

Child Rights Centre Policy Paper

Child-Friendly Justice in the Republic of Serbia



Child Rights Centre



**Save the Children
Sweden**

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— *Child Rights Centre Policy Paper* —

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Introduction

Child-friendly justice is an important step towards realisation, promotion and protection of the rights of the child in the Republic of Serbia. The realisation of child-friendly justice principle implies an adjusted justice system which is more appropriate for children and proceedings available to the children in terms of necessary independent legal representation. This means that children are given opportunity to protect their rights and interests in case they come into contact with judicial and administrative system, either as witnesses, victims (aggrieved party) or criminal offenders, prosecutors and claimants in civil, administrative proceedings, as well as the proceedings before the independent justice authorities. Compliance with this principle is in accordance with the Convention on the Rights of the Child,¹ Optional protocols to the Convention on the Rights of the Child and various other international documents, and particularly Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice,² which was adopted in 2010. Adjustment of the judicial system which is more appropriate for the children in Europe is also part of EU Agenda for the Rights of the Child³ and is one of the most important standards in the field of protection of child's rights.

This publication is intended for the professionals who work in the field of protection of the rights of the child, and especially legal practitioners who work in judicial institutions of the Republic of Serbia, as well as the policy makers in the institutions of the European Union and the Republic of Serbia who make new methods and priority areas of human and child's rights promotion. This publication presents the most important challenges the Republic of Serbia faces in this field and measures which have been proposed to solve the recognized problems, in order to highlight the importance of the child-friendly justice principle. We hope that this publication will influence the policy makers and make them recognize the importance of this area of the child's rights as the key area for improvement of status of children in the Republic of Serbia and realization, promotion and protection of their rights. Encouragement of children and their active participation in the field of representation and protection of their rights and interests would immensely influence the improvement of legislation and the policies aiming at complete realization of the rights of the child, implementation of legal solutions and enhancement of justice institutions.

¹ *Law on Ratification of the UN Convention on the Rights of the Child*, "Official Gazette of SRJ – International Contracts" no. 4/96 and 2/97.

² *Document adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers' Deputies, version edited 31st May 2011.*

³ *EU Agenda for the Rights of the Child* adopted by the European Commission of the European Union 52011DC0060 from 15th February 2011 52011DC0060, (52011DC0060, 15th February 2011).

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Description of current conditions and obstacles in realisation of this principle

Through ratification of the Convention on the Rights of the Child, the Republic of Serbia has obliged to respect the rights of the child and take all the appropriate measures to promote and protect the children's rights. Among other aspects, this includes the undertaking of all the legislative measures aiming at realization of the rights provided by the Convention on the Protection of the Rights of the Child and establishment of efficient legal tools in case of violation of any of these rights, especially establishment of proceedings which are appropriate for children and their legal representatives.

The process of harmonization of national legislation with the assumed obligations provided by the Convention on the Rights of the Child and ratified optional Protocols has been continuous process for a long period of time. From 2006, the Constitution of Serbia recognizes the rights of the child and in such manner it contains separate article (article 64) with title "the rights of the child" which guarantees exercise of human rights in accordance with age and emotional maturity, including a series of separate rights of the child, such as the right to personal name, right to birth registration, right of child to know his/her origin, the right of child to maintain his/her identity, the right to protection from psychological, physical, economical and any other form of abuse or mistreat. The Constitution also states that the rights of children and their protection shall be regulated by the law.

In relation to the rights of the child there are more than 80 laws in the Republic of Serbia from different fields which regulate specific issues relevant to the accomplishment of certain rights guaranteed by the Convention. During the past few years, the Republic of Serbia has made great effort in order to adjust the national legislation with the Convention on the Rights of the Child in different areas of child's rights protection. It has passed numerous laws containing provisions which directly improve the rights of the child. Some of the most important laws are the *Family Law*⁴ (2005), *Law on Prevention of Discrimination against Persons with Disabilities*⁵ (2006), *Law on Juvenile Criminal Offenders and Criminal Legal Protection of Juveniles*⁶ (2006), *Law on the Foundations of Education and Upbringing*⁷(2009), *Law on the Prohibition of Discrimination*⁸

⁴ *Family Law*, "Official Gazette RS" no. 18/2005 and 72/2011

⁵ *Law on Prevention of Discrimination against Persons with Disabilities*, "Official Gazette RS" no. 33/2006

⁶ *Law on Juvenile Criminal Offenders and Criminal Legal Protection of Juveniles*, "Official Gazette RS" no. 85/2005.

⁷ *Law on the Foundations of Education and Upbringing*, "Official Gazette RS" no. 72/2009 and 52/2011

⁸ *Law on the Prohibition of Discrimination*, "Official Gazette RS" no. 22/2009

(2009), *Law on Birth Registry*⁹ (2009), *Law on Public Information*¹⁰ (2009), *Law on Associations*¹¹ (2009), *Law on Social Protection*¹² (2011).

Apart from measures undertaken in order to improve the legislation, one of the major problems is the practical implementation of legal solutions, since there are no efficient mechanisms of implementation and accomplishment of legal provisions, control mechanisms in cases of violation of rights in some sectors (health, social and educational sector) and inadequate procedural solutions and executive mechanisms which should ensure implementation of provided legal provisions in practice (family relations). This causes numerous systematic violations of rights of the child and these rights are usually protected through the institution of proceedings before the judicial, administrative and independent authorities. However, the system of child-friendly justice which may enable efficient procedures available to the children and ensure necessary independent legal representation has not been yet established.

The Republic of Serbia is currently going through the phase of judicial reform. Improvement in the field of establishment and promotion of child friendly justice which has been reached so far is mainly directed to the field of juvenile justice system, while the reform regarding the child-friendly justice in civil and administrative procedures have failed. As a result, children are considerably deprived of chance to protect their rights, guaranteed by the law.

I. Child friendly justice in the criminal proceedings – child as criminal offender and child as victim

Law on Juvenile Criminal Offenders and Criminal Legal Protection of Juveniles (hereinafter referred to as the *Law on Juveniles*) which regulates this field contains a series of legislative improvements aiming at establishment of the child friendly justice system. The law on juveniles is based on principle of restorative justice and, in relation to the procedure for the juvenile criminal offenders, it introduces the institute of diversion orders as diversion measures which represent deflection from the court procedure. The law also provides a series of new measures of non-institutional character and prescribes that custody and prison measures are imposed only as final measure and in as short period of time as possible. In relation to the protection of juveniles who are involved in court proceeding as aggrieved parties or witnesses of criminal offences, the *Law on Juveniles* prescribes a series of measures and procedures such as urgency of proceeding, limitation of child hearing to maximum two hearings, obligatory presence of psychologist, pedagogue or other professional in the process of hearing. The *Law on Juveniles* also introduces compulsory

⁹ *Law on Birth Registry*, "Official Gazette RS" no. 20/2009.

¹⁰ *Law on Public Information*, "Official Gazette RS" no. 71/2009

¹¹ *Law on Associations*, "Official Gazette RS" no. 51/2009 and 99/2011

¹² *Law on Social Protection*, "Official Gazette RS" no. 24/2011

training of professionals who are involved in such proceedings, and also the right to free legal aid by the specialized lawyer.

The process of reform of juvenile judicial system is being more intensified during the past few years, and also the activities of the Council for monitoring and improving the work of criminal procedure and criminal sanctions against minors (hereinafter referred to as the Council).¹³ In 2010, the Ministry of Justice has formed the Working Group which prepared the text of the *Law on Amendments and Modifications of the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles* and in the beginning of 2012, it was submitted to the relevant ministry. The working group has also made necessary bylaws which are important for the implementation of the law.¹⁴ However, neither the *Law on Amendments and Modifications of the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles* nor the state bylaws are brought by the National Assembly or the relevant Ministry. They have developed Proposal for amendments and modifications of the SK3 and SK4 forms, upon which the official statistical data in this field are gathered, analyzed and presented by the Statistical Office of the Republic of Serbia before their further adjustment with the *Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles*, *Family law* and the *Law on Social Protection*. The Statistical Office has adopted proposal of amendments and modifications of the SK3 and SK4 forms after they have been submitted to the director of the Statistical Office. The Statistical Office of the Republic of Serbia has submitted new SK3 and SK4 forms with guidelines on how to fill these forms out to the courts and prosecutors offices, and new forms are being implemented since 1st January 2012.

Apart from a series of reforms in the juvenile judicial system, there is still a need for further improvement of this area in order to provide implementation of legal solutions contained in the *Law on Juveniles* in practice and complete implementation of standards and obligations contained in the Convention on the Rights of the Child. In such manner, the problem of insufficient implementation of diversion orders, and also measures of restorative justice in practice (especially measures of special responsibilities), lack of adequate conditions and precisely defined standards of juvenile detention, lack of alternatives to detention, lack of network of institutions for the execution of criminal sanctions, particularly institutions for the execution of security measure of compulsory psychiatric treatment and implementation of educational enhanced surveillance measures with daily stay at appropriate correctional institutions. There is also a problem of insufficient awareness of

¹³ Council for monitoring and improving the work of criminal procedure and criminal sanctions against minors was founded by the Ministry of Justice and the Supreme Court of Serbia in 2009, and based upon the article 166 of the *Law on Juvenile Criminal Offenders*.

¹⁴ *Regulations on implementation of juvenile detention measures, Regulations on implementation of diversion orders, Regulations on method of evidence and statistical analysis of specific diversion orders and stated educational measures, security measures and juvenile imprisonment punishment.*

juvenile criminal offenders of the law protecting their rights, especially during their detention or stay at institutions for the execution of criminal sanction. As a general rule, in all prisons of Serbia, there are juvenile detainees, and the main reason is said to be the lack of space in detention rooms. As a result it is not possible to separate juveniles from the adults and they all dwell together. In such manner, not even the minimum standards prescribed by the national and international legislation are taken into account. Moreover, no measures have been undertaken to solve this issue adequately. Educational and psychological support of juvenile offenders in institutions of juvenile justice system is on a very low level. There are not enough logical activities and school education is not as available as necessary, which is one of the reasons of inappropriate social integration of juveniles and their employment once they leave the correctional institutions. Regarding the juvenile aggrieved parties and witnesses of criminal offences, in great number of cases there are no adequately equipped premises which could provide less traumatic legal hearings of children, nor are there persons in charge who might prepare children for hearing and inform them about entire court procedure. The question of reintegration and rehabilitation, and also the compensation of juvenile aggrieved persons (that is, victims of criminal offences) is not solved in appropriate manner.

2. Child-friendly justice system in civil, administrative procedures and procedures before independent justice authorities

The position of children in civil procedures is mainly regulated by the *Family Law, Civil Procedure Code, Law on General Administrative Procedure*, and other relevant laws from different sectors (health, education, social security). The *Family Law* regulates the family legal protection (domestic violence, protection of children from abuse and neglect, deprivation of parental rights, giving custody of the child, child support, divorce and adoption) and precisely defined principles necessary for operationalization and realization of child-friendly justice in civil proceedings. This includes the accomplishment of the principle of the best interest of child, right to participation and expression of thoughts, and also regulation of child's legal representation in the proceedings (by legal representative or temporary representative).

In civil and administrative procedures, a child can be a party (mainly claimant) or witness and cases in which a child is involved in the court proceedings are numerous. In greatest number of cases, these proceedings are related to the family law protection, education, health and social protection. Initiation of proceedings aiming at protection of specific rights requires undertaking of certain legal actions, including gathering of information regarding the necessary legal tools, working capability and legal knowledge. Even though this area is very complex and despite the fact that it demands high legal

knowledge and skills, in civil and administrative judicial procedures involving children, the legislation of the Republic of Serbia does not provide legal aid or a representative by a professional who would objectively or impartially represent the rights and interests of children (guardian). According to the legislation of the Republic of Serbia, a child is represented by his/her parent, unless there is a conflict of interests between the child and a parent. In such case, the Center for Social Welfare (or the custodian authority) appoints the child's legal representative (temporary representative) who does not have to be an attorney. Such legal solutions do not provide the right of children to adequate protection of their rights, neither in civil nor in administrative judicial procedures regarding the violation of their rights. Due to the lack of judicial and administrative practice, the capacity of professionals to implement the legal solutions in practice remains on the same level, and as a result, in some fields and sectors, systematic violations of rights are constantly found.

There are also situations in which a child is not given opportunity to participate in the procedure and it does not have a status of a party. Thus, the child is deprived of opportunity to file a complaint against the decision, even though such decision are made in procedures involving a child to a great extent (for example, deprivation of parental right, divorce of a marriage, etc.). The same problem may be found in cases in which children ask protection of their rights from the independent authorities, such as the Ombudsman of the Republic of Serbia and the Commissioner for Protection of Equality. Even in this case children are not given opportunity to independently submit a complaint to the state authorities and they are not provided legal aid and independent representation.

Child-friendly justice implies provision of legal help and independent representation in all the procedures of protection of child's rights. Independent representation provides that the guardian of child's rights shall represent the rights of the child independently, efficiently and completely; inform the child about all phases of procedures and, in cooperation with the child, take all the measures which are necessary for protection of the rights of the child.

Another problem is insufficiently distinguished role of the Center for Social Welfare in situations where the Center has a role of custodian authority in the field of social work, social care and professional support of judicial authorities in the process of making decisions and the role of the child's legal representative. Custodial authority participates in great number of procedures involving children, while efficiency of the judicial procedure greatly depends upon efficient and timely cooperation between social and judicial system. Custodial authority is also involved in all the phases of criminal proceedings (it provides to the court information and opinion on a juvenile, circumstances related to his/her behavior and personality and it is given important role in the implementation of diversion orders and educational measures), while in the field of family protection, the

custodial authority institutes proceedings of removing a child from a family, gives opinion on the procedure of divorce regarding the exercise of parental right, provides services of family counseling and institutes proceedings of deprivation of parental rights. However, in cases where the Center for Social Welfare is at the same time the custodial authority and the child's representative, the capacities of decision makers are not entirely distinguished from custodial authority which represents the child. Thus, it is impossible to provide objective and impartial representation of a child by the Social Welfare Center.

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Improvement Recommendations

Child-friendly justice is an important step towards realization, promotion and protection of the rights of the child in the Republic of Serbia. Compliance with this principle is in accordance with the Convention on the Rights of the Child,¹⁵ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and other international documents, especially UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),¹⁶ UN Rules for the Protection of Juveniles Deprived of their Liberty,¹⁷ UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines),¹⁸ UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules),¹⁹ and also the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice,²⁰ adopted in 2010.

Regarding the issue of judicial protection of rights, General Comment No. 5 of the Committee on the Rights of the Child indicates the importance of efficient

¹⁵ *Act Ratifying the UN Convention on the Rights of the Child*, "Official Gazette SRJ – International contracts" no. 4/96 and 2/97

¹⁶ *UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, adopted by the Resolution of the General Assembly of the United Nations 40/33 from 29th November 1985 (A/Rezol/40/33, 29th November 1985).

¹⁷ *UN Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by the Resolution of the General Assembly of the United Nations 45/113, from 14th December 1990 (A/Rezol/45/113, 14th December 1990).

¹⁸ *UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, adopted by the Resolution of the General Assembly of the United Nations 45/112 from 14th December 1990 (A/Rezol/45/112, 14th December 1990).

¹⁹ *UN Standard Minimum Rules for Non-custodial Measures* adopted by the Resolution of the General Assembly of the United Nations 45/100 from 14th December 1990 (A/Rezol/45/100, 14th December 1990).

²⁰ *The Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, adopted on 17th November 2010 at the 1098th meeting of the Ministers' Deputies – version edited 31st May 2011.

legal means in case of violations of rights, and especially significance of adequate procedures which are available to children and their representatives, such as information, counsel and child representation. This also includes the support in case a child does not have a representative and access to independent appellate proceedings and courts with necessary legal and any other aid. In case there is a violation of rights, General Comment No. 5 indicates that there should be adequate reparation, including compensation and, if necessary, other measures which provide physical and psychological recovery, rehabilitation and reintegration.²¹

Recognition of child-friendly justice would provide adequate protection of rights for all the children who have come into contact with judicial and administrative system, either as witnesses, victims (aggrieved parties) or criminal offenders, petitioners and claimants in civil, administrative and procedures before independent authorities. Compliance with these principles would influence not only the reduction of child victimization and trauma of children who have come into contact with judicial or administrative system, but also their encouragement to represent and protect their rights, improving in such manner policies and legislation related to the protection of child's rights.

Regarding the practical implementation of the child-friendly justice in the Republic of Serbia, it is necessary to take the following steps:

1. Enhance the awareness of children regarding their rights

Enhancement of the awareness of children regarding their rights and ways of protection of their rights in case of violation has yet to be implemented on systematic level. Improved provision of information is the first step in realization, promotion and protection of rights. Realization of the child-friendly justice requires the awareness of children regarding their rights and manners in which they can protect their rights in case of violation.

2. Provide legal aid and independent child representation in all the civil and administrative proceedings before the independent authorities

Child friendly justice implies provision of legal aid and representation of children in all the judicial procedures related to protection of their rights. In cases of conflict of interests between a child and a parent or other procedural parties, it is necessary to appoint the protector of child's rights (guardian) so that the independent representative may completely represent the interests of the child.

²¹ *General Comment No. 5 (General Measures of Implementation)* adopted by the Committee on the Rights of the Child CRC/GC/2003/5 from 3rd October 2003 (CRC/GC/2003/5, 3rd October 2003.), paragraph 24.

Legislation of the Republic of Serbia provides legal aid and representation of children by lawyers only in the juvenile criminal justice proceedings (criminal proceedings) and this refers to both juvenile criminal offenders and juvenile aggrieved parties in criminal proceedings.

According to the legislation of the Republic of Serbia, in all the other judicial proceedings (civil, administrative and procedures before the independent authorities) a child is represented by his/her parent, except in cases in which there is a conflict of interests between a parent and a child. In such case, the Social Welfare Center (or custodial authority) provides legal representative (temporary representative). Since parents and legal representatives usually do not have adequate legal knowledge, they are not capable of representing the child's interests in the most appropriate way. This is particularly evident in the family proceedings (child alimony, domestic violence), procedures before various administrative authorities (education, health, social security), and also in situations which require institution of several court procedures in different procedural systems (for example, criminal act of domestic violence in which the aggrieved party is a child who is given legal aid in criminal procedure, and at the same time there is pending procedure of deciding on measures of protection from domestic violence before the civil courts, that is, the family council where the child is not given adequate legal aid or independent legal representation).

3. Provide availability of judicial, administrative and independent organs for all the children and in accordance with the child-friendly justice principle

Protection of the child friendly justice principle implies that all children are capable of using legal remedies in order to maintain efficient protection of their rights in case their rights have been violated. Thus, the access to the court is organized in a manner which provides adequate support, participation and provision of information before, during and after the court proceedings. Accordingly, a child should be given adequate and timely information on alternative solutions of court proceedings (mediation, diversion and non – custodial measures), methods of institution of proceedings for protection of their rights, procedures, legal remedies, decisions and their meaning, removing all the other obstacles of children's access to the courts, such as court proceedings expenses and lack of legal aid and representation.

4. Improve the status of children in the juvenile justice system

In order to realize the child-friendly justice principle it is necessary to provide full implementation of the *Law on the Juvenile Criminal Offenders and Criminal Protection of Juveniles*. This implies improvement of implementation of

diversion orders and also the practice of deciding on special responsibilities and other non – custodial measures, establishment of institutionalized framework of an adequate implementation of restorative principle of justice (provision of alternatives to the detention, and also security measures of compulsory psychiatric treatment and implementation of educational enhanced surveillance measures with daily stay at appropriate institutions). Special emphasis should also be put on the improvement of conditions in detention and institutions for the execution of criminal sanctions and provide better educational and psychological support of juveniles in juvenile justice system institutions. Regarding juvenile victims and witnesses of criminal offences, there should be adequately equipped premises for legal hearing and stay of children in the courts, providing satisfactory reintegration and rehabilitation

5. Provide continuous training of all the professionals who are actively involved in criminal, civil and administrative proceedings, in accordance with the principles of the child-friendly justice

Child-friendly justice implies that all the professionals participating in the proceedings involving children and who are constantly in contact with children shall be completely informed on principles of child-friendly justice and methods of appropriate implementation of these principles in practice. This includes implementation of training of the professionals, making a guide to good practice, establishment of the mechanism of continuous improvement, mentor support and monitoring.

6. Provide efficient cooperation between the judicial system and social security system

Recognition of child-friendly justice principles requires effective cooperation between the judicial system and social security system. Considering the fact that the custodial authorities participate in the great number of proceedings involving children, it is necessary to enhance their cooperation and secure their efficient and coordinated activities.

At the same time, it is necessary to precisely determine and distinguish jurisdiction in work of both the Social Welfare Center and custodial authority and to provide complete independence of the custodial authority and efficiency in representation of child's rights and interests.