

**Golić Darko\***

<https://orcid.org/0000-0003-2315-5040>

**Logarušić Dejan\***

<https://orcid.org/0000-0001-9782-9277>

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## **CHILD RIGHTS: INTERNATIONAL STANDARDS AND THEIR IMPLEMENTATION IN THE LEGAL SYSTEM OF REPUBLIC OF SERBIA<sup>1</sup>**

**ABSTRACT:** As a necessary consequence of the strengthening of human rights, there appears the idea and movement of the existence of the child rights separated from the human rights. These are the rights which will pull out the child from the grip of the powers not only of the state, but also of the parents, and will allow the child to be viewed as a separate human being, with his/her own rights, his/her own identity, integrity and dignity. This idea will be spread so much by the end of the twentieth century that it will lead to significant phenomena and changes at the international level. Normative activity within the United Nations has never produced such a result as the UN Convention on the Rights of the Child. An almost universally accepted legally binding document has, in an extremely short period of time, set fairly high uniform standards of children's rights at the global level. We will see that the domestic legislator did not follow the tendencies of the international community to a sufficient extent, so it was only in 2019 he took certain political steps to correct the given situation, but without sincere desire or strong will enough to complete the procedure.

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\* LLD, Associate professor at the Faculty of Law for Commerce and Judiciary, Business Academy in Novi Sad, Serbia, e-mail: [g.darko83@gmail.com](mailto:g.darko83@gmail.com)

\*\* LLD, Associate professor at the Faculty of Law for Commerce and Judiciary, Business Academy in Novi Sad, Serbia, e-mail: [dejan.logarusic@pravni-fakultet.info](mailto:dejan.logarusic@pravni-fakultet.info)

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In contrast to the universal level where the child rights de facto codified in the UN Convention on the Rights of the Child, at the national level they remain fragmented, with many gaps recognized by the domestic public authorities.

**Keywords:** *child rights; international standards; national standards; the Convention on the Rights of the Child; the Draft Law on the Rights of the Child.*

## 1. Introductory remarks

Since the second half of the twentieth century, one of the most powerful movements at the international level has certainly been the movement for the protection of human rights. From that movement, we will see, a movement for the protection of children's rights will also arise. The emancipation of children's rights, i.e. their separation from the sphere of general human rights, is certainly justified considering their psychological and physical immaturity. The particularly vulnerable and sensitive position of children justifies, even demands, a special regime for the protection of their position, rights and interests. Thus, we will see, over time, the child will be recognized with many civil, political, economic, social and cultural rights, and the position of the child in modern society will be significantly improved.

Generally speaking, the oldest concept of relationship meant that parents have power over their children as over things, and freely dispose of them. However, with the extremely long development of society, the concept of children's rights was finally created, which begins to limit the power of parents over children. Certainly, the emergence and development of the concept of children's rights can be seen as a necessary continuation of the process of development of general human rights. Namely, just as with the development of human rights and freedoms, individuals were freed from decisions made "on their behalf and in their best interest" by the state, embodied in the monarch or later the ruling group, so, in truth, much later, the rights of the child began to develop, which limited parents' ability to manage their children's lives "in their best interests." As a consequence of the social movement to liberate man from power, with the concept of human rights, the concept of children's rights as a separate segment of human rights is also developing strongly and rapidly. The normative activity of the international community will be particularly developed in the second half of the twentieth century, which will culminate in the adoption of the comprehensive UN Convention on the Rights of the Child,

which will then become the basis for building international and national systems for the protection of children's rights in modern society.

In Serbia, in the period up to the nineties of the last century (FRY), the economic, social and cultural rights of the child were exercised at a relatively satisfactory level. Thus, every child could receive free education, have health care and be a user of numerous services within the social system. At the same time, this situation precluded the enjoyment of the child's political and civil rights. The child was legally and factually voiceless in society, school, family or institution. Such a position of the child was a consequence of the traditional, "protective" attitude of society, parents or extended family members.

This paper seeks to provide an overview of the international standards for the protection of the rights and position of the child contained in the most significant and universal international legal instruments dedicated to the rights of the child, and to point out the national normative frameworks regulating the rights of the child and those by which international standards are implemented in the domestic legal order. The paper also gives suggestions as to how this issue should be regulated *de lege ferenda at the national level*.

## **2. International standards for the protection of children's rights and their development**

Children's rights first received the attention of the wider international community after the end of the First World War. Thus, Draškić (2009, p. 38) notes that even before the United Nations was formed, certain changes in the understanding of the position and rights of the child began, and that the moment it became clear that international standards could and must be adopted apply to children, the process of "internationalization of children's rights" began, which was first materialized in the Declaration on the Rights of the Child from 1924, which was adopted by the Assembly of the League of Nations, and then, in an expanded form, the United Nations adopted a new Declaration on child rights 1959. This Declaration, made in the light of the consequences of the First World War, primarily concerned the material needs of children, that is, the need to provide them with food, care, shelter, or help (Freeman, 1983, p. 19).

Upon its formation, the United Nations will take over the Declaration on the Rights of the Child from 1924, but soon after the adoption of the Universal Declaration on Human Rights from 1948, the shortcomings of the Geneva Declaration were noticed (Samardžić, 2018, p. 27), so that on the 20 In November 1959, the Declaration on the Rights of the Child was unanimously adopted by all members of the UN General Assembly.

Samardžić (2018, p. 29) also highlights international legal acts of a universal character as relevant for establishing and protecting the position and rights of children, although these documents do not specifically refer to children. Thus, as one of the basic documents, the Universal Declaration of Human Rights is highlighted,<sup>2</sup> which contains a provision on the family – the family is considered a natural and basic unit of society, and the right of men and women to marry and found a family is highlighted; proclaims their equal rights in marriage and states that consent to marriage should be given freely. In particular, Article 25, paragraph 2 guarantees the child's special right to special care and assistance. Although the Declaration does not abound in provisions dedicated to children, this provision clearly indicates that the rights and position of children and families were in the minds of the authors of the Declaration, although the primary focus of the Declaration, we believe, was on strengthening the rights and position of man, as an individual, after the end of one of the biggest destructions in the history of mankind. The Universal Declaration will then represent one of the starting points for the adoption of the UN Convention on the Rights of the Child, and will occupy an important place in the preamble of this Convention.<sup>3</sup>

Also, it can be considered that of general importance for the position and rights of the child, prior to the UN Convention on the Rights of the Child,

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<sup>2</sup> The Convention was adopted by the General Assembly of the United Nations by Resolution 217A of December 10, 1948 in Paris; Like other declarations and acts of the UN General Assembly, they do not have a legally binding nature, until they are accepted and incorporated into the internal legislation of the member states. Therefore, these acts represent the position and will of the international community, but have no legal effect. However, we believe that the generally accepted position on the obligation and binding of states to the provisions of this Declaration is correct. Namely, as the Declaration in question was adopted without votes against it, and as over a long period of time, the practice of almost all countries is in agreement with the provisions of this Declaration, we believe that many of its provisions have become part of customary international law, and given that both constitutive elements: 1) *opinio iuris* and 2) state practice. Therefore, we believe that certain provisions of this Declaration have the status of *ius cogens* norms of international law.

<sup>3</sup> Although, strictly speaking, it is not necessary for the General Assembly of the United Nations to express a legal basis for the adoption of any act, it is the practice of the General Assembly that it will always refer to the appropriate rules contained in the Charter of the United Nations, as well as other resolutions, recommendations, conventions or rules that were adopted by this Assembly. The UN Convention on the Rights of the Child strongly invokes and relies on the Universal Declaration of Human Rights, citing it in several paragraphs of its Preamble. The UN General Assembly almost explicitly based the adoption of the UN Convention on the Rights of the Child on the Universal Declaration as a legal basis. The only conclusion that can be drawn from this is that the provisions on children's rights are considered an extension of the rules contained in the Universal Declaration and represent its logical consequence.

were the International Covenant on Civil and Political Rights, which, among other things, prescribed an explicit ban on discrimination against children on any grounds; and expressly provides that every child will be registered immediately after birth and will be given a name, as well as that every child has the right to citizenship (Art. 24). International Covenant on Economic, Social and Cultural Rights prescribes the obligation of the contracting states to recognize the right of every person to enjoy the best state of physical and social health that he can achieve (Samardžić, 2018, p. 28).

The normative activity of the United Nations in the field of protection of the rights and position of the child was intensive from the very beginning, so a considerable number of instruments were adopted that directly or indirectly strive to protect the position of children (Holzscheiter, 2010, p. 117). Thus, at the level of the United Nations, the UN Convention on Consent to Marriage, the Minimum Age for Marriage and the Registration of Marriages from 1962 was adopted and the Recommendation on Consent to Marriage, the Minimum Age for Marriage and the Registration of Marriages (1965 year), achieved the proclaimed goals, i.e. achieved certain results. Jovašević (2008, p. 475) points out the rules for juvenile criminal justice (the so-called Peking Rules) adopted by the UN in 1985 as relevant instruments for improving the situation of minors, 4) the UN Rules on the Protection of Minors Deprived of Liberty (the so-called Havana Rules) from 1990, 5) UN Guidelines for the Prevention of Juvenile Delinquency (so-called Riyadh Guidelines) from 1990, 6) UN Standard Minimum Rules for Alternative Penal Measures (so-called Tokyo Rules) from 1990 and 7) European Rules on social sanctions and measures for the implementation of juvenile criminal justice (the so-called Vienna Rules) from 1997.

Also, from the aspect of protecting the rights and position of the child, of particular importance, as an international instrument of universal character, ILO Convention No. 182 on the worst forms of child labor and ILO Recommendation No. 190 on the prohibition and urgent action for the abolition of the worst forms of child labor, but and Convention No. 138 on the minimum age for work (Vujović, 2016, p. 188 et seq.). Also of importance are the International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the elimination of all forms of discrimination against women, Convention against torture and other cruel, inhuman and degrading treatment or punishment; Convention on the Rights of Persons with Disabilities; United Nations Convention against Transnational Organized Crime, United Nations Protocol to Prevent, Suppress and Punish Trafficking in Human Beings, Especially Women and Children, as Supplement to the United

Nations Convention Against Transnational Organized Crime; Conventions adopted under the auspices of the Hague Conference on Private International Law that the Republic of Serbia has confirmed and two that will be confirmed during this year (on international adoption and child protection). In addition to the above, within the framework of the UN, a large number of instruments have been adopted that directly or indirectly strive to protect the position of children (Holzscheiter, 2010, p. 117).<sup>4</sup>

### ***2.1. United Nations Convention on the Rights of the Child from 1989***

When we talk about the rights of the child at the universal level, certainly the most important act that was adopted is the UN Convention on the Rights of the Child from 1989 (hereinafter: the Convention).

Petković & Pavlović (2016, p. 181) state that this Convention represents the most important and basic international legal document which emphasizes the importance of ensuring the conditions for full respect of children's rights, dignity and value of human personality. The convention is the result of many years of work<sup>5</sup>, and the very beginning of work on the document that will deal with children's rights was stimulated on the one hand by the development of the perception of children as special individuals, and on the other hand by the accelerated consolidation of international human rights law (Detrick, Doek & Cantwell, 1992, p. 19). On November 20, 1989,

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<sup>4</sup> Listing and explaining in detail each individual international instrument that directly or indirectly refers to the position and rights of the child would greatly exceed the scope of this paper, and would be suitable for the preparation of a doctoral dissertation. Therefore, in this paper, along with a brief overview of the evolution of regulations on children's rights within the League of Nations and the United Nations, the UN Convention on the Rights of the Child is presented with its key provisions, as well as other instruments that the author considered to be the most important.

<sup>5</sup> At the 34th session of the United Nations Human Rights Commission in 1978, it was pointed out that children have suffered through wars and other forms of aggression, and that it is necessary and justified to protect their position in particular. At the same session, the Polish delegation presented a draft proposal for a convention on the rights of the child, which was based on the United Nations Declaration on the Rights of the Child from 1959 and the Universal Declaration on Human Rights from 1948. The proposal was then circulated to governments and international organizations for their observations, objections and suggestions. Soon, a working group was formed that worked on the proposals sent by individual states, that is, organizations. Only after a full ten years (although the Convention was originally intended to be adopted in 1979) did the Working Group submit the final draft of the text of the Convention, which, after its adoption by the UN Human Rights Commission and the Economic and Social Council, was sent to the UN General Assembly for adoption.

the General Assembly adopted the Convention on the Rights of the Child, without a vote, and thus this Convention became unique among acts related to human rights.<sup>6</sup> Surely, respecting the previous achievements in the normative regulation of the position and rights of the child, the Convention itself refers to earlier documents and respects their achievements, expanding the previous work (Petković & Pavlović, 2016, p. 182), and the rights prescribed by the Convention itself represent a synthesis of efforts to ensure the highest possible quality of life of the child, and the best possible protection of the sensitive position of the child.

General term, Convention points out four basic procedures (basic standards) on which it is based (similarly to Samadžić, 2018, p. 31) and which represent the starting point for every single legal rule contained in it: a) prohibition of discrimination – where, in Article 2, the obligation is emphasized the contracting state to non-discriminatoryly respect and ensure the rights stipulated in the Convention to every child; (Petković & Pavlović, 2016, p. 182); b) the obligation to promote the best interests of the child in all activities concerning children (Stefanović & Prelević, 2012); c) the right to survival and development of the child and g) the right of the child to be heard and to have his opinion given due attention (Lansdown, 2022, p. 41). The Convention itself has three parts, which do not bear special names. However, according to the nature of the provisions contained in the parts, we can conditionally make the division so that the first part includes substantive legal provisions (substantial norms) that prescribe the rights of children; the second part contains provisions on the formation of the Committee for the Rights of the Child as a body that supervises the implementation of this Convention and the third part of the Convention contains final provisions concerning its entry into force, validity, ratification, accession, etc.

With regard to the substantive norms themselves, we will outline the most relevant for the general position of the child and his rights. Thus, already in Article 1 of this Convention, the United Nations defines once and for all, from the aspect of international law, the definition of a child – a child is any human

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<sup>6</sup> It is interesting to note that this convention is the most widely and rapidly ratified convention ever. As many as 196 countries have acceded to this Convention, and until today only the United States of America, in whose company Somalia was for a long time, which, however, passed its instrument of ratification on October 1, 2015. Therefore, bearing in mind these facts, but also the rules on the emergence of customary international law, it could be argued that the rights contained in this Convention are at the same time the rules of customary international law, and on that basis are *ius cogens* norms and are *applied* to all states regardless of their ratification, unless they consistently and expressly opposed the creation of a customary legal rule.

being<sup>7</sup> who has not reached the age of eighteen. Therefore, this provision sets a kind of age limit for childhood – 18 years. Such a definition is primarily of international legal character and effect.<sup>8</sup> This age limit must be applied by member states both as a rule and as a reference point, for determining any other age for any specific purpose or activity (Pais, 1997, p. 414). This would further mean, we believe, that the contracting states cannot condition the exercise of rights or privileges by a later age.<sup>9</sup>

However, the same article allows for the possibility of coming of age even earlier, when this is prescribed by the national law applicable to the child. This provision should not be interpreted as a general clause for avoiding the obligations arising from the Convention, nor as enabling the establishment of those ages that are not in accordance with its principles and provisions (Pais, 1997, pp. 414-415). The Committee on the Rights of the Child emphasized that where the age of majority is set below eighteen, Member States are expected to indicate how all children benefit from such protection and enjoy their rights under the Convention until they reach the age of 18. The Committee sought justification for any reduction in child protection and urged member states to review to ensure that all children up to the age of 18 continue to receive the full protection of the Convention (Lansdown & Vaghri, 2022, p. 410). The Human Rights Committee has also emphasized that States Parties cannot be relieved of their obligations towards children under the age of 18 even where they have reached the age of majority under domestic law (OHCHR, 1989, para. 4). It follows from this that the possibility of attaining the age of majority was previously foreseen as an exception that should be narrowly interpreted and conservatively applied, but which will not release the state from the obligations provided for in the Convention; in other words, a contracting state may, by prescribing a lower age for attaining majority, grant greater rights, but

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<sup>7</sup> This wording is not accidental. We believe that by opting for the wording “human being” the authors of the Convention tried to avoid the question of when human life begins, i.e. when an embryo or fetus can be considered a living being, and considering the fact that the moment of the beginning of life, but also the issue of abortion, is extremely a politically disputed issue that divides states and societies, and the wish of the authors of the Convention was for it to be as universally accepted as possible.

<sup>8</sup> This determination, however, is not absolute even at the level of international law. Thus, Article 38 of the Convention foresees an exception to this rule – a child for the purposes of the rules on participation in armed conflicts is considered a person who has not reached the age of 15.

<sup>9</sup> Thus, with regard to the United States of America, certain rights and privileges are limited, that is, conditioned by the age of over 18 years. For example, only a person who has reached the age of 21 can buy and consume alcohol, according to the Law on the Minimum Age for Consumption of (Alcoholic) Beverages from 1984. If the USA would ratify the Convention, this Act, as well as many others (both federal and federal units), would have to be changed or repealed.



not impose those obligations and duties on persons under 18 years of age that are incompatible or contrary to the provisions of this Convention.

Article 2 of the Convention expressly prohibits discrimination and discriminatory practices against children, that is, any person under the age of 18, based on any personal characteristic of the child, as well as the characteristics and status of his or her parent or guardian. On the other hand, the same article (paragraph 2) foresees the positive obligation of the contracting states to take all appropriate measures to ensure the protection of the child from forms of discrimination or punishment based on the status, activities, expressed opinion or belief of the child's parents, legal guardians or members families. The provisions of this article are one of the basic postulates and international legal standards not only of children's rights, but also of general human rights (Lansdown, 2022, p. 11 et seq.). Also, as one of the basic postulates of this Convention (Ruggiero, 2022, p. 22), but also of children's rights in general, Article 3 of the Convention prescribes that in all activities concerning children, regardless of whether they are undertaken by public or private institutions of social guardianship, courts, administrative authorities or legislative bodies, the best interests of the child shall be of primary importance.<sup>10</sup> The child is therefore recognized as having the "right to have his or her best interests" assessed and taken into account as a primary factor in all actions or decisions concerning him or her, both in the public and private spheres" (UN Committee on the Rights of the Child, 2013, paragraph 1). The UN Committee on the Rights of the Child (2003, paragraph 12, 2009, paragraph 2) considers that Article 3 supports all other provisions of the Convention. At the same time, it should be noted that the concept of the best interest of the child is one of the most complicated concepts to determine, and the Committee defines it as "*a dynamic concept that requires an assessment that corresponds to the specific context.*"

Article 6 of the Convention guarantees the right to life of every child, which is acquired by birth itself, and prescribes the positive obligation of the contracting states to ensure the survival and development of the child to the greatest extent possible. It is important to point out that this provision introduces the right to survival and development for the first time in an international agreement (Vaghri, 2022, p. 32). From the wording of paragraph

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<sup>10</sup> Freeman (2007, pp. 25-26), however, criticizes this formulation. This is because in the wording of the Declaration from 1959, the best interests of the child should be "paramount in consideration", so that the best interests of the child are of crucial importance in the decision-making process, while in Article 3(1) of the Convention they are only of "primary consideration" importance" – thus one of the possible determining factors.

1 of this article – “*Contracting parties recognize that every child by birth has the right to life*”- it follows that this right, according to its nature, is the (only) inherent right of the child, and it extends beyond the negative obligation of non-interference, imposing a proactive obligation on contracting states to take all comprehensive legislative, administrative and other positive measures to ensure the inherent and indivisible right to life and survival and development of the child (Nowak, 2005, pp. 17–18). In connection with this right, the provision of Article 37, of the Convention should be highlighted according to which the contracting states undertake “*that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.*” *Neither the death penalty nor life imprisonment, without the possibility of parole, shall be imposed for acts committed by persons under the age of 18.*<sup>11</sup> Although the right to life is not absolute, the standard for justifying any failure to protect a child’s life is extremely high (Peleg & Tobin, 2019). States parties are required to provide explicit protection in law that includes strict limitations on measures that arbitrarily and non-arbitrarily deprive a child of life (Nowak, 2005, p. 2).

Furthermore, Articles 7 and 8 guarantee the child a body of personal rights that includes the right to be registered immediately after birth, and from birth he has the right to a name, the right to acquire citizenship and, as far as possible, the right to know who his parents are and the right to their care, and the possibility of the child being stateless is eliminated (Article 7), and the contracting states undertake to respect the child’s rights to preserve identity, including citizenship, name and family relations in accordance with the law, without illegal interference (Article 8). Article 7 introduced a new component confirming the child’s right to know his origin and to be cared for by his parents, recognizing that parental care is as important for the child’s psychological stability and development as name and nationality (OHCHR and Rädga Barnen (Society: Sweden), 2007, pp. 379-380). Essentially, Articles 7 and 8 aim to facilitate the recognition of the legal subjectivity of the child as a human being independent of his parents, capable of exercising his own rights (Hodgkin et al., 2007, pp. 97-109). It should also be emphasized

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<sup>11</sup> In accordance with Article 37, Article 6 must be interpreted as prohibiting the death penalty (UN Committee on the Rights of the Child, 2010, paras. 32–33, 2012a, paras. 37–38); We believe that this provision implicitly states that the death penalty for a person under the age of 18 represents cruel, that is, inhuman treatment. Also, we believe that this provision was one of the main reasons that the US did not ratify this Convention. Namely, in the USA, the death penalty against minors was not considered an inhumane or cruel treatment until 2005 (that is, 16 years after the adoption and 15 years after the entry into force of this Convention) when the Supreme Court of the USA in the case of *Roper v. Simmons* held that the death penalty against minors as unconstitutional, because he considered it to be an inhumane and cruel punishment.

that Articles 12-14 of the Convention stipulate that the signatory states shall ensure to every child capable of forming his own opinion the right to freely express that opinion on all issues concerning the child, and he has the right to express himself, to receive and give information in regarding everything that concerns him, and the opinion of the child will be given due consideration in every procedure that concerns him. The right of thought, conscience and religion is especially guaranteed. These guarantees, viewed together, enable and strengthen the role of the child in any procedure that concerns him, that is, it gives him the opportunity to participate in such a procedure.

### **3. National normative framework for the protection of children's rights**

#### ***3.1. Constitutional regulation of the rights and position of the child***

Like many modern countries, the Republic of Serbia prescribes and guarantees certain human rights in its Constitution. Marković (2013, p. 460) points out that by guaranteeing of human rights, the state in fact sets a limit that it must not cross, if it rests on democracy, because even though democracy is not reduced to human rights, it does not exist without them.

When it comes to the Constitution of Serbia, the second part is devoted to human rights, which is also the title "Human and minority rights and freedoms". Within this part of the Constitution, human rights that fall within the domain of family law are within the group of social rights, which are otherwise considered new rights (Marković, 2013, pp. 483-484). The framer of the Constitution made an interesting mistake when he decided to include the rights of the child in the same group of rights and, for example, the right to work. In terms of the application and protection of both human rights and children's rights, it can be said that the Constitution of Serbia from 2006 establishes a relatively broad normative framework for regulating human rights and children's rights. When it comes to human rights in general, the previous statement is not disputed in the least, bearing in mind the fact that almost 60 articles of the Constitution are dedicated to human rights. However, when it comes to children's rights, explicit constitutional provisions that refer exclusively to children's rights are few and far between. However, for the first time in the constitutional history of our country, the current Constitution expressly provided for rules on rights of the child, namely in Article 64, entitled "Child's Rights" (Analysis, 2011, p. 10).

In the light of the presented international standards, several things should be pointed out. Guided by the provisions of international instruments, in Article 64, paragraph 1 of the Constitution, our constitution enactor provided that children enjoy human rights appropriate to their age and mental maturity. This provision, which is essentially declarative in nature, cannot be criticized in particular. However, we still think that the constitutional enactor could have been more careful in choosing words. Namely, in the light of current movements and imperative rules on non-discrimination, we believe that the words “*mental maturity*” were superfluous. It is not disputed that the text of the provision was drafted in good faith and with good intentions. However, it is a well-known fact that some children, due to various medical reasons, do not reach certain levels of mental maturity and development. Certainly, these children enjoy full rights that are guaranteed to them both by international instruments and domestic law. The scope, quality and realization of their rights is not, therefore, conditioned by any level of mental maturity, nor can it be. Therefore, such words did not have to, nor should they, be found in this (in any case declarative) constitutional provision.

However, paragraph 2 of Article 64 of the Constitution is a substantive legal norm, and stipulates that every child has the right to a personal name, registration in the birth register, the right to know his origin and the right to preserve his identity. By prescribing in this way, the domestic constitution-maker fully complied (if not literally took over) with the provisions of Article 7 of the Convention. However, our constitution maker went one step further. Namely, where in Article 7 of the Convention the right to know the origin remained relatively optional – “*and as far as possible*” – our constitution maker, and what is allowed by Article 41 of the Convention – provides more rights for the child by excluding any condition and establishing as the absolute right of the child to know his origin (Draškić, 2009, p. 5 et seq.). Although the child’s right to integrity and identity should be supported as much as possible, the necessary caution should be pointed out when prescribing absolute rights. Namely, in modern times, adoptions and biomedically assisted conceptions that include donors are not as rare as they were in the nineties of the last century. With the correct linguistic and objective interpretation, the only logical conclusion is that the constitution-maker excluded the possibility of anonymous donation, because any contractual clause guaranteeing anonymity would be null and void as contrary to the

Constitution.<sup>12</sup> Thus, the Committee on the Rights of the Child emphasized the need to understand the term “parent” in its broadest sense to include “biological, adoptive or foster parents or members of the extended family or community as provided by local customs” (UN Committee on the Rights of the Child, 2013b, paragraph 59).

Following international standards, our constitution maker blanketly prohibits psychological, physical, economic and any other abuse and exploitation (Article 64). Furthermore, paragraph 4 of the same article guarantees that children born out of wedlock have the same rights as children born in marriage. Interestingly, this protective provision is not explicitly provided for in the provisions of the Convention. However, Article 25, paragraph 2 of the Universal Declaration stipulates that all children are equal, regardless of whether they are born in marriage or out of wedlock. As the Convention invokes and relies on the Universal Declaration, it is clear that this protection is also provided. However, we believe that the text of the Convention could have contained an explicit provision on the equalization of children born in marriage and out of wedlock.<sup>13</sup> The concept of the best interest of the child, as a guiding principle and fundamental postulate on which the Convention is based, is mentioned only in one place in the Constitution – in Article 65, which foresees the possibility of limiting the rights of one or both parents when it is in the best interest of the child.

Article 66 of the Constitution also prescribes special protection for the family, mother, and single parent parents, and in this sense special protection is guaranteed for children who are not taken care of by their parents and

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<sup>12</sup> In *Gaskin v. the United Kingdom*, it was held that the provision can also be understood to include knowing the identity of any person with whom they have a gestational or biological relationship, for example, as a result of assisted reproductive technologies or surrogacy (*Gaskin v. the United Kingdom*, 1989, para. 39). In this sense, the legal system of the USA recognizes anonymous donors, who have valid contracts with the institution where they donated biological material, which provides for anonymity clauses so that their identity can never be revealed. The American courts applied balance tests, and found that the interest of the birth and existence of the child, even at the cost of not revealing the identity of the donor of biological material, outweighs the interest of the child to know the identity of the parent. American courts, therefore, take the view that it is the lesser evil to preserve the anonymity of the donor, because without the guarantee of anonymity, it is quite possible, if not probable, that many donors would not donate biological material.

<sup>13</sup> Certainly, our legislator acted in accordance with this principle even before the adoption of the 2006 Constitution. Thus, the Family Law from 2005 contains a provision in Article 6, paragraph 4 according to which a child born out of wedlock has the same rights as a child born in marriage. Furthermore, the Inheritance Law of 1995 does not differentiate between children born in wedlock and children born out of wedlock in terms of inheritance. In this sense, it must be stated, the domestic legislator was progressive.

children with disabilities in mental and physical development . Protection of children from child labor is also foreseen, i.e. prohibition of work for children under 15 years of age and prohibition of work for children under 18 years of age in jobs that are harmful to children's morals or their health – which is in accordance with Convention No. 138 on the minimum age for work of the International Labor Organization.

Although the Constitution does not recognize and does not refer to the basic principles of the Convention as such (Explanation, paragraph 2), but only mentions them sporadically and sparingly, we should keep in mind the constitutional provisions of Articles 16 and 18 of the Constitution that ratified international treaties are part of the internal legal order and that they are directly applied, and that, in accordance with the provisions of Article 18, paragraph 3 of the Constitution of the regulation on human and minority rights, they are interpreted in favor of improving the values of a democratic society, in accordance with valid international standards of human and minority rights, as well as the practice of international institutions that supervise their implementation. Therefore, regardless of the failure of the constitution maker to incorporate the most important and many other provisions of international instruments guaranteeing the rights of the child, that failure had no practical consequences, since, through ratification, all those instruments are an integral part of the internal legal order and are directly applied. Also, Article 68 of the Constitution stipulates that children receive health care that is financed from public revenues, if they do not receive it on some other basis. By prescribing this constitutional provision, our country acted in accordance with the obligations contained in Article 24 of the Convention. Article 64, paragraph 5 of the Constitution stipulates that the rights of the child and their protection shall be regulated by law.

### ***3.2. Draft Law on the Rights of the Child and the Ombudsman for the Rights of the Child***

As it was pointed out, the drafter of the constitution predicted that the issue of children's rights and their protection would be regulated by law. Although it could be argued to the contrary, we believe that the provision of Article 64, paragraph 5 of the Constitution nominally obliges the legislator to enact a special law that will foresee and regulate children's rights and their protection, especially for the reason that an extremely small number of constitutional provisions are dedicated to children's rights. With that, we believe, the framer of the constitution provided a general framework

and a basis for further regulation of this issue, giving, at the same time, an instruction to the future legislator to regulate the issue of children's rights with a special (systemic) law (similar to the Explanation, p. 6). That is why the constitution maker prescribes a special legal basis for passing this law – Article 64, paragraph 5 of the Constitution – and not that this law be passed on the basis of the general legislative authority of the National Assembly from Article 99, paragraph 1, point 7 in connection with Article 97 of the Constitution. This is supported by the content of the Explanation (2019, p. 1), where Article 64, paragraph 5 of the Constitution is designated as the constitutional basis for the adoption of the Law on the Rights of the Child and the Ombudsman for the Rights of the Child. However, in contrast to this, the legislator failed to enact such a special law in the last 17 years. This certainly does not mean that children's rights are not provided for or protected by other laws and regulations,<sup>14</sup> but this was not done in a systematic, unique way; The absence of a kind of codification of children's rights, as provided for in Article 64, paragraph 5 of the Constitution, we believe, is a deficiency of the domestic legal order. However, in 2019, the Ministry of Labour, Employment, Veterans and Social Affairs drafted the Law on the Rights of the Child and the Ombudsman for the Rights of the Child (hereinafter: the Draft), which never entered the parliamentary procedure. Nevertheless, with the hope that this Draft will become a part of positive law at some point in the near future, it is necessary to point out several things related to this Draft at this point.<sup>15</sup>

As already mentioned, the constitutional basis for this draft is found in Article 64, paragraph 5 of the Constitution.<sup>16</sup> It is further stated that the Constitution does not expressly refer to the most important rights of the child, which have been declared as “basic principles”, and that the right to

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<sup>14</sup> In the Explanation (p. 5), it is stated that over 80 laws are relevant from the aspect of protection of children's rights.

<sup>15</sup> The Committee for the Rights of the Child, when considering the Initial Report of the Republic of Serbia on the implementation of the Convention on the Rights of the Child, in its Final Considerations as early as June 2008, suggested that Serbia adopt a comprehensive Law on Children and the Protector of the Rights of the Child – the Children's Ombudsman, which was repeated at subsequent meetings of the Committee as well as at the Third Periodic Review of the State of Human and Civil Rights in the Republic of Serbia in March 2018. By stating the recommendations, the Republic of Serbia accepted such recommendations and undertook to implement them. The recommendation of the same content was given in his annual report on the state of human rights in Serbia by the Commissioner for Human Rights of the Council of Europe, Tomas Hammarberg (October 2008). We hope that the day will come when these recommendations will be fulfilled.

<sup>16</sup> Although it is wrongly stated in the Explanation that it is about “Article 64, Clause 5” of the Constitution.

participation of children is not mentioned in the Constitution in general. Given that the basic principles of the Convention on the Rights of the Child have not been proclaimed as constitutional principles, and bearing in mind their importance and the fact that their realization is a condition for the realization of all other rights of the child, it is necessary that the future Law on the Rights of the Child and the Ombudsman for the Rights of the Child defines these principles and determines their content, as well as regulates the manner of their realization and an independent mechanism for their promotion, improvement and protection (Explanation, p. 1). It is not decided why 13 years were necessary from the adoption of the Constitution to the drafting of this Draft. The rationale further states that this law will contribute to the harmonization of the entire legal system related to children, because due to the fact that it will be the so-called the “umbrella” law is necessary to harmonize the existing legal solutions in all sectoral laws with the solutions contained in the Law on the Rights of the Child and the Protector of the Rights of the Child.

As decisive reasons for the adoption of this Law, it is pointed out that it is necessary in order to *“bridge the gaps in the system of children’s rights, which are inevitable in the existing, fragmented approach”* and that *“in particular, it should be borne in mind that the currently established mechanism of promotion and control of the implementation rights of the child, through the institution of the Ombudsman of the Republic of Serbia, in which one Deputy deals with this area and the area of gender equality does not give the expected and desirable results.”* (Explanation, pp. 6-7). Given the fact that this Draft, nor any other, was neither adopted nor entered into the parliamentary procedure, it should be concluded that in the last 3 years things have drastically improved, and the gaps have been filled, so it is not necessary to enact this legislation.

The Draft Law itself was generally praised as a strong and correct step forward towards the comprehensive regulation of the issue of children’s rights and their protection.<sup>17</sup> In many ways, the draft is similar to the UN Convention on the Rights of the Child itself, and with its 126 articles, it is one of the most comprehensive legal texts in the field of human rights, which is logical considering the fact that it is a codification. The draft essentially divides the rights of the child into seven chapters, and they are grouped according to the

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<sup>17</sup> See the Report on the Public Debate on the Draft Law on the Rights of the Child and the Child Rights Defender; available at: <https://www.minrzs.gov.rs/sites/default/files/2019-07/Deca%20%20Izvestaj%20Javna%20rasprava.pdf>



type of rights themselves. A special chapter of the Draft consists of the rights of special groups of children and protection measures. Also, it is important to point out that Article 4 of the Draft, within the first chapter – Basic Provisions, following the provisions of the UN Convention on the Rights of the Child, defines the concept of a child as any human being from birth to the age of 18. This provision seeks to define a child at the universal level in the legal system of the Republic of Serbia.

The second chapter refers to the basic rights of the child, which contains all the basic principles from the sphere of children's rights: the right to non-discrimination (Article 11), the right to pursue the best interest (Article 12), the right to an opinion and respect for an opinion (Article 13; this is, in fact, the right to participation), the right to life (Article 14), the right to survival and development (Article 15), the right to a healthy environment (Article 16) and the right to dignity (Article 17). We believe that these provisions, in addition to establishing and proclaiming certain rights, should, in the spirit of the Convention, also serve as guiding principles when applying and interpreting other provisions of this Draft.

The third part of the Draft is dedicated to the civil and political rights of the child, so it includes the right to personal and family identity, the right to preserve identity, the right to privacy, the right to freedom of expression, the right to freedom of opinion, conscience and religion, the right to freedom of association and the right to access information.

The fourth part is dedicated to the child's right to protection from violence, so this regulates the prohibition of violence, the prohibition of torture (torture) and deprivation of liberty, special measures to protect children from violence, planning measures and preventive measures, training and raising public awareness, special protection measures child victims, prohibition of child trafficking, prohibition of exploitation of children for pornography and prostitution, protection of children from the use of narcotics, tobacco, alcohol and other psychoactive substances and from drug abuse, protection of children from participation in games of chance, protection of children from violence in printed material and the use of information and communication technologies (ICT), the right to protection from harmful information and the right to recovery and reintegration.

The fifth, sixth, seventh and eighth parts are devoted, essentially, to the social, cultural and economic rights of the child, and where they are included: the right to live in a family and maintain personal relationships with family members, obligations and responsibilities of parents, separation of the child from the parents, the child without parental care, the right to

health, the child's education about health, the child's participation in making decisions concerning his/her health, the child's right to information about his/her health, the child's right to independent consent to medical measures, the child's right to a standard of living, the right on social protection and access to social protection services, respect for the child's opinion in the social protection system, the right to education, obligations of public authorities in realizing the right to education, goals of education, respect for the child's opinion in the education system, the right to free time, play and rest and others.

Finally, the tenth and eleventh parts of the Draft are dedicated to the establishment and functioning and actions of the Ombudsman for Children's Rights, as an independent and independent state body that takes care of children's rights and monitors their realization.

So, as we can see, the systematization of the Draft largely corresponds to the Convention on the Rights of the Child, with the fact that the Draft has been supplemented with certain rights of the newer generation – such as the right to a healthy environment, the right to an (adequate) standard of living, and certain rights have been further elaborated – especially the child's right to protection from violence. By such prescription, ie. by adopting this Draft, a strong step forward would be made – by creating a codification on the rights of the child at the national level, which is rare among European countries. In addition, with the proposed quantity and quality of rights guaranteed by the Draft, Serbia would fully comply with international standards and assumed obligations, and would go a step further than that.

#### **4. Conclusion**

The normative activity of the international community in the field of prescribing, developing and protecting children's rights during the second half of the twentieth and twenty-first centuries was particularly intense, and they are at different levels, both universal and regional. Children's rights are comprehensively viewed through the prism of human rights and contemporary threats (Bjelajac, 2017), abuse and denial of children's rights in the context of child labor (Bjelajac, 2008a), and all in the spirit of humane development and the rule of law (Bjelajac, 2008b). The pinnacle of this normative activity is certainly embodied in the UN Convention on the Rights of the Child adopted in 1989. The convention codified the existing, but provided for and additionally expanded new rights of the child. This Convention, with extremely fast ratification by an extremely large number

of countries, will eventually become a kind of constitutional document of the modern civilized world. This Convention was supplemented by two optional protocols, as well as a number of other later instruments of both the United Nations and the Council of Europe, and it was built on the national level. On the other hand, there is no positive legal codification of children's rights, although the obligation to pass a special law in the sphere of children's rights and their protection is stipulated by the express provision of Article 64, paragraph 5 of the Constitution, and for which there is a real strong need, which, as we have seen, recognized by the public authority itself. However, despite this need and recognition, despite the constant recommendation of the UN Committee on the Rights of the Child, the public authorities have failed to enact a comprehensive law on children's rights and their protection for 17 years. Such an attitude of the domestic legislator cannot be justified or accepted. In addition, due to the omission of the constitution maker, the text of the Constitution itself does not explicitly contain any of the fundamental principles and basic postulates on which the UN Convention on the Rights of the Child and, indeed, the entire international legal system of children's rights are based. Although the protection of children's rights in the domestic system can be found and derived indirectly from a huge number of legal and other texts, we believe that this is not a satisfactory approach – especially since the very concept of a child is defined differently from regulation to regulation, which is also pointed out in the Explanation. The draft Law on the Rights of the Child and the Protection of the Rights of the Child was an imperfect but significant step forward towards solving this issue.

Speaking *of de lege ferenda* at the national level, only one thing can be emphasized – it is necessary, taking into account the basic principles and postulates of the Convention on the Rights of the Child and other international legal instruments, as well as the suggestions presented at public hearings, to pass a special law on the rights of the child – the Law on the Rights of the Child and Ombudsman for the rights of the child. The draft from 2019 represents a good starting point (which is not surprising, when it strongly leans and is based on the Convention on the Rights of the Child), and where certain changes and additions should be made. Let that be the first step forward.

**Golić Darko**

Pravni fakultet za privredu i pravosuđe u Novom Sadu, Univerzitet Privredna akademija u Novom Sadu, Srbija

**Logarušić Dejan**

Pravni fakultet za privredu i pravosuđe u Novom Sadu, Univerzitet Privredna akademija u Novom Sadu, Srbija

## **PRAVA DETETA – MEĐUNARODNI STANDARDI I NJIHOVA IMPLEMENTACIJA U PRAVNOM PORETKU REPUBLIKE SRBIJE**

**REZIME:** Kao nužna posledica jačanja prava čoveka, javlja se ideja i pokret o postojanju prava deteta, odvojena od prava čoveka, prava koja će dete izdvojiti iz stiska vlasti ne samo države već i roditelja, te će omogućiti da se dete posmatra kao zasebno ljudsko biće, sa svojim pravima, svojim identitetom, integritetom i dignitetom. Ova ideja će se toliko raširiti do kraja dvadesetog veka da će dovesti do značajnih pojava i promena na međunarodnom nivou. Normativna aktivnost u okviru Ujedinjenih nacija nikada pre niti posle nije dala takav rezultat kao što je dala Konvencija UN o pravima deteta. Gotovo univerzalo prihvaćen pravno obavezujući dokument, u izrazito kratkom vremenskom periodu, postavio je prilično visoke uniformne standarde prava deteta na globalnom nivou. Domaći zakonodavac, videćemo, nije u dovoljnoj meri ispratio tendencije međunarodne zajednice, da bi tek 2019. godine preduzeo određene političke korake kako bi ispravio datu situaciju, ali bez iskrene želje ili dovoljno snažne volje da postupak i okonča. Za razliku od univerzanog nivoa gde su prava deteta *de facto* kodifikovana u Konvenciju UN o pravima deteta, na nacionalnom nivou ona ostaju fragmentirana, sa mnogo praznina koje priznaje i domaća javna vlast.

**Ključne reči:** *prava deteta, međunarodni standardi, nacionalni standardi, Konvencija o pravima deteta, Nacrt Zakona o pravima deteta.*

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