirectly significant for the rights of the child, they are distributed in the laws regulating certain areas of social relations. In the Republic of Serbia, the relationship between the legislative and factual situation is not satisfactory, bearing in mind the fact that despite the measures taken to establish an appropriate legal, institutional and strategic framework that would be harmonized with international standards in the field of children's rights, the exercise of children's rights is accompanied by certain challenges in reality.

The strategic document reflecting the state policy in relation to children is the National Action Plan for Children (2004-2015),¹⁶¹⁶ which provided for priority measures and activities aiming to create the most favorable conditions for children's life, growing up and inclusion in society. Given the state's obligations under the Convention on the Rights of the Child, the major shortcoming of NAP was the fact that it did not cover all areas of children's rights. During 2018, the relevant ministry launched an initiative to draft a new National Action Plan for Children, which has not been applied to date, and our country does not have a unified one in the field of children's rights (Bulletin of the Center for Children's Rights, 2019: 4). Activities aimed at children are carried out in accordance with strategies for certain issues, namely: Strategies for prevention and protection of children from violence, Strategies for prevention and protection against discrimination, Strategies for education development in Serbia until 2020, National Youth Strategies (2015-2025), which contain goals directly applicable to children, while most of the remaining strategies (the total number of strategies is over sixty) have only an indirect impact on the lives of children (Golić Ružić, 2015: 11).

In strategic documents, the main directions of policy development towards children are as follows: reduction of child poverty and protection of children from the consequences of economic crises; quality education, without discrimination and inclusion of Roma children in education; better health for all children, improvement of the position and rights of children with disabilities; protection of the rights of children without parental care; protection of children from exploitation, violence, abuse and neglect; protection of children from trafficking in human beings; improving children's health and social protection; strengthening the capacity of the state to solve problems related to children's rights and increase budget for children (Vučković-Šahović, Petrušić 2015:74).

CONCLUSION

The major goal of international legal protection of the rights of the child is the establishment of adequate protection mechanisms in national law. The rights belong to the child at birth and have to be recognized in the areas of his/her human, individual, collective, civil, political, economic, social and cultural interests, in accordance with age and developmental abilities of the child. Basic questions that are always asked when the child is the center of attention are as follows: what are the rights of the child in general, what is the nature of those rights and what is their content. Essentially, the rights of the child are not different from human rights, nor is their basis different. Only individual, specific rights are different, and thus a special type of protection is different. A special attitude towards the regulation of children's rights is conditioned by the fact that children are subjects of rights, and that they cannot acquire rights and obligations until they reach certain age due to the lack of intellectual maturity and lack of life experience.

The exercise of the rights of the child in the nation state is guaranteed by the ratification of international agreements. The state is obliged to respect, protect and promote the rights of the child. The process of promoting the rights of the child implies constant activities aimed at spreading the idea of the rights of the child, including all systems of society. This means that states, in the field of children's rights, have to take certain measures through national bodies in charge of protection of children's rights, the ombudsman for children's rights, specialize judges, improve the network of social institutions, create special policies in the field of children's rights, improve education, inform children about their rights, etc.

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