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# RIGHTS OF THE CHILD UNDER SERBIAN LAW<sup>1</sup>

## - HARMONIZATION WITH EUROPEAN AND INTERNATIONAL CONVENTIONS -

### I

#### **The principles of the rights of the child under the Serbian Constitution**

The new Serbian Constitution was promulgated in 2006. This Constitution encompasses several principles which, among others, concern modern rights of the child.

We should first emphasize that our Constitution states that human and minority rights guaranteed by the Constitution shall be implemented directly. Rights of the child as well as rights and duties of parents are included in the part of the Constitution dedicated to human and minority rights and freedoms (Section 2 of the Constitution).<sup>2</sup> The Constitution guarantees, and as such, directly implements human and minority rights which are guaranteed not only by the Constitution, but also by the generally accepted rules of international law and by ratified international treaties and laws (Art. 18).

Because of the possibility that the rights guaranteed by Constitution be limited or changed by law, the Constitution establishes that the law may prescribe the manner of exercising these rights only if:

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<sup>1</sup> The results of this research project have been the basis on which a special module « Selected rights of the child » has been devised as part of the international master course at the University of Novi Sad. In this international master course various European universities are also involved (Berlin, London, Cluj, Iasi), which all contributes to the realization of the goals of this project, which is to incorporate our Faculty in the European area of science and education.

<sup>2</sup> Section 2 of the Constitution includes Articles 18 through 81.

- it is explicitly provided for in the Constitution, or otherwise necessary for the exercise of a specific right because of its nature, and
- such law does not, under any circumstance, influence the substance of the relevant guaranteed right.

The provisions on human and minority rights shall be interpreted so as to promote the values of democratic society pursuant to valid international standards in human and minority rights, as well as the practice of international institutions that supervise their implementation.

It is obvious that many among the generally accepted rules of international law and ratified international treaties concern the rights of the child. As the most important one, we should single out the UN Convention on the Rights of the Child (CRC), which was ratified by our country in 1990<sup>3</sup>. They should be implemented directly and without limitation, except under the conditions prescribed by the Constitution.

Our Constitution also foresees that human and minority rights guaranteed by the Constitution may be restricted by law if and for the purposes prescribed by the Constitution, and to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right (Art. 20).

Generally accepted rules of international law and ratified international treaties are an integral part of the legal system in the Republic of Serbia and are applied directly.

But, there is some limitation to this general rule. Namely, ratified international treaties must be in accordance with the Serbian Constitution. This provision is not so common and is not in accordance with the necessity of mutual cooperation with other countries that are also parties to international conventions, and which raises an expectation that all contracting parties to a convention respect their international obligation assumed through an international convention.<sup>4</sup>

Some principles regarding the rights of the child foreseen by our Constitution are doubtlessly recognized in our country and are part of our legal system. These are:

1. Prohibition of discrimination (Art. 21) meaning that all are equal before the Constitution and law, and that everyone shall have the right to equal legal protection, without discrimination.

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<sup>3</sup> Convention UN on the Rights of the Child (*entered into force* 2 September 1990), until 12 February 2008 has been ratified by 193 counties, see on internet presentation <http://www2.ohchr.org/english/bodies/ratification/11.htm>, last visited on 30 November 2008. USA (16 February 1995) and Somalia (9 May 2002) has been signed but still not ratified the said Convention.

<sup>4</sup> See more in *O. Cvejić Jancic, Ustav kao izvor porodičnog prava* (Constitution as a source of family law), *Pravni život* br. 9/2008 (Legal Life no. 9/2008).

2. All direct or indirect discrimination based on any ground shall be prohibited, and particularly based on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability.

3. Prohibition of discrimination in family law matters concerns especially equalization of all persons irrespective of sex (gender equality) and birth (equal status of the child born out and in wedlock).

As regards gender equality, we should stress that it was guaranteed since our first Constitution (1946) up until our new Constitution (2006). Namely, in our legal system all children have equal rights and duties in family, inheritance and all other branches of law, irrespective of their sex. This prohibition of discrimination has almost completely been realized in law, but in everyday practice, we can say that it is a process that still needs some time and effort to be achieved. Though, some inequality exists even in the Family law itself. For example, if a young girl gives birth to a child before majority (at the age of 15 or 16), she legally becomes a mother and shall be written in the Birth Registry as the mother of the child, while a boy cannot voluntarily recognize his paternity before reaching the age of 16. The reason of this “discrimination” is the natural difference between men and women: whilst pregnancy and delivery are very obvious facts, which are very difficult to hide from friends and relatives; the case with the paternity is never self-evident as maternity is.

The second important group of constitutional prohibitions of discrimination regarding family law is based on birth. Namely, throughout a rather long period of time in the history of mankind, a child born out of wedlock has not been recognized and has suffered discriminating because of their “illegitimate” origin. In our country (as it was the case in almost all socialist countries), inequality based on the birth was abolished after the Second World War.

Other constitutional rights of the child set forth in Art. 64 of the Constitution are as follows: the right to enjoy human rights suitable to their age and mental maturity; the right to personal name; the right to entry into the registry of births; the right to learn about its origin; the right to preserve his or her identity; the right to protection from psychological, physical, economic and any other form of exploitation or abuse; and, if born out of wedlock, the right to equal treatment as the child born in wedlock. The rights of the child and their protection shall be regulated by law.

These rights of the child have been implemented in the Family Act of Serbia (abbreviated FA), which was enacted 2005 i.e. before the Constitution was promulgated, because our legislator took account of the harmonization of our Family Law with the most important international conventions, which in turn is the reason why many of the most modern rights of the child found their place in our current family law. The rights of the child recognized by the Family Act will be discussed in the following headings.

## II

### **The rights of the child in Serbian Family Law**

#### **The right of the child to know about her/his origin**

This right of the child is also prescribed by the CRC, but in our law it is much wider. In Article 7, the CRC laid down that the child shall be registered immediately after birth and shall have the right to name from the moment of birth, the right to acquire nationality, and, *as far as possible*, the right to know and be cared for by his or her parents. The possibility or impossibility of the child to know about her or his origin may be factual or legal. The CRC surely did not contemplate the factual impossibility but, before all, the legal impossibility for the child to know about her or his parents. That means that the law does not provide either the possibility to challenge or establish paternity or maternity, or any other right related to knowing her or his origin.

In Serbian family law the child has the right to know who his or her parents are and this right may only be limited by statute.

The child who has reached the age of 15 and who is capable of reasoning has the right of insight into the Birth Registry and other documentation relating to his or her origin.

The importance of this right of the child is undoubted, especially in case of adopted children and those conceived by biomedical assistance; but also in case of the children conceived naturally and born in or out of wedlock, if the data in the Birth Registry do not coincide with biological truth. In the realization of the right of the child to know the truth about her or his origin, our law has abolished the time limit for the child to file an action before the court in order to establish or challenge her or his maternity or paternity (Art. 249/1, 250/1, 251/1 and 252/1 FA).

In case of adopted children or those conceived by medical assistance, the legal situation is different. The adopted child has no right to establish her or his origin by way of a judgment, but it does have the right to examine data filed in the Birth Registry and other documents pertaining to her or his origin. Furthermore, before allowing the adopted child to have insight into the Birth Registry, the registrar is obliged to refer the child to psychosocial counseling in the guardianship authority, family counseling service or another institution specialized in mediation in family relations (Art. 326/3 FA). The purpose of this counseling is to facilitate the child's acceptance of the truth about its origin and to contribute to the lessening of possible stress, resentment or despair that may affect the child after having found out about his or her parents.<sup>5</sup>

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<sup>5</sup> This may particularly happen if the biological parent of the child (or both of them) is imprisoned, convicted of murder, insane, or has neglected the child leaving her or him without taking care of her or him and so on.

This right of the child could be of primary importance for the child because of the need of personal identification with his or her ancestors; then because of medical reasons i.e. because of the need of proper medical treatment in case of transferable diseases or illnesses; then because of legal reasons, such as to inherit her or his biological parents and relatives, or to receive maintenance from them in case of the child born out of wedlock, etc.

### **The right of the child to personal name**

Personal name consists of a name and a surname. Personal name shall be entered in the Birth Registry. Everyone is obliged to use his or her personal name. Persons whose name or surname, or both name and surname, include more than three words are obliged to use a shortened personal name (chosen personal name) in legal operations.

The child's name shall be determined by his or her parents. Parents have the right to have the child's name entered in the Birth Registry also in their mother tongue and using the alphabet of one of them. Parents have the right to choose the child's name freely, except if it is defamatory name, contrary to public moral, or contrary to the customs and opinions of the community. In these cases, the registrar can refuse to enter a name in the Birth Registry.

In some cases child's name shall be determined by the guardianship authority. That shall be the case when the parents are not alive, are unknown, cannot reach agreement on the child's name, or if they gave the child a defamatory or a name that is contrary to the customs, moral and opinions of the community.

As regards the child's surname, it shall be determined by his or her parents according to the surname of one of them. They may not give different surnames to their common children. The surname that they give to the first common child shall be the same for all common children. The children of the same parents cannot have a different surname.

Besides the abovementioned situation whereby the guardianship authority is authorized to decide on the child's *first name*, the Family Act also foresaw a case where it is also competent to decide on the child's *surname*, which shall be the case when the parents are not alive, are unknown, or if they cannot reach agreement on the child's surname.

Every person who has reached the age of 15 and is capable of reasoning has the right to change his or her personal name independently. The child who has reached the age of 10 and is capable of reasoning has the right to give consent to the change of his or her personal name, if parents, adopters or guardians wish to change it.

### **The right of the child to live with her or his parents and the right to parental care**

It is completely normal that a child has the right to live with her or his parents and to be raised by them. This right may be limited only by law, when it is in the best interest of the child, and when it is so decided by the court.

The court may hand down a decision on the separation of the child from his or her parents and entrust the child to a foster parent or a social service institution, only if reasons exist that deprive the parents fully or partially of the parental right.

But there are many practical situations in which is not possible for the child to live with both of her or his parents, for example when the marriage or cohabitation of child's parents has come to an end, or when the parents have separated without divorce. In this case, the court shall decide which parent the child shall live with, taking into account the best interest of the child. The child who has reached the age of 15 and who is capable of reasoning has the right to decide which parent he or she wants to live with. That is a new right of the child, which was unknown before the 2005 Family Act. If the child is younger than 15 but older than 10, she or he has the right to express her or his opinion about that, but not to decide independently.

### **The right of the child to personal contacts with her or his parents, relatives and other persons with whom the child is particularly close**

Among the most important novelties introduced by new 2005 Family Act is the right of the child who has reached the age of 15 and is capable of reasoning to decide on the maintenance of personal relations with the relatives and other persons that she or he is particularly close with, unless this right has been restricted by a court decision with regard to the best interest of the child.

The parent that lives with the child must allow personal contact between the child and the other parent, unless she or he can be fully deprived of parental rights. In the same time, the right of the child to maintain contact with the parents is a duty for the parents, and both the parents who do not allow the contact with the child and those who do not want to maintain contact with the child may be punished by way of full deprivation of parental rights. The child who has reached the age of 15 can independently decide what her or his best interest is and accept or refuse contact with the other parent. If the child has not reached the age of 15 years, she or he does not have the right to decide on it, but only to express her or his opinion in a court proceeding.

However, it is quite regrettable that the same right on maintenance of personal relations with the child is not granted to the relatives and other persons with whom the child is particularly close. This is especially important if the parent with whom the child lives does not allow maintenance of such contact and the child is too young to decide upon it independently. Under our law, relatives and other persons could only file an action before the court in order to be granted the maintenance of personal contacts with the child through the Center for social work or public prosecutor. In our opinion, this is not the best way to protect the best interest of the child, because the personal contacts with close relatives (but not only with them) could be very important for proper upbringing of the child and for the creation of his or her family identity. In case one parent is deceased, the family ties between the child and the relatives of the deceased parent are more important, and they shall have the personal right to protect it in a court proceeding.

After all, Article 5 of the Convention of the Council of Europe on the Contact concerning Children provides that, subject to the child's best interests, contact may be established between the child and persons other than his or her parents, if they have family ties with the child.<sup>6</sup> The Family Act of Croatia also provides that the grandfather and the grandmother have the right to maintain contact with their grandchildren, as well as brothers and sisters and the half brothers and half sisters with their minor brothers or sisters or half brothers or half sisters, having in mind the welfare of the child.

### **The right of the child to development and education**

Every child has the right to education in accordance with his or her abilities, wishes and inclinations. The child who has reached the age of 15 and who is capable of reasoning has the right to decide which secondary school he or she shall attend. The parents do not have the right to decide about the child's education instead of their child, but they can advise her or him, and they shall help and support them to make a proper decision, but nothing more than that.

The parents have the obligation to provide for the child's elementary education, and to take care, in accordance with their capabilities, of the child's further education.

The parents have also the right to provide for such education of the child that is in accordance with their religious and ethical beliefs. This right of the

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<sup>6</sup> Convention of the Council of Europe on Contact concerning Children, done in Strasbourg on 15 May 2003. Our country has not yet acceded to it. This Convention entered into force on 27 May 2005, after ratification of the three countries: Albania, Czech Republic and San Marino. Until 2007 no other country has ratified the Convention, see U. Kilkelly, *Annual Review of International Family Law*, in *The International Survey of Family Law*, Gen. editor Bill Atkin, Edition 2007, p. 10.

child is also guaranteed by the CRC, which laid down in its Article 14 that “*States Parties shall respect the right of the child to freedom of thought, conscience and religion. 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. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or fundamental rights and freedoms of others.*” The same right is guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the corresponding Protocols, whereby “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance (Art. 9 para 1).” The European Court of Human Rights, as the judicial authority of the Council of Europe competent for the protection of human rights and fundamental freedoms proclaimed by the abovementioned Convention, recognizes this right of the child in its case law in many of its judgments.<sup>7</sup>

In our country, after the Government’s enactment of the Decree on the Organization and Realization of Religious Education as an Alternative Subject in Primary and High Schools (2001), the religious education became an optional school subject starting from the first year of the primary school, and the parents may choose whether their child shall attend religious teachings. If the child has reached the age of 15, she or he has the right to decide about religious education independently.

The state funds religious education for seven traditional churches and religious communities.<sup>8</sup> The religious teaching for the traditional churches and communities shall be organized regardless of the number of believers of each of these denominations at a given area (Art. 4 of the Decree).

### **Full legal capacity of the child**

Under Serbian Family Law the child who is 18 years old and is fully legally capable to take care of herself or himself and to participate independently in all legal matters, judicial or administrative proceedings – in other words, to

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<sup>7</sup> For example case *Valsamis v. Greece* (no. 21787/93)

<sup>8</sup> Seven traditional churches and religious communities in Serbia are: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Lutheran Church, the Reformed Church, the Evangelical Christian Church, and the Islamic and Jewish communities (Art. 1 para 2 of the Decree).

represent herself or himself. The statutory representation of the child by her or his parents or guardian comes to an end when the child reaches the age of majority i.e. the age of 18.

However, the child has the so-called “*qualified capacity*” for some family law relations if she or he has reached the age of 16 and is capable of reasoning. Such is the right to file an action before the court in order to receive the court’s permission to conclude marriage before the age of majority. The court may, for justified reasons, allow the conclusion of marriage to the minor who has reached the age of 16 and has reached physical and mental maturity necessary for the performance of rights and duties in marriage. The court shall also hear the parents of the minor, but their opinion is not binding on the court.

The second is the right of the child to acquire full legal capacity before majority, if he or she has become a parent. In this case, the child must ask the court to decide about it. Before granting full legal capacity, the court has to make sure that the minor child (who has reached the age of 16 and has become a parent) has reached physical and mental maturity necessary for independent care of his or her own person, rights and interests.

This right is new and is granted to the child who becomes a parent in order to give capacity to the young parent to take care about her or his child independently without the necessity to conclude marriage or to be dependent on her or his parents. On the basis of the aforementioned conditions, the decision to recognize full legal capacity prior to the age of 18 shall be rendered by the court in a non-contentious proceeding.

The special qualified capacity is also granted to the pregnant girl who has reached the age of 16 and who may independently submit a claim for abortion. If she is younger than 16, the consent of her parents is required. This right is not provided for by the Family Act, but by the Act on the Proceeding of Interruption of the Pregnancy in the Medical Institution.

Moreover, the boy who is 16 years old and who is capable of reasoning can independently recognize paternity of the child born out of wedlock (Art. 46 FA). The qualified capacity also includes the right of the child to give consent to the acknowledgment of paternity, if she or he was born out of wedlock. This right has been granted both to the non-marital mother who is 16 years old and capable for reasoning, and to the non-marital child under the same conditions (Art. 48, 49 FA).

Some other rights have also been granted to the child who has reached the age of 15 and who is capable of reasoning. We have already mentioned some of them, such as the right to know about her or his origin, the right to change her or his personal name, the right to decide which parent she or he wants to live with, the right to decide about personal contacts with her or his parents and with

relatives and other persons whom she or he is particularly close with, then the right to choose which secondary school he or she shall attend, the right to give medical consent, etc.

Among the rights of the minor child is the right to perform legal acts whereby he or she manages or disposes of his or her income or property acquired by his or her own work. Namely, under our labor law, the child who is 15 years old may get a job independently, subject to the written consent of her or his parent, adopter or guardian, and consequently, has the right to freely dispose with her or his earnings and the property thus acquired. She or he is however obliged to support her or his parents and minor brothers and sisters, if they do not have enough means for their own support. If the child has property acquired in a way other than work, it is up to the parent to manage and dispose with it. To dispose of the child's immovable or movable property of considerable value, the parent must have permission of the Center for social work.

### **The right of the child to give a medical consent**

This is also a new provision and it established the right of the child who is 15 years old and who is capable of reasoning to give consent to a medical intervention. The parents have no right to intervene or change the decision of the child, because the child's right is independent. If the child is younger than 15, it is up to her or his parents to give consent to medical intervention. The question may be raised about what should be done if the parents disallow some medical intervention, although it may be detrimental to the child's health. For example, such a situation might arise if the child's parents are followers of the Jehovah's Witnesses and do not allow their child to receive blood transfusion due to the religious reasons. The Family Act does not provide a special solution for this kind of problem, but the Health Protection Act<sup>9</sup> sets forth that, if the patient is a minor or is deprived of full legal capacity, medical measures shall be subject to information and approval by his or her legal representatives (parents, adopters or guardian – Art. 35 para 1 HPA). The competent medical worker who considers that the legal representative of the patient does not act in the best interest of the child (or person deprived of the legal capacity) is obliged to promptly report it to the guardianship authority.

Under the Serbian Family Act, the guardianship authority may decide to appoint a temporary guardian to a ward, as well as to the child under parental care, or the person having full legal capacity, if it deems it indispensable for temporary protection of person, rights or interests of such persons (Art. 132 para

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<sup>9</sup> Published in the Official Gazette of Republic of Serbia no. 107/2005.

1 FA). Under the abovementioned conditions, the guardianship authority has a duty to appoint a temporary guardian to the person whose interests *are opposite* to the interests of her or his statutory representative (Atr. 132 para 2 point 3 FA). Decision on the appointment of temporary guardian shall also determine the legal operation or type of legal operations that the guardian may undertake, depending on the circumstances of each specific case. In this case, the guardian shall be authorized to give consent to medical measures if it is in the best interest of the child.

### **The right of the child to express her or his views**

The Serbian family law provides a series of the so-called procedural rights of the child. Through these new procedural rights of the child, the Serbian law has been harmonized with the UN Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights. It should be underlined that our country has ratified only the former Convention, which in Article 12 sets forth the following:

*“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.”*

A couple of years following the entry into force of this UN Convention, namely in 1996, the Convention on the Exercise of Children's Rights was enacted and opened for signature under the auspices of the Council of Europe.<sup>10</sup> Serbia has so far neither signed nor ratified it. According to Article 1 paragraph 2 of the latter Convention, its object is *“in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves, or through other per-*

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<sup>10</sup> Done at Strasbourg on 25 January 1996, entered into force on 1 July 2000. Until 31 October 2008, this Convention had been ratified by 13 member states. These are: Slovenia, Poland and Greece (1 July 2000), Czech Republic (1 July 2001), Latvia (1 September 2001), Germany (1 August 2002), Turkey (1 October 2002), the Former Yugoslav Republic of Macedonia (1 May 2003), Italy (1 November 2003), Cyprus (1 February 2006), Ukraine (1 April 2007), France and Austria (1 January and 1 October 2008 respectively). Besides this, the total number of signatures not followed by ratifications is 11: Finland, Iceland, Ireland, Luxemburg and Sweden (1996), Portugal and Spain (1997), Slovakia (1998), Croatia and Malta (1999), Russia (2001).

*sons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority”.*

Despite the fact that Serbia has not acceded to it, the provisions of the Serbian Family Act have mostly been harmonized with the two aforesaid conventions, i.e. both with the UN Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights. The motivation behind it is to promote and protect modern procedural rights of the child. Such is, for example, the right of the child who is capable of forming his or her own opinion to freely express it (Art. 65 para 1 FA). The child also has the right to receive, in the nick of time, all information necessary to form his or her opinion. The Act further provides that due attention, in accordance with the child's age and maturity, must be given to this opinion in all matters important to the child and in all proceedings affecting her or him (Art. 65 para 2 and 3 FA).

The child who is ten years old may freely and directly express his or her opinion in any court or administrative proceeding where his or her rights are being decided upon, and may independently, or through some other person or institution, address the court or administrative organ and request help in the realization of the right to freely express her or his opinion. The court and administrative authorities shall establish the child's opinion in cooperation with the school psychologist or the guardianship authority, family counseling service or some other institution specialized for mediation in family relations, in the presence of person the child chooses himself or herself (Art. 65 para 4,5 and 6 FA).

These rights of the child are new in our legal system, and their implementation is really challenging for the competent courts and other authorities. One can expect that these provisions will be implemented fairly well, because the judges deciding in family disputes must have special knowledge on the rights of the child, whereas the members of the jury must have experience in working with the youth (Art. 203 FA). Furthermore, if affecting the child or the parent who exercises parental rights, the proceedings in family matters are urgent (Art. 204 FA), which in turn means that the first hearing shall be held within 15 days of the filing of the action and shall be finished within two hearings at most. The appellate proceedings shall be finished within 30 days (Atr. 204 FA).

However, there is still remaining a lap in the improvement of the protection of the best interest of the child. Namely, our family law does not prescribe the right of the child to be heard within the family, if her or his parents should take decision about the family matters that affects the child. Actually, majority decisions taken within the family concerns the child. For example, if the parents are considering divorce, or adoption of the another child, or possibility to move away and so on, they do not need neither to ask for the view of their child about that nor to take into consideration her or his view.

### **The right of the child to maintenance**

In Serbian family law, the legal obligation of mutual maintenance is established between: parents and children; between other blood, adoptive and in-law relatives; as well as between spouses, ex-spouses and cohabiting partners and ex ones. Until the age of majority, children have the unconditional right to maintenance from their biological and adoptive parents (Art. 154 para 1 FA),<sup>11</sup> which means that the child has the right to maintenance regardless of any general and special conditions prescribed for other creditors and debtors of this legal obligation. Parents are obliged to provide maintenance of their minor child even to the detriment of their own maintenance. The purpose of the obligation of legal maintenance is to provide existential needs of the creditor from the person who is legally considered the debtor.

Beside this, under certain preconditions, the minor child also has the right to maintenance from the mother and father-in-law. Namely, if the child has no parents able to meet the existential needs of the child, and if the marriage between the child's biological (adoptive) and in-law parent did not end by divorce or annulment, the child has the right against her or his in-law parent and vice versa (Art. 159 FA). This right lasts until the child reaches the age of majority.

The minor child may also receive maintenance from her or his brother and sister, no matter whether they (debtors) are major or minor. The only condition allowing a brother or a sister to be a debtor of maintenance is that she or he has sufficient means to support the minor brother or sister (Art. 157 FA). This may occur if a minor brother or sister is employed and gains income through work or property. It should be mentioned that this obligation of brothers and sisters exists only if the parents of the minor child have died or do not have sufficient means to support their minor child.

Under certain conditions, the major child also has the right to support from his or her parents. These conditions have been foreseen in two situations (Art. 155 FA). Firstly, a major child who is not capable to work (disabled child), and who does not have enough means for support, has the right to support from the parents, as long as such a state lasts. Secondly, a major child, before reaching the age of 26, and during regular schooling, also has the right to support from the parents in proportion to their means. If the parents are not alive or do not have enough means for support, the abovementioned major child has the right to support from the other ancestors in the straight line (grandmother and grandfather, great-grandmother and great-grandfather, etc) in proportion to their

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<sup>11</sup> In relation to his or her adopters and their relatives, the adopted child is equalized with the biological child. Besides, the FLA establishes that the adopted child has the same rights towards her or his adopters as the child towards her or his parents (Art. 6 para 5 FA).

means. An additional condition for the major child to receive support from parents or ancestors is that the request for support would not represent manifest injustice for the parents or other ancestors in straight line.

### **The right of the child to nationality**

The nationality of the Republic of Serbia may be acquired in the following four ways: by origin, by birth on the territory of the Republic of Serbia, by admission, and through international contracts.<sup>12</sup>

a) *The child acquires Serbian nationality by origin* if both of the parents have Serbian nationality irrespective of the child's place of birth (in Serbia or abroad). If the child was born on the territory of Serbia, and one parent has Serbian nationality, the child will also acquire our nationality by origin. The third situation in which the child also acquires Serbian nationality by origin is situation in which the child was born abroad and one of the parents has Serbian nationality and the other parent is either unknown, does not possess any nationality (stateless), or his or her nationality is unknown (Art. 7 NA). In the all of the three mentioned situations the child acquires nationality of the Republic of Serbia by simple inscription in the Birth Registry (Art. 6 para 2 NA). The law also foresees several other, less usual situations in which the child born abroad acquires Serbian nationality.<sup>13</sup>

b) *The child acquires Serbian nationality by birth* if she or he was born or found on the territory of the Republic of Serbia, and the child's both parents are either unknown (foundling), do not possess nationality, or their nationality is unknown, or the child does not possess nationality (Art. 13 NA). In this case, the child shall be inscribed in the Birth Registry, and she or he will be deemed a Serbian national from birth. If it is established by the time the child reaches the age of majority that his or her parents possess foreign nationality, the Serbian nationality of their child will end at the parents' request. If the child is older than 14, her or his consent is needed (Art. 13 para 4 NA).

c) *The child acquires Serbian nationality automatically* if the Ministry of Internal Affairs, upon the conclusion of proceedings on acquiring nationality by admission, issues a binding decree granting nationality to his or her parents (Art. 6 para 3 NA). Before that, the Ministry shall verify that all conditions set forth by the law have been fulfilled. The most important conditions are the following (Art. 14 NA):

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<sup>12</sup>Nationality Act of the Republic of Serbia of 2004 ("Official Gazette no. 135/04), as amended on 24 September 2007.

<sup>13</sup> See more in Articles 8-12 NA.

1. That the foreigner is at least 18 years old and is not deprived of full legal capacity,

2. That she or he has been dismissed from foreign nationality or has submitted confirmation that she or he will receive such dismissal after being admitted in Serbian nationality,

3. That, at the moment of submitting the application, he or she had been registered as a resident at the territory of the Republic of Serbia for at least three years without interruption.

4. That she or he submits written statement that she or he considers the Republic of Serbia as her or his state.

If both parents had acquired Serbian nationality by admission, their minor child acquires it too.

d) *The child might also acquire Serbian nationality by way of ratified international contracts* under the conditions prescribed thereunder, if the condition of reciprocity is fulfilled (Art. 26 NA).

If a national of the Republic of Serbia has double nationality i.e. that of the Republic of Serbia and another country, she or he is deemed a national of Serbia during his or her stay on the territory of our country.

### **The right of the child to protection against domestic violence**

Violence among family members is neither a new topic nor a new phenomenon.<sup>14</sup> It can be said that it is a universal phenomenon known to all societies across all historic time periods. It is notorious that the most common victims of domestic violence are wives and children.<sup>15</sup> The child can be not only a direct victim of domestic violence, but also indirect, when she or he witnesses violence against other family members, especially her or his mother. The CRC expressed strong reluctance against all forms of violence towards children, saying:

*“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (Art. 19 para 1 CRC).”*

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<sup>14</sup> See more in O. Cvejic Jancic, *Protection from Domestic Violence*, The Internacional Survey of Family Law, Ed. 2008, Gen. Editor Bill Atkin, page 317-335 (Family Law, Jordan Publishing Limited 2008).

<sup>15</sup> See the data about domestic violence in O. Cvejic Jancic, op. cit. p. 328.

Taking into consideration this provision of the CRC we may say that our Family Act is not in accordance with it, because under Serbian law physical punishment of the child is not explicitly forbidden. Art. 69 para 2 Family Act sets forth that “*parents may not subject the child to humiliating actions and punishments that insult human dignity of child and shall be under the obligation to protect the child from such actions of other persons.*” Thus, one may assume that physical punishment of the child is within the scope of “humiliating actions and punishments that insult human dignity of child” but, however, the child is not protected enough, for example, from a slaps in the face or on the backside. It would be better not to leave any suspense whether the slaps or similar physical punishment also falls under the scope of humiliating actions and whether that insults human dignity of child. Physical punishment of the child shall be prohibited as within the family so as out the family.

As already mentioned, domestic violence is not a novel occurrence of the modern era; new is only the interest of the state to provide protection to the victims of family violence and to fight against it, and, as a result, we currently have two kinds of protection: criminal and family law protection.

As regards criminal law protection, it should be emphasized that our new Criminal Code (2005) introduces a new criminal act (termed *domestic violence*) that sanctions the act of violence towards family members. The sanctions range from pecuniary fine combined with a maximum of one year of imprisonment, as the mildest form of punishment, for instances of endangered tranquility and physical integrity or mental state of a family member; to imprisonment ranging from three months to three years for instances when domestic violence results in severe consequences, severe injury, or serious impairment of health. Finally, if domestic violence results in death of a family member, the sentence of imprisonment ranging from three to twelve years can be pronounced.

Besides criminal law protection regulated by criminal legislation, family law too, envisages certain measures of protection against domestic violence that can be taken in civil procedure. The possibility of family law protection from domestic violence perpetrated by one family member against the other has significantly increased the level of protection of the endangered family members.

However, it should be underlined that the protection from domestic violence is not a special right of the child, since we only have a general provision on the protection of all family members as victims of family violence. Nonetheless, if the child becomes a victim of domestic violence, the family law secures slightly better protection, because the court proceedings are deemed as especially urgent, meaning that the first hearing must be held within eight days of the filing of the action, whereas the proceedings before the higher court shall be finished within fifteen days (Art. 285 FA).

Pursuant to Article 198 of the FA, the court in civil law proceedings can issue one or more of the following measures for the protection from domestic violence:

- Warrant to remove from the family household, regardless of the right to ownership or lease;
- Warrant to move in the family household, regardless of the right to ownership or lease;<sup>16</sup>
- Restraining order preventing the approach of a certain family member up to a certain distance;
- Restraining order preventing access or approach to the residence or place of work of a family member;
- Prevention of further harassment of a family member.<sup>17</sup>

### **The right of the child to protection from exploitation and abuse**

The Serbian Constitution prescribes, as a general principle, that the child shall be protected against mental, physical, economic, and any other exploitation and abuse (Art. 64 para 3 of the Constitution). The family law also provides for protection in these cases through full or partial deprivation of the parents' parental rights. Namely, the parent who abuses parental rights or grossly neglects parental duties may be

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<sup>16</sup> With regard to the warrant to move into a family household, legal literature has pointed out to the incorrect formulation of Article 198, paragraph 2, line 2. Namely, this measure can only relate to the plaintiff (victim of the violence), which had to leave the family household in order to protect himself or herself from violence that he or she had been exposed to. The court orders the victim to return to the house that it was forced to leave. However, such a court order is not consistent with decisions taken in civil law proceedings, where the plaintiff can only be ordered to pay the costs of judicial proceedings, but no other obligation can be imposed on him or her. Due to the need to secure unfettered return to the family household, the court order should order the defendant to allow the return of the plaintiff to the family household, that is to order him to refrain from any action that would prevent the return of the plaintiff", see more in: N. Petrusic, "Porodičnopravna zaštita od nasilja porodici u pravu Republike Srbije", in: "Novo porodično zakonodavstvo" ("Legal protection against family violence in the new Serbian family law" in: "New Family Legislation"), Collection of Papers of the Conference in Vrnjanska Banja, Kragujevac, 2006, p. 32.

<sup>17</sup> The measures proposed by I. Schwenzer, in collaboration with M. Dimsey in "*Model Family Code*" (Art. 2.2) are similar: "In particular, the court may order that the respondent: a) leave, remain away and refrain from entering the dwelling of the aggrieved person, b) refrain from approaching the aggrieved person, c) refrain from establishing contact with the aggrieved person in any way, and d) refrain from being in certain locations.", Intersentia, Antwerpen – Oxford, 2006, page 89. Neither the Serbian law nor the Model Family Code prescribe measures such as mandatory treatment of alcoholism or addiction to other substances, treatment of illness, or mandatory psychiatric counseling or treatment, although these could very often be the reason why family violence occurs.

fully deprived of the parental right (Art. 81 FLA). If the parent exercises parental rights and duties unconscionably, he or she may be partially deprived of the parental right (Art. 82 FLA).

The abuse of parental rights exists if the parent:

1. Physically, sexually or emotionally abuses the child;
2. Abuses the child by forcing her or him to excessive labor, labor that endangers her or his moral, health or education, or labor prohibited by law;
3. Instigates the child to commit criminal actions;
4. Accustoms the child to indulge in bad propensities;
5. Otherwise maliciously abuses the rights of child.

The parent grossly neglects her or his parental duties if he or she:

1. Abandons the child;
2. Does not at all take care of the child that he or she lives with;
3. Avoids to provide maintenance to the child or to maintain personal contacts with the child that he or she does not live with or prevents the maintenance of personal contacts between them;
4. Fails, intentionally or unjustifiably, to create conditions for common life with the child living in a social service institution;
5. Otherwise grossly neglects the rights of child.

Finally, a binding court decision on full deprivation of the parental right shall deprive the parent of all parental rights and duties, except for the duty of maintenance. In the decision on full deprivation of parental right, one or more measures of protection of the child from domestic violence may also be issued.

Partial deprivation of the parental right is a measure of family law protection of the child, applicable if the parent does not exercise parental right conscientiously enough, although not as unconscionably as to amount to abuse or gross neglect of the parental rights and duties.

The parent who is partially deprived of the parental right may be deprived of one or more rights and duties, except for the duty to support the child. Firstly, the parent exercising the parental right may be deprived of the right and duty to protect, raise, bring up, educate, represent the child, and manage and dispose of the child's property.

On the other hand, the parent who does not exercise the parental right may be deprived of right to maintain personal contact with the child as well as of the right to decide on issues significantly influencing the child's life.

Deprivation of the parental rights is effected by the civil law courts in family law proceedings.

The strongest consequence of deprivation of the parental rights is that the child may be adopted without the consent of her or his parent. Namely, consent is not required of the parent who is fully deprived of the parental right or who is

deprived of the right to decide on issues significantly influencing the life of the child (Art. 96 FA). In this case, the parental right definitely ends and it is not possible to reverse it, which is legally and theoretically possible until the child is adopted.

### **The right of the child to habitation**

Having in mind that the child enjoys special protection of the state (Art. 6 para 1 FA), the Serbian Family Act sets forth that the child and the parent who exercises the parental right shall have the right of habitation in the apartment owned by the other parent, if they do not own another apartment in which they could move in. This right of the child and the parent with whom the child lives shall last until the child reaches the age of majority.

The child and the parent whose request for habitation would represent manifest injustice for the other parent shall not have the right to habitation (Art. 194 FA).

In the end, this is a very important right of the child. In essence, it means that the child has the right to stay, until the age of majority, in the same apartment even after the family ties between her or his parents come to an end, and regardless of whether it happens because of divorce or simply separation of the child's parents. The child is protected against the need to move out of the apartment and to suffer from uncertainty after the separation of his or her parents. It is the new right of the child and it is established in the best interest of the child. The ownership of one parent over the apartment is no longer an obstacle for the child to stay with the parent who exercises the parental right. The UN Convention on the Rights of the Child proclaims that the best interest of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or *legislative bodies* (Art. 3 of the Convention). It seems that our legislator has taken this provision of the Convention into account, regarding this very important part of child's life.

### **Concluding remarks**

The twentieth century represents a remarkable milestone in the apprehension and creation of the legal status of the child and in recognition of the specialties affecting the child and her or his rights. The end of the twentieth century was crowned by adoption of the UN Convention on the Rights of the Child (1989), which ushered in the new era in regulation of the rights of the child – the era of children's rights. This does not mean that the relation towards

the child has been automatically changed all over the world, nor that children's status has been improved. However, this process begins and one should hope that it will result in eradication of many detrimental behaviors and customs towards children.

Serbia ratified the CRC in 1990 and we may say that the provisions of the said Convention, as well as of other European conventions regarding the rights of the child irrespective of whether Serbia has so far ratified them, have mainly been implemented in our family law system. However, there are some discrepancies. For example, physical punishment of the child is not explicitly prohibited under the Serbian Family Act, although the CRC is very clear about that. The similar situation is with regard to the right of the child who is capable of forming her or his own view to express that view freely in all matters affecting her or him. Our law does not secure that right when the family matters are in question, since the parents are not obliged to consult their children when deciding about family related issues. For example, they are not obliged to seek their child's view on divorce, adoption or any other family issue that might affect the child.

Furthermore, discrepancies also exist in case of the right to maintenance of personal contacts concerning the child, which our law only gives to the child, thereby excluding the child's relatives and other persons with whom the child is particularly close. This is especially important if the parent with whom the child lives does not allow maintenance of such contact and the child is too young to decide upon it independently, which is neither in accordance with the European Convention on Contact Concerning Children nor in the best interest of the child.

As far as other rights of the child are concerned, such as the right of the child to know about her or his origin, the right of the child to personal name, the right of the child to live with her or his parents and the right to parental care, the right of the child to education, the right of the child to give medical consent, the right of the child to nationality, and other rights of the child which we have been considered in this paper, one may say that the higher European standards are satisfied. Some of them, such as the right of the child born out of wedlock to have equal rights as the child born in wedlock, are introduced in our legal system after the Second World War. Until the 1974 Constitution, there were some differences between these children, but after the 1974 Constitution differences in their legal status have been eliminated.

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## **„Prava deteta prema pravu Srbije“ – Harmonizacija sa evropskim i međunarodnim konvencijama -**

### *Rezime*

Dvadeseti vek predstavlja značajnu prekretnicu u poimanju i koncipiranju pravnog položaja deteta i u priznavanju specifičnosti vezanih za dete i njegova prava. Kraj dvadesetog veka je krunisan usvajanjem Konvencije o pravima deteta, čime započinje jedna nova era u regulisanju prava deteta - era dečijih prava. To ne znači da se automatski i svuda u svetu promenio odnos prema deci ili poboljšao njihov položaj. Ali proces je započeo i treba se nadati da će vremenom dovesti do iskorenjivanja mnogih štetnih običaja i postupaka prema deci.

Srbija je ratifikovala Konvenciju UN o pravima deteta 1990. g. i može se reći da su odredbe ove Konvencije kao i odredbe evropskih konvencija koje se tiču prava deteta, bez obzira da li ih je naša zemlja ratifikovala, uglavnom implementirana i naše porodično pravo. Ipak, ima nekih nesaglasnosti sa ovim Konvencijama. Tako na pr. fizičko kažnjavanje dece nije prema našem pravu izričito zabranjeno iako je Konvencija o pravima deteta vrlo jasna po tom pitanju. Slična je situacija i sa pravom deteta koje sposobno da formira sopstveno mišljenje da to mišljenje izrazi u svim stvarima koje ga se tiču. Naše pravo ne garantuje to pravo deteta kada se radi o odlukama koje ga se tiču a donose se u porodici. Na pr. roditelji nisu dužni da pitaju dete za mišljenje niti da ga konsultuju kada donose odluke koje se odnose na pr. na eventualni razvod braka, ili na usvajanje tuđeg deteta, na preseljenje ili na druga pitanja koja se tiču i njihovog deteta. Zakon obavezuje sve organe koji donose odluke koje se tiču deteta (sudske, administrativne i sl) da pre toga saslušaju i uzmu u obzir mišljenje deteta, ali ne obavezuje i roditelje da o tome vode računa.

Naše pravo nije predvidelo ni pravo bliskih srodnika da održavaju lične kontakte sa detetom, već samo pravo deteta na kontakte sa bliskim srodnicima i licima sa kojima ga vezuje posebna bliskost. Međutim, ako je dete malo i ne može da ostavaruje pravo na kontakte samostalno, niti da razvije odnose bliskosti sa njima ako ih roditelj koji vrši roditeljsko pravo ne odobrava, kontakti sa

srođnicima će mu biti uskraćeni, jer njima zakon nije priznao pravo na kontakte kao njihovo samostalno pravo, što nije u skladu sa Evropskom konvencijom koja se tiče kontakata sa detetom.

Što se tiče postalih prava deteta, kao na pr. pravo deteta da zna za svoje poreklo, pravo deteta na lično ime, pravo deteta da živi sa svojim roditeljima i da se roditelji staraju o njemu, pravo na obrazovanje, na davanje saglasnosti na medicinske intervencije, pravo na državljanstvo kao i druga prava deteta koja su u radu razmatrana, može se reći da su najviši evropski standardi dečijih prava zadovoljeni. Jedno od takvih prava, kao na pr. pravo deteta rođenog van braka na jednak položaj kao i dete rođeno u braku, je uvedeno u naše pravni sistem još posle Drugog svetskog rata. Do Ustava iz 1974. g. postojala je izvesna razlika u pravnom položaju dece rođene u braku i van braka, ali je posle donošenja tog Ustava svaka razlika u njihovom pravnom statusu izbrisana.