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A COMPARATIVE ANALYSIS OF THE  
HARMONIZATION OF THE NATIONAL  
LEGISLATION OF THE REPUBLIC OF  
MONTENEGRO WITH THE CONVENTION  
ON THE RIGHTS OF THE CHILD



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## CONTENTS

### A COMPARATIVE ANALYSIS OF THE HARMONIZATION OF THE NATIONAL LEGISLATION OF THE REPUBLIC OF MONTENEGRO WITH THE CONVENTION ON THE RIGHTS OF THE CHILD ..... 1

INTROUCTION .....	6
An analysis of the provisions of the Constitution of Montenegro within the context of exercise of the rights of the child .....	9
1. General notes .....	9
The Law on the Budget .....	15
The Law on the Protector of Human Rights and Freedoms .....	17
1. General comments .....	17
2. Character, scope, competence and powers of the Protector of Human Rights and Freedoms in the protection of the rights of the child .....	19
3. Competencies of the Protector related to judicial and administrative proceedings .....	20
4. Legal initiatives, the participation of the Protector in law-making process, the prevention activities of the Protector aimed at ensuring the proper implementation of the regulations on child rights .....	21
5. Legitimation of the institution of proceedings, legal representation of the child and the procedural rights of the child in the procedure of addressing complaints .....	22
6. Protection of the rights of the children deprived of their liberty and the children who are not living with their parents .....	24
Draft Law on Montenegrin Citizenship .....	26
1. Acquisition of citizenship .....	26
2. Loss of citizenship .....	28
Draft Law on Foreigners .....	29
Law on Minority Rights and Freedoms.....	32
1. General review .....	32
2. Obligations of the state.....	32
3. Definition of minorities .....	33
4. Personal and/or collective rights .....	34
Draft Asylum Law .....	37
1. The Draft Asylum Law proclaims the following basic principles: ....	37
2. Important characterizes of the proceedings .....	39
The State Border Control Law .....	42
The Law on Media .....	44
The Right of a Child to Education.....	47
The Law on Preschool Upbringing and Education .....	51
Primary Education Law .....	54
The Law on Education and Upbringing of Children with Special Needs ...	57

1.	Principal Dedication to the Inclusive Approach .....	57
2.	Participation in Drafting Orientation Proposal .....	58
Social and Child Protection .....		59
1.	Introductory Remarks .....	59
2.	Overview of the SCPA Structure .....	59
3.	Principles of Social and Child Protection .....	59
4.	Normative Definitions .....	61
5.	Prevention of Institutionalization of Children.....	63
6.	Development of Services .....	64
7.	Temporary Institutionalization as an Imperative .....	64
8.	Possible Standard Rules for Selection of Benefits and Services .....	65
9.	Children with Disabilities.....	68
10.	Special Reference to Child Protection and Administrative Consolidation .....	68
Protection of Children from Violence.....		70
1.	General Comments.....	70
2.	Scope of Protection of Children from Violence.....	71
3.	Methods for Provision of Legal Protection .....	72
4.	Protection Providers and Synchronisation of Their Work .....	73
5.	Specialisation of Legal Professionals.....	73
6.	Entitlement to Legal Protection from Domestic Violence .....	73
7.	Principles of Procedure .....	74
8.	Duty to Report Domestic Violence .....	75
9.	Protection Measures .....	75
10.	Procedure for Imposition of Protection Measures .....	76
Rights of the Child and Protection of the Rights of the Child .....		77
- Analysis of the provisions of the Family Law Bill from the aspect of exercise of the rights of the child – .....		77
1.	Rights of the Child .....	77
2.	Best Interests of the Child .....	77
3.	Business Capacity of the Child .....	78
4.	Legal Institutes: Adoption, Foster Care and Guardianship (from the Aspect of the Rights of the Child).....	78
Adoption.....		79
Family Placement (Foster Care).....		82
Guardianship over Minors .....		84
5.	Status and Legal Capacity of Children in Proceedings.....	87
6.	Expression of Views .....	88
7.	Legal Representation of the Child .....	89
8.	Parents as Legal and Voluntary Representatives of the Child .....	90
8.	Collision Guardian of the Child .....	92
Health and Health Care .....		94
1.	Right to health in the Convention on the Rights of the Child .....	95
2.	Laws of the Republic of Montenegro analysed from the aspect of	

compliance of health legislation with the Convention on the Rights of the Child .....	96
Compliance Analysis .....	96
3. What could be done .....	99
Strategic Environment Impact Assessment Act .....	102
Rights of Children in Conflict with the Law .....	103
Position of Juvenile Criminal Offenders .....	103
1. Relevant International Law and Juvenile Justice System .....	103
2. Age for criminal liability .....	105
3. Division of juveniles who may be criminally liable by age criterion..	106
4. Key elements of the system of juvenile penal sanctions .....	107
Treatment of Juveniles in The Criminal Procedure Code of the Republic of Montenegro .....	112
1. Legal framework .....	113
2. The right to a defence counsel .....	114
3. The principle of diversion from criminal prosecution and its rational modification towards the procedure conducted according to the principle of diversion from criminal prosecution with intervention.....	115
4. Deprivation of liberty in the pre-investigatory proceedings and detention in criminal proceedings against juveniles .....	120
5. Specialisation of the actors in juvenile criminal procedure .....	121
7. Conclusion on the compliance of juvenile criminal procedure in the Republic of Montenegro with the relevant international instruments .....	122
Enforcement of Penal Sanctions against Juveniles .....	123
1. Legal framework .....	123
2. Referral to the juvenile disciplinary centre .....	123
3. Increased supervision measures .....	124
4. Institutional measures .....	124
5. Enforcement of juvenile prison sanction.....	125
Ratio legis of Criminal Justice Protection of Juveniles.....	127
Criminal Justice Protection of Juveniles in the Republic of Montenegro and Harmonisation with the Relevant International Norms and Standards ..	128
1. Offences against life and limb .....	130
2. Offences against sexual freedom .....	131
4. Offences relating to marriage and family committed against juveniles .....	132
5. Other criminal offences against juveniles.....	134
The position of Juvenile Victims of Abuse and Neglect in .....	135
the Criminal Proceedings .....	135

## INTRODUCTION

This comparative analysis of the compatibility of national legislation of the Republic of Montenegro with the Convention of the Rights of Child was primarily made to be used by the representatives of Montenegrin Parliament and by all professionals and academics who work with children, whose work is either directly or indirectly related to the protection of children's rights.

The document that you have before you was produced, thanks to the cooperation between the Parliament of Montenegro and the UNICEF. Non-governmental organization »Child Rights Centre« from Belgrade was hired for the purpose of drafting this document and its experts studied the legislation in force in Montenegro with a view to examining their compatibility with the internationally recognized instruments for the protection of children, primarily with the UN Convention on the Rights of the Child.

Concerning the fact that the drafting of this analysis started in the middle of 2006, we want to emphasize that the object of analysis was the draft Family Law of Montenegro, draft Law on Asylum, Draft Law on Foreigners, draft Law on Montenegrin Citizenship and the draft Constitution of Montenegro from March 2007.

The prime goal of drafting such a document was to ensure that the forthcoming reform processes position child rights appropriately and that the members of the Parliament refer to this document while drafting new and amended versions of the law that refer to promotion and protection of child rights.

There are very few laws that refer to the rights of the child and, hence, the voice for children must be clearly heard.

Concerning the fact that children in Montenegro account one quarter of the total population of Montenegro, and that present generations of children and youth will one day become a leading force in the process of building Montenegro as a democratic and modern society, particular attention should be given to children and to creation the conditions for adequate protection of their rights.

By adopting laws that ensure appropriate protection of children's rights, we will make children's rights a political priority and ensure that they are positioned in legislation as they deserve according to international standards.

Rifat Rastoder  
Vice-President of the Parliament  
Republic of Montenegro

Waheed Hassan  
Representative a.i.  
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In its thirty-fourth session held in October 2003, the Committee on the Rights of the Child, the supervisory body of the Convention on the Rights of the Child, adopted General Comment No. 5 entitled General Measures of Implementation of the Convention on the Rights of the Child. This document, which expands on the provision of Article 4 of the Convention, serves to the States Parties as a construction of measures to be taken on the national plane with respect to the implementation of the rights of the child.

The general implementation measures identified in General Comment No. 5 aim to promote full enjoyment by all children of all rights of the child through: harmonization and adoption of relevant regulations, establishment of coordination and supervisory bodies – both government and independent, creation of a comprehensive database, awareness raising and education, development and implementation of relevant strategies, services and programmes.

When it comes to the adoption and harmonization of different regulations which pertain to children and which constitute the basis for the exercise of their rights, it is generally believed that the legislative reform of each country must be complete and new legislation comprehensive, synchronized and adjusted in terms of time and content. It is precisely these challenges that the law-maker of the Republic of Montenegro is currently confronted with.

In the text that follows, the working group of the Child Rights Centre of Belgrade including: Nevena Vučković Šahović, PhD, Vesna Dejanović, professor Nevena Petrušić, PhD, Vladan Jovanović, professor Milan Škulić, PhD, professor Viktorija Cucić, PhD, Marija Petrović and Ivana Stevanović, MA, conducted a comprehensive analysis of both the wordings of applicable laws and those currently in preparation (drafts and outlines) submitted by the Office of the UNICEF in Podgorica, with the aim of considering their coordination with the Convention on the Rights of the Child and other international instruments laying down norms and standards for the promotion and exercise of the rights of the child. Analysed were more than twenty laws of the Republic of Montenegro, primarily those pertaining to the following: family legal protection, the right to education, health care and social protection and the position of juvenile persons in the juvenile justice system no matter whether they

are offenders or injured parties. The analysis also pays special heed to other acts which, directly or indirectly, govern or are important for the creation of an environment that is to promote the implementation of the rights of the child in the Republic of Montenegro. This primarily refers to the Constitution of the Republic of Montenegro, the Law on the Protector of Human Rights and Freedoms, the Law on the Budget, the Law on the Media, etc...

Apart from conducting the analysis, the working group also aimed to propose some solutions that could contribute to the promotion of the position of the child at legislative level, particularly bearing in mind that the law-maker of the Republic of Montenegro is to tackle a number of laws which are to provide for a more appropriate implementation of the rights of the child in practice.

# AN ANALYSIS OF THE PROVISIONS OF THE CONSTITUTION OF MONTENEGRO WITHIN THE CONTEXT OF EXERCISE OF THE RIGHTS OF THE CHILD

## 1. General notes

The Constitution of Montenegro is written in clear and precise language. The wordings of the provisions are brief and without unnecessary legal finesse, which also makes it possible for legal laymen to understand the meaning of the text.

The analysis of constitutional provisions first provides a brief overview of the Constitution as a whole and suggestions as to which norms, to our mind, should be included in the new Constitution of Montenegro. This is followed by an analysis of concrete solutions i.e. norms which we believe are not sufficiently clear and precise.

Constitution, as an act of the highest supremacy in a country must be guaranty for adequate protection and promotion of children`s rights in Montenegro.

We use this opportunity to point out the importance of proper consideration of children`s rights within the proposed draft text of the new Montenegrin Constitution. To begin with, we would like to underline that the rights of the child are not specially standardized by the Constitution of the Republic of Montenegro, but are “derived” from general human rights. Although proposed text defines supremacy of signed international treaties upon national legislation we believe that children`s rights deserves more attention within the proposed text.

This resulted in the fact that only some of the rights laid down by the *Convention on the Rights of the Child* (hereinafter referred to as: CRC) are guaranteed to children and that the content and scope of these guaranteed rights are narrower than those envisaged by the CRC. Likewise, the provisions of the Constitution particularly referring to children are not fully stipulated in the spirit of the CRC and their respective formulations are such that the child is not an independent holder of such rights, but rather “a protected species”. The protectionist spirit of these norms testifies to the “lack” of aware-

ss about a child as a citizen entitled to seek the exercise and enjoyment of his or her rights; rather a child is regarded as a protected asset.

A need for harmonization of proposed text with relevant international standards, first of all UN Convention on the Rights of the Child still exists and we should not neglect it.

In the text stated below we will list UNICEF recommendations regarding definitions and children`s rights which should be considered in the new Montenegrin Constitution and should present guaracy for adequate protection of children.

1. The Constitution does not contain the determination of the “child” notion, that is, it contains no definition of a child. Given that this notion is referred to in several provisions of the Constitution, it would be advisable to define the child the way it was done under Article 1 of the *Convention on the Rights of the Child*: “A child means every human being below the age of eighteen years...” or by way of defining the attainment of majority precisely in the wording of the Constitution no matter whether such a definition is provided for in the wordings of laws.
2. *The new Constitution should ensure full recognition and protection of human rights and the rights of the child in compliance with international norms and standards. We would like to note that the Constitution should establish the rights of the child as a constitutional category through a formulation that would include the following:*
  - *The direct implementation of the Convention on the Rights of the Child in all situations when so possible.*
  - *The definition of a child (which persons the Convention refers to) which would then be applicable to all legal provisions where references are made to a child;*
  - *All of the four basic principles of the Convention (optimal growth, survival and development, principle of non-discrimination, principle of the best interest of the child and principle of child participation).*
  - *Emphasis on the obligation of the state to create conditions for the exercise of the rights of the child to the maximum extent possible.*

*Besides, we believe that in formulating certain rights of the child in future, heed should be taken of the following:*

*As regards the right to life, survival and development, it should be stressed that the state undertakes to take all necessary measures to ensure the best possible conditions for the survival and development of all children;*

- *As regards the non-discrimination principle, it should be emphasized that all children enjoy equal rights regardless of their citizenship (apart from the discriminatory grounds already contemplated in the Constitution);*
- *Likewise, we propose that the principle of the best interests of the child be granted the status of a constitutional principle, that is, it should be ensured that the Constitution lay down that everybody is obliged always to act in accordance with the best interests of the child in matters pertaining to him or her (please, note that one should not fall in a trap of laying down this principle only when at issue are the acts of state bodies)!*
- *The right of the child to express his or her views on all matters affecting the child in line with his or her evolving capacities should also be included in the constitutional wording.*

In order to formulate the said principles in the best possible way, it would be advisable to abide by the wording of the Convention as adjusted to the manner in which the norms of internal law are drawn up. Thus, a comprehensive protection of the rights of the child would be achieved, which does not mean that special rights that constitute an integral part of the Constitution even at present should not be highlighted.

3. In addition proposed Constitution does not lay the ground for the appointment of ombudsman for the rights of the child, which, from the point of view of Article 4 of the *Convention* imposing an obligation on the States Parties to undertake “all appropriate measures for the implementation of the rights recognized in the present Convention”, should be ensured. The specificities pertaining to the implementation of the rights of the child in relation to the exercise of human rights and freedoms are important. Therefore, it is not advisable for an ombudsman for human rights concomitantly to be the protector of the rights of the child. Defining a ground for appointment of the Deputy

Ombudsman for Children within the proposed text should present minimum guaranties of adequate protection, in particular having in mind the proposal of the Ombudsman Office for Montenegro for appointment of the Deputy Ombudsman for Children submitted to Montenegrin Parliament in December 2006.

When discussing particular provisions of the Constitution, we believe that special account should be taken of the following:

1. However, the Constitution does not envisage the obligation of the state to ensure, to the maximum extent possible, the survival and development of the child (which is also an obligation of the state under the CRC). Article 65 of the Constitution lays down that mother and child enjoy special protection. This provision most certainly points to the special rights and measures that have been (and are) stipulated in legal regulations and that improve the conditions in which children live, yet emphasis is laid on protection implying a patronizing attitude rather than a child's right to be provided with the best possible conditions for *survival and development*. Apart from that, both mother and child are subject to protection, hence it is clear that the framer of the Constitution did not have in mind a child as the holder of the right on one hand, and the state as the holder of the obligation to ensure the best possible (at a given time) conditions for survival and development, on the other. We note that this obligation of the state is stipulated under Article 6 of the CRC and is inseparable from the right to life of every child. Apart from guaranteeing the inviolable right to life, the state is also under the obligation to guarantee that in relevant circumstances, it will take all measures to create, to the maximum extent possible, the conditions for the survival and development of a child.
2. Article 64 paragraph 3 lays down the obligation of children to care for their parents whenever they should be in need of care. However, this formulation is rather unclear in scope – namely, the question arises as to whether this matter pertains to children as persons below 18 years of age or children as biological descendants, that is, whether this applies to all children. Such a wording is not sufficiently precise and could le-

ad to broad interpretations and (concealed) exploitation of children. The special protection of children is also stipulated under Article 66 of the Constitution which prohibits abuse of children (paragraph 1). The same Article also bans employment of children and minors on jobs hazardous for their health (paragraph 2). In this manner, abuse of children is prohibited, but not their exploitation, abuse, torture, maltreatment and neglect. Likewise, paragraph 2 of the same Article gives rise to certain confusion, primarily for two reasons: 1) both children and minors are mentioned creating confusion terminology-wise as to who the terms children and minors refer to; 2) the following question arises: if employment of children on jobs hazardous for their health is prohibited, does this mean that employment of children on jobs not hazardous for their health is permitted? This once again points to the need for the Constitution to define the terms used in it.

3. Apart from Article 16 of the Constitution guaranteeing freedom and equality for all citizens regardless of any peculiarities or personal attributes and equality before the law, Article 64 paragraph 4 the Constitution prescribes that: “Children born out of wedlock shall have the same rights and obligations as children born in wedlock”. We believe that the term “obligations” should be deleted from the wording of the Constitution because the purpose of equalizing children born out of wedlock with those born in wedlock in the constitutional text is to point to their status of marital and non-marital children, which does not affect the enjoyment of guaranteed human and (child) rights and freedoms, as well as all other rights. In a nutshell, their legal subjectivity is not stipulated with their status of marital i.e. non-marital children.
4. The said provisions are the only ones in which the Constitution makes special reference to children. In provisions regulating other human rights, e.g. the right to education, a child enjoys the same rights as others. We believe that in drafting the new Constitution, special account should be taken of the specific rights of the child which are not covered by general human rights such as: the right of access to relevant information (Article 17 of the CRC), protection of parentless

children (Article 20 of the CRC), the right to the highest attainable standard of health (Article 24 paragraph 1 of the CRC), the particularities of the juvenile crime system (Article 40 of the CRC), protection against torture and neglect (Article 19 of the CRC), protection from the illicit use of narcotic drugs (Article 33 of the CRC). We also recommend that the law-maker pay special attention to the rights that have not yet been recognized as those held by children. Their recognition, and primarily their signature, shall ensure better protection in future for those they pertain to. An example for this is the right to privacy. Although the content of this right is no different than that of the general right to privacy, we believe that it is the obligation of the state to define a child as the holder of the right for the purpose of promoting a child's right to privacy.

## THE LAW ON THE BUDGET

Albeit not a source of child rights in the narrower sense of the word, *the Law on the Budget* is important because it represents a good indicator of the exercise of such rights. Without a comparative analysis of the budgetary trends over a period of at least three years, it is impossible to comment on the manner in which the government treats the funds related to the exercise of the rights of the child. However, we shall set out herein certain conclusions that are possible to be drawn.

Budgetary resources are allocated on a ministry basis and reach the beneficiaries through the competent Ministries, that is, through the relevant budgets of the Ministries. Budgetary lines are not designed in a manner securing an insight into the amounts allocated to end-beneficiaries which are utilized for servicing the system providing such services. Likewise, no conclusions can be drawn from the budget as to the resources earmarked for the implementation of child rights, that is, the amount set aside by the state for the education of children, health care of children and children's entitlements arising from social protection. Thus, for instance, apart from the lines allocated to primary and secondary education, the education budget also includes a special line for the education of persons with special needs and the resources for the education promotion programme. There is also a line for the pupil and student standard. However, it can be observed that no funds are envisaged under the pupil transportation item, that is, no special funds are allocated for these purposes. Since the provision of primary education is the obligation of the state, we believe that the funds for the transportation of primary schoolchildren should be planned by the state budget (rather than the respective budgets of local self-governments), irrespective of the manner in which such rights are exercised, not only because the state is under the obligation to secure equitable conditions (availability) for all children, but also for reasons of visibility of these funds. The budget of the Ministry of Labour and Social Welfare sets aside child's allowance and meal allowance for pre-school institutions. All other lines are impossible to consider in relation to children. When it comes to the health care budget, it is traditionally impossible to determine the funds being allocated to the health care of children.

Our recommendation would be to render the budgetary resources set

aside for the exercise of child rights visible either within special programmes or special budgetary lines within the budget, particularly the budgets which are the most significant in this respect – those expected to transfer the most extensive funds for children’s needs.

# THE LAW ON THE PROTECTOR OF HUMAN RIGHTS AND FREEDOMS

*The Convention on the Rights of the Child* envisages that the States Parties should undertake relevant legal, administrative and other measures for the implementation of the rights of the child recognized by the Convention. *The Committee on the Rights of the Child* maintains that the set up of independent bodies for the protection and promotion of child rights and permanent oversight of the application of the Convention on the Rights of the Child (ombudsmen, children's commissioners and similar institutions) is of exceptional importance for the exercise of the rights of the child and implementation of the Convention (General Comment No. 2). It also argues that the establishment of independent bodies falls within the obligations the countries assumed by ratifying the Convention on the Rights of the Child. Consequently, the Commission welcomes the establishment of national institutions, and calls on the states which have failed to found some of the institutions urgently to do so.

Montenegro elected that the duty of an independent national body in charge of overseeing the exercise, protection and promotion of child rights be discharged by the protector of human rights and freedoms (ombudsman/ombudsperson). In Montenegro, the institution of the Protector of Human Rights and Freedoms (hereinafter referred to as: "Protector") was established by the *Law on the Protector of Human Rights and Freedoms* (hereinafter referred to as: LP).<sup>1</sup>

## 1. General comments

The protector of human rights and freedoms is an independent national body of general nature set up with a view to protecting human rights and freedoms of all population categories under the jurisdiction of the state of Montenegro. Regardless of the fact that this national body also has a say in the sphere of child rights as they constitute an integral part of the human ri-

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<sup>1</sup> *The Law on the Protector of Human Rights and Freedoms* was adopted by the Montenegrin Assembly on 8 July 2003 ("The Official Gazette of the Republic of Montenegro", 41/03). The LP came into force on 18 July 2003.

ght and freedom corps, it is undoubtedly necessary that a special independent body (the protector of child rights) be set up exclusively to oversee the implementation and protection of such rights. This is attested to by the fact that the protection of child rights is specific in many aspects as compared to the protection of the rights of adults and it is reasonably feared that the activities of the protector of human rights and freedoms as a general institution would be more oriented towards the protection of the human rights and freedoms of adults. If the state of Montenegro nevertheless determined that the introduction of the protector of child rights as a special institution is not rational bearing in mind the number of inhabitants, the size of its territory and the like, it would be required that a special deputy of the protector of child rights be appointed to deal exclusively with the protection and promotion of the rights of the child.

In view of the fact that the applicable Constitution of the Republic of Montenegro does not lay down the institution of the Children's Rights Protector, the future Constitution of the Republic of Montenegro should stipulate such an institution in order for its establishment and activity to be based on a sound constitutional ground, whereby its position would be much strengthened and the institution itself would gain an even greater legal authority and importance.

An analysis of the rules provided for in the LP on the election, termination of office and dismissal of the Protector and a range of powers vested in him or her undoubtedly reveals that the Protector exercises both legal and political power required for the efficient discharge of his or her duty and that sufficient guarantees are in place for this body truly to be independent and autonomous in its work, be neutral and protected, to the maximum extent possible, from political and all other influences which could impair his or her impartiality. This is particularly contributed to by the provision set forth in Article 8 paragraph 1 of the LP envisaging that the Protector is elected by the Assembly of the Republic of Montenegro and the provision set out in Article 8 and Article 14 of the LP providing that the Protector and his or her Deputy enjoy immunity as Members of Parliament and may not be liable for an opinion expressed and recommendation given in the exercise of his or her duties. The independence of the Protector is also guaranteed by the provisions of Article 16 of the LP stipulating that the Protector and his or her Deputy may not hold any representative and other public office, nor may they perform any

other professional activity, except scientific, educational and artistic, and activities falling under the protection of copyright and that they may not be members or partners of the bodies of political parties.

Apart from the authorizations in the protection of rights assigned thereto under the LP, the power vested with the Protector is also illustrated by the obligation of the President of the Republic, the President of the Assembly and the Prime Minister and members of the Government of the Republic of Montenegro, Municipal Mayors, Capital City Mayor and Old Historical Capital Mayor to meet the Protector without any delay upon his or her request (Article 29 of the LP). The authors of the LP undisputedly endeavoured to create statutory conditions for a maximally transparent and public procedure ensuring the election of competent persons of high moral values and personal and professional integrity to discharge the duty of the Protector and/or Deputy Protector. In this regard, particularly significant are the provisions of Article 8 paragraphs 1 and 2 of the LP laying down that in the procedure for establishing the proposal for the election of the Protector, the competent working body of the Assembly is to undertake consultations with scientific and specialized institutions, organs and representatives of the non-governmental sector dealing with human rights and freedoms issues and that the public should be informed about the launch of the procedure to propose candidates.

## 2.Character, scope, competence and powers of the Protector of Human Rights and Freedoms in the protection of the rights of the child

An analysis of the legal provisions regulating the scope of duties, competences and powers of the Protector indicates that this institution has a wide scope of duties and that its powers are mainly broad enough to provide for an efficient supervision and intervention in the child rights sphere. Under Article 23 of the LP, the Protector may consider cases involving violations of the rights of the child no matter whether a violation was committed by a state agency, a local self-government body, public services and other bearers of public powers (health care and educational institutions, a public company and some other legal entity exercising public powers), which makes it possible for the Protector to take action no matter which body i.e. person infringed the ri-

ght of the child. On the other hand, the Protector is authorized to take action i.e. seek that a violation be remedied not only when such a violation of a child's right resulted from the adoption of an act and/or taking an action but also when a violation arose from the competent body/service's failure to conduct a particular procedure and/or take relevant action (Article 23 paragraph 1 of the LP), which is a positive solution given that violations of child rights, as evidenced by experience, very often result precisely from failure to take activities prescribed by the law.

However, the applicable legal regulations do not provide for the Protector's authority to act in cases in which the violation of a child's right resulted from acting and/or failure to act by *private entities*, which is inconsistent with the standards of the Committee for the Rights of the Child envisaging that the national institution for child rights should be concerned with the protection and promotion of child rights not only in relation to state bodies, but also in relation to relevant public and private entities. Bearing in mind the fact that the system of social and health care protection of children in the Republic of Montenegro is based on ownership pluralism and that service providers in the sphere of children's health care also include private institutions, it is necessary to create legal conditions for the Protector to supervise the activities of all bodies, institutions, legal entities and individuals performing children-related duties and act in cases when the violation of child rights is a result of acting and/or failure to act by private entities included in the system of social care for children.

### 3. Competencies of the Protector related to judicial and administrative proceedings

The Protector is authorized not only to consider individual violations of child rights and provide his or her final opinion and recommendation based on the findings of such consideration, but he or she is assigned a wide range of competencies in the judicial proceeding domain as well (Article 24 of the LP). Bearing in mind that a large number of child rights are exercised in administrative proceedings and that in this procedure delays, abuse of procedural powers and non-execution of court decisions may also occur, it would be useful if the

special powers of the Protector related to judicial proceedings laid down by Article 24 of the LP also be expanded to administrative proceedings.

In order to ensure that the Protector take appropriate action in cases involving violations or possible violations of child rights, in drafting future amendments to the applicable regulations governing the Protector, the possibility should be reviewed of recognizing the Protector's power to take certain actions in the course of the judicial proceedings aimed at preventing violations of child rights in the proceedings proper and creating conditions for the court decision to be lawful and equitable. It is to this end that the LP should be amended. Likewise, it is indispensable to stipulate the Protector's right and obligation to submit a report to the competent Public Attorney's Office, advise the competent guardianship body and propose measures for the protection of the rights and interests of a child if in the regular course of his or her duties, he or she becomes aware that the child is subject to violence, sexual abuse, torture, exploitation or neglect.

#### 4. Legal initiatives, the participation of the Protector in law-making process, the prevention activities of the Protector aimed at ensuring the proper implementation of the regulations on child rights

Apart from the basic control duty, the Protector has the right to launch legislative initiatives for amending certain legislation for the purpose of harmonizing the relevant legislation with internationally-recognized standards. The Protector is also authorized to provide an opinion on draft laws and other regulations or general enactments if he or she deems it necessary for the purpose of protecting and promoting the rights and freedoms of the child (Article 25 of the LP). These provisions are of exceptional importance in the process of harmonizing the legislation on the rights of the child with international standards and principles. In order for the proposals, legislative initiatives and opinions of the Protector to exert relevant influence, it would be useful to lay down the obligation of the Ministries, the Government and the Assembly to review the Protector's initiatives and opinions and to provide him or her with feedback.

Pursuant to Article 26 of the LP, the Protector may forward a propo-

sal for the institution of proceedings before the Constitutional Court of the Republic of Montenegro for the purpose of assessing the constitutionality and legality of the legislation and general enactments relating to the rights of the child. This broad legal power is particularly useful as it ensures that all anti-constitutional and illegal regulations in the sphere of child rights be eliminated from the legal system, thus contributing to the establishment of a harmonized and coherent legal regime in the domain of the rights of the child.

Under Article 23 paragraph 2 of the LP, the Protector tackles general issues of importance for the protection and promotion of human rights and freedoms and cooperates with relevant organizations and institutions dealing with human rights and freedoms. This rather vague provision lays legal grounds for the Protector, inter alia, to exercise some other important roles as well such as promotional, information-providing and advisory.

However, it seems it would be useful if the law explicitly stipulated certain duties of the Protector, such as the duty to promote the rights and interest of children, be committed to the implementation and promotion of the right of children with special needs, propose measures to suppress harmful acts which infringe the rights and interest of children, advise on the irregularities perceived, inform the public about the status of child rights, familiarize children with the method of exercising and protecting their rights and interests and provide advice on how to exercise and protect their rights and interests.

In addition, cooperation should be expanded by prescribing the Protector's duty to cooperate with children and children's organizations, encourage children to express their views, proposals and initiatives, initiate public activities aimed at improving the position of children and personally participate in such activities, as well as propose measures for boosting the involvement and influence of children in the social community.

## 5. Legitimation of the institution of proceedings, legal representation of the child and the procedural rights of the child in the procedure of addressing complaints

The provisions of the Law on the Protector of Human Rights and Freedoms (Articles 30 through 45), and the provisions contained in the Rules of Procedure regulating the methods of work of the Protector of Human Rights

and Freedoms of January 22, 2004<sup>2</sup> (hereinafter referred to as: “the Rules”) regulate in detail the method of work of the Protector in case a complaint is filed and at his/her own initiative, when the Protector is informed that a human right or freedom of a person have been violated. The proceedings on complaints are designed to suit the proceedings instituted by a grown-up person and not the child. Namely, although the institution of proceedings and the proceedings themselves are relatively simple, it can hardly be expected that the children would be able to properly draft a complaint bearing in mind their age and evolving capacities, particularly in view of Article 32 of the LP and Article 5 of the Rules. In order to ensure that the proceedings are adjusted to the child age and its evolving capacities to the maximum possible extent, it is necessary to draft relevant amendments to the LP that would stipulate a special simplified procedure for the receipt of and acting on the complaints filed by children in person.

According to the provisions of the Law on the Protector of Human Rights and Freedoms, the complaint may not be filed only by a child, but also by the relevant association and organization or elected representative acting on behalf of the child (Article 31, para 2 of the LP), provided that, in such a case, the complainant is required to attach his or her consent i.e. authorization of the injured party. Although the regulations do not explicitly envisage that the child’s legal representative may also file a complaint, such an authorization he is vested with arises from the general rules on the legal representation of the child.

The analysis of the rules on the submission of a petition on behalf of an injured party shows that the circle of persons and/or bodies that may file a complaint is too narrow. Likewise, the rules on the legal representation of the child in the proceedings before the Protector by the child’s parents or guardians as its legal representatives are missing. The relevant provisions of the law should explicitly provide for the authorization of a parent to file a complaint on behalf of the child, where it is necessary to distinguish between the cases when a parent shall act on behalf of the child as its legal representative and when he or she shall act as the child’s attorney, in which case the parent should be authorized to institute proceedings. Furthermore, it is required to envisage the rules stipulating that the child may exercise its right to an informed opinion in the proceedings before the Protector, not only when the child

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2 “The Official Gazette of RCG”, No. 6/2004

itself has filed a complaint, but also when other persons or bodies have done so on its behalf, as well as in case the Protector has instituted the proceedings at his/her own initiative.

## 6. Protection of the rights of the children deprived of their liberty and the children who are not living with their parents

Pursuant to the provisions of Article 28 of the Law on the Protector of Human Rights and Freedoms, the Protector shall be authorized to undertake, without prior notification, a checkout of all premises in which the children deprived of their liberty are held. The Protector is also entitled to communicate with the children deprived of their liberty without being monitored by the officials, while the child deprived of its liberty shall be entitled to file its complaint in a sealed envelope and the institution in which the child is accommodated shall forward the correspondence addressed by the child deprived of its liberty immediately to the Protector, unopened and unread, whereas any response by the Protector shall follow the same procedure (Article 28 of the Law on the Protector of Human Rights and Freedoms). These coordinated legal provisions are extremely important and effective because they stipulate the conditions facilitating the Protector to provide adequate protection of the rights of the children deprived of their liberty, who, being in such circumstances, are exposed to a higher risk of the violation and breach of their human rights. They become even more significant when we take into account that Montenegro is still facing the problem of accommodation of detained juveniles and the juveniles sentenced to juvenile imprisonment and corrective training for the period longer than two years, because there are no special facilities or institutions in which the juveniles could be accommodated separately from adults, as envisaged by the relevant international standards (The Convention on the Rights of the Child, The Tokyo Rules, The Beijing Rules).

According to the provisions of the LP, the Protector may have an insight into the operation of each governmental body, local self-governance body and public services and other public authorities in charge of the protection of the children. Accordingly, the LP sets forth a series of duties of those entities in order to ensure that the Protector may gain a full insight into all the relevant circumstances, unhindered and in cooperation with those entities.

Besides, these entities are obliged to provide the Protector with all the data and communications, documentation, copies of the requested files and documents and the like, as well as to allow him/her access to all premises (Article 40 of the LP). It is beyond any doubt that these provisions contribute to the efficiency and effectiveness of the work of the Protector in the filed of protection of the child's rights.

The applicable LP does not, however, envisage the authorization of the Protector to make a direct insight into the methods of providing care of the children who, under the decision of a competent body, temporarily reside or are accommodated by legal entities or individuals (homes for the children without parental care, special institutions for developmentally impaired the children, foster parents and the like). That such a possibility exists could only be indirectly inferred, particularly based on Article 15 of the Rules, envisaging that the Protector, i.e. the person authorized by him/her, shall be entitled to enter the official premises of each governmental body, local community body or public authority. In view of the need to create the conditions for conducting this type of control over the exercise and protection of the rights of children, who are especially vulnerable and exposed to a higher risk of violation of their human rights given that they are outside their natural family environment, it is necessary explicitly to stipulate the relevant authorizations of the Protector, including the authorization to enter, unhindered and without a prior notice, the premises where children are accommodated. Accordingly, the Protector shall be obliged to compile a report on inspection and deliver it to the person whose work was subject to such inspection and to the body supervising the work of that person.

## DRAFT LAW ON MONTENEGRIN CITIZENSHIP

*The Draft Law on Montenegrin Citizenship* is a special legal act (i.e. a draft legal act), which meets all standards of regulating the matter which represents its subject in a modern way. This draft law is primarily in accordance with Article 7 of *the Convention on the Rights of the Child*, because its provisions define the right to acquire citizenship broadly and in a manner that ensures that the child is not a stateless person in all situations when it is somehow factually connected with the state of Montenegro. During the analysis, we will focus only on explaining the basic principle and pointing out certain “inconsistencies” that have been noticed but that do not endanger the overall evaluation of this draft law.

### 1. Acquisition of citizenship

The initial fact that the Draft Law takes into account is the child’s origin (Articles 5 and 6), i.e. the citizenship of the child’s parents at the moment of its birth. Thus, the child whose parents are Montenegrin citizens will acquire Montenegrin citizenship regardless of the fact where it was born. If only one of the parents is a citizen of Montenegro, other relevant facts are also taken into account, so that the child will acquire citizenship:

- If it is born in Montenegro;
- If the child is born outside the territory of Montenegro, it will acquire citizenship:
  - o If the other parent is unknown, without citizenship or of unknown citizenship (*we think that we should add here the possibility that the parents choose the child’s citizenship, i.e. if one of the parents is a Montenegrin citizen and the other is not, the parents may choose that the child be a Montenegrin citizen and that it be entered into the book of citizens with the other parent’s consent*),
  - o If (the child) is left without citizenship;
  - o If an application for registration in the birth register and the register of Montenegrin citizens is filed before the child becomes 18.

- o In case of complete adoption if one of the adoptive parents is a Montenegrin citizen (*We assume that this provision refers to the adoption that has been performed in Montenegro pursuant to Montenegrin legal regulations because it mentions the form of adoption that exists in domestic legislation. The same problem arises in connection with Article 16, paragraph 1, item 3 that deals with the acquisition of citizenship by admission (and not birth) if the child legally and continually resides in Montenegro with its adoptive parent from incomplete adoption, who is a Montenegrin citizen. This also refers to forms of adoption and it is again unclear which concrete situations (groups of facts) the legislator had in mind. This further raises the question of what happens with the child's citizenship when one of the adoptive parents from complete adoption acquires Montenegrin citizenship by admission and whether the provision that regulates the acquisition of citizenship by admission when one of the parents has acquired citizenship by admission is applied in this case (Article 16, paragraph 1, item 2). We believe that it is necessary to perform a deeper analysis of possible (potential) groups of facts when it comes to adoption and the acquisition of citizenship and resolve the said situations in accordance with the principles of legal equality and the request to prevent the child from being a stateless person (i.e. provide that it always has citizenship).*)

The next fact that the draft law considers as a basis for the acquisition of citizenship is the fact that the child was born or found in the territory of Montenegro (Article 7); the additional requirements set forth by the legislator are that the child's both parents are unknown, or of unknown citizenship or without citizenship, or any other situation that would leave the child without citizenship. It is clear that the expression "found child" does not only refer to children without parents or children with unknown parents but also to the child who lives in the territory of Montenegro and whose parents do not have citizenship or whose citizenship is unknown and also to situations in which the child would be left without citizenship.

Montenegrin citizenship may also be acquired by admission (Article

16). When it comes to this way of acquiring citizenship, the right of the child is connected with its parent's admission into Montenegrin citizenship. The child has its authentic right to acquire citizenship by admission when it legally and continually resides in Montenegro with its adoptive parent who is a Montenegrin citizen, in case of incomplete adoption. In this situation, the child's admission depends on the citizenship of the adoptive parent, but the admission of the child into citizenship is not preceded by the admission of the adoptive parent because he (she) is already a Montenegrin citizen. When it comes to the child's admission into citizenship, it is also important that it is necessary to obtain the other parent's consent, except in case when the child has no citizenship. In case of dispute between the parents, the guardian institution will give its opinion. Also, the child who is over 14 has to give its consent to admission into citizenship.

## 2. Loss of citizenship

Montenegrin citizenship can be lost on 3 grounds: 1) upon request, 2) by force of law or 3) pursuant to international contracts and agreements (Article 21). In case of loss of citizenship upon request, the child's status is related to its parents (adoptive parents) who submit a request on behalf of the child. When the request is submitted by one of the parents because he loses citizenship by release, the other parent gives his consent if he himself is a citizen of Montenegro. If this parent, however, has unknown residence or if he is deprived of the ability to work or the parental right, then the request will be accepted if the guardian institution thinks that it is in the child's interest.

The draft law clearly defines the situation where the child has been placed into one parent's custody and care by a legally valid court decision – in this case, the other parent's consent is not necessary. Given that the Draft Family Law and this law are both in the preparation phase, it is necessary to harmonize the terminology that is used in them. Thus, for example, the Draft Family Law speaks about the autonomous performance of the parental right based on a court decision, and not about custody and care.

Release from citizenship (the loss of citizenship upon a citizen's request) in case of a child is limited by the requirement that such release does not leave the child without citizenship, which restriction has been imposed in order to avoid the stateless status.

## DRAFT LAW ON FOREIGNERS

Generally speaking, *the Draft Law on Foreigners* regulates the rights of foreigners in a satisfactory way, and it also regulates the issues related to children foreigners in a satisfactory way. The rights of the child that this draft law regulates are mostly related to the rights of the child's parents, but individuals who are below 18 and over 16 also have the rights that they can exercise independently. The tendency that has been more or less thoroughly implemented grants foreigners in Montenegro an appropriate set of rights (possibilities).

From the aspect of the rights of the child, special attention should be paid to the institution of temporary residence for the purpose of family reunion (Article 35). The request for issuing permission for temporary residence for the purpose of family reunion is submitted by a foreigner who is a close family member of a Montenegrin citizen or a foreigner who has been granted permanent or temporary residence or refugee status. Close family members include a spouse, a child born in or out of wedlock and an adopted child, i.e. a foster child. The draft law even extends the right to legitimately submit such requests to relatives, if there are special, personal or humanitarian reasons for family reunion. It is clear that the legislator wanted to cover practically all the situations and individuals who can submit a request for family reunion. However, thus formulated article of the draft law excludes a non-marital partner from the number of individuals who make legitimate requests for family reunion. A certain interpretation may lead to the situation where a child from a non-marital union may seek temporary residence for the purpose of family reunion, while the child's other parent could not do so because he/she is "only" a non-marital partner and not the spouse of a Montenegrin citizen or an individual who has been granted temporary or permanent residence, and also not a relative so that paragraph 3 of Article 35 of the Draft Law on Foreigners cannot apply to such parent. This means that the other parent would have to wait that the child gets permission for temporary residence and then submit his/her request. In this way, the child's right to live with both parents is violated and children born out of wedlock are indirectly discriminated against.

The extension of temporary residence in case of an underaged person who was born in the Montenegrin territory but does not have Montenegrin citizenship is directly related to the parent, i.e. guardian and such person's residence in the territory of Montenegro shall be extended by the period granted

as temporary residence to one of the parents or guardians of the child (Article 37 of the Draft Law). This is the only article in the Draft Law where the child's guardian is mentioned. It would therefore be advisable to harmonize this and other provisions of the draft law with provisions where the rights of the parents are related to the right of the child and vice versa. In other cases (when the child is not born in the territory of Montenegro), Article 36, paragraph 1 shall apply, so that the child's residence may be extended to a period of 3 years or until the fulfillment of requirements for permanent residence.

Granting the permission for permanent residence is possible under conditions set out in Article 40, paragraph 1 of the Draft Law. We will here pay attention to two conditions contained in Items 3 and 5. According to Item 3 permanent residence shall be granted to "an underaged person with temporary residence in Montenegro if one of the parents is a foreigner who has been granted permanent residence, with another parent's consent", and according to Item 5 permanent residence shall be granted "to a close family member of a Montenegrin citizen or foreigner with permanent residence in Montenegro or recognized refugee status" (according to the definition referred to in Article 35 of the Draft Law, close family members include a child, an adopted child or a foster child). The said provisions can be problematic for two reasons:

1. Item 3 refers only to the child (underaged person) of a foreigner parent who has been granted permanent residence and who needs the other parent's consent, while the child has already been granted temporary residence;
2. Pursuant to Article 35, Item 5 refers to children (born in and out of wedlock), adopted children and foster children of a Montenegrin citizen or foreigner with permanent residence in Montenegro or a refugee status. *It stems from the aforesaid that both Items 3 and 5 can apply to the child of a foreigner who has been granted permanent residence, while the requirements stipulated by these items are not the same. In case of Item 5, it is not necessary to obtain anyone's consent, nor is it necessary that the child has permission for temporary residence. We assume that the legislator's intention was to provide another parent's consent so that the child could get permanent residence, but this obligation has been relativized by Item 5. In view of this, we believe that it is necessary to more precisely define the provisions of this Article of*

*the Draft Law in terms of preventing possible ambiguities regarding the area of implementation of the said norms.*

The Draft Law on Foreigners contains special provisions on the legalization of foreigners' residence that refer to persons who are justifiably believed to be victims of the criminal offense of human trafficking. The relevant authority will allow them to stay and grant them residence in Montenegro for humanitarian reasons (Article 63), or grant them permanent residence if requirements set forth in Article 64 of the Draft Law on Foreigners have been met. These persons will also be given a special guarantee preventing their forceful removal as a result of illegally entering or residing in Montenegro (Article 67). The said provisions also refer to children (underaged persons). The existence of these provisions is very important for the protection of persons who are victims of the criminal offense of human trafficking and we may say that by this Montenegro has fulfilled a part of its obligation that arises from Article 35 of the Convention on the Rights of the Child that refers to the protection of children who are victims of abduction, sale and child trafficking.

# LAW ON MINORITY RIGHTS AND FREEDOMS

## 1. General review

*The Law on Minority Rights and Freedoms* is based on the Montenegrin Constitution, and the Charter on Human and Minority Rights and Civic Freedoms, which no longer exists in the Montenegrin legal system, which is why the wording of the law should be adjusted accordingly. The law itself envisages the primacy of international acts and obliges the state to follow and respect the standards applicable in international law in allowing the minorities to exercise their rights, so that the aforementioned fact that the law is based on the Charter is less problematic in practice. It must be taken into account, however, that for the reasons of legal security and equal treatment in the implementation of the law, it is always advisable to incorporate in the wording of the law itself the standards that the legislator is referring to. By means of the institution of acquired rights, the Law prevents the restriction or abolition of the rights and freedoms that members of the minorities, independently or together with other members of their group, enjoyed until the Law came into force.

Generally speaking, the Law ensures the protection of rights of minority members, both as individuals and as a group. Also, in terms of fulfilling international obligations, the state has assumed the obligation to create an environment where it is actually possible to achieve the proclaimed equality of minorities.

## 2. Obligations of the state

The obligations that the state has assumed include the conclusion of international agreements on the protection of the rights of minority members (Article 6) and the adoption of a minority policy strategy (which is within the Government's jurisdiction) in order to provide conditions allowing the minorities and their members to freely enjoy and promote their special national or ethnic characteristics (state institutions are also obliged to undertake appropriate measures, in accordance with the Minority Policy Strategy). The development and improvement of studying the history, tradition, language and cul-

ture of the minorities and the obligation of the relevant authorities to provide the protection of cultural heritage of the minorities and their members are also among the obligations of the state. The control mechanism for monitoring the exercise and protection of minority rights is the report that the Government submits to the Parliament once a year (Article 38). The protection of the rights is provided by state institutions, local government institutions and courts (Article 37). The state has also assumed the obligation to finance education in the language of the minority to every extent possible, and the obligation to finance groups, institutions, associations and non-governmental organizations that the minorities establish in all areas of life. The state has obliged the units of local self-government where a minority constitutes the majority or a significant part of the population to publish by-laws within their jurisdiction in the language and alphabet of the minorities (Article 27). Problems could arise in connection with the descriptive term “significant part” – whether it refers to 10%, 30 % or some other percentage. It would be good if the phrase “a significant part of the population” was more clearly defined.

The law also contains the prohibition of undertaking measures and activities that would change the population structure in the areas inhabited by minorities and that are aimed at restricting their legal rights and freedoms. We believe that the said restriction related to the aim of the measure or activity that changes the population structure is superfluous, i.e. that the prohibition of changing the population structure should be absolute. Namely, the real, essential aim in case of undertaking the said activities would certainly be hidden, i.e. masked by other aims, so that such restriction opens up the possibilities for abuse, which should be avoided at all costs.

### 3. Definition of minorities

According to the Law, a minority is a group of Montenegrin citizens that are less numerous than the predominant population and that have their common ethnic, religious or linguistic characteristics that make them special or different from the majority population. The legislator here adds that the group is historically linked with the Republic and that it is motivated by a wish to express its national, ethnic, cultural and religious identity (Article 2). The special protection of minorities is aimed at allowing its members to free-

ly use their own language, to have and freely express their national, i.e. ethnic background, confess their faith and promote their culture. Therefore, the said definition lacks the fact that a group may also be distinguished by its culture, i.e. that a minority group is not only defined by its special national (ethnic) background, language and religion, but also by its culture. Culture is not an accompanying element of minority identification, but a special element, so that a minority may be defined only on the basis of this element. It is not necessary that a group has all the characteristics that make it special; it is enough that it has one, which is why it is necessary to list all the characteristics in the definition.

#### 4. Personal and/or collective rights

The legislator is very explicit when it comes to this issue, and it says that minority members exercise their rights and enjoy their freedoms both as individuals and as part of a community. The manner of enforcing these rights certainly depends on whether they are exercised as collective or individual rights. Certain rights can be exercised both as collective and personal (individual) rights. The rights that we may consider personal in this context, i.e. that an individual enjoys independently from other members of his/her minority are as follows:

- equality with other citizens and equal legal protection (Article 4, paragraph 1);
- the right to express, preserve, develop, transfer and publicly display their national, ethnic, cultural, religious and linguistic identity, as a part of their tradition (Article 8, paragraph 1);
- the right to choose their nationality, accompanied by a full freedom of choice regarding the use of personal and family names and the names of their children (Article 10, paragraph 1). This freedom is important from the aspect of preserving the child's right to identity (Article 7 of the Convention on the Rights of the Child). The names are entered into the birth register and other personal documents in the language and alphabet of the minority, which means that the right to identity is fully protected in the part that refers to the name and nationality;

- the right to use their language and alphabet (Article 11, paragraph 1);
- prohibition of discrimination that refers to every type of discrimination, and not only discrimination on grounds related to the specific characteristics of minority group members (Article 39). The prohibition of discrimination is equally important when a minority member exercises his/her rights as an individual and together with other members of his/her minority.

The law, however, fails to regulate the freedom of confession by a special article. We believe that it would be important if, regardless of Article 8, paragraph 1 that guarantees “the right to express, preserve, develop, transfer and publicly display their national, ethnic, cultural, religious and linguistic identity, as a part of their tradition“, members of minorities and minorities as groups were guaranteed the freedom to perform religious rituals, attend religious services and privately or publicly express their religious beliefs. This freedom should be accompanied by an objection of conscience, which means that every individual that contrary to his/her faith or convictions has to perform an obligation that includes carrying weapons should be relieved of such duty.

When we speak about the rights of the child, we think that the text should contain one special characteristic – namely, the freedom of thought, conscience and confession as defined by Article 14 of the Convention on the Rights of the Child obliges the state to respect the right and obligation of the parents to guide the child toward exercising this freedom in accordance with its developmental abilities. This provision contains double protection of the rights of the child – on one hand, it protects the child’s right to be guided by its parents, without the influence of the state, but on the other, this guidance depends on the child’s developmental abilities, which means that the guidance which is not in accordance with the child’s developmental abilities is not allowed and that the state retains the rights to interfere in such cases. This way, the children are protected from possible abuse.

The other rights envisaged by the Law on Minority Rights and Freedoms are exercised as collective rights, i.e. as the rights that an individual exercises together with other members of the minority group that he himself belongs to. Given the large number of (collective) rights envisaged the law, and the fact that their definition is largely not contentious, we here want to point out the following: namely, all the rights that have been envisaged and the way of writing the norms indicates that minority primarily refers to national, i.e. eth-

nic minorities. This is not in itself a problem because national minorities are most often different from the majority population on more grounds than religious or cultural minorities, which is why it is necessary to envisage the protection of their language and alphabet, which most often includes the protection of their religion and culture and the freedom to choose their nationality. But such generalization creates the following kind of problem in Article 25 of the law: this article of the law stipulates the right to the proportional representation of minorities in public services, state authorities and local government. If we take the secularity of the state into account, then this provision cannot refer to minorities that are exclusively religious (and that are in no other ways special compared to the majority population) because it would violate the principle of secularity.

*In order to provide that the rights envisaged by the law do not remain only theoretical, we believe that it is important to add special provisions on the judicial protection of minority rights. In other words, we think that it is necessary to guarantee to all minority members the right to judicial protection if some of their rights have been violated along with the right to remove the consequences arising from such violation. This can either be done by making Article 37 of the Law more precise or by adding a special provision. The way in which Article 37 has been stipulated (the protection of minority rights is secured by state or local government institutions and courts) does not emphasize it enough that such protection is the personal right of every individual, but rather points out the authorities' obligation to provide such protection. The introduction of proposed amendments would help achieve an enviable level of minority rights protection, which can already be described as good.*

# DRAFT ASYLUM LAW

*The Draft Asylum Law* regulates in full detail the issue being its subject matter. The Law also contains the legal and procedural rules for granting asylum and a refugee status to refugees and their family members, which, from the aspect of the child's rights, is extremely important. Likewise, the Draft Law sets forth the rules envisaging other forms of protection (additional and temporary) for the persons at risk in their countries of origin. The Draft Law explicitly regulates the conditions for qualifying for some kind of protection as envisaged therein. It stipulates in detail each relevant procedure, as well as the rights that qualified persons can exercise during the period of protection, and the grounds on which such a protection ceases.

## 1. The Draft Asylum Law proclaims the following basic principles:

- The principle of subsidiary protection – when an asylum seeker does not fulfill the conditions for being granted the refugee status, the competent body is obliged to assess whether there exist conditions for granting another form of protection – Article 5 ;
- Prohibition of expulsion or return, in case this would pose a threat to a person's life or freedom – Article 6;
- The principle of non-discrimination– i.e. the prohibition on discrimination on all grounds – Article 7;
- Confidentiality and data protection– all personal data related to individual asylum applications, as well as any representations, explanations and the data from any documents obtained or used during the procedure shall be treated as confidential and shall represent an official secret - Article 8;
- Family unity – i.e. the obligation to take the measures to ensure family reunion with the consent of the asylum seeker - Article 9;
- Non-punishment for illegal entry into and/or sojourn in the territory of Montenegro – on condition that the person in question has directly come from the country in which his/her life is endangered

- and that he/she has submitted his/her asylum application with no delay - Article 10;
- Protection of persons with special needs – specifying which persons are deemed persons with special needs, including minors, unaccompanied minors, persons with mental or physical impairments, persons that were tortured, raped or exposed to other severe forms of mental, physical or sexual violence, and the law guarantees to such persons all relevant care – Article 11;
  - The clause referring to gender, i.e. the guarantee that the person will have the interpreter and official person of the same gender during the proceedings and that account will be taken that during the proceedings such a person is treated so as not to pose a threat to his/her gender identity – Article 12;
  - Compliance with legal order by the person who has been granted asylum -Article 13;
  - Restriction of political activity of the asylum seeker and/or the person who has been granted asylum – at issue is the restriction that also applies to the political engagement of the citizens of Montenegro and involves their participation in establishing and running the organizations the activities of which endanger the »security and public order of Montenegro, or the goals of which are contrary to the principles of the international law« - Article 14;
  - Voluntary returns – the competent body shall provide assistance to the persons entitled to protection in terms of this law or the persons whose right to protection ceased at their voluntary return to the country of origin or at their departure to a third country, and shall organize their return – Article 15;
  - The cessation of protection is possible only when the reason for such cessation is based on legally prescribed conditions, which is established under special proceedings –Article 16;
  - Right of appeal (legal protection) i.e. the two-instance proceedings regulated by this law. Likewise, this Article excludes the possibility of instituting legal proceedings against the decision of the second-instance body - Article17;
  - Cooperation of the competent bodies of Montenegro with the High Commissioner for Refugees is also envisaged in Article18.

## 2. Important characterizes of the proceedings

In order to provide security for asylum seekers, the Draft Law limits the deadlines for rendering decisions, so that the first-instance body shall render the relevant decision within 3 months (Article 19, paragraph 3), and the second-instance body shall render the relevant decision within 2 months (Article 20, paragraph 3). Likewise, Under Article 24, the bodies in charge of maintaining contacts with asylum seekers shall ensure that such persons can submit their applications as soon as possible and that a certificate on the receipt of their applications is issued. These provisions are deemed highly important from the aspect of legal security.

The Draft Law excludes publicity in the proceedings for granting asylum, but the legal representative, attorney or guardian of a minor and the representative of the High Commissioner and the interpreter may be present during the asylum seeker's giving a statement (Article 34, paragraph 2.) *We are of the opinion that the presence of the legal representative or guardian of a minor should be envisaged as a mandatory condition and not only as a possibility.*

The Draft Law also regulates the accommodation of persons, setting forth that persons with special needs, including children, should be provided with special accommodation and care. The details related to the accommodation and treatment of minors are specified in Article 28 of the Draft Asylum Law and they provide for the following:

- Appointing a guardian for the minor referred to as an unaccompanied minor,
- Shortening the deadline for rendering decisions on granting a 30-day asylum to unaccompanied minors;
- The obligation to take account of the accommodation, mental and physical condition of the minor, the best interest of the child, and the efforts to locate the child's family.

The provisions related to particular accommodation are not further detailed in the Draft Law, but there is a possibility that they be regulated through by-laws. *We consider that it is necessary to ensure that the acts taken meet the best interest of the child, and to shorten the deadlines for decision-making not only in case of unaccompanied minors, but also in all other proceedings involving a minor.*

The rights of an asylum seeker are regulated in Article 29 of the Draft Law. We underline that the Draft Law provides for free-of-charge elementary

and secondary-level education, right to healthcare and social welfare, the freedom of residence and movement and the freedom of confession. This chapter of the Draft Law also envisages the person's right to family unity.

The rights of the persons that were granted a refugee status after regular proceedings are expanded to include the right to college and university education in the institutions founded by the Republic under the conditions applicable to foreigners, while the right to family unity becomes the right to family reunion. This right is regulated in Article 47 of the Draft Asylum Law stipulating that a family member shall be understood to mean a spouse, an underage child and the guardian of a minor, but family reunion may also be allowed with other family members under justifiable circumstances. The question arises whether the guardian of a minor can be understood to mean the child's parent and/or adoptive parent because it is quite possible that the child be granted a refugee status when its parents have no such status. This is another form of discrimination against non-martial children.

In case a person is not granted a refugee status because he/she does not fulfill the conditions set forth in the Draft Law, and that person would, »in case of his/her return to the country of origin or other country, be subjected to torture or inhuman or humiliating treatment or punishment, or if his/her life, security or freedom would be endangered by a large-scale violence, external aggression, internal conflicts, massive violation of human rights and other circumstances that pose a serious risk to life, security or freedom« (Article 2, paragraph 4) – such a person may be granted the right to additional protection. This right will be exercisable for one year, but it may be extended for further 6-month periods as long as the relevant reasons exist (Article 54). The rights of such a person are identical to the rights of the persons with a refugee status, save for the right to college and university education and, as regards other rights, that person is subject to the provisions applicable to foreigners with approved temporary residence (Article 55).

The Draft Asylum Law also envisages another form of protection. At issue is a temporary protection referring to the persons (foreigners) »in case of sudden or expected mass influx from the country in which their life, security or freedom are at risk due to a large-scale violence, external aggression, internal conflicts, massive violence of human rights or other circumstances that pose a serious risk to life, security or freedom, and if, due to such mass influx, there is no possibility of conducting proceedings to make decisions regarding individual refugee applications« (Article 2, paragraph 5).

*The Draft Asylum Law does not provide for non-marital partners. From the aspect of the child's rights, this may create a certain problem. It may happen that a child is born of a non-marital relationship, where one of the parents and the child qualify for some kind of protection, but the other parent may exercise his/her right only independently on some other grounds envisaged by the law, but not through the family unity institutes i.e. family reunification. It is understandable that the proposer wanted in this way to ensure a higher level of legal security. However, the exclusion of a non-marital partner from the family group, on one hand, and exclusion of a parent from the right to family reunion, on the other hand, may well create the aforementioned factual situation, which means the breach of the rights of the child set forth in Articles 7 and 11 of the Convention of the Rights of the Child.*

## THE STATE BORDER CONTROL LAW

The State Border Control Law regulates the control of state border, the method of exercising control over the crossing of the state border of Montenegro, inland control, international border police cooperation and cooperation between state border services (Article 1). From the point of view of child rights, this Law is significant in terms of preventing illegal crossings of the state border for the purpose of averting abductions and trafficking in children and the abuse of children for drug trafficking and other forms of abuse.

An analysis of the Law is adjusted to the importance of the Law in the sphere of child rights and therefore includes the norms which are relevant in this respect. Under Article 6 of the Law the crossing of state border is defined as any movement of people across state border (paragraph 1). In order to cross the state border, one is required to possess a valid travel document i.e. other prescribed document. The border is crossed at a border-crossing (paragraph 2) except in cases of an international agreement or force majeure (Article 7 paragraph 1). In the event of force majeure, a person is under the obligation immediately to inform the competent bodies of such a crossing. Border control is carried out at the border-crossing location (Article 23 paragraph 1). Outside the border-crossing location, border control may be conducted on trains, planes and vessels (paragraph 2), and exceptionally in some other places for health and technical reasons or at the request of the party (paragraph 3).

Bearing in mind the importance of state border crossing control from the point of view of child rights, we believe that apart from health and technical reasons, added here should also be the prevention of trafficking in persons and/or drug trafficking in order to lay the grounds for the competent bodies to carry out control when they suspect that the abovementioned activities are conducted not only at the border-crossing area.

The obligations of a person crossing the state border (Article 24) are reduced to the presentation of documents with which he or she crosses the border, undergoing border control, not leaving the border-crossing location until the control procedure is over and non-evasion of border control. This Article fails to stipulate other obligations when at issue are children crossing the state border and/or persons crossing the state border with children and having the same obligations as other persons. It is clear that a child crossing

the state border is not doing it alone, hence it would be advisable to prescribe in Article 6 or Article 24, the age limit for an independent crossing of persons across state border and stipulate that below such age, a person may cross the border only if accompanied by an adult based on the presentation of the relevant travel document.

The Law also governs the protection of state borders including the control of the movement of persons along the state border for the purpose of ensuring its inviolability (Article 40). This Article lays down the possibility of halting and searching a person and/or means of transport crossing the border outside the border-crossing.

Following the analysis of the Law concerned, it is obvious that it includes no provisions directly pertaining to the rights of the child and that the provisions applicable to other persons are applied to children accordingly. Likewise, persons who cross the border with children have no special obligations prescribed by this Law. For this reason, we stick to the abovementioned suggestion related to the location of exercising border control.

## THE LAW ON MEDIA

The *Law on Media* (hereinafter referred to as LM) opens with a brilliantly phrased Article 1 which stipulates the implementation of international standards in this field. Moreover, it refers to the case law of the European Human Rights Court. While showing the earnestness of the legislator in taking over and fulfilling the (international legal) obligations, this provision also facilitates the making up for any gaps in the legal text by applying international acts, i.e. it enables the practice and theory to assign the institutes and legal standards which are currently in use the significance they have in European practice. Unfortunately, the proclaimed guidelines have not been completely incorporated in the Articles of the law which follow and the quality of the text fails to meet the highly set standards from Article 1. This is important for the enforcement of the law, because it imposes the issue of the readiness of the subjects enforcing the law, especially courts dealing with protection of rights, to base their decisions on international acts. We, therefore, believe that all obligations and rights should be clearly stipulated in the legal text.

From the point of view of the children's rights, the focus of further review would be on the following rights and freedoms:

- The freedom of expression (Article 13, CRC) – whether a child is enabled to express his/her opinions (views) through media, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers;
- The right of the child to adequate access to information (Article 17 CRC) – that States encourage the mass media to disseminate material of social and cultural benefit to the child and take measures to protect the children from information and material injurious to his or her well-being;
- Protection of privacy (Articles 16 and 40. CRC) – whether protection of the child from interference with his or her privacy and the right to protect his or her honour and reputation has been ensured;
- Respect of all the basic principles of the convention – whether the Law on Media takes care of the enforcement of all the rights of the child in view of the Convention's ground principles, especially with regard to the non-discrimination principle, a rather prominent principle in the field of information.

**1. The Media in Montenegro are free.** The legal restrictions are in accordance with international regulations, so that one can conclude that this right has been honoured in the domain of enforcing the right of the freedom of expression in the media. Founding the media and their distribution are free, there are anti-monopole clauses in the field of information, while operation of foreign media and information institutions has been separately regulated. All the legal provisions, we believe, ensure smooth operation of the media and allow full freedom in the flow of information.

**2. Special protection of minors** is set out in Article 22 of LM. This Article is also, however, in breach of one of the key principles of criminal proceedings against minors – the principle of respect of privacy in all stages of criminal proceedings (Article 40, Paragraph 1, Item VII, CRC). As the publication of the verdict is only one stage in the procedure, any disclosure of identity of a minor, even after the final verdict has been passed is prohibited. The disclosure of the proceedings cannot be justified by their completion because information about the minor comes from the verdict and there is no verdict outside criminal proceedings. This provision is in breach of Article 475, Paragraph 2 of the Law on Criminal Procedure which strictly forbids the disclosure of a minor's identity, even in a situation in which the court allows the publication of parts of the proceedings. We would use this opportunity to highlight the importance of the best interest of the child principle which, among other things, implies that in all situations in which a child's rights are being decided upon, its best interests have priority over the interests of other parties involved, in this case, the public. In this way, even if there were no legal regulations expressly banning the publication of a minor's identity, giving priority to the public interest over the interest of the child is in breach of one of the fundamental principles of the Convention on the Rights of the Child. Verdicts of the European Court in Strasbourg also prove this fact as they expressly give priority to privacy principle over the public principle.

Also, in considering the issue of privacy of minors outside criminal proceedings, the LM completely overlooked the fact that, in order to publish facts (information) on minors, one requires approval (from a legal representative or minor personally). Consequently, there are no provisions laying down the age for granting independent approval, i.e. before which age the approval for publishing information is given by a lawful delegate and after which the media are obliged to obtain approval directly from the minor. Further consequ-

ence of failing to regulate the obligation of giving approval is that the protection of the right to privacy (ban of further breach, i.e. compensation of damage) could be requested only in line with Article 20 of the Constitution that guarantees the right to privacy, which is very unfavourable for the injured party. Indirectly, Article 20 of the LM could serve as grounds for protection of the privacy right in the part in which it provides for the responsibility of the media outlet founders should a media outlet publish an item of information which “disrupts the legally protected interest of the person to whom the information refers or which insults the honour and the integrity of the individual,” but the extensive interpretation of this provision is somewhat restricted by Article 2 of the LM stipulating the rights and freedoms which constitute grounds for media activities, where there was no room for the right of respect for privacy. In view of the aforementioned, we believe that it is advisable that the Law on Media should include a provision expressly stipulating the obligation of the media to respect the right to privacy. We believe that provisions of Article 23 of the LM should be additionally analysed as it provides for the ban on publishing information which instigate discrimination, bigotry or violence, because the listed discriminatory grounds have been limited to belonging or not-belonging to a certain race, religion, nation or sexual orientation. This provision needs to be expanded, leaving the list of discriminatory grounds open, i.e. publication of any information which instigates discrimination on any grounds should be banned.

**4. The right to correction and response** has been adequately reinforced by threat of indictment, should media fail to publish the correction or response as provided by LM. Here too, we would recommend that minors below the age of 16 should have the right to ask for the publication of a correction or response independently, which would imply that they are entitled to take up legal proceedings should there be an infringement on their right to a correction or response. The participatory principle, or the principle of a child’s right to be involved in all issues that concern him/her, in keeping with their developmental capabilities obliges the legislator to consider whether a sixteen year old’s developmental capabilities allow them to decide independently whether they would use and protect their right to a correction and response.

# THE RIGHT OF A CHILD TO EDUCATION

Schooling and the right to education in Montenegro has been regulated by a set of laws and the review that follows refers to the following ones:

- *The General Law on Upbringing and Education*
- *The Law on Amendments of the General Law on Upbringing and Education*
- *The Law on Pre-school Upbringing and Education*
- *The Law on Primary Education and Upbringing*
- *The Law on Education and Upbringing of Children with Special Needs*

The constitutional framework regulating this particular right of the child is found in Article 62 of the Constitution which guarantees universal and equal right to schooling for everyone and stipulates that primary education is compulsory and free of charge. The stipulation of Article 62, Paragraph 2 of the Constitution makes it clear that there is free tuition and not free education in Montenegro. We would like to highlight here that free primary schooling is one of the goals that the CRC sets before its States Parties (Article 28, paragraph 2 of the CRC). In this context, it would be very important that the primary school costs be minimised, i.e., that tuition fee should include some of the accompanying costs - e.g. transport to school where necessary, textbooks and teaching aids, etc. Free Education should be the goal of a state which is obliged to put in place measures for gradual provision of truly free education.

*The General Law on Upbringing and Education*<sup>3</sup> with its *Law on Amendments of the General Law on Upbringing and Education* is the umbrella law in the field of education. This law primarily deals with the schooling system and has multiple significances from the aspect of the right of the child. Firstly, it sets out the goals of education, the key principles which serve as grounds for the education system, as well as the rights and the liabilities of the pupils and students.

### Problems observed during review would be as follows:

1. Article 1 of the Law requires adjustment of terminology with the one currently used by international instruments;

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<sup>3</sup> *The review of the law does not include provisions which refer to adult education*

2. The goals of education (Article 2) are largely compatible with those set out in Article 29 of the CRC. One should, however, add that the goal of education is to enable comprehensive development of individuals up to their fullest potential (Article 2, paragraph 1, item 1). We would also like to highlight that, when it comes to “the development of a child’s sense of statehood and belonging to a culture, tradition and history and development of a sense of national identity, and belonging to a culture, tradition and history”, the Convention uses the term “developing respect” (not “sense”), which is a somewhat different term, implying not only the development of an individual’s sense as a prerequisite for developing respect of one’s own identity, but also implies respect for the same values in other people, which, should, we believe, be the whole point of this norm;

*Although the very principle of non-discrimination has been incorporated in the education goals, and has been set out separately in Article 9 of the Law, however, equal treatment refers to the citizens of Montenegro, which is not in keeping with the principle of non-discrimination as stipulated by the Convention, It is, namely, essential to guarantee the children who are not the citizens of Montenegro the right to be included in the education and upbringing system under certain circumstances using a systemic law, regardless of the fact that certain laws, or draft laws, (e.g. Draft Law on Granting Asylum) guarantee the right to education of certain non-citizens of Montenegro residing in Montenegro. It would be advisable to stipulate what constitutes discriminatory behaviour and, in view of that, stipulate that discrimination would be any direct or indirect differentiation and endorsement thereof, exclusion or limitation for the purpose of precluding the claiming of rights, reduction of rights or cessation of equal treatment of a child, i.e. pupil.*

3. The *participatory* principle has been proclaimed within the goals of education in Article 2, item 2 and item 6. The former reference refers to the choice of education programmes while the latter refers to participation “on all levels of activities”. We, however, believe that the phrase “on all levels of activities” testifies to its declarative nature and lack of understanding of this principle, because children cannot and should not participate “on all levels of activities”. They should participate in issues that directly concern them in a way commensurate to their capabilities.
4. The rights of pupils have been stipulated by Article 97 of the Law, whi-

le their liabilities have been stipulated by Article 98. It is primarily important to stress that pupils should have responsibilities, not duties or obligations. Certain corrections should, we believe, be made to the article providing for the rights of pupils. In principle, the law should guarantee the pupils (i.e. the children) that everyone in school is obliged to respect their rights guaranteed by this law as well as by other laws in force in Montenegro, i.e. it should guarantee the respect for integrity and personality of each pupil (disciplinary measures shall be applied in a way commensurate with the child's human dignity). It is necessary to ban physical violence and insults to a child's or pupil's person. This is particularly important because one of the pupils' obligations is to respect the rights of others. Only then is it possible to list other rights as stipulated by Law. The list needs to be extended to include the right to lodge a complaint to grades and to claim other educational rights. Failing to set out the legal tools to help a child or his/her legal representative protect the rights that are guaranteed to the child is considered to be a grave omission. In order to ensure full protection of the rights of the pupils, one should first stipulate that the institution should ensure respect for the pupils' rights. Also, it would be necessary to provide for the obligation of the staff to report violation of a child's (pupil's) rights, whenever they notice such violation, as well as who should they report it to. The law should also provide the child or his/her legal representative with a legal tool to do so (a complaint). Under the current law, complaints lodged by the child and its parents are stipulated by Article 95 which provides for the competence of the parents' committee - namely its remit is to consider complaints related to education and upbringing. But this whole issue is left unregulated as the law does not stipulate who has the right to a complaint and when, to whom a complaint can be lodged, who decides on the complaint and who is in charge of implementing a decision reached on the complaint. With regard to that, we believe it important to set out the following:

- the right of the child to lodge a complaint (i.e. his/her legal representative on his/her behalf);
- in which situation a child may lodge a complaint (regarding grades obtained and claiming other educational rights);

- to whom should a complaint be lodged - the principal would be the natural destination;
  - deadlines in deciding on a complaint;
  - enforcement of the decision on the complaint;
  - the obligation of the competent body to consult a child in the procedure of reaching the decision and the way in which a pupil (child) participates in the procedure.
5. One of the pupils' rights is the right to timely and complete information, complemented by the right to receive instructions on the pupils' rights and obligations at the beginning of a school year. These rights should also be stipulated in such a way as to allow a pupil to be informed about his/her rights and obligations at any point, not only at the beginning of the school year, while the right to timely information should be extended to include all issues regarding his/her education.
  6. Under this Law, the state took upon itself to provide primary education under equal conditions through the network of institutions (Articles 8 and 42). One of the ways to ensure equality is to include the rights concerning pupils' standard. These provisions are aimed at including certain categories of pupils in the process of schooling with the necessary support that the state is providing to increase the accessibility of education. The law has, however failed to stipulate one of these rights - the right to transport fee participation - in more detail which leaves an open issue of who is entitled to this right and under which conditions. We believe it very important in view of the compulsory nature of primary education and the responsibility of the state to provide the children with access to schooling through its network of institutions and in other appropriate ways. If one takes into consideration the fact that a number of children do not have adequate educational institutions in their places of residence, we believe that it is necessary to be more specific in this provision when it comes to children (pupils) in primary schools, because primary schools are compulsory, while, when it comes to secondary education, the decision may be left to the educational institutions, local authorities, etc. who would further specify this issue with regard to the needs of the local population and their own capacity.

## THE LAW ON PRESCHOOL UPBRINGING AND EDUCATION

Preschool upbringing and education is considered to be vital in encouraging a child's upbringing and education and timely socialisation. The state is, therefore, obliged to enable as many children as possible to be included in preschool upbringing and education. This further implies the obligation to provide various modalities of including a child in the education system at a preschool age. Although the provision of preschool programmes offers assistance to the parents in their care for the children, the emphasis should be on the right of the child to adequate environment in which it should acquire initial social behaviour skills and the right of the child to an encouraging environment which would contribute to it developing to its fullest potential. It is therefore required to ensure that all 4 fundamental principles of the Convention on the Rights of the Child are clearly recognised and incorporated into the system. A particular task would be consistent implementation of the principles of non-discrimination, especially bearing in mind that the grounds for further education as a prerequisite for breaking free from the poverty circle are set at the pre-school age. It practically means that it would require providing the poorest categories and Roma children with equal opportunities to access preschool upbringing and education. The same refers also to children invalids, i.e. children with arrested development.

The following points come up in the analysis of the aforementioned:

1. Preschool education and upbringing includes all children before they start primary school (Article 3 of the Law on Preschool Upbringing and Education, hereinafter referred to as LPUE). This means that the law does not stipulate the bottom age for a child to join organised groups within institutions. We should also stress the following: Article 26 of LPUE stipulates that enrolment of children is performed according to prescribed conditions, wherein it is unclear to which prescribed conditions the law refers in this section. Article 8 of the LPUE stipulates that children stay in a nursery up to the age 3, while children between the age of 3 and school age should stay in kindergartens. Article 24 stipulates the number of children per group. Therefore, the only conditions ensuing from the legal provisions are the age of the child on the

- one hand and institutional capacities on the other. This further opens the issue of guarantees the state provides regarding claiming the right to preschool education and upbringing - i.e. whether in each particular case a child would be able to enrol the institution of choice and the institution with a curriculum its parents consider appropriate.
2. The law singles out children with special needs including gifted children and retarded children. The legal text, however, does not elaborate which specificities refer to gifted children, while for retarded children, the text stipulates that, for those children who cannot be included in regular curriculum, the forms and the contents of activities are set up in special curricula (for children who can be included in regular curricula additional and individual programmes are stipulated). We should highlight that the inclusive principle should be applied whenever possible, which means that this principle should be stressed in the very text of the law.
  3. The law provides that parents participate in the costs of school meals for the children in preschool institutions (Article 35 LPUE) and designates the competent body and criteria to determine the co-payment. It also provides that “the cost of school meals for parentless children and children whose parents are the beneficiaries of the family social benefit in an institution from Paragraph 1 of this Article, is to be paid by the Centre for Social Work on the territory of which the child, i.e. the parents reside.” The law does not provide, however, for the obligation of the state to improve the access of vulnerable children and children from marginal groups to preschool education other than subsidising the cost of children’s stay in these institutions.
  4. LPUE provides a wide range of modalities of preschool upbringing and education and grants the parents the right to choose. The parents choose in line with the interests and the needs of their child. The diversity of programmes on offer could certainly contribute to the inclusion of more preschool children in the educational process at a very early age. It would be useful to review the implementation of the drafted concept and actual options to choose from, but this is a different issue which we shall not elaborate on this occasion.
  5. Regarding the inclusion of children, we believe that we should point out the following: neither the LPUE nor the Law on primary educa-

tion do not provide compulsory school preparation, i.e., the children's participation in preschool upbringing and education. This should be borne in mind while setting up the primary education curricula in view of the responsibility of the state to provide equal right to education to everyone. Children who have been included in preschool education and upbringing curriculum are at an advantage compared to those who have not been included. Thus, setting up the primary school curricula which directly build on the preschool curricula, puts children who have not taken part in it at a disadvantage, which infringes upon the non-discrimination principle.

6. Since the systemic law on education and upbringing does not include a norm which would protect the dignity and the integrity of the pupils, i.e. children, in the education system, we consider it a legal gap that the LPUE does not provide any guarantees to that effect. Moreover, the law only mentions rights regarding the right to choose curriculum (Article 7). Unfortunately, this is not an encouraging approach, because it is obvious that, in spite of the noble intentions to modernise the preschool education concept - which is best reflected in a large number of modalities provided by LPUE - it retains the protectionist approach which does not recognise a child as a legal person in preschool education.

## PRIMARY EDUCATION LAW

Primary education should, according to CRC, be compulsory and free of charge. The state is obliged to put in place mechanisms to ensure comprehensiveness, reduce the drop-out rate, as well as appropriate control of the stated commitments. The review of this law is based exclusively on the right of the child and the implementation of these rights in the education system in primary schools and, we shall not, therefore, elaborate on organisational or conceptual solutions which do not have direct bearing on the rights of the child.

In the section of the Law which deals with the right to education of children with special needs (Article 9), the following two groups of children stand out: 1) children with learning difficulties and 2) developmentally challenged children. This, however, calls for terminological correction in cooperation with experts in this field, for the purpose of their adjustment with international instruments. It also requires clearer and more explicit focus on the inclusive model of education for children with special needs.

The time the children spend in schools is limited by Article 26 of the Law and depends on the age of the pupils, which respects the right of the child to leisure, while Article 16, which stipulates the extended curricula, obliges the school to organise these programmes in line with its capacities, to include extracurricular activities and outdoor classes, which raises the quality and diversity of the curriculum. Article 19 is in line with these trends, as it stipulates that a school should develop extracurricular activities - i.e. care for extracurricular cultural, sports and artistic contents to be offered to the pupils.

Children start school in the year in which they complete six years of age (Article 31). Therefore, the age limit as a prerequisite to enrol school has been stipulated. Possible deviations have also been stipulated (early enrolment, or delayed enrolment), which have been accompanied by a corresponding process mechanism. One should also consider enabling longer delay in enrolment, under special conditions to allow the children who, due to subjective or objective reasons could not enrol primary school in time to manage to claim their right to primary education. Obligation of enrolment in primary schools lies on the parents, while it is up to the schools and competent inspections to monitor enrolment (Article 36). It is, however, arguable whether fines are the most efficient mechanism to use when addressing this issue, in view of the fact

that that usually the unenrolled children come from the poorest and the most marginalized families. We believe that affirmative action should be provided along with individualised approach to the non-enrolment issue, or the issue of children giving up school. To that end, one of the solutions could be to let local authorities who are in charge of education (schooling) arrange for counselling and mobile teams to implement affirmative action to increase the rate of enrolled children and reduce the rate of discontinuing education.

With regard to completion of education and attending school for children over 15, we believe it is a good solution that the Law allows these children to be included in regular education up to the age of 17 at their parents' request. We also believe that a child between ages 15 and 17 should be allowed to attend school regularly at his/her own request, too. We, however, deem as completely inappropriate the legal provision which obliges the school to issue elementary school certificate to a child over 15 years of age at the parents' request even if the child has not completed school. Namely, this raises the issue of the purpose of issuing such a certificate, and, apart from that, such an attitude on the part of the legislator diminishes the power of compulsoriness of schooling and renders regulating elementary education as compulsory completely irrelevant. All this leads to a conclusion that the only compulsory element here is that a child should have a certificate of graduation from primary school obligation, without actually having the obligation of attending and completing primary school. It is the obligation of the state to enable all children to have education. And when one takes into account the section regulating the completion of primary school obligation, one concludes that this obligation is too formalized and that it overlooks the proclaimed goals of education and the very purpose of prescribing compulsoriness of primary education which should serve only one purpose – that all children should acquire elementary knowledge and skills necessary for them to be able to lead an independent life.

One of the guarantees of the right of the child to primary education is included in Article 42 which provides that a pupil may not be expelled from school during compulsory schooling, but that he/she can be transferred to another school according to the procedure stipulated in that article.

*The Law on Primary Education* stipulates also the complaint of the pupil to a grade obtained in subjects at school or in demeanour (Article 62), which is submitted to the principal, while the committee appointed by the principal reaches the final decision on that pupil's complaint. There is, however,

no deadline stipulated for the committee to reach this decision. This does not, however, demean the need to provide in principle the right of a pupil to a complaint in the General Law. We also believe that it would be necessary to introduce the right to a complaint and corrective measures provided in Article 66 of the Law as well as the right to claim other rights and the obligation of the body imposing a measure to hear out the pupil's opinion first.

# THE LAW ON EDUCATION AND UPBRINGING OF CHILDREN WITH SPECIAL NEEDS

Quite clearly, the Law on Education and Upbringing of Children with Special Needs was passed following an in-depth and thorough process, a comprehensive review of international norms and standards with regard to education of this heterogeneous social group. The well thought-out process which preceded the passing of this law makes this law easy to review. It does not take much effort to establish that almost everything that should have been done on the legislative level with the aim of creating a legal framework for adequate redress for the rights of the children with special needs in the education segment – has been done. The law is based on internationally accepted values, principles and standards, while the legislator wisely accepted the suggestions coming from relevant experts who were involved in the consultative process before the law was passed. The authors of this text can only express their view based on empirical truth – that a good law does not guarantee a good-quality system regulated by law. It is, therefore, the implementation of the law in question rather than the law itself that requires reviewing. This would help assess the actual situation regarding education and upbringing of children with special needs, and could, possibly, allow for offering recommendations to adjust practice to the law.

We should highlight a few points, as food for thought for the body in charge of drafting legal regulations (and their amendments) as well as the legislators themselves.

## 1. Principal Dedication to the Inclusive Approach

According to Article 8 of the Law, upbringing and education of the children with special needs take place in preschool institutions, primary education institutions and secondary and vocational education institutions, as well as special institutions dealing with upbringing and education of children with special needs. Articles 13-16 of this Law stipulate the following issues: curricula with adjusted performance and additional professional support, special

education curricula, upbringing curricula and personalised education curricula. These legal provisions clearly display the intention of the legislator to set up inclusive approach as the grounds for organising and implementing education of children with special needs. We still believe that Article 8 of the Law should stipulate more clearly the principle that education and upbringing of children with special needs should be rolled out at school, as a rule and whenever possible (together with “typical children” allowing for greater integration), and only exceptionally in a separate institution. Also, the same norm should stipulate criteria for the implementation of the exception, as well as that it is an exception to provide upbringing and education in a special ad-hoc institution, i.e. that inclusive education is the goal, even if it is achieved through curricula of occasional and appropriate inclusion of the child in regular school, through mutual participation in extracurricular activities of the school, i.e. by sharing the curriculum in some subjects with their peers, all in keeping with the child’s personalised curriculum.

## 2. Participation in Drafting Orientation Proposal

According to Article 20 of the Law, the Committee drafts the orientation proposal based on their estimate, discussion with the child’s parents, as well as based on pedagogical, social-pedagogical, psychological and other documents they obtain from relevant institutions. We believe that in proposing a child’s orientation, mostly adequate participation of persons relevant to the child and to advocating its interests has been provided. We, however, believe that a child’s own participation in this process should also be stipulated, whenever possible with regard to age, maturity and child’s capacity to express its wishes and opinions. This would help render the child’s participation in all actions of concern to it as a value of the Convention on the Rights of the Child (CRC) completely legally operational in the field of upbringing and education of children with special needs. We also believe that one should add the child’s guardian to the list of people with whose cooperation the orientation proposal is reached. This is beneficial in cases of parentless children, when it is necessary to have the guardian participate in the protection of rights and interests with respect to the child’s personality, growth and development.

## 1. Introductory Remarks

The present analysis is, on the one hand, conditional upon:

- 1) the scope, the contents and the structure of the Social and Child Protection Act (hereinafter: the SCPA), and
- 2) on the other hand, the level of harmonisation of the SCPA with the norms, principles, rules and standards contained in the relevant international documents, primarily the Convention on the Rights of the Child.

The focus of professional attention in preparation of the present comments is directed at the rights and needs of the child, as well as at the intentions of the legislator reflected in the word, the spirit and the concept of the norms comprising the SCPA.

## 2. Overview of the SCPA Structure

The most important chapters that make up the SCPA are the following:

1. Basic provisions,
2. Fundamental rights arising from social protection,
3. Fundamental rights arising from child protection,
4. Social work services,
5. Institutions of social and child protection.

Such a structure primarily reflects the fusion of the fields of social and child protection, which are separately regulated, i.e. subject to different regulations in other countries, into the framework of one legal text.

## 3. Principles of Social and Child Protection

Within the basic provisions, the legislator insists on:

- a. setting forth the principles of social and child protection (Article 3),
- b. specifying target groups, i.e. entities that are accorded special protection under the SCPA (Article 4),

- c. establishing the so-called explicative legal norms, which are aimed at defining the most important concepts whereupon the SCPA is based, which the SCPA uses, and which are of vital importance for the validity and legal existence of the SCPA (Article 13).

With regard to the principles on which social and child protection are based, it should be pointed out that the legislative practice, as well as the legal practice and general social norms, makes it possible to choose between the two following solutions in drafting of a legal text:

- not to define the principles on which the act is based explicitly in the legal text, or
- to define the principles explicitly in the legal text, as it has been done in the SCPA.

It should also be pointed out that the principles must be evident in every separate part of the act. Namely, it is more important for a principle to be present in every separate part of the act than to be formulated as a legal norm (as a rule, within general or basic provisions) without the correlation between the formulated principle and other separate parts of the act. This particular remark is supposed to draw attention to the formulated principles on which social and child protection are based, as defined in Article 3 of the SCPA, and (even more) to serve as an instrument of verifying the existence of those principles in other separate parts of the SCPA.

The principles defined in the basic provisions of the SCPA are the following:

- respect for the dignity of recipients of benefits and services in the field of social and child protection,
- personal responsibility and active participation of beneficiaries in creating objectives and activities within the domain of social and child protection,
- pluralism of providers, activities, forms, methods and services in the domain of social and child protection,
- partnership and association of different providers of activities and programmes, particularly on the local level.

We point to the fact that the pluralism of providers, activities, forms, methods and services in the domain of social and child protection, defined as a principle of social and child protection, is not sufficiently incorporated in the relevant provisions of the SCPA. In that sense, pluralism in social and child protection cannot be seen sufficiently clearly as normatively operationalized.

As target groups that require special protection, the SCPA defines *inter alia*:

- children without parental care;
- children with physical, mental and sensory disabilities;
- abused and neglected children;
- children with behavioural disorders.

A conclusion that may be derived from this is that the legislator has consciously and carefully singled out children as a special target group that is particularly important from the aspect of the need to be treated within the framework of social protection. It can be concluded from the relevant terminology used in the SCPA that it is adequately neutral and non-discriminatory.

#### 4. Normative Definitions

We would also like to stress that the use of normative definitions in a legal text is a positive approach in terms of appropriateness. However, such an approach runs a risk of producing insufficiently good definitions. Leaving undefined a term that is significantly used in the Act means leaving the theory and also the legal practice to »deal« with its definition. This means that the legal practice may, due to the lack of sufficient grounds and instructions in the Act, resort to a deviant understanding of the term used in the Act and distort the intention of the legislator with regard to its meaning. On the other hand, if the meaning of a term is defined but not well enough in the Act, the practice and enforcement of that legal regulation is threatened by a different, but equally serious, danger. A bad definition limits the legal practice in constructive and appropriate interpretation of the legislator's intention (if the meaning of the term is not defined) and limits it to the meanings that transcend life. We will present a few, in our opinion inadequate, definitions of certain terms. Under the SCPA (Article 13, paragraph 1, item 3), »a child with disabilities is a child who can be trained for independent life and work and a child who cannot be trained for independent life and work«. Such a definition of a child with disabilities does not reflect the intention of the legislator to have the social protection system that is based on the principle of social inclusion of children with disabilities. The legislator's easy acceptance of the fact that a child cannot be trained for independent life and work, on which the rights of these children arising from social protection are based, does not sufficiently reflect the intention to facilitate the inclusion of children with disabilities into the society based on their remaining capacities, but with the intention to first identify, strengthen and de-

velop children's remaining capacities and abilities using social work services and personalised programmes designed for every particular child. Item 4, line 1 of the same Article of the SCPA sets forth that »a single provider is a parent who is divorced or faced with the situation that the other parent is deceased or unknown, and who sustains an underage child or a child of legal age who has been incapacitated for work before reaching the age of 18, until he/she enters into matrimony or a common law marriage«. It should be noted here that the definition of a single provider should also include a parent who is not divorced but has a child born out of wedlock, as well as a parent of a child born in marriage who is not divorced but has long ago stopped cohabiting with the other parent. Parents having such factual status also represent single providers, but with certain deficiencies that their children may feel and that may be mitigated with an appropriate package of benefits and services provided by the system of social and child protection.

Pursuant to item 8 of the same Article of the SCPA, »a beneficiary is a person who enjoys benefits in the system of social and child protection«. In terms of the integrative approach to social protection and the approach implying participation of beneficiaries, a beneficiary cannot be understood to mean only a person who is entitled to some benefit in the system of social protection, but in addition to benefits, and in some cases even before they are determined, the possibility and the need for provision of social work and social protection services must be examined. The fact that the social protection system is based on benefits makes it rigid, inflexible and showing no respect for the primary need for services that facilitate maximum social integration of the beneficiary, as well as keep the beneficiary in his/her natural (family) environment, provided that the society (support system and services) enable the beneficiary to preserve and develop his/her potentials. Also, linking the term "beneficiary" only with the rights arising from social and child protection unduly prevents other entities (apart from persons) to be defined as beneficiaries. A beneficiary of social work services (Article 63 of the SCPA) does not have to be only a person, but may be a family or a social group. In view of the foregoing, we propose the following definition of a beneficiary:

*A beneficiary is a person who enjoys benefits in the system of social and child protection, or a person, group or family who receives social work services (alternatively, social protection services). Within the meaning of a beneficiary, a family is any primary family group, extended family or foster family.*

According to item 1 of the same Article of the SCPA, »a family is made up of married or unmarried partners and children (legitimate, illegitimate, adopted and

step children) and other relatives living together«. The anachronistic term »bračni i vanbračni *drugovi*« (literally, »married or unmarried *companions*«) should not be used in the definition of a family, since it is burdened with a socialist-communist ideological reference to *comrades*. We believe that the terms *partners* or *spouses* should be used instead of *companions*.

## 5. Prevention of Institutionalization of Children

Under the SCPA (Article 12), »basic social protection benefits are: 1) family cash benefit; 2) personal disability allowance; 3) allowance for home care and assistance; 4) placement in an institution; 5) placement in another family; 6) allowance for professional rehabilitation and vocational training; 7) health care; 8) coverage of funeral costs; and 9) one-off cash benefit«. On the basis of the analysis of elementary social protection rights, with particular emphasis on the rights of the child, it may be concluded that the legislator has not paid sufficient attention to the child's right to develop in the family environment, to the need to introduce services aimed at strengthening or rebuilding parental capacities for the purpose of providing adequate care to the child, and if that is not possible, to the need to find another alternative solution for the child, which is aimed at keeping the child in the family (extended or foster) rather than referring him/her to a residential institution. Placement in an institution implies that the institutionalized person – in our case, the child - is in specific circumstances where there are indications that the child's desired living environment has deteriorated so much that the child can no longer live with his/her family or with his/her parents.

This immediately takes us to the question or the problem of prevention. How much should prevention be used as an institute of social protection in the sense that its goal is to avoid the occurrence of circumstances where there are indications that the child should be deprived of direct parental care and family environment? We believe that it is certainly necessary to discuss preventive activities the purpose of which is to avoid putting the child in a situation where he/she should be deprived of direct parental care or family environment. Here we put intentional emphasis on *the prevention of depriving the child of parental care and family environment*, since we do not want *the prevention of the child's institutionalization* to be the first issue discussed within the framework of preventive activities. It should also be stressed that the prevention of institutionalization represents, in a sufficiently large number of cases, only the second step after the prevention of depriving children of parental care and family environment. This, first

of all, means the possibility to prevent parental dysfunctionality (exercise of parental rights and duties), as well as the cases in which the dysfunctionality in the exercise of parental rights and duties may be remedied through organised work in the field of social protection, and not only social protection. With regard to the prevention of deprivation of direct parental care, there is also the possibility to provide organised support to parents of children with disabilities so that the children could continue to live with their parents in the family environment. The activities on remedying such circumstances result in prevention of depriving children of (direct) parental care, which could otherwise lead to their institutionalization. Consequently, prevention of occurrence of certain circumstances is at the same time prevention of institutionalization.

## 6. Development of Services

In that sense, the SCPA should express the intention of state authorities to develop the services within the social protection system aimed at preventing the deprivation of parental care, which is missing from the existing legal text. More specifically, the Act does not provide for the services that are, in the context of preventing institutionalization of children, aimed at strengthening the social mechanisms (parents, family, relatives) that enable the child to stay in the family. In line with the foregoing, we draw your attention to the possibility of legal formulation of certain social protection services, and in particular:

- consulting and therapeutic services,
- prevention and information services,
- family support and strengthening services.

## 7. Temporary Institutionalization as an Imperative

The obligation of the states parties to the Convention on the Rights of the Child to respect *the right of the child to preserve his/her identity* (Article 8 of the Convention on the Rights of the Child) includes the child's nationality, name and family relations. In accordance with the spirit of the whole Convention, the child has *the right to live with his/her parents*. Failure to use the capacities of government authorities and services, as well as other relevant factors in the field of social protection, in order to enable the child to live with his/her parents represents a violation of that right. Pursuant to Article 20 of the

Convention on the Rights of the Child, a child temporarily or permanently deprived of his/her family environment, or who, in his/her own best interest, cannot be allowed to remain in that environment, is entitled to special protection and assistance provided by the state. The states parties will in accordance with their national laws ensure alternative care for such a child, which could include one of the following institutes:

- foster placement,
- adoption, or
- placement in suitable institutions for the care of children.

Therefore, under Article 20 of the Convention, a child who is temporarily or permanently deprived of his/her family environment is *entitled to special protection and assistance provided by the state*, as well as *to alternative care*. From the aspect of the Convention and also from the aspect of the conducted research showing negative irreversible consequences of placing children in institutions of social protection, the institutionalization of children is *a necessary evil*. From the aspect of the child's right to live in a natural and the least restrictive environment, placing the child in an institution of social protection has to be defined by the law as temporary (in addition to daily and occasional), but can never be permanent. Contrary to these views, Article 26 of the SCPA defines placement in an institution as being, *inter alia*, of a *permanent nature*. We think that professionals in the relevant social protection bodies should not be thus encouraged to refer children to institutions for permanent placement. Institutionalization cannot be permanent *a priori*, but only temporary and as short as possible, and the Act should clearly state this intention as the legislator's firm position.

## 8. Possible Standard Rules for Selection of Benefits and Services

In principle, we are of the opinion that the SCPA lacks a set of norms that would regulate (on the level of standard rules) the obligations of centres for social work and other relevant social factors in selection of benefits and/or services from the fields of social and child protection. Here we shall only briefly point to the purpose and possible composition of such a set of legal norms, which refer to all recipients of social and child protection benefits and services, but which should be viewed through the prism of the rights of the child.

- Complete (holistic) assessment of beneficiaries' needs – In the assessment of beneficiaries' needs we should not only determine the levels of risk and spe-

cific benefits, but also the circumstances and situations in the life of a person that can contribute to that person's involvement in the regular living conditions and to the exercise of all benefits the person is entitled to. A complete (holistic) assessment includes at least three dimensions that have to be taken into account:

1. personal factors,
  2. environmental factors, and
  3. personal habits and needs.
- Resorting to less restrictive services – forms of protection (minimum restriction) – In the provision of relevant benefits or services, the form of protection to be used and/or the service to be provided to the beneficiary will be as less restrictive as possible for the beneficiary, his personality and his personal and social rights and needs.
  - Participation of beneficiaries in selection of the necessary service – In the assessment of the beneficiary's needs, as well as in the process of selection of the most suitable service and/or the most suitable form of protection, it is necessary to take into account the beneficiary's opinion and the opinion of the beneficiary's legal representative (parents or guardian), unless it is contrary to the best interests of the beneficiary. The beneficiary, as well as his/her legal representative, must be informed of all issues pertaining to the beneficiary's rights, the possibilities for exercise of those rights and/or provision of the relevant service, as well as of all consequences (legal, social, psychological, and other) of the exercise of a certain right, provision of the relevant service and/or implementation of the relevant form of social protection.
  - Proximity of services – The beneficiary will, whenever possible, be provided with the relevant service, right and/or suitable form of protection in his/her living environment. The organisation providing the service is obliged to use all the possibilities offered by:
    1. the beneficiary's family environment,
    2. the beneficiary's extended family environment,
    3. local community,
    4. several neighbouring local communities (municipalities) where certain uniform services have been developed that may be provided to the residents of those municipalities. The selection of services and/or forms of protection outside the beneficiary's place of residence may only be made if it has been documented that it is not possible to provide the relevant service and/or form

of protection in the beneficiary's place of residence or nearest social environment.

- Development and utilisation of resources in the local community – Social factors in the local community have the duty to develop and use different social protection services in the local community. Any service, benefit, or form of social protection, which may be provided in the local community will be provided to the beneficiary in the local community by, if possible, the public services, non-governmental organisations, or associations of citizens and other organisations at the local level.
- Duration and continuity of service – In the cases when the service or form of protection contributes to the beneficiary's feeling of security, his/her development and independence, the provided service or form of protection will be of adequate duration. Continuing protection or service will be provided to the beneficiary for as long as he/she is in need of such service or the most appropriate form of protection, respecting the necessity to change the form of protection or type of service provided to the beneficiary in keeping with his/her needs and capacities of the system.
- Placement in an institution of social protection – Placement in an institution of social protection will, as a rule, be considered the most restrictive and inappropriate form of social protection or service. This measure will be applied only in the cases when, in view of the overall needs of the child, his/her remaining capacities, and the impossibility to ensure an alternative form of protection (alternative service), it is the only form of protection or the only service that can be provided to the child. For the duration of the placement in an institution of social protection, the centre for social work and the institution where the beneficiary is placed are obliged to:
  1. consider such institutionalization as a temporary form of protection until the child returns to his/her family or until other appropriate form of protection is found or alternative service provided,
  2. start, immediately after the child's institutionalization, with strengthening the child, his/her natural family or extended family for his/her return to the natural family or placement in an extended family or foster family, or with strengthening the child for independent life – in keeping with the circumstances, needs and interests of the child,
  3. review on a regular basis the possibility to use another form of protection or provide another adequate service from the field of social protection.

- Placement in another family – With regard to the placement in another family (Articles 31-33 of the SCPA), it should be noted that the following elements cannot be clearly seen, although they should be:
  - readiness to encourage different forms of family placement (urgent family placement, specialised family placement, temporary family placement, etc.) by recognising them as legal institutes in the sphere of social and child protection regulations and regulating them up to an appropriate level;
  - setting up a legal framework for programmes used for preparing foster parents to provide foster care, as well as programmes for support to foster parents and children placed in another family;
  - setting up a legal framework for programmes supporting independence of children placed in another family (the same applies to children placed in an institution), as well as supporting adolescents after termination of protection.

## 9. Children with Disabilities

In addition to the foregoing, under Rule 4 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, the *states should ensure the development and supply of support services, including assistive devices for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights*. Further, under Rule 9 of the Standard Rules, *persons with disabilities should be enabled to live with their families. States should encourage the inclusion in family co-unselling of appropriate modules regarding disability and its effects on family life*.

We think that the rights existing in the SCPA related to children with disabilities pose a risk of segregation of children with disabilities. We believe that it is necessary to formulate non-discriminating provisions with regard to children with disabilities, as well as to establish legal grounds and framework for promotion of programmes that facilitate inclusion of these children in the social environment.

## 10. Special Reference to Child Protection and Administrative Consolidation

According to Article 43 of the SCPA, basic benefits in the field of child protection are:

- 1) birth grant;
- 2) child allowance;
- 3) childbirth allowance;
- 4) child care allowance;
- 5) rest and recreation of children.

The same legal regulation stipulates that the government may also provide other benefits and forms of child protection, depending on its financial resources. Article 95 of the SCPA sets forth that benefit claims are resolved in the first instance by the centre on whose territory the claimant has established residence. We would like to underline potential advantages of evident administrative consolidation of providing different types of financial assistance in one centre for social work. This legal approach enables beneficiaries to complete all activities related to social and child protection benefits in one place (*»one-stop« approach*).

From the aspect of the rights of the child, unification of competencies represents a framework for better understanding and better fulfilment of different needs of the child by a single service. However, the legal framework and administrative consolidation are certainly not sufficient for accomplishing that goal. Forming, updating and administrating of a single database, organising the centre for social work in the way that enables propulsive communication among organisational units within the centre, as well as centralised use of documents for exercise of different rights through the same body (centre for social work), are some of the issues that we cannot address here, but would only like to draw attention to.

# PROTECTION OF CHILDREN FROM VIOLENCE

## 1. General Comments

The legislation of the Republic of Montenegro has still not established a comprehensive system of protection of children from domestic violence because the legislative activities have so far moved in the domain of criminal legal regulations, which resulted in the incrimination of domestic violence as a criminal offence. However, Montenegro has invested intensive efforts in establishing adequate measures of protection of children from domestic violence outside the system of criminal legislation. The result of those efforts is the *Draft Law on the Protection from Domestic Violence of the Republic of Montenegro* (hereinafter: the Law), the working version of which has been presented to the public and has twice been subject to public debate, as well as the *Family Law Act* (hereinafter: the FLA), which was passed by the Government of Montenegro at its session held on 24 August 2006. These two acts are expected to be passed soon, which will ensure a valid normative framework for complete, quality, modern and synchronised protection of children from domestic violence in Montenegro.

In drafting the *Law on the Protection from Domestic Violence* and in drafting the FLA, the authors have undoubtedly taken into account international rules and standards in this field, especially those established by the *Convention on the Rights of the Child*, *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights* and *European Convention for the Protection of Human Rights and Fundamental Freedoms*. They have also taken into account the interpretations of the *Committee on the Rights of the Child* and the opinions of the *European Court of Human Rights*, especially the rulings related to the field of family life.

The analysis of the rules contained in the *Law on the Protection from Domestic Violence* evidently shows that the authors have taken account of the need to provide adequate, comprehensive, synchronised and timely legal and social protection from domestic violence, being aware of the fact that a large number of children grows up in families which are dominated by conflicts and violence instead of love and understanding, that children are victims of domestic violence not only when they are directly subjected to violence, but also when they witness the »scenes« of domestic violence directed at other members of their family, as well as that domestic violence remains unseen and unknown for a long time and that the society, as a rule, tolerates domestic violence until it takes a dramatic form or dimension. Such a position of the authors of

this Law is confirmed, *inter alia*, by extremely important provisions of organisational character, which stipulate providing social support and accommodation for victims of domestic violence (Article 5), making a plan of assistance to victims of domestic violence (Article 6), granting a concession for operation of a public service for prevention of domestic violence, the duty of the state to provide sufficient capacities in safe houses and shelters for victims of domestic violence (Article 7), establishing local emergency centres and other public services to assist victims of domestic violence (Article 8), the possibility for violence victims to choose a trustworthy person to accompany them in all proceedings related to domestic violence (Article 14), etc. Also, the provision of Article 4 of the Law is of special importance because it explicitly recognises and guarantees the right of violence victims to *social support and protection from violence in accordance with the law*. It is beyond doubt that without all these forms of organised support and assistance to victims of domestic violence it would not be possible to establish an adequate and efficient system of legal and social protection.

## 2. Scope of Protection of Children from Violence

The provisions of the Draft *Law on the Protection from Domestic Violence*, together with the provisions of the FL Bill, ensure reaction to violence against children, regardless of its form and type, which is in accordance with the CRC that defines all forms of violence, maltreatment, abuse or neglect of children that threaten or harm their physical, mental and sexual integrity as violations of the children's right to life, survival and development. Such a conclusion is derived from the provision of Article 2 of the Law whereby domestic violence is defined as behaviour of one member of the family that threatens the physical integrity, mental health or tranquillity of another member of the family. The second paragraph of this Article sets out the characteristic, and in practice most frequent, forms of domestic violence, including: 1) infliction or attempted infliction of a bodily injury; 2) provoking fear by threatening to commit murder or inflict bodily injuries to a family member or a person close to him/her; 3) forced sexual intercourse; 4) incitement to a sexual intercourse or a sexual intercourse with a child under 14 years of age or with an incapacitated person; 5) restricting the freedom of movement or communication with third parties; and 6) insults and any other rude, reckless and malicious behaviour. Having in mind the enumerated forms of violence, it seems that the operational definition of domestic violence as given in Article 2, paragraph 2 of the Law should be supplemented with "sexual freedom" as another legally protected good that may be threatened.

On the other hand, the solutions envisaged in the FL Bill represent a considerable improvement in the sphere of protection of children from violence and a significant step forward from the earlier legal solutions. This is confirmed by the fact that in order to create conditions for efficient and effective protection of children from violence, Article 5 of the FL Bill explicitly stipulates that the state is obliged to take *all necessary measures* to protect children from neglect, abuse and exploitation. Besides, when we talk about protection of the child from violence inflicted by his/her parents, the provisions of Article 70, paragraph 2 of the FLA are of special significance since they set forth that parents *may not subject the child to humiliating actions and punishments that insult the human dignity of the child and have the duty to protect the child from such actions by other persons*, as well as the provisions of Article 87 of the FLA pertaining to *deprivation of parental rights* as the strictest penalty in cases when a parent abuses his/her parental rights or grossly neglects his/her duties toward the child.

### 3. Methods for Provision of Legal Protection

The authors of the *Law on the Protection from Domestic Violence of the Republic of Montenegro* have chosen to regulate the legal protection from domestic violence in a single law and have based the projected model on the system of prevention and repression measures imposed as independent measures or as part of an adhesion procedure. We are of the opinion that such a solution of the authors of the *Law* may potentially be a cause of certain problems since the proposed solutions do not offer clear criteria for legal qualification of an act of domestic violence, and it is not completely clear when to file criminal charges in a specific case of domestic violence, when to report a minor offence and when to initiate some “other court procedure”. In this case, it should be kept in mind that the norm that in Article 220 of the *Penal Code* specifies a criminal act of domestic violence is formulated in a similar manner as the norm in Article 2 of the *Law on the Protection from Domestic Violence* of the Republic of Montenegro that also defines what is considered to be domestic violence. Therefore, we suggest that the Law should clearly define the criteria to distinguish among the implementation of specific methods for provision of legal protection, precisely defining the conditions under which specific forms of legal protection from domestic violence may simultaneously be used.

#### 4. Protection Providers and Synchronisation of Their Work

The provision of Article 9 of the Law stipulates that the “complete and synchronised protection from violent behaviour in the family” is to be provided by the competent authorities (police, court, prosecutor, guardianship authority), and classifies non-governmental organisations into the category of “protection providers” (Article 9, paragraph 2), which is a good solution because everywhere in the world NGOs are part of a single system of protection from domestic violence. However, the authors of the *Law* envisage only the *possibility* of cooperation between non-governmental organisations and government authorities responsible for providing assistance to victims of domestic violence, i.e. the possibility of their participation in interdisciplinary teams for assistance to victims of violence. We consider such a solution to be too narrow.

#### 5. Specialisation of Legal Professionals

The proposed text of the *Law on the Protection from Domestic Violence* does not provide for any specialisation of legal professionals who are involved in the cases of domestic violence. The rules of specialisation are contained in the FLA and refer to the specialisation of judges who conduct legal proceedings in family related matters (Article 318 of the FLA). Since measures for protection from domestic violence may also be imposed in other proceedings, it is necessary to stipulate that the proceedings for protection from domestic violence are conducted by professionals who have received special education to act in family related matters and who have special knowledge in the field of the rights of the child, no matter which authority is in charge of ruling the case.

#### 6. Entitlement to Legal Protection from Domestic Violence

The authors of the *Law on the Protection from Domestic Violence* have defined in the provision of Article 3 of the Law a broad circle of persons who are subject to protection from domestic violence, which is an expression of their understanding of the very phenomenon of domestic violence and its specific characteristics that make it different from all other forms of violence, as well as respect for the recommendations contained in numerous documents of the United Nations, Council of Europe and

other international and regional organisations. However, we must point out to a possible problem that may arise in imposing measures for protection from domestic violence in criminal proceedings, in view of the fact that in the *Penal Code* the family or the family group is understood to include former spouses and their children, as well as parents of former spouses (Article 142, item 29 of the MPC). The solution to this problem is even more complex when the child is a victim of domestic violence not only in the criminal proceedings, but also in civil proceedings for protection from neglect and abuse of the child.

## 7. Principles of Procedure

The goal of the proposed model of legal protection from domestic violence is to ensure efficient protection from domestic violence. It is of special importance that the authors of the Law have not satisfied themselves only with proclaiming the principle of urgent procedure (Article 10), but have materialised it by prescribing short deadlines for appeals in petty offence proceedings and rules on non-suspension of appeals.

Confidentiality of procedure also represents one of the basic principles, which we particularly welcome, mindful of numerous misuses in this field. We consider the provision in paragraph 2 of Article 11 of the *Law* to be of particular importance, because it sets forth that the information relating to domestic violence is confidential and may be disclosed only with the consent of the victim. However, it should be pointed out that this general rule is not completely appropriate in cases when minors are subject to protection; therefore, when proceeding in legal matters of protection of this category of persons it is necessary to specify separate rules with regard to the principle of confidentiality.

Another important principle is the principle of officiality that is dominant in the procedure for protection from violence, which goes to show that the authors have kept in mind that domestic violence is not a private problem, but that its prevention is in public interest. Also, it would be useful to supplement the list of principles with the principle of investigation that would be applicable to gathering of procedural materials.

## 8. Duty to Report Domestic Violence

The provision of Article 12, paragraph 1 of the *Law* prescribes the legal duty of a wide circle of entities (medical, educational and other institutions and bodies, as well as non-governmental organisations) to report to the police the instances of domestic violence they have discovered in the performance of their duties. The provisions of the *Law* also prescribe the explicit duty of health care workers, social workers, teachers or care workers to report the instances of violence they have learned of in the performance of their duties. This duty also applies to other family members, as well as any citizen who learns of any committed acts of violence (Article 12, paragraph 2). This duty is especially emphasised if the victim of violence is a minor, which we believe is of extreme importance. However, the failure to fulfil the duty to report domestic violence does not entail any penalty. This may create certain problems in practice, especially if the passing of this *Law* is not followed by signing of appropriate protocols of cooperation between the representatives of different systems and institutions that would regulate these issues in more detail.

## 9. Protection Measures

A wide range of the proposed protection measures (Article 15 through Article 22) evidently shows that the authors of the *Law* have kept in mind the modern solutions in comparative law and recommendations of international organisations. The authors have also invested great efforts to clearly define concrete measures of protection and, what is particularly important, to envisage conditions in which any of the measures may be imposed.

Furthermore, the *Law* provides for the possibility to simultaneously impose a number of protection measures (Article 15, paragraph 1), which is a good solution that can contribute to better individualisation of social reaction in cases of domestic violence and that clearly defines the purpose of such measures as: *prevention and suppression of domestic violence, remedying the consequences of committed acts of violence and taking efficient measures for re-education of committers of violence and elimination of circumstances that are suitable for or encourage new acts of violence in the family* (Article 16). This clearly demonstrates the right of victims of domestic violence to reintegration and recovery, and the focus of these measures on concrete activities with violence committers that should contribute to their re-education.

## 10. Procedure for Imposition of Protection Measures

The contents of provisions operationalizing the procedure for legal protection from domestic violence (Articles 23-34) undoubtedly show that, compared to the previous versions of the *Law*, significant progress has been made because the proposed solutions are now better and more consistent and the procedural provisions are more precise and more clearly formulated. However, despite the authors' efforts to regulate the procedure in order to provide active, effective and efficient legal protection for victims of domestic violence and contribute to prevention of further acts of violence, there are certain holes, shortcomings and deficiencies that should be remedied in order to create conditions for provision of top-quality legal protection, preclusion of problems in legal practice and ensuring of the necessary level of procedural uniformity.

The authors of the *Law* have not specified the nature of the procedure for imposition of protection measures when the procedure is conducted before the court. Article 37 sets forth that the provisions of the *Law on Petty Offences* and the *Criminal Procedure Code* apply accordingly to the procedure for protection from domestic violence, which causes a dilemma whether it is at all subject to civil court procedure. It seems necessary that the *Law* clearly defines the nature of the procedure and thus eliminate any dilemma that may arise in that respect.

# RIGHTS OF THE CHILD AND PROTECTION OF THE RIGHTS OF THE CHILD

- Analysis of the provisions of the Family Law Bill  
from the aspect of exercise of the rights of the child –

The main and general normative act regulating the rights of the child is the Family Law Act. The Republic of Montenegro is in the final stages of preparation of the FLA, whose provisions undoubtedly show that its authors have based the projected legal solutions on modern principles in the domain of the rights of the child, following the spirit of the Convention on the Rights of the Child. The comparative analysis of the FL Bill and the Draft FLA has shown that the authors have improved certain legal solutions and that a significant step has been made towards the implementation of standards and principles proclaimed in the Convention on the Rights of the Child.

## 1. Rights of the Child

In the text of the FLA (Articles 61-68), the authors of the Act have envisaged a wide range of rights of the child, some of which belong to the domain of substantive law and others are procedural in nature. In view of the need for full implementation of the Convention, it is desirable to have the basic rights of the child explicitly specified in the general provisions of the FLA, in particular the child's right to life, survival and development, the right to non-discrimination, the right to respect for the child's best interests, and the right of the child to express his/her views. These rights of the child are by their nature the guiding principles and the foundations of all other children's rights.

## 2. Best Interests of the Child

The FLA sets forth the *principle of best interests of the child* as the main guiding principle which everyone is under obligation to follow in all activities related to the child (Article 5 of the FLA), which is a highly important solution. This principle is particularly stressed in actions for protection of child's rights. The provisions of the FLA that refer to parental rights and their exercise do not contain an explicit provision stating that in the

exercise of their parental rights and duties parents should be guided by the best interests of the child, and this can only indirectly be concluded from other provisions. Not a single provision of this Act defines the term “best interests of the child”, although it is a key principle. In view of the problems encountered so far in assessing the “interests of the child”, it is necessary to have one norm that would stipulate the list of contents, facts and circumstances that need to be taken into account when assessing the welfare of the child.

### 3. Business Capacity of the Child

The authors of the FLA have tried to expand the business capacity of the child to the maximum. The Act envisages a whole range of business capacities of the child, but there is no provision that would in a general manner stipulate that the child who is capable of forming a judgement will acquire specific rights in decision making.

As for independent decision making, the FLA has set the minimum age limit for making decisions by the child, but this limit differs, depending on the type of decisions to be made (the child should be 10 years old to choose with which parent he/she wants to live – Article 62, paragraph 4 of the FLA; 15 years old to consent to a medical intervention – Article 64, paragraph 2 of the FLA; 15 years old to decide which secondary school he/she will attend – Article 65, paragraph 2 of the FLA; etc.). Apart from the specific age, an additional precondition is necessary for independent decision making – that the child is capable of forming a judgement. However, the FL Bill neither provides mechanisms for assessment of the child’s ability to form a judgement nor defines the relevant criteria. Also, the child has not been granted a special legal tool to use in case the court or administrative authority misjudges the capacity/competence of the child for independent decision making. Only if he/she is a party to the proceedings (which is not always the case), it would be perhaps possible for the child, as a party with legal capacity, to file an appeal on those grounds, invoking incorrect application of substantive law.

### 4. Legal Institutes: Adoption, Foster Care and Guardianship (from the Aspect of the Rights of the Child)

The provisions of the FLA that refer to the legal institutes of adoption, family placement (foster care) and guardianship of the child, from a general point of view:

- represent examples of a fairly contemporary determination of the system of values, concepts, and normative and technical elements;

- recognise to a considerable extent the standards contained in international conventions (primarily in the CRC) and advanced positive law;
- recognise to a considerable extent the contemporary approaches to and theories of the family, children, relationship between parents and children when children are deprived of parental care.

Beside the stated positive general remarks, we believe that it is also necessary to draw attention to the following:

- The above mentioned provisions stipulate that the activities of the guardianship authority are performed by the centre for social work which makes decisions on adoption, foster care and placing the child under guardianship. These norms contain the concept of concentration of different roles of the guardianship authority, making it “the judge, the jury and the executioner“. In the example of adoption, the guardianship authority, *inter alia*:
  - o decides on the eligibility of future adopters,
  - o determines the family status of the child,
  - o passes a decision to start the adoption procedure.

The guardianship authority plays both the role of the social service and the role of the court.

In such a context, what is evidently missing is an independent authority (court), which would pass decisions in the cases of considerable legal vulnerability of the child where the human rights – the rights of the child - are deeply infringed.

- With regard to the normative instruments for preventing the need for alternative forms of protection of children without parental care, the following must be pointed out:
  - o The FLA does not contain the norms that clearly state that the government through its authorities can provide adequate support to parents in order to avoid the need to look for alternative forms of child care;
  - o The FLA does not contain clear norms for investing systematic efforts to provide adequate support within the extended family of the child in order to prevent resorting to alternative protection.

## Adoption

### Forms of adoption

Pursuant to Article 8 of the FLA, upon adoption the adopter and the adoptee establish relations that exist between parents and children, with a vi-

ew to providing the adopted child with the living conditions equal to those enjoyed by children who live in their family. Such a determination gives rise to a conclusion that there is only one form of adoption in the FLA – complete adoption, but other provisions further in the text of the FLA show a distinction between complete adoption and incomplete adoption.

Regulating adoption by defining its two forms (complete and incomplete adoption) fulfils the need that has been formulated in practice and that in principle does not derogate the rights of the child. Such a normative determination of adoption by the legislator shows that the Act is in harmony with the needs and phenomena of life. The only suggestion that can be made in that regard is that Article 8 of the FLA should be formulated so that it clearly identifies two forms of adoption recognised by the FLA. The argument for this suggestion can be found in Article 148 of the FLA, which sets forth that «incomplete adoption shall establish the same rights and duties between the adopters, on the one hand, and the adoptee and his/her descendants, on the other, that exist under the law between parents and children, unless otherwise specified by law. Incomplete adoption shall not affect the rights and duties of adoptees toward his/her parents and other relatives.» The quoted provision speaks of the differences between incomplete and complete adoption and states that incomplete adoption does not establish completely identical relations between adopters and the adoptee as between parents and the child.

#### Preparation for adoption and period of adaptation

The provisions of the FLA which deal with adoption have two major deficiencies that may jeopardise the interests of the child or the child's right to be provided with adequate conditions for normal growth and development.

Namely, the FLA does not contain the provisions on:

- obligatory preparation of potential adopters,
- obligatory adaptation period.

In view of the general irreversibility of changes to the family status of the child arising from adoption, we believe that the interests of the child (adoptee) would be better protected by introduction of obligatory preparation of potential adopters for performance of adoptive, i.e. parental duties, as well as by introduction of the obligation to refer the child to his/her adopters for a period of adaptation (except in case of foreign adopters). As for the adaptation period, it should also be noted that its duration should be defined in more flexible terms. Therefore, the relevant provision of the FLA (Article 141) should state, "... for a period of *up to* six months" instead of "... for a period *of* six months".

### Eligibility for adoption

It can be seen from the provisions of the FLA that a child under 18 years of age is eligible for adoption, except in case of complete adoption where the child may not be older than 10. Our focus here is on the age of the child eligible for adoption. We are of the opinion that a provision dealing with the situation where the child has through emancipation (entering into marriage) acquired his/her business capacity before turning 18 is missing from the FLA. The legislator has not clearly defined such a situation, so we suggest its normative regulation. In view of the purpose of adoption, we think that a child who has acquired full business capacity through emancipation may not be put up for (incomplete) adoption.

### Unmarried partners as adopters

We believe that it is good that the legislator has decided to allow unmarried partners to adopt children. However, it is not clear what the legislator's intention was in setting different conditions depending on the duration of nonmarital cohabitation with regard to the possibility of complete and incomplete adoption. For complete adoption of a child, it is necessary that unmarried partners have been cohabiting for a *longer period of time* (Article 132, paragraph 2 of the FLA), while incomplete adoption is approved if unmarried partners have been cohabiting for a *shorter period of time* and if there are particularly justified reasons for such adoption (Article 134, paragraph 2 of the FLA). Such a concept of legal norms reveals inappropriate discrimination of nonmarital cohabitation with regard to adoption.

### Foreign citizens as adopters

Pursuant to Article 125 of the FLA, the adoptive relationship between a foreign citizen, as the adopter, and a domestic citizen, as the adoptee, may not be established, except if an adopter cannot be found among domestic citizens and with the consent of the minister responsible for social protection. Such a formulation of the legal norm is contrary to Article 21 of the CRC, which states that inter-country adoption may be considered as an alternative means of the child's care.

### Central registry of adoptions and choice of adopters

The FLA lacks the norms that would deal with the central registry of adoptions. We are of the opinion that the establishment of that registry, covering the whole territory of the Republic of Montenegro, would contribute to optimization of the selection of adequate adopters for every individual child. Furthermore, the central regi-

stry would in that sense increase the potential of norms and practice of adoption with regard to meeting the best interests of the child in selecting an adoptive couple that is best suited to the child's character and needs.

### Termination of complete adoption

With regard to termination of complete adoption by way of annulment, we suggest taking into consideration the possibility of *exceptional* termination of complete adoption, *upon request of an adult adoptee if there are valid reasons for such termination, provided that the adult adoptee may submit the request before reaching the age of 25*. The authority competent for the exceptional termination of complete adoption should be the court. The reason for possible inclusion of this exception into the FLA can be found in the cases where the adoptee was »blessed« by adoption at the time when he/she was not able to express his/her will in an adequate manner (as a child) and it is possible that there are valid reasons for termination of that adoptive relationship. »Valid« reasons can be understood as legal standards or can be specified in the text of the Act. In addition, for the purpose of legal security of adopters and in order to prevent any abuse of rights by the adult adoptee, this possibility can be restricted to a specific time period after the adoptee reaches maturity (e.g. until he/she reaches age 25).

## Family Placement (Foster Care)

### Specialised foster care

We have found that the provisions of the FLA regulating foster care are very comprehensive and meaningful and facilitate the advancement of foster care from the aspect of family law.

Pursuant to Article 157 of the FLA, the following children may be placed in another family:

- children without parental care,
- children whose development is hindered by the circumstances in their own family,
- pedagogically neglected children,
- children with physical and mental disabilities.

The stated Article of the FLA, in legal and technical terms, expertly encompasses different target groups of children who may receive this measure of protection under family law. This opens up a normative path for different types of foster care, the

so-called ordinary foster care, on the one hand, and specialised foster care, on the other. Only, we think that not enough emphasis has been put on emergency foster care, i.e. foster care of children who are victims of domestic violence (abuse), which should be additionally incorporated in the fabric of the FLA.

#### Training of foster carers

Under Article 162 of the FLA, for the purpose of improving the quality of foster placement for the child, the guardianship authority is obliged to provide foster carers with adequate preparation (training) for raising and bringing up of the child. The said provision reveals a due concern of the legislator to provide good and trained foster parents for the child. In this context, we would only like to draw attention to the necessity of prescribing a training programme for potential adopters as well, since adoption is more radical and, as a rule, irreversible form of protection under family law.

#### Unmarried partners as foster carers

We would like to draw attention to a certain lack of skill in legal and technical terms in Article 166, paragraph 1, item 2 of the FLA. According to that provision, the child may not be placed in a family where one of the married partners does not meet the requirements for a foster parent. It should be noted that foster care is a legal institute connected with the family and that Article 2 of the FLA leads to a conclusion that unmarried couples may also be foster parents. However, this is brought into question if we take into account the legal and technical composition of Article 166, paragraph 1, item 2 of the FLA, which speaks only of married partners. In this regard, we propose that the legislator should correct the stated normative inconsistencies in order to make the possibility of unmarried couples becoming foster parents unquestionable. We think that allowing unmarried couples to engage in foster care, that is, allowing the child's placement in the family of unmarried couples, is the true intention of the legislator that has not been articulated in a sufficiently clear manner.

#### Support programmes and child independence programmes

Article 176 of the FLA establishes the obligation of the guardianship authority to monitor the development of children who have been placed in other families and determine whether their custody, care, upbringing and education are effected in line with the provisions of the FLA and the agreement on their placement. The same article of the FLA establishes the obligation of the guardianship authority to draw attention of the family in which the child is placed to the shortcomings of his/her cu-

study, care and upbringing, propose measures to eliminate those shortcomings, give advice on any issue and take measures which it is authorised to take under the law. We have found that, in keeping with the spirit of the FLA and the purpose of the institute of foster care from the aspect of family law, the guardianship authority has been, in principle, obligated to:

- monitor the child placed in foster care, and
- provide support to the child and foster parents.

Furthermore, we believe that a link between the FLA and the *Social and Child Protection Act* (SCPA) should be established by adding a reference provision in the FLA that would specify that the issue of programmes of support to children in foster care and foster families will be regulated in detail by the SCPA. The FLA should also include a reference provision that would point to the need for regulation by the SCPA of the programmes for promotion of independence of children placed in foster care, that is, children's preparation for independent life upon termination of foster care after they have reached majority and/or completed regular schooling.

## Guardianship over Minors

### Purpose of guardianship over minors

The provisions of the FLA that refer to the legal institute of guardianship of children represent, by their structure and contents, good grounds for quality and appropriate guardianship protection of children in need of such protection. It can be said that the sections of the FLA that deal with guardianship, focusing on guardianship of the child, are well rooted in the best interests of the child that are contained in the definition of the purpose of guardianship. The comprehensive norm in Article 179 of the FLA clearly states that the purpose of guardianship is to enable the child to lead an independent life and/or to ensure the protection of legal interests of the child with regard to his/her personality and property. What is, in our opinion, missing from the definition of the purpose of guardianship is the answer to the following question – until what time should the measures of guardianship protection over the child be applied? In that regard, we suggest that the norm of the FLA be amended so as to clearly state that guardianship over the child will last *until the conditions for the exercise of parental rights are created or until the child acquires business capacity (independence)*.

### Definition of a child without parental care

One of the important basic norms for regulation of the legal institute of guardianship over the child is the norm contained in Article 231 of the FLA. In this provision, apart from definition of the purpose of guardianship over minors, the legislator also defines the meaning of a child without parental care. The provisions of the stated article clearly define a child without parental care, except in the last paragraph which sets out the legal standard of “parents are unable to take regular care of the child”. However, we are of the opinion that the introduction of this legal standard in the definition of a child without parental care to whom the measure of guardianship is applied is inevitable and that it duly leaves it to the legal and professional practice to determine in each individual case the contents of this legal standard, which by itself cannot infringe upon the rights and best interests of the child.

### Guardianship plan and individualisation of child protection

The clarity of the concept of norms regulating guardianship over the child can also be seen in the contents of Article 180, paragraph 2 of the FLA, which stipulates that the decision on placing someone under guardianship must include a guardianship plan. In order to fulfil the purpose of guardianship, a clear objective in each individual case is best specified by using the instrument of a guardianship plan. The structure of the stated norm leads to a conclusion that the legislator considers the guardianship plan as a technical instrument by which the guardianship authority dynamically responds to the challenges put before it by the very needs of the child placed under guardianship with regard to the obligations of the guardian, the institution or the person with whom the child is placed, and the guardianship authority. We believe that the guardianship plan is the proper instrument to use in order to see and express the overall subtlety of guardianship as an institute from the corpus of family law, to set clear, measurable and realistic goals for guardianship and tasks to be performed by all involved parties, with the specified time frame and logic, leading to accomplishment of the set goals. Furthermore, we believe that the concept of an individual plan (in case of guardianship, this means the guardianship plan) should also be normatively incorporated into the institute of foster care. Individualisation of family law protection, and along with it social protection, should find its place not only within the legal institute of guardianship. We would like to stress that it is good to define guardianship by its purpose, but that foster care, as an institute of family law, should also have its normative purpose and its concrete objective that is in instrumental terms regulated through a plan. The plan (of guardianship and the individual plan of foster care) can, in principle, be

normatively interpolated in the FLA, but it is desirable to add, beside the provisions introducing the guardianship plan (and foster care plan) into the legal and professional life, a norm that would also regulate the definition of the guardianship plan (as well as foster care plan), its purpose and minimum contents. The stated norms should correlate with the relevant provisions of the SCPA.

#### Guardianship authority

Here we would like to point to the substantiality of the provisions on guardianship authority, focusing on one, in our opinion, particularly good provision. Namely, pursuant to Article 184 of the FLA, the guardianship authority may set up a professional advisory body composed of relevant experts (medical doctors, pedagogues, lawyers, psychologists, social workers, etc.) with a mandate to analyse professional issues and propose taking specific guardianship measures. We understand this norm as the legislator's intention to «open up» the guardianship authority and make it cooperate with the environment by using expert resources from the environment for performance of the duties within its competence. To this end, we would like to suggest to interpolate in the FLA the provision stipulating that the stated «opening» of the guardianship authority will not be applied only to placement under guardianship, but to other activities of this authority regulated by the FLA.

#### Performance of the guardian's duties

Articles 202 and 203 of the FLA regulate the issues of performance of the guardian's duties with the approval from the guardianship authority and without that approval. The supervision of the performance of the guardian's activities that cannot be classified as his/her usual activities is for the most part well-balanced by the provisions of the stated articles of the FLA. These provisions also recognise the cultural and social circumstances in which the legal institute of guardianship is implemented. As for Article 202 of the FLA, we would like to point to an imprecision in item 4 of paragraph 1 of this Article. Namely, in specifying the situations in which the guardian needs the approval of the guardianship authority for performance of particular activities, it is certainly necessary to have a provision that would, instead of mere enumeration, leave room for other circumstances and situations. That is why item 4 states that the guardian may "take other important measures in relation to the personality of the ward" only with the approval of the guardianship authority. We think that a clear provision should precede the provision of item 4 that would regulate the obligation of the guardian to request approval from the guardianship authority for medical interventi-

ons on the ward, except in the situations when an urgent (emergency) medical intervention is necessary.

## 5. Status and Legal Capacity of Children in Proceedings

There is no general norm in the FLA that would stipulate that the child should participate in all the proceedings related to him/her. The lack of such a general provision is a very serious omission, because the child is not given the possibility to be a party to the proceedings related to his/her rights that would enable him/her to participate in the first instance proceedings and appeal against the first instance decision if it is unlawful and violates his/her rights and interests.

The FLA recognises the child's legal capacity to sue in maternity and paternity suits, actions for protection of the rights of the child and child support suits. However, under the FLA, a child enjoys the status of a party only in maternity and paternity suits, in which he/she has to be included because joinder of parties is compulsory (Article 349 of the FLA). In all other proceedings, even in those which the child is authorised to initiate, the child does not necessarily have to have the status of a party because the legislator does not prescribe compulsory joinder. Therefore, the child will have the status of a party in the proceedings dealing with his/her rights only if he/she himself/herself is the plaintiff, and if the proceedings have been initiated by another person with legal capacity to sue, the child will not have the status of a party.

The child does not have the status of a party in actions for protection from domestic violence, when such actions are conducted as main court proceedings for protection of adult family members. The status of the child is unclear and the child represents a kind of an »inactive« party, not the legal subject of the proceedings who will directly, or through his/her representative, protect his/her rights and interests.

The child is also not a party to the proceedings joined with a matrimonial suit. The provisions of Article 344 of the FLA stipulate the obligation of the court in a matrimonial suit to pass a decision on the exercise, limitation or deprivation of parental rights. Since all these decisions are made, according to the provisions of the FLA, in the proceedings to resolve a matrimonial suit, in which the child does not have the status of a party, the child is obviously reduced to the "object" of the proceedings, although the court decides on his/her rights, i.e. passes a decision affecting the rights and interests of the child.

The analysis of the provisions contained in the FL Bill shows that the status

of the child in certain legal actions is not regulated in a satisfactory manner, because no adequate normative solutions have been created to ensure that the child fully exercises his/her individual procedural rights provided for in the *CRC* and the *European Convention on the Exercise of Children's Rights*. Also, no adequate mechanisms of court protection have been created for protection of certain rights of the child established under provisions of substantive law.

We are of the opinion that it is extremely important from the aspect of the exercise of the rights of the child that the status of a party is granted to the child in all proceedings in which his/her rights are decided upon, as stipulated by the Convention standards.

## 6. Expression of Views

The right of the child to seek, receive and impart information of any kind, the right to freedom of thought, conscience and religion, the right to freedom of association and to freedom of peaceful assembly, and the right of the child to form and express his/her views in all matters affecting him/her in accordance with his/her age and maturity, are just some of the civil and political rights of the child. Particular importance is accorded to the right of the child to express his/her views in all matters affecting him/her, and the respect for the child's views is one of the four complementary guiding principles in the approach to the rights of the child, which have been developed and used in practice by the Committee on the Rights of the Child.

The right of the child to express his/her views freely is stipulated in Article 12 of the *CRC* and procedurally operationalized in the *European Convention on the Exercise of Children's Rights*, which establishes a number of individual rights of the child, creating conditions for children to participate in an adequate manner in the proceedings affecting their rights and interests and to express their views.

The authors of the *FLA* have guaranteed the right of the child to express his/her rights freely and tried to create optimum conditions for its exercise. Especially important in this regard is the provision contained in Article 67 of the *FLA*, whereby the right of the child to express his/her views has been explicitly and widely recognised. Compared to the earlier regulations, this represents a significant improvement in the field of children's rights. However, the manner in which this right has been specified and operationalized may be criticised because it has failed to eliminate the risk of violations of this right or to provide guarantees that the child's views will be respected, va-

lued and effect certain influence on the contents of decisions. Thus, under Article 133 of the FLA, the child's consent to adoption is required if the child has reached 10 years of age and is capable of understanding the meaning of adoption. This provision excludes the possibility that a child who has not reached the age of 10 may express his/her view of the intended adoption, even if he/she is actually able to form his/her views in line with his/her evolving capacities. On the other hand, a child who has reached the age of 10 and whom the guardianship authority has assessed as unable to form his/her views does not have any legal remedy to use in that case, and the guardianship authority is not obliged to conduct a separate procedure to determine the capacity of the child to form a judgement and pass a separate decision stating the child's incapacity.

Expression of the child's views implies that the child is informed of all aspects of the matter to be decided upon, which the authors of the FLA had in mind when they stipulated in Article 67 that the child has the right to receive in a timely fashion all the information necessary to form his/her views. The Act prescribes specific rules on the duties of the court, administrative authority, and collision guardians or temporary representatives of the child to provide the child with the necessary information to develop »informed« views. However, with regard to the access to information related to the matters to be decided on in legal proceedings, the child has no legal instrument that he/she could use in the event that the court, administrative authority or his/her collision guardian or temporary representative fail to fulfil their duty to provide him/her with the relevant information.

## 7. Legal Representation of the Child

In contemporary law, independent legal representation of the child represents one of the special children's rights stemming from Article 12 of the Convention on the Rights of the Child. Explicit provisions on this right are contained in Article 4 of the *European Convention on the Exercise of Children's Rights*, pursuant to which the child has the right to apply, in person or through other persons or bodies, for a special representative in proceedings affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the child.

The analysis of the FLA shows that its authors have tried to improve the representation of the child to the maximum extent and to ensure the child's independent legal representation. Since adequate legal representation of the child is vital to

the exercise of his/her rights, the authors have tried to provide valid procedural guarantees for adequate representation of the child, especially in the situations of evident or latent conflict of interest between the child and his/her legal representative, in the event of collision of interests of the child and his/her legal representatives, and in the situations where parents, as legal representatives, do not pay sufficient attention to representation.

As provided in the FLA, the role of the child's representative in civil court proceedings is played by the child's parents and his/her regular legal or voluntary representatives, as well as special (independent) representatives of the child – collision guardian, appointed by the guardianship authority, and temporary representative, appointed by the court. The regular representative of the child under guardianship is his/her guardian or the guardianship authority, if it has decided to perform the function of the guardian alone.

## 8. Parents as Legal and Voluntary Representatives of the Child

Representation of minor children is one of the important components of parental rights. Parents who jointly exercise parental rights are equally entitled to represent their children. They exercise these rights jointly and consensually, which includes the possibility that one of the parents, on the basis of an agreement between them, takes the function of representation in a specific legal matter. In regulating the representation of the child, the legislator has given a twofold function to the parents – as the child's legal representatives and as the child's voluntary representatives (appointees).

The attempt of the legislator to normatively regulate and clearly differentiate between legal and voluntary representation as two categorically different representative functions of parents cannot be considered completely successful because certain rules on representation are incomplete, conceptually inconsistent and not harmonised with some of the principles of voluntary representation. Such a conclusion is derived from the provision contained in Article 73, paragraph 1 of the FLA, which stipulates that “parents have the right and the duty (underlined by N.P.) to represent their child in all legal transactions and in all proceedings exceeding the limits of the child's business and legal capacity (legal representation)”, and the provision contained in paragraph 2 of the same Article, which sets forth that “parents have the right and the duty (underlined by N.P.) to represent their child in all legal transactions and in all proceedings within the limits of the child's business and legal capacity, unless stipulated otherwise by the law (voluntary repre-

sentation).” It follows from these, in linguistic terms, completely clear rules that parents have the *right* and the *duty* to represent children both as their legal and as their voluntary representatives, which further means that the law itself is the basis for both types of representation of the child by his/her parents. Since the provisions of the FLA do not explicitly specify that the child, within the limits of his/her business capacity, should authorise his/her parents to represent him/her by giving a statement of will, it is evident that the parents, as voluntary representatives, do not derive their authorisation for representation from the will of the child but from the law.

The rules contained in the FLA on parents as voluntary representatives of the child open a number of disputable issues and dilemmas, which can cause quite a confusion in practice. First of all, there is a question whether parents, as legal representatives of the child in the proceedings where the child has the legal capacity, should identify themselves by presenting their act of authorisation or in the manner they identify themselves when acting as legal representatives of the child. It is also disputable whether, if the child has the legal capacity, the court should at all summon the child’s parents to the hearing in case they have not been identified as representatives of the child in the initial procedural action taken by the child within his/her legal capacity. Furthermore, we cannot with complete certainty answer the question whether, in the proceedings for which the child has the legal capacity and in which the child’s parents represent him/her as voluntary representatives, only the child personally and directly may take procedural actions and whether a procedural action taken by the parents will be effective if the child later changes or revokes that action. There is also a potentially disputable question of the scope of the parents’ authorisation as the child’s appointees, since the legislator does not make any distinction between the legal and voluntary representation of the child in terms of their scope. In this regard, it is uncertain whether the child should specify the scope of the parents’ authorisation for his/her representation in a lawsuit using the system of the so-called positive enumeration and whether, if the child has failed to do so, all the rules of the Law on Petty Offences relating to the scope of authorisation of non-lawyer appointees apply to the scope of the parents’ authorisation, including the rules under which a non-lawyer appointee must have explicit authorisation for taking dispositive procedural actions and for transferring the authorisation to another person (substitution).

## 8. Collision Guardian of the Child

Crucially important for the protection of the rights of the child are legal instruments that ensure that a child has valid representation in the situations when there is evident or latent conflict of interest between the child and his/her regular legal representative or when the child is not adequately represented for other reasons. According to the FLA, this goal should be accomplished by the institute of collision guardian and the institute of temporary representative. Collision guardians and temporary representatives are subsidiary legal representatives because they represent the child only in a specific legal case, while in all other legal relations and proceedings the child is represented by his/her regular legal representative.

Article 358, paragraph 1 of the FL Bill contains a general rule under which the child is represented by a collision guardian if there are adverse interests between the child and his/her legal representative. This rule is specified in Article 358, paragraph 2 of the FLA, which stipulates that a child who has reached the age of 10 and who is capable of forming a judgement may request from the guardianship authority, personally or through another person or institution, to appoint a collision guardian for him/her, and a child who has reached the age of 10 and who is capable of forming a judgement may request from the court, personally or through another person or institution, to appoint a temporary representative to him/her due to the existence of adverse interests between him/her and his/her legal representative. The court is authorised to appoint a temporary representative to the child if it finds that, in a dispute over the protection of the child's rights or in a dispute over the exercise of parental rights, the child, as a party, has not been adequately represented (Article 359, paragraph 2).

In order for a collision guardian to be appointed to the child, it is necessary that the child is a party to the proceedings and that there is conflict of interest between him/her and his/her legal representative, i.e. that the child is not «adequately» represented. The key reason and precondition under substantive law for appointment of an independent representative for the child is the existence of the conflict of interest between the child and his/her legal representative. However, although determining the conflict of interest is often an extremely complex and sensitive task, the authors of the FLA have not specified, not even as an example, any indicators for recognising the conflict of interest nor offered any guidelines for its determination, although this should be done.

The possibility of appointing a temporary representative to a child in the situation when his/her regular legal representative does not represent him/her in an

«adequate manner» is also very important, because this makes sure that the child in a proceeding will always receive legal assistance of standard quality, not only when there is a conflict of interest, but also when the child is not adequately represented for any reason. However, the text of the FLA does not contain instructions for identifying the contents of the legal standard of «adequate representation», so that for the purpose of harmonising the legal practice the courts will alone have to build the criteria they will use in assessing the adequacy of representation.

## HEALTH AND HEALTH CARE

Compliance and/or non-compliance of Montenegrin health care legislation with the Convention on the Rights of the Child is, in our opinion, delimited by two things:

1. Unclear and inadequately operationalised concept of child health;
2. Perception of the Convention on the Rights of the Child by health workers.

Ad 1. The concept of child health is not extensively discussed in professional literature. The definition of health of the World Health Organisation (WHO), static by nature (“health is state“) and ridden with numerous difficulties in respect of practical operationalisation tacitly applies to children. In 2004, the Institute of Medicine of the US National Academy<sup>4</sup> set up a Committee on Evaluation of Children’s Health, which, *inter alia*, drew up a new definition: “Child health should be defined as the extent to which individual children or groups of children are able to:

- o Develop and realise their potential;
- o Satisfy their needs;
- o Develop the capacity that allows them to interact successfully with their biological, physical and social environments. “

Unlike the reductionist model of disease and health, which in case of both adult persons and children implies the “cause–effect“ relation, this new concept advocates the perception of child health as an ascending line stretching through all development stages, with factors from biological, physical, and social environments, and behavioural factors taking effect along that line. Therefore, child health is a dynamic interaction through time, but also the effect, i.e. consequences, of such interaction. This broad definition operates to full effect if broken down into three measurable categories:

- o State of child’s health, which pertains to presence and/or absence of disease and existence of bodily symptoms;
- o Functioning, which pertains to the impact of child’s health on child’s everyday life and activities;
- o Health potential, which encompasses a series of child’s characteristics making up positive aspects of health, such as competence, development capacity and the like.

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4 Institute of Medicine, National Academy: *Children’s Health, The Nation’s Wealth* Available from URL <http://www.nap.edu/catalog/10886>

This concept of child health, which certainly lends itself to far broader analysis of the degree of harmonisation of children's right to health and the applicable legislation, has unfortunately remained confined to strictly professional context, rendering no impact on health policy in the field of child protection. This concept, however, is identifiable in the treatment of child health in the Convention on the Rights of the Child.

Ad 2. So many years since the ratification of the Convention on the Rights of the Child by the SFRY and after numerous activities undertaken by the predominantly non-governmental sector, one can assume that the concept of child rights generally and specifically in health care has to this day remained devoid of any clear purpose to a large number of health workers and decision-makers in health sector. Some will, most likely, see it as a field of theoretical relevance for the professionals in the field; the others will claim that everything they do is absolutely child rights-based, while some will adhere to their profound conviction that the issue should be addressed by lawyers and not by professionals responsible for children's health. With laws being the safest legal way for the rights to "enter life", child rights in the area of health and health care seem to be far from this goal.

## 1. Right to health in the Convention on the Rights of the Child

Although it is only Article 24 of the Convention that directly concerns health and health care services, most of the papers analysing this document cite the following articles as ones that concern children's health directly:<sup>5</sup>

- o The right to life, survival and development (Article 6, paragraph 2 of the CRC)
- o Children with disabilities (Article 23 of the CRC)
- o Health and health care (Article 24 of the CRC)

Also, articles related to health are:

- o The right to non-discrimination (Article 2 of the CRC)
- o Protection of privacy (Article 16 of the CRC)
- o Access to information (Article 17 of the CRC)

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<sup>5</sup> Vienna Declaration and Programme of Action: Fact Sheet No 10, The Right of Child Available from URL <http://www.unhcr.ch>.

## 2. Laws of the Republic of Montenegro analysed from the aspect of compliance of health legislation with the Convention on the Rights of the Child

The following documents were analysed:

- o The Constitution of the Republic of Montenegro
- o Health Care Act
- o Health Insurance Act
- o The General Law on Upbringing and Education
- o The Law on Preschool Upbringing and Education
- o The Law on Primary Education and Upbringing
- o The Law on Education and Upbringing of Children with Special Needs
- o Family Law Bill

### Compliance Analysis

#### General

For key pieces of health legislation, child is an *invisible* category and is discussed *in the package* with expectant mothers, mothers, women and the elderly. “Children, expectant mothers and elderly persons shall be entitled to publicly financed health care, if they are not covered by another insurance program.” (The Constitution of the Republic of Montenegro, Article 57). Drawn up almost entirely from the aspect of adult persons, health care legislation remains almost utterly insensitive to the concept of the child and the child rights, without as much as an outline of state measures requiring adherence to child rights. Although the rationale of *the Health Care Act* states that the Act defines the responsibilities of the Republic in the area of health care for the purpose of compliance with recommendations and conventions pursuant to which governments of states have clear role in setting health policy, it is not easily discernable from the applicable legislation, as far as child rights and compliance with the Convention is concerned, at least. Thus, while enumerations of some civil rights could cover children by implication, those civil rights could also be interpreted to apply solely to adult population (Articles 2, 3, and 4 of *the Health Care Act*). On the other hand, the principal characteristic of the Convention that health should not be perceived solely within the scope of its preservation and restoration, but as a dynamic process of development and constant improvement is not corroborated by the relevant legislation. Unlike health laws, education laws and Family Law Bill, which specifically refers to some of the child rights, treat children as a specific category.

According to the Convention on the Rights of the Child, the child is an entity who:

- o May and should be included in the decision-making process in respect of his or her health;
- o May and should assume responsibility for his or her health;
- o May and should participate in all life situations that concern his or her health;
- o Should know and should be informed;
- o Should state its views;
- o Has the right to privacy and confidentiality;

The applicable legislative solutions treat child as an object that is provided and offered.

### The right to health care

The right of the child to the enjoyment of the highest attainable standard of health and health care is explicitly guaranteed neither in *the Health Care Act* nor in *the Health Insurance Act*. The closest guarantee of the kind can be found in Article 64 of the Family Law Bill, which reads as follows: “Child has the right to be provided with the best living and health conditions that ensure his or her appropriate growth and development.” *The Health Care Act* (Article 10, paragraph 7) provides for priority protection measures for children (*health care to children and youth until completion of regular schooling, and protection of women in the area of family planning*). However, the range of the measures offered is characteristic for the entire population, and fails to specify the contents and measures of relevance for child population in various periods of growing up (nursing children, infants, pre-school children, school children, and adolescents). The situation is identical with the defining of the primary health care activities (Article 33, paragraph 5).

Child health is sporadically referred to in the General Law on Upbringing and Education, which states that: *Education institutions co-operate with health institutions in the realisation of health care of children and/or school children, and in particular in the performance of mandatory medical check-ups, regular screenings and vaccination* (Article 15).

Medical institutions providing health care, as defined in the *Health Care Act*, are also intended to provide services to adult population. While some forms of health care provided by primary health care centres possibly acknowledge children, children are completely omitted from the enumeration of the categories of population receiving health care in primary health care centres (Article 40, paragraph 5 of the *Health Care Act*). Further more, the section dealing with establishment of specialised hospi-

tals and institutes makes no mention of child health care as a reason for establishment (Articles 43 and 44 of the *Health Care Act*). Thus, specialised hospitals are established: *for the treatment of specific illnesses and relevant medical rehabilitation*, but not for specific categories of population – children’s hospitals.

Health care staff – law recognises a paediatrician as a team member (Article 19). However, the law does not specify that if a paediatrician is not available, physicians and other medical staff working with children must be adequately trained.

Marginalised and vulnerable children are still invisible in health legislation. Not a single phrase exists that refers to recognition and satisfaction of the needs of poor children, refugee children, national minorities, and children with special needs. Only the definition of health care (Article 33, paragraph 5) cites the following: *Health rehabilitation of children and youth with physical disabilities*.

Preventive activities, no reference to *child- and youth-friendly programmes*, adolescent-specific services, and the like exists anywhere.

#### Consent to medical interventions

According to the *Health Care Act*, children are completely deprived of the right to consent to or reject a medical intervention or to choose between the offered medical interventions (Article 18, paragraph 9). Neglected is the fact that a child with the capacity to reason can express its choices in respect of the proposed medical interventions, and in particular in respect of pregnancy termination, HIV testing and the like. This right, however, is recognised in the Family Law Bill: *A child who has attained 15 years of age and is able to form a judgement may give his or her consent to the performance of a medical intervention* (Article 64).

#### Biomedical research

*The Health Care Act* does not explicitly prohibit medical research on children. Article 27 makes a deficient argument why certain research would possibly be permissible, and addresses the ways in which the consent could be obtained.

#### Other health care-related rights

Article 18 of the *Health Care Act* defines the rights of citizens, but not the rights of the child. As child rights cannot be included by implication only, we believe that child rights, such as the right to express views, and the right that such views be given due weight, as well as keeping of professional secrets, protection of child’s privacy, and confidentiality of information about child’s state of health are completely omitted from the law.

### Other health-related rights

- Non-discrimination

While Article 4 of *the Health Care Act* refers to equality in health care, the advocacy of non-discrimination of marginalised and vulnerable children and children with special needs is lacking.

- The right to information

Health legislation does not recognise even in a rudimentary form the two articles of the Convention that concern information. The right of the child to receive adequate information about his or her rights, health care measures impacting children, own health needs, specific issues of growth, development, growing up, and coming of age is not mentioned at all. Article 10, paragraph 2, refers to: *health training and education in connection with the most prevalent health problems*, but not sufficiently and not specifically with respect to children.

### 3. What could be done

Neither child rights-based health care nor health care system recognising the interests of the child and enabling the realisation of child rights – can be identified in the Montenegrin health legislation (*Health Care Act and Health Insurance Act*). Those Acts focus on adult population or sometimes on overall population. In cases where the legislation refers to the child, he or she is perceived merely as an object of protection, *appended* to mother, woman and family planning. One could hardly say that legal regulations are child friendly. Although some effort to that effect was made in the Family Law Bill, that is certainly not an appropriate legislative framework to govern health care.

We believe that health care is an area that calls for numerous, radical changes, starting from the supreme and most important document – the Constitution:

1. It is paramount that the Constitution includes an article that would explicitly guarantee to children aged 18 and below the highest attainable standard of health and health care consistent with the respect of child rights (modification of Article 57). It is also significant that the Constitution offers to children guarantees for healthy environment (modification of Article 19), and for appropriate living conditions, survival and development.
2. The Constitution inaugurating the concept of: child rights would be the most adequate basis and guide for further implementation of those rights and their integration into relevant laws. The most appropriate approach to that goal

is to SET UP A NATIONAL CHILD COMMITTEE, that would be tasked with defining the national child policy framework, in this case national policy in the area of child health and health care (but in other areas as well). The national policy should define and determine:

- A child health concept, and consequently, a concept of health care that can ensure such health. Holistic, developmental concept of child health that can be attained through active participation of children and parents, inter-sectoral collaboration, and respect for ALL child rights – should be the basis for future activities;
  - Child health issues of national interest, to be addressed in the *Health Care Act and Health Insurance Act*;
  - Mechanisms to reduce regional and territorial risks;
  - Mechanisms to assess children's needs and identify priorities;
  - An outline of child-friendly health service that would be ready to respond to the variety of requirements and needs children have at different ages and in different territories;
  - Mechanisms to research into local particularities and how specific needs are met.
3. The issues proposed by the National Committee to be incorporated into laws would be further elaborated in the appropriate legal regulations.

Therefore, the law cannot be restricted to a minimalist concept of provision of health services to children. It must further elaborate the concepts defined in the Constitution to offer a framework for everything that the state will provide to children in terms of health care, and the things that can be achieved, obtained and implemented in a variety of other ways and through the engagement of local community, parents and children themselves. The main notions that need to be elaborated and stands that need to be defined in the law are (in addition to those mentioned above):

- o The concept of child health;
- o The concept of health care for children that is to be implemented pursuant to the law;
- o The place and role of child rights in attaining the defined concept of health and health care ;
- o What the concept of equality in health implies and what measures are needed to ensure the realisation of that right in respect of poor children, marginalised children, child refugees, victims of abuse, children with special needs, and other children who are exposed to health risks;

- o What child friendly services will be established and what services are needed in specific phases in the life of children;
- o Age when a child may consent to or refuse medical intervention;
- o To define what research on child subjects implies; who can perform such research, how, and in what circumstances; application procedure;
- o To define evaluation process of health technologies and new interventions used on child population, and the manner in which a new technology or intervention may be applied, irrespective of whether they are clinical or educational or behavioural or social interventions;
- o When and how a child gives consent to termination of pregnancy;
- o When a child may consent to HIV testing;
- o To define the age when a child may be granted the right not to inform parents of his or her HIV status, and persons who may know the results of a child's HIV status, if the child is 14 years of age or younger;
- o The right of a child to confidential counselling;
- o And other issues of interest for child health;
- o To clearly formulate anti-discriminatory views and SINGLE ACCEPTABLE PRACTICE in respect of the position of vulnerable children in health care institutions and other institutions and organisations.

The law could also open up possibilities, by defining the rights of children as patients in health care institutions, for specifying the treatment children should be accorded by medical staff in hospitals and generally in the process of realisation of health care. While the issues of child health care may meet with the issues of education, family protection, and social protection, it would be important for all of them integrally to be included in the *Health Care Act and Health Insurance Act* – to enable adequate planning and allocation of resources. This could be addressed in two ways:

- o By introducing a new chapter: *Child Health and Child Health Care*. This method offers extensive possibilities for all specificities to be recognised, and in particular the rights of a rather heterogeneous group of population;
- o By amending the existing chapters so as to address the specificities of the child's age.

## STRATEGIC ENVIRONMENT IMPACT ASSESSMENT ACT

Although the *Strategic Environment Impact Assessment Act* does not refer to children as stakeholders, its relevance is indirect, as the application of this Act (from 1 January 2008) will create conditions for environment protection, which in turn will facilitate the realisation of the right of children to life, survival and development. The efforts made in this piece of legislation to improve the health of people are highly commendable. This Act suggests that the public have become fully aware of the need to ensure sustainable development and long-term planning with a view of improving living conditions of citizens, taking account of the need to preserve healthy environment that has been long neglected. Such a comprehensive approach is proposed to be replicated in regulating other legal areas.

# RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW

## Position of Juvenile Criminal Offenders

### 1. Relevant International Law and Juvenile Justice System

*The Declaration on the Rights of the Child*, adopted in Geneva in 1924, in paragraph II, states that “the delinquent child must be reclaimed”. The Declaration is not a binding international instrument. Although it conveys the message to the states parties that they should do everything in their power to rehabilitate delinquent children and to reintegrate them into the society, it does not formally bind them to do so.

Long after, the United Nations adopted the second *Declaration on the Rights of the Child* in 1959. That is another elective instrument reflecting the concern for the welfare of the child and inviting the states to protect children. Certain principles embedded in the Declaration, such as principles 1, 2 and 10, call upon “parents, upon men and women as individuals, and upon voluntary organisations, local authorities and national Governments” to, *inter alia*, recognize the rights set forth in the Declaration and to strive for respect of non-discrimination and the best interests of the child, and protection from practices that may foster discrimination in any form. Only indirectly does this instrument recommend that special attention be accorded to the juvenile justice system.

Only with *the International Covenant on Civil and Political Rights* from 1966 were certain aspects of juvenile justice system included in a global and binding instrument. Article 10 (2)(b) and (3) sets forth the obligation of states parties to separate accused juvenile persons from adults, to bring them “as speedily as possible for adjudication” and to treat them in the manner which is appropriate to their age and legal status. Article 14(1) sets forth the obligation to respect privacy, allowing that “where the interest of juvenile persons . . . requires or the proceedings concern matrimonial disputes or guardianship of children” judgement may be rendered in a criminal case or in a suit in law without the presence of the public. Further on, the same article in paragraph 4

states that “in the case of juvenile persons, the procedure shall be such as will take account of their age and desirability of promoting their rehabilitation.” Although the scope of these provisions is limited to concrete aspects of juvenile justice system, they initiated the processes for the creation of new and review of the existing national juvenile justice systems.

In 1985, the United Nations adopted the *Standard Minimum Rules for the Administration of Juvenile Justice*, known as the “Beijing Rules”. This document sets a framework for the national juvenile justice systems and gives guidelines to national systems how to treat juveniles in conflict with the law. Although the Rules are not binding, some of their principles are embedded in the *Convention on the Rights of the Child*. The others served as an aid and benchmark for interpretation of the child rights standards applicable to juvenile justice. Besides, the “Beijing Rules” call upon the member states to report every five years to the UN Secretary General about the national implementation of this instrument. The governments are encouraged to seek assistance in harmonising legislation and practical organisation. Also, non-governmental organisations are invited to take part in the implementation of those principles.

*The Convention on the Rights of the Child* from 1989 includes an article concerning juvenile justice – Article 40. Generally, the provisions of this article deal with the rights of every child alleged as, accused of, or recognized as having infringed the penal law. Their rights must be observed and such children must have access to all available legal means, including any legal and other aid in preparing and presenting their defence. In principle, court proceedings and institutionalization should be avoided whenever it is possible and appropriate.

*The Convention* deals specifically with torture and deprivation of liberty in Article 37, periodic review of treatment provided to the child and all other circumstances relevant for their placement in Article 25, and the obligation of states parties to provide relevant treatment with a view of rehabilitating and reintegrating children who find themselves in special circumstances back into community (article 39).

After the Convention, two important instruments were adopted under the aegis of the United Nations in 1990: *The UN Rules for the Protection of Juveniles Deprived of Their Liberty* and *the UN Guidelines for the Prevention of Juvenile Delinquency* (“the Riyadh Guidelines”). Those instruments are not

binding and they supplement the “Beijing Rules”. They also serve as a tool for interpreting and implementing *the Convention on the Rights of the Child*.

*The European Convention for the Protection of Human Rights and Fundamental Freedoms* from 1950 does not include provisions pertaining to the rights of children covered by the juvenile justice system. However, the relevant provisions apply to both children and adults. Article 5 of *the Convention* states that “everyone has the right to liberty and security of person”. No one shall be deprived of his liberty save in the following cases and in accordance with the procedures prescribed by law”..., including “[d]etention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.” Article 6 sets forth that “[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Judgements are pronounced publicly, save when “[t]he interests of juveniles or protection of the private life of parents ... require” otherwise. The right to respect for private and family life, which is so important within the scope of the juvenile justice system, is proclaimed in Article 8 of this international treaty.

Since *the European Convention* has come into force, a number of opinions and adjudications has been rendered and applied as precedents in the member states of this international treaty. *The European Convention* is binding only upon its signatories, but also upon individuals who are citizens of other countries, when they find themselves in the jurisdiction of signatory countries. That is why non-signatory states should also familiarize with the law of the Council of Europe, especially that concerning human rights.

## 2. Age for criminal liability

The Montenegrin *Penal Code* sets the age for criminal liability at the level identical to that defined in the substantive criminal legislation of the SFRY, following in the steps of other countries emerging after the break up of the SFRY. The same age of criminal liability is typical for many European countries. According to Article 80 of the MPC, penal sanctions may not be imposed on a person who at the time when the crime was committed was under fourteen years of age (child). *This legal solution is in line with the relevant*

*international regulations*, primarily with Article 40 of the Convention on the Rights of the Child, and the provisions of the Beijing Rules<sup>6</sup> and the Riyadh Guidelines.<sup>7</sup>

In effect, the above international instruments are not explicit on the minimum age for criminal liability, which minimum differs significantly across the comparative legal systems. The principal international instruments governing this issue and the spirit of legal mechanisms set out thereunder imply, however, that the age must not be set too low. The solution from the MPC seems to be optimal and to correspond to generally-accepted European standards.

### 3. Division of juveniles who may be criminally liable by age criterion

As it was the case in former SFRY, and as it is the case now in most of the countries that exist on the former Yugoslav territory, the Montenegrin *Penal Code* makes the following distinction between offenders, based on age criterion (Article 81 of the MPC):

- 1) Juveniles - persons over fourteen years of age but who have not attained eighteen years of age at the time when the offence is committed;
- 2) Young adults (Article 111 of the MPC – offenders who are over eighteen years of age but who have not attained twenty-one years of age); and
- 3) Adults – offenders who are twenty-one years of age.

Juveniles are further divided into: a) young juveniles – persons over fourteen years of age but who have not attained sixteen years of age at the time when the offence is committed; and b) older juveniles – persons over sixteen years of age but who have not attained eighteen years of age at the time when the offence is committed.

<sup>6</sup> Adopted in 1985 under the UN General Assembly Resolution A/Rec./40/33.

<sup>7</sup> Adopted in 1990 under the UN General Assembly Resolution A/Rec./45/112.

*The above division by age is absolutely adequate and in line with principal international regulations and the European standards.* It is also in compliance with the Convention on the Rights of the Child, despite the fact that the Convention defines a child as a person who has not attained eighteen years of age. Namely, for the purposes of the Convention (Article 1), child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. The difference lies in terminology, and is substantially irrelevant; many developed democratic countries in Europe, such as Germany, have applied a solution almost identical to that in the MPC.

*The Montenegrin penal legislation meets the standard embedded in the UN Convention on the Rights of the Child (Article 40, paragraph 3, item (a)), according to which States Parties must, inter alia, establish a minimum age below which children will be presumed not to have the capacity to infringe the penal law.*

#### 4. Key elements of the system of juvenile penal sanctions

While young juveniles may be subjected only to educational measures, older juveniles may be, in addition to educational measures, sentenced to a term in juvenile prison, or may be pronounced security measures, under certain legally prescribed conditions (Article 81, paragraphs 1 – 3 of the MPC). Suspended sentence and judicial admonition may not be pronounced to a juvenile.

The purpose of educational measures and juvenile prison sentence, within the framework of general purpose of penal sanctions, (Article 4, paragraph 2 of the MPC) is established in terms of *special preventive action* – to ensure formation, rehabilitation and proper development of juveniles (Article 82 of the MPC) through: 1) protection and assistance, 2) supervision, 3) vocational training, and 4) enhancement of personal responsibility of the juvenile - and to exert intensified influence on juvenile delinquents not to repeat the offences and on other juveniles not to commit offences (combined *general and special prevention*).

Such a purpose of sanctions against juveniles is in line with the general intent of the relevant international regulations to ensure the effectiveness of

penal sanctions through the measures of criminal justice system. Nevertheless, this provision is predominantly declarative in nature, and considering indisputably irrepresive character of sanctions imposable on juveniles, it is uncommon for such sanctions to have the features of the general prevention, which in effect can refer solely to juvenile prison. Therefore, the purpose of classical educational measures seems better to be determined separately from the purpose of juvenile prison.

The latest changes in the substantive penal legislation of Montenegro introduced special measures, as a form of (para)sanctions for juveniles, which was a major headway within the framework of the legal system.

Article 80b specifies the purpose of diversion orders aggregately as:

- 1) *procedure- and function-related purpose* – not to initiate criminal proceedings or to discontinue criminal proceedings against a juvenile; and
- 2) *substantive law-related purpose based on the special prevention concept* – to influence the development and enhance personal responsibility of the juvenile so as to prevent repeat offending in the future.

Only the latter, i.e. the substantive-law related purpose of diversion orders (directly focusing on special prevention) could be their purpose in terms of criminal substantive law, and could be considered as the purpose of those specific (para)sanctions, while the former (subsequently related to special prevention) actually boils down to *procedural effect* of a diversion order, when the diversion order is an element of diversion with intervention. Such an effect of the diversion order cannot by any means be the purpose thereof, as the effect and purpose of a matter can never be the one and the same thing. In our opinion we are dealing here with a technical anomaly without any relevance to substance, which should be, by all means, rectified in some of the future novations of the Montenegrin criminal law.

The criminal law of Montenegro recognizes the following educational measures (Article 83 of the MPC):

- 1) Disciplinary measures – reprimand and referral to juvenile education centre;

2) Measures of increased supervision – by parents, adoptive parents, or guardians, and guardianship authority, or increased supervision with daily attendance in relevant educational institution for juveniles, and

3) Institutional measures – remand to rehabilitation institution, remand to correctional institution, committal to special institution for treatment and acquiring of social skills.

In selecting the educational measure, the court takes particularly under deliberation the following elements:

1) Those pertaining to the person of the juvenile – age, degree of mental development, mental characteristics, inclinations, and degree of neglect formation-wise,

2) Those pertaining to the subjective aspect of the offence – motives for committing the offence,

3) Those pertaining to micro social system of the juvenile – environment and living circumstances,

4) Those pertaining to objective elements of the offence – gravity of the offence,

5) Those pertaining to any former recidivism – whether the juvenile has any former diversion order or conviction, and

6) All other circumstances of relevance for pronouncement of such measure that would best serve to achieve the purpose of educational measures.

Although useful as guidance to the court, the above parameters for the selection of juvenile educational measures seem to be too abstract and overly casuistically formulated, all the more so as a general formulation of »all other circumstances« follows thereafter.

Articles 85 – 90 of the *Penal Code* specify the cases in which individual penal sanctions are pronounced. Despite the fact that penal sanctions are not of repressive character, they could be ranked according to their gravity.

*The range of penal sanctions enforceable against juvenile offenders fully meets the requirements of the Convention on the Rights of the Child (Article 40, paragraph 4) according to which a variety of dispositions should be made available.*

With the latest amendments to the law, the Montenegrin legislator took things one step further to introduce some specific measures – diversion orders, and in particular (Article 80c):

- 1) Settlement with the injured party so that by compensating the damages, apology, work or otherwise, the detrimental consequences would be alleviated either in full or partly;
- 2) Regular attendance of classes or work;
- 3) Engagement, without remuneration, in the work of humanitarian organisations or community work (welfare, local or environmental);
- 4) Undergoing relevant check-ups and drug and alcohol treatment programs;
- 5) Participation in individual or group therapy at suitable health institution or counselling centre.

Also, in addition to increased supervision, a juvenile may be imposed some special obligations (Article 91 of the PC), some of which are in keeping with the modern idea of restorative justice (apology to the victim), and some very similar to diversion orders by nature.

*Juvenile sanction system as envisaged under the MPC enables selection of the most adequate measure in any given case, and is fully in line with Article 40, paragraph 4 of the CRC, thus offering a wide range of measures available to be taken in respect of juvenile delinquents.*

*Diversion orders in combination with criminal procedure mechanisms inherent to the diversion from criminal prosecution with intervention are a segment of a most adequate diversion mechanism, which is fully in compliance with Article 40, paragraph 3, item b) of the CRC, according to which problems should be addressed without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.*

Although no provision of any international instrument sets it out explicitly as a separate measure – as such instruments cannot possibly regulate all minute details – it is a pity that the *Penal Code* does not include *regular sport activities*, either as one of diversion orders or in the system of special measures, as such measure can be very effective and useful in specific cases.

Further more, in addition to regular attendance of school and education that would be envisaged pursuant to a diversion order, it could be useful to provide for *courses where some skills could be acquired* or even *courses focusing on peaceful resolution of problems*, which could be most beneficial for juveniles with pronounced emotional problems, and even more so for juveniles with impulsive behaviour or with difficulty to control aggressive charge.

Issues likely to arise in the system of penal sanctions and other measures enforceable against juvenile delinquents, as stipulated in the *Penal Code* include practical difficulties related to enforcement of certain sanctions, especially the more challenging ones, such as special obligations and diversion orders, as parasanctions *sui generis*.

Namely, such measures require not only relevant norms, which now undoubtedly exist in Montenegro and are fully harmonised with the relevant international instruments, but call for a whole well-balanced system to be put in place in support of timely and correct selection of the most appropriate measure in any given case, and its successful and unhindered enforcement, which in practical terms requires both competent professionals and relevant institutions. These are all most pertinent requirements that extend beyond the normative framework, while at the same they are a part of the prerequisites for full implementation of the norms of the penal legislation.

## TREATMENT OF JUVENILES IN THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF MONTENEGRO

The treatment accorded to juveniles pursuant to *the Criminal Procedure Code* of the Republic of Montenegro resembles, and in many elements coincides with the treatment of juveniles under the Criminal Procedure Act of the SFRY and the FRY, respectively. Significant changes were introduced with the enactment of the latest *Act Amending the Criminal Procedure Code, and the Act Amending the Penal Code*, in the part that relates to procedural mechanisms falling within the domain of juvenile criminal procedure.<sup>8</sup>

While the regulations governing juvenile criminal procedure were generally far from inadequate even before the latest amendments, they could be further improved in many aspects. Namely, the juvenile criminal procedure applicable in former Yugoslavia was a modern one, with its main shortcoming being extreme inefficiency. According to reliable statistical data about 1/3 of juveniles suspected of having committed an offence were not covered by the penal system, as the criminal proceedings against such juveniles were never initiated following the principle of diversion from criminal prosecution, and the proceedings against 1/3 of juveniles were discontinued due to inappropriateness to further pursue criminal prosecution, so that only 1/3 of juveniles who had committed an offence (in procedural terms, until the final completion of the trial solely on the level of well-founded suspicion), were subjected to penal sanctions. The penalty of juvenile prison traditionally accounts for less than 1% (somewhat above 0.5%) and the institutional measures for 3 – 4% in the structure of the pronounced penal sanctions.

The latest amendments to the substantive and adjective criminal law of Montenegro allowed action to be taken following the principle of diversion from criminal prosecution with intervention, which in turn enabled a major headway to be made in addressing the above described problem that prevailed in the practice of the former Yugoslav penal system. Nevertheless, there is a whole series of other issues pertaining to juvenile criminal procedure in

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<sup>8</sup> *Official Gazette of the Republic of Montenegro, no. 47, Podgorica, 25 July 2006.*

the Republic of Montenegro that could be further improved, as we will discuss below, focusing on the compliance of the provisions governing that procedure with the relevant international documents and instruments.

## 1. Legal framework

The principal formal characteristic of the legal framework is that the procedure against juveniles is governed by the *Criminal Procedure Code*, which is a legitimate solution, as no international legal document requires special and separate juvenile legislation to be put in place – a special law to govern juvenile criminal justice as a whole, and specifically juvenile criminal procedure included.

On the other hand, many developed countries have enacted special laws to address the issues of juvenile justice, in terms of both substantive criminal law and adjective criminal law. As a modern solution, those special laws encompass provisions pertaining to criminal justice protection of juveniles. Such legal frameworks are typical for Germany, Austria, Spain, Belgium, England and Wales, France and other countries that have traditionally had specific laws governing juvenile criminal procedure, which laws are *lex specialis* in relation to the Criminal Procedure Code, being a *lex generalis*. By way of illustration, in Germany such a relationship exists between the Juvenile Court Act (Jugendgerichtsgesetz – JGG) and the Criminal Procedure Code - (Strafprozeßordnung – StPO).

*While not representing a formal legal obligation of Montenegro founded on international legal obligations, we believe that enactment of a juvenile justice law would in itself be a major advance for the Republic of Montenegro. Thereby the government would in yet another way underline its intention to specifically and adequately address the issue within its legal system, which would symbolically be an unequivocal indication of a more explicit attention being given to that particularly vulnerable category of population.*

*Therefore, although there is no formal obligation on the international level to separate the problem area of juvenile justice in a special law, such a step would certainly be useful from the practical point of view, as it would enable all those concerned with the implementation of the juvenile criminal procedure to focus on the*

*matter.* The experience of the developed countries with efficient legal systems suggests such a solution as being most advantageous. Thus, it could be recommended for implementation in the Republic of Montenegro, with a view of opening up more possibilities for sustaining all the good new solutions from the domain of juvenile criminal procedure, and for their further promotion.

## 2. The right to a defence counsel

According to Article 469, paragraph 1 of the CPC, the juvenile may retain a defence counsel from the moment of the commencement of pre-trial proceedings, and pursuant to Article 469, paragraph 2 of the CPC, the juvenile must retain a defence counsel from that stage of the proceedings if the proceedings are conducted for a criminal offence punishable by imprisonment for a term of more than three years, and for other criminal offences punishable by a more lenient punishment – if a juvenile judge deems that the juvenile needs the defence counsel.

The right to professional defence arises from international instruments and specifically from Article 14 of the *International Covenant on Civil and Political Rights* and Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. In a broader sense, this right is also based on Article 37 of the CRC. This right is further emphasised in Article 40 of the *Convention on the Rights of the Child*.

The provision of Article 469, paragraph 1, that the juvenile *may* retain a defence counsel from the moment of the commencement of pre-trial proceedings implies that the juvenile may not retain a defence counsel in the pre-investigatory proceedings, which seems to be illogical, as the juvenile actually *must* have a defence counsel at that stage, just like a suspect who is an adult person. That provision is not in line with Article 231, paragraph 9 of the CPC, pursuant to which a suspect is to be interrogated pursuant to the provisions of the *Criminal Procedure Code* governing the interrogation of the defendant if the suspect accepts to give statement in the presence of defence counsel. The police are obliged to notify the state prosecutor of the interrogation of the suspect, and the state prosecutor may be present at the interrogation. The record of the interrogation is not separated from the case documents, and may be used as evidence in the criminal proceedings.

Further on, we are of the opinion that the point in the procedure when a defence counsel may be retained should be moved to *the first interrogation of the juvenile*, so as to encompass the pre-investigatory proceedings, which would result in the deletion of above described provision of Article 469, paragraph 1, of the Code. The provision according to which the suspect may not be interrogated in the pre-investigatory proceedings without the defence counsel (Article 231, paragraph 9 of the CPC) analogously applies to juveniles when they are suspects. The fact that the juvenile must have a defence counsel if interrogated as a suspect is another reason why Article 469, paragraph 1 should be taken out. The case law of the European Court of Human Rights in Strasbourg strongly suggests that the juveniles against whom criminal proceedings have been initiated should be allowed to have professional defence from the early stages of the proceedings.

### 3. The principle of diversion from criminal prosecution and its rational modification towards the procedure conducted according to the principle of diversion from criminal prosecution with intervention

The principle of diversion is opposite to the principle of legality of criminal prosecution (obligation to institute criminal proceedings), or to the principle of legality of *ex officio* criminal prosecution. Many theoretical papers do not treat it as a separate or specific principle of the criminal procedure, but rather as a procedural opposite to the principle of legality (an exemption to that principle). It is characterised by “opportuneness” of the prosecution, meaning that the criminal prosecution does not have to be undertaken even though all the requirements arising from the principle of legality have been met, and that prosecution may or may not be initiated given the appropriateness of criminal prosecution in a given case. The criterion for non-prosecution in some national (comparative) criminal procedures, for instance, is related to high costs of the proceedings, or is based on some characteristics of the defendant.<sup>9</sup>

<sup>9</sup> For more see: Kern, E. und Roxin, C. *Strafverfahrensrecht*, 14. Auflage, Verlag C. H. Beck, München, 1976, p. 61.

The principle of diversion from criminal prosecution exists in *two situations* in respect of the public prosecutor: 1) *when criminal procedure is initiated against juveniles*, in which case the state prosecutor may in two cases for the reasons of appropriateness and/or (in)appropriateness elect to not initiate criminal proceedings against the juvenile, despite the fact that all other legal requirements have been fulfilled, and 2) in case of some relatively *minor offences*, when it takes two forms: a) *diversion with intervention* (Article 244 of the CPC), and b) diversion from criminal prosecution due to *real repent* of the suspect, given the fulfilment of other requirements (Article 245 of the CPC) – dismissal of criminal report for the reasons of fairness.

In two instances, state prosecutor, who is solely authorised to initiate criminal proceedings against juveniles (exclusive jurisdiction of the state prosecutor), may elect not to initiate the proceedings, albeit existing evidence that the juvenile has committed a criminal offence:<sup>10</sup> 1) for a criminal offence *of a certain degree of gravity* – a criminal offence punishable by a term of imprisonment of up to five years<sup>11</sup> or a fine, where the state prosecutor holds that it would be inappropriate to conduct a proceedings against the juvenile, considering the following circumstances in aggregate: a) circumstances pertaining to the offence: 1. nature of the criminal offence, and 2) the circumstances under which the offence has been committed, and b) circumstances pertaining to the juvenile: 1. previous life of the perpetrator and 2. personal characteristics of the juvenile (Article 482, paragraph 1 of the CPC; 2) *when the enforcement of a sanction is pending* - when the enforcement of a punishment or an educational measure is pending, the public prosecutor may decide not to request the institution of the criminal proceedings for another criminal offence committed by the juvenile if, taking into account the gravity of that criminal offence and the punishment or educational measure the enforcement of which is pending, the conduct of the criminal proceedings and the imposition of criminal sanction for that offence would be purposeless (Article 482, paragraph 3 of the CPC).

<sup>10</sup> For more see: Škulić, M. (1997) *Princip oportuniteta u krivičnom postupku prema maloletnicima*, Beograd: *Izbor sudske prakse /The Principle of Diversion from Criminal Prosecution of Juveniles*, Belgrade: *Selection of Case Law/ - »Государјум«*, no. 7–8/97, pp. 66–68.

<sup>11</sup> Article 54 of the Act Amending the Criminal Procedure Code, Official Gazette of the Republic of Montenegro, no. 47, Podgorica, 25 July 2006.

Diversion from criminal prosecution with intervention is by its nature a hybrid, or a mixed institution of the criminal procedure, with both elements of classical *non-institution of the criminal proceedings* on the ground of inappropriateness, and elements of *forgiveness to the perpetrator*, should he or she “deserve” such a special abolition by fulfilling certain obligations. Considering the character of the obligations, which to a certain extent resemble some penal sanctions (for instance, a fine or community service), this institution can to a certain degree fulfil *the purpose of criminal sanctioning*, without formal punishment or occurrence of other typically adverse consequences of the enforcement of punishment, or occurrence of the stigmatisation after conviction.

*We believe the introduction of certain possibilities of diversion with intervention in the juvenile criminal procedure under the latest amendments to the criminal procedure law in the Republic of Montenegro to be absolutely justifiable and fully in line with the international legal obligations, all of which was achieved in a rational manner by making a possibility for the criminal proceedings not to be initiated against a juvenile conditional upon fulfilment of certain obligations by the juvenile within specified time, which obligations concern education and formation of juveniles and have generally beneficial effect on their development.*

Those obligations (*conditions* for the conduct of the procedure following the principle of diversion from criminal prosecution) would in effect be some kind of „parasanctions“ devoid of any potentially repressive elements. Such a procedural solution (Article 482a of the CPC) is in operational terms directly in connection with the amendments to *the Penal Code* (Articles 80a, 80b, 80c, 80d, 80e, and 91, paragraph 2), pursuant to which diversion orders were instituted as a special kind of (para)penal sanctions.

While creation of mechanisms for conducting the procedure according to the principle of diversion with intervention is not, in a strictly formal sense, stipulated under the relevant international legal instruments, it arises from the right to fair trial, as one of the fundamental human rights, and the provisions of the Convention on the Rights of the Child, and particularly from Article 37, according to which states parties should treat each child with humanity and dignity, and in the manner which takes into account the need of persons of his age, and Article 39, according to which states parties should promote physical and psychological recovery of a child in an environment which

fosters the health, self-respect and dignity of the child throughout the rehabilitation and reintegration efforts.

Rather than by conducting criminal procedure at any cost, the general goals set in the CRC can in many situations be achieved more efficiently and effectively with certain diversion measures or various forms of alternative sanctions and (para)sanctions as such, and with various models of alternative procedures in general. That calls for and justifies the introduction of certain models of diversion with intervention in the juvenile criminal procedure, as set forth in the Montenegrin legislation. With the latest changes in the criminal substantive and procedural normative environment, Montenegro has evidently taken a step in the right direction, which does not necessarily mean that fresh solutions cannot be further amended or modified with a view of improving them, especially after some feedback has been received on how they operate in the field.

The decision of the state prosecutor not to initiate criminal proceedings against a juvenile may, given the consent of the juvenile, his parents, adoptive parents or guardian, be made conditional on the fulfilment of one or more obligations set out in Article 91 of the Penal Code (Article 482a, paragraph 1 of the CPC). It would be appropriate if this provision stated that *the consent of parents, adoptive parents or guardian was not mandatory*, as in some situations consent of the juvenile would suffice. One should bear in mind that in some cases parents, adoptive parents or guardians might be uncooperative, and make the diversion with intervention impossible albeit the state prosecutor's decision, and the juvenile's consent. In some situations it would be contrary to the interest of the injured party, resulting in the violation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>12</sup> According to Article 4 of the Declaration, victims should be treated with compassion and respect for their dignity, and the victims are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

While a possibility for the victim and the suspect to reach a *settle-*

<sup>12</sup> Proposed for adoption at the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders, held in Milan between 26 August and 6 September 1985. Adopted under the UN General Assembly Resolution 40/34 of 29 November 1985.

*ment* is justifiable, it is incorrect to use the term »suspect« for the juvenile, who from the point of view of terminology is not the defendant at all. This also serves to show why (as discussed above) the requirement to seek parents, adoptive parents, or guardians' consent for diversion with intervention should be waived. Additionally, *the procedure for settlement between the juvenile and the victim* should have been either *formally regulated* in a special law or outlined in a relevant by-law.

In the text below we shall discuss some terminology-related and technical errors and omissions in the *Penal Code*, in the part which, following the latest novations, deals with diversion orders and therefore is directly connected with certain provisions of the *Criminal Procedure Code*, which has recently been amended to include elements of diversion with intervention in the provisions governing juvenile criminal procedure.

Article 80b specifies the purpose of diversion orders aggregately as:

- 1) *procedure- and function-related purpose* – not to initiate criminal proceedings or to discontinue criminal proceedings against a juvenile; and
- 2) substantive law-related purpose based on the *special prevention concept* – to influence the development and enhance personal responsibility of the juvenile so as to prevent repeat offending in the future.

Only the latter, i.e. the substantive-law related purpose of diversion orders (directly focusing on special prevention) could be their purpose in terms of criminal substantive law, and could be considered as the purpose of those specific (para)sanctions, while the former (subsequently related to special prevention) actually boils down to *procedural effect* of a diversion order, when the diversion order is an element of diversion with intervention. Such an effect of the diversion order cannot by any means be the purpose thereof, as the effect and purpose of a matter can never be the one and the same thing. In our opinion we are dealing here with a technical anomaly without any relevance to substance, which should be, by all means, rectified in some of the future novations of the Montenegrin criminal law.

In Article 91, paragraph 2, after the word »employment«, words »of

the juvenile« should be added, so as to make it clear that the paragraph refers to hiring a juvenile - a person who performs community work without pay.

#### 4. Deprivation of liberty in the pre-investigatory proceedings and detention in criminal proceedings against juveniles

Deprivation of liberty in the pre-investigatory proceedings (Article 232 of the CPC) covers both adult suspects and juvenile suspects. We believe that it would be more appropriate if the police did not have the right to deprive juveniles of liberty, and if such a possibility was available solely to juvenile judges.

Namely, the right of police officers to deprive adult suspects of their liberty is an exemption to the rule that it is the court that decides on the matter by ordering detention. Therefore, such an exemption should not be expanded to include juveniles, who in principle should have a more favourable status in the criminal procedure. This is not expressly envisaged by the relevant international instruments but arises from the general effect of Article 37 of the CRC, pursuant to which article each child is to be treated with humanity and respect, and in a manner which takes into account the needs of persons of his or her age, and a juvenile judge is certainly more apt to do so than a police officer. Besides, the same article of the Convention sets forth that arrest or detention of a child must be *ultima ratio*, or in other words must be used only as a measure of last resort and for an appropriate period of time, which a juvenile judge is again fit to determine, taking into account relevant case law.

Detention of a juvenile may be ordered only exceptionally (Article 488, paragraph 1 of the CPC) on one of the grounds set out in Article 148, paragraph 1 of the CPC. In stipulating that the detention be ordered against juveniles only in *exceptional* cases, the Montenegrin legislator took into account relevant international instruments, and primarily Article 37 of the CRC and an obligation of states parties arising therefrom to prohibit unlawful or arbitrary deprivation of liberty of children.

The main shortcoming of the law is that no conditions are provided for education of juveniles while in detention. Namely, given the presumption of innocence, no educational measures that are penal sanctions by nature may be taken against the juvenile while in detention. However, certain general

educational measures - very much like general educational measures taken in respect of juveniles who are at liberty - should be carried out even in detention, which is all in keeping with the case law of the European Court of Human Rights. The requirement to put in place measures that would have educative effect on detained juveniles, and the requirement to create conditions for the detained juveniles to be in an educative environment lacking, the detained juveniles would in that respect be in a less favourable position than juveniles at liberty, which is unacceptable.

This must not by any means provide for educative activities, the contents of which correspond to the substance and contents of penal sanctions that have certain educative connotations and fall in the domain of juvenile criminal law, as it would be in violation of both the criminal law principle of legality and the presumption of innocence, and would directly contravene both the applicable regulations in the Republic of Montenegro - and not only those at the rank of law – and the Montenegrin Constitution, as well as Article 11, paragraph 1, of the *Universal Declaration of Human Rights*, Article 14, paragraph 2, of the *International Covenant on Civil and Political Rights*, and Article 6, paragraph 2, of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*.

*Therefore, one must use utmost care and moderation in exposing juveniles while in detention to educative activities, the scope of which activities should coincide with that of the activities that are applicable to persons of his or her age who are not deprived of their liberty. Educative activities intended for detained juveniles should meet the standards typical for democratic societies, and should offer to juveniles while in detention possibilities to learn how to read and write if they are illiterate, or to have access to psycho-social therapy if needed, to have contact with the media, and the like.*

## 5. Specialisation of the actors in juvenile criminal procedure

Identically to the former CPC of the SFRY (FRY), the Montenegrin CPC recognises functional jurisdiction of juvenile judges, who conduct pre-trial proceedings, and preside over the juvenile panel in the further course of the proceedings, while the lay judges sitting on the juvenile panel are selected

from among the professors, teachers, care workers, and other persons experienced in juvenile education (Article 477, paragraph 3 of the CPC).

This is a traditional solution, which should in practice be supported by adequate continuing training of juvenile judges, who would definitely need to specialise in trying such a vulnerable group of population. *The specialisation, however, should encompass state prosecutors, who are the only authorised persons to initiate proceedings against juveniles, the police officers, who deal with juveniles in the pre-investigatory proceedings, and lawyers, who provide professional defence to juveniles.* While no provision of the relevant international instruments explicitly stipulates this obligation, in general terms it arises from Article 40 of the CRC, according to which every child must be treated in a manner which is consistent with the promotion of the child's sense of dignity and worth, and takes into account the child's age and the need for promoting the child's reintegration in society. Those goals, by the obvious logic, can be achieved far more successfully by the players who are adequately trained and specialised.

## 7. Conclusion on the compliance of juvenile criminal procedure in the Republic of Montenegro with the relevant international instruments

The latest amendments to the criminal procedure law and criminal substantive law of the Republic of Montenegro made a significant step forward not only towards designing an efficient and more humane juvenile criminal procedure and its consistent harmonisation with the relevant international instruments, but also towards adoption of modern criminal procedure mechanisms that are immanent to modern legal systems and have proven to yield satisfactory results in many advanced and democratic countries for several decades now.

Nevertheless, the Republic of Montenegro has ample room for further improvement of its legislation governing juvenile criminal procedure. In the text above, we have made certain suggestions to that effect that we believe would be useful as a base for concrete *de lege ferenda* modifications.

# ENFORCEMENT OF PENAL SANCTIONS AGAINST JUVENILES

## 1. Legal framework

As explained above, the Montenegrin criminal legislation is characterised by the fact that it did not opt for creating a separate body of norms to treat juveniles, which would be *lex specialis* in relation to other criminal law norms, which in turn would have the effect of *lex generalis*. The same applies to the system of enforcement of penal sanctions. As pointed out in connection with the juvenile criminal procedure, we believe that, in principle, this matter would be more adequately addressed in a separate law that would concern solely juveniles.

While no specific obligation to opt for such a legal framework arises for Montenegro from any of the international legal instruments, it would certainly send a clear message that Montenegro accords special attention to the position of juveniles in the criminal procedure. Moreover, such a concentration of criminal law matter that specifically concerns juveniles would be of practical relevance, as the authorities in charge of the criminal procedure and enforcement of penal sanctions against juveniles could focus on juveniles as a separate legal category, as well as a factual (social, psychological, etc.) category.

## 2. Referral to the juvenile disciplinary centre

This measure is enforced in education institutions set up specifically for that purpose, and in shelters, education institutions, schools and other similar institutions (Article 115 of the PSEA).

The Montenegrin Penal Sanction Enforcement Act defines this measure in a fair and humane manner, in full compliance with the relevant international regulations, although its practical application seems to raise the issue of effectiveness and the issue of actual availability of appropriate institutions and facilities of the kind.

### 3. Increased supervision measures

These measures, depending on the type, are executed by parents, adoptive parents or guardians, by the relevant social care authority, or with daily attendance in relevant educational institution for juveniles.

We are of the opinion that the execution of increased supervision measures, as stipulated under the Montenegrin PSEA, should be supplemented and consistently harmonised form- and substance-wise, bearing in mind international legal obligations of Montenegro. With that in mind, it would be desirable to create more transparent mechanisms for the protection of the rights of this category (primarily mechanism that would ensure respect for the best interest of juveniles and participative principle in the enforcement of the increased supervision measures), and for the responsibility of the relevant social care authority, when such an authority is in charge of enforcing the increased supervision measures and when it performs a supervisory function over the enforcement of the measures by parents, adoptive parents or guardians.

### 4. Institutional measures

Institutional measures are executed in rehabilitation institutions, correctional institutions, and special institutions (Article 136 of the PSEA).

As for institutional educational measure of remand to rehabilitation institution, the applicable provisions are not clear on how juvenile offenders are practically differentiated from other wards, which could lead to some problems, and possibly to stigmatization of either category of persons remanded to a rehabilitation institution.

As for the remand to a correctional institution, the legislator has regulated the enforcement of this institutional educational measure in a much more precise and comprehensive manner. We want to highlight the need to promptly provide objective conditions for the implementation of this measure, and to adopt precise by-laws and regulations, such as house rules containing specific provisions on the organisation of life of juveniles remanded to correctional institutions.

At this point we want to point to Article 152, paragraph 3, pursuant

to which the principal who establishes that the juvenile has negative influence on the behaviour of other pupils/students in school (in case when the juvenile attends school outside the correctional institution) may deny such juvenile the right to attend school, in which case, neither the juvenile nor the correctional institution have recourse to any effective remedy to challenge the lawfulness and legitimacy of the principal's decision (other than to general legal mechanisms which are relatively inefficient and slow).

Rather rigid, this norm rests completely on the principal's arbitrariness, and envisages no procedure that would realistically and fairly establish whether the juvenile's negative behaviour affects other pupils/students, and how. *We are of the opinion that this provision is absolutely in conflict with Article 28 of the CRC.*

Such a possibility for the principal should be eliminated, and the principal should only have the right to require the management of the correctional institution to take relevant steps, when in his opinion the juvenile is in serious violation of usual norms of school discipline or is in serious violation of the school attendance rules. It would also be quite adequate to address the issue following the general norms of school students' conduct, rather than to single out, in such a particular way, the juvenile against whom penal sanctions are executed.

## 5. Enforcement of juvenile prison sanction

Enforcement of this penal sanction against juveniles, as the only sanction which is formally the punishment, is scarcely regulated in the Montenegrin PSEA. Article 69 of the PSEA sets forth that the provisions thereof apply to the enforcement of juvenile prison, unless otherwise set out in Chapter Five, which deals specifically with juvenile prison.

Only two other articles refer to juvenile prison (Articles 70 and 71), which is insufficient and does not distance juvenile prison enough from classical prisons for adults. *We believe this to be an inadequate solution and in contradiction with Article 40, paragraph 4, of the CRC, according to which a wide range of dispositions should be envisaged for juveniles, such as care, guidance, supervision, legal aid, and other.*

In effect, juveniles against whom the juvenile prison sanction is enforced have at their disposal a spectrum of mechanisms that concern their legal status in prison; the mechanisms, however, are very much like those available to adult convicts, which seems to be contrary to general trends in the modern democratic countries with good-quality legal systems that seek to regulate the status of juveniles separately from that of adult convicts.

The contents of Articles 70 and 71 of the PSEA seems to be quite correct; nevertheless, we believe that the status of juveniles against whom juvenile prison sanction is enforced should be regulated either in a separate law (as discussed above) or by introducing a substantial body of provisions into the applicable PSEA, which would be a major qualitative step forward for the Montenegrin legislation, whereby it would come even closer to the European and general international legal standards.

## RATIO LEGIS OF CRIMINAL JUSTICE PROTECTION OF JUVENILES

Criminal justice system is made up of substantive and procedural norms that a state applies to react to the gravest violations of personal integrity (physical, mental and sexual), and *ratio legis* of a special criminal justice protection of juveniles is based primarily on: 1) social need for more effective response to injuring or endangering persons belonging to the youngest age groups, and 2) the fact that in many situations these persons are far more endangered than adults due to the physical and mental development specific for their age.

## CRIMINAL JUSTICE PROTECTION OF JUVENILES IN THE REPUBLIC OF MONTENEGRO AND HARMONISATION WITH THE RELEVANT INTERNATIONAL NORMS AND STANDARDS

The starting position for the discussion given below will be the analysis of violence against children and young persons (juveniles) from the perspective of harmonisation of legal norms criminalizing the offences against life, bodily and sexual integrity, health and upbringing of juveniles embedded in the Montenegrin criminal law with the relevant international norms and standards, such as:

- *The Convention on the Rights of the Child;*
- *The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts;*
- *The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;*
- *International Covenant on Civil and Political Rights;*
- *International Covenant on Economic, Social and Cultural Rights;*
- *UN Convention against Transnational Organised Crime and the Protocol on Prevention, Elimination and Punishment of Trafficking in Human Beings, Especially Women and Children;*
- *The ILO Convention No. 138 concerning Minimum Age for Admission to Employment;*
- *The ILO Convention No. 182 on Worst Forms of Child Labour;*
- *The Hague Convention 28 on Civil Aspects of International Child Abduction.*

The interpretations of the Committee on the Rights of the Child of the Convention on the Rights of the Child and the positions of the European Human Rights Court, especially its judgements related to family life, are of particular relevance to the criminal justice protection of juveniles from violence. This gains special importance due to Montenegro's membership in the Council of Europe and the ratification of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, and other instruments of the Council of Europe for the protection of children from violence, among which we want to highlight the following charters and conventions (most of

the European charters and conventions stated below are yet to be signed and ratified by Montenegro):

- *European Social Charter* (from 1961) and *European Revised Social Charter* (European Social Charter revised in 1996 and started to apply in 1999);
- *European Convention on the Compensation of Victims of Violent Crimes* (adopted in 1983) with the following recommendations: *Recommendation on the position of the victim in the framework of criminal law and procedure*, from 1985 and the *Recommendation on the assistance to victims and prevention of victimization* from 1987;
- *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment no. 126* (adopted in 1987, started to apply in 1989);
- *Convention on Cybercrime no. 185* (adopted in 2001, started to apply on 1 July 2004);
- *European Convention on the Exercise of Children's Rights* (adopted in 1996, started to apply in 2000),

And numerous other recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

Consistent respect and full implementation of international norms and standards are preconditions for creation of a legal framework that will correspond to the spirit of the time, and for fulfilment of the requirements imposed on Montenegro in the process of international integrations. Even more than that, the incorporation of modern solutions in the *Penal Code* and the *Criminal Procedure Code* and *Witness Protection Act* is one of the conditions for better and more modern organisation of the child rights protection in Montenegro in case of criminal justice reaction to violence against juveniles.

The Republic of Montenegro has been applying the new *Penal Code* since 2004. The Code introduced many novelties in the area of criminal justice protection of juveniles, such as broader range of criminal law norms aimed to protect physical, sexual, and emotional integrity of juveniles, and clear definition of terms pertaining to criminal justice protection of children and young persons, all in the spirit of harmonisation of the national legislation with the international norms and standards.

As most modern criminal laws, the *Montenegrin Penal Code* defines in a separate chapter the meaning of the terms used in the Penal Code. The importance of this resides in the fact that it was the first time ever that the terms such as *child*, *young person*, and *juvenile* were defined in a penal code. *The Penal*

*Code* defines the *child* as a person below fourteen years of age (Article 142, paragraph 8 of the MPC). *Young person* is a person between fourteen and eighteen years of age, while the term *juvenile* is understood to mean a person who has not attained eighteen years of age (Article 142, paragraphs 9 and 10 of the MPC). The introduction of a generic term of *juvenile* in the list of terms used in the criminal legislation is of utmost importance, as it ensures better accuracy and clarity of offences established in the criminal legislation, especially bearing in mind the international instruments dealing with the protection of this category of population which insist on the obligation of the states to understand the term *child* to mean a person of up to eighteen years of age, which is in the spirit of the *Convention on the Rights of the Child*.<sup>13</sup> We also want to stress that in establishing domestic violence as a criminal offence, the legislator deemed it necessary to define who made up a *family or family union, specifying that family or family union included former spouses and their children and former spouses' parents*.

Generally speaking, the *Penal Code*, as all modern criminal laws, includes norms designed predominantly or exclusively to protect children and young people (juveniles) from acts that harm their bodily, sexual, and emotional integrity, health, unhindered development and education. These crimes are classified in three chapters of the Penal Code: »offences against life and limb« (Chapter XIV of the MPC), »offences against sexual freedom« (Chapter XVIII of the MPC) and »offences relating to marriage and family« (Chapter XIX of the MPC).

## 1. Offences against life and limb

Most of those offences are of general nature and may be committed by any person. Some of them have the character of a "privileged act" and they are punishable more leniently as they relate to certain mental disorders in mother caused by the delivery of a child. *The Penal Code provides for the offence of: aiding and abetting suicide (Article 149 of the MPC). This offence takes its qualified form when the victim is above fourteen years of age and in such a case carries a penalty of imprisonment from two to ten years (Article 149. paragraph 3, of*

<sup>13</sup> According to the the *Convention on the Rights of the Child* a child means: »every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier« (Article 1 of the *Convention on the Rights of the Child*, A/Rezol/44/25, 20 November 1989).

the MPC), and when committed against a child, this offence carries a penalty that corresponds to that stipulated for aggravated murder (Article 149, paragraph 4, of the MPC). It should be noted that Article 144, item 8, of the Penal Code provides for a penalty of imprisonment of minimum ten years or imprisonment of up to thirty years in case of a murder of a child; in other words, this form of criminal offence falls under the category of aggravated murder.

In addition to the above, the offences against life and limb include murder (Article 143 of the MPC), manslaughter in a heat of passion (Article 145 of the MPC), mercy killing (Article 147 of the MPC), negligent homicide (Article 148 of the MPC), serious bodily harm (Article 151 of the MPC), light bodily harm (Article 152 of the MPC), brawling (Article 153 of the MPC), threat by dangerous implement in brawl or quarrel (Article 154 of the MPC), endangerment (Article 155 of the MPC), abandonment of a helpless person (Article 155 of the MPC), and failure to render aid (Article 157 of the MPC). Juveniles can be passive subjects in any of these offences, but the fact that they are underage persons does not qualify the offence in any way. Of special concern is the legal solution according to which the prosecution for the basic offence of light bodily harm (whoever causes light injury or minor health impairment, Article 152, paragraph 1, of the MPC) is instituted by private action, which in our opinion is a significant restriction, considering the specific development level of this category of victims and the fact that the function of prosecution is discharged on their behalf by other private persons who are duly authorised to do so.

## 2. Offences against sexual freedom

The group of offences »against sexual freedom« has undergone significant changes. The changes are linguistic, as well as substantial in nature, and are reflected in abandoning anachronistic terms: “indecent acts” and “unnatural acts” that date back from the time when establishing of these criminal offences was believed to be in the service of protection of “sexual morality“. Also, the intention of the phrase “sexual intercourse or an equal act” was to avoid archaic meaning of the “normality” of sexual intercourse. That highlights the substance of these offences, which includes coercion or (qualified) threat as constitutive elements of most of the offences falling within this group, and the need to protect sexual integrity of victims of these crimes. Children and yo-

ung persons (juveniles) have a specific position in the criminal law when they are passive subjects of the offences, and criminal justice protection has seen significant improvement in respect of this category of persons, in a sense that in this Chapter the minority status is actually the basis for establishing certain offences, and for establishing aggravating (qualifying) circumstances of some offences for the purpose of stipulating a stricter punishment.

Conceptually, the basic offence from Chapter XVIII of *the Penal Code - rape* – has been established in a completely new way. Both the offender and the passive subject may be persons of either masculine or female sex. The offence, in addition to „sexual intercourse“, is established so as to encompasses the acts that are comparable to sexual intercourse (“sexual intercourse or an equal act”). Of remarkable importance is the establishment of an offence of: *sexual intercourse with a child* (Article 206 of the MPC). Consent by a child, even when the initiative for the sexual intercourse comes from the child, is irrelevant for the existence of the offence. As for rape, the passive subject of this offence may be both a male or female child (a person of up to 14 years of age).

This Chapter, in addition to the above stated criminal offences, includes all offences committed against sexual freedom, such as: *sexual intercourse with incapacitated person* (Article 205 of the MPC), *sexual intercourse by abuse of power/office* (Article 207 of the MPC), *solicitation and facilitation of sexual intercourse* (Article 209 of the MPC), *mediation in prostitution* (Article 210 of the MPC), and *presentation of pornographic material and pornographic exploitation of children* (Article 211 of the MPC).<sup>14</sup> Those offences take their qualified form if committed against a juvenile (child or young person).

#### 4. Offences relating to marriage and family committed against juveniles

Another category of offences governed by *the Penal Code* is offences relating to marriage and family. The reasons why marriage and family are protected under the criminal law are many. The position of the Montenegrin legislator on criminal law response in the domain of marriage and family is similar to that taken by most countries of former Yugoslavia. Most of the offen-

<sup>14</sup> Here we want to point to, in our opinion, an omission of the legislator to establish as a criminal offence in respect of child pornography the possession of pornographic material on computer systems and/or mediums for storing computer data.

ces included in Chapter XIX of the *Penal Code*: “relating to marriage and family“ are of *implicitly blanket* character, and in concrete assessment whether there has been an offence or not one must take into account certain regulations contained in other legislative areas - primarily those pertaining to protection offered under the family law. Such a situation results from the fact that Montenegro’s family legislation does not endeavour to directly protect the values founded on the real and factual meaning of marriage and family, but rather leaves it to criminal legislation.

Common characteristics of offences relating to marriage and family committed against juveniles are the use of family law terms to define the perpetrator and malice as the predominant form of guilt. This particularly refers to an offence established in Article 219 of the *Penal Code*: “*neglecting and abusing a juvenile*”, where, using vague terms such as “neglect” and “provide for”, the legislator expects their actual qualification to be made under the legal standard of “gross dereliction”. The same applies to the offences of *cohabiting with a juvenile* (Article 216 of the MPC), *abduction of juvenile* (Article 217 of the MPC), *change of family status* (Article 218 of the MPC), *failure to provide maintenance* (Article 221 of the MPC), *domestic violence* (Article 220 of the MPC), and *violation of family duty* (Article 222 of the MPC).

Broad representation of legal standards is common in legal protection of children from abuse and neglect. Their application is characterised by quite broad discretionary rights of the relevant authorities, which in their activities abide by the principle of appropriateness and rely on professional assessment in determining the meaning of standards. The risks of such a legal approach are insufficient legal security, arbitrariness and self-will of government authorities and institutions. In this respect, this part of Montenegrin criminal law is characterised by most general, equivocal and insufficiently clear terms, which creates considerable difficulties in the legal practice and operation of relevant professional institutions.

The problem is further complicated by the fact that theoretical determination of fundamental terms differs from practical one. For example, of seventeen reports made to the European Council, most state that neglect is a form of abuse, recommending the use of term “lack of care“ instead of term “abuse“. Furthermore, these reports take the position that abuse and neglect of child are not two separate terms, while the others believe otherwise, stressing that those two terms are not synonyms. In this respect, crucial is the need to differentiate between legal terms and provide legal security and diffe-

rentiated protection. Also, *the Convention on the Rights of the Child* differentiates between measures (in terms of the obligation of states parties to take all legislative, social, administrative and educational measures) for the protection of 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.

## 5. Other criminal offences against juveniles

Beside the above stated norms, the *Penal Code* contains some other offences that can be committed *inter alia* against juveniles, and classified as the offences harmful to physical, emotional and sexual integrity of juveniles. At this point we want to specifically refer to offences set out in Chapter XXXV: »offences against humanity and other values protected under the international law«: *human trafficking* (Article 444 of the MPC), *trafficking in children for adoption* (Article 445 of the MPC), and *holding in slavery and transportation of enslaved persons* (Article 446 of the MPC). The establishment of the said criminal offences in the *Penal Code* helped incorporate international instruments (primarily: *The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, *the UN Convention against Transnational Organised Crime and the Protocol on Prevention, Elimination and Punishment of Trafficking in Human Beings, Especially Women and Children*, and *the ILO Convention No. 182 on Worst Forms of Child Labour*) into the protection of juveniles under the substantive criminal law in a »more precise« and consistent manner.

# THE POSITION OF JUVENILE VICTIMS OF ABUSE AND NEGLECT IN THE CRIMINAL PROCEEDINGS

The victimization of juveniles is a process where they become victims of a violent offence. Victimization may and does produce very serious consequences for the victim, and they are further compounded with a whole series of adverse effects and omissions arising from the criminal procedure rules. Some of those consequences may arise from the structure of criminal procedure itself, while the others could be avoided by improved response of the authorities having jurisdiction to act in such situations. Fundamentally, the overall problem area boils down to the method of establishing relevant facts of the case, while secondary victimization of children in the criminal justice process could be minimised primarily by avoiding repeated interrogations of juvenile victims or by interrogating them so as to minimise or completely rule out the possibility of encounter with the offender.

As for the rules of presentation of evidence, they have also undergone certain procedural modifications, principally in view of protecting juvenile victims. In this respect, legislative reforms in a number of countries permitted the use, to the greatest possible extent, of video and audio tapes with the juvenile victim's statement as evidence and the use of such a statement in later stages of the proceedings, without further distress for the victim. Also, in giving oral evidence, juveniles may give their statement in a separate room outside the court room, and the use of transparent mirror is also allowed. A special procedure preparing a victim of violence to appear in court needs to be followed as well. *The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography* in items 8 and 9 insists that it is the state which should take all measures so as to protect the best interests of child victims in all stages of criminal justice process, recognizing at the same time the principle of equity and impartiality. Also, the state must observe other principles, such as:

- To inform child victims of their rights and any facts of relevance to their case;
- To observe the right of child victims to express views freely, and to give due weight to such views;

- To protect privacy and identity of child victims;
- To provide for the safety of child victims and their families;
- To avoid unnecessary delay in the disposition of cases and the execution of orders.

The Montenegro's criminal procedure legislation lacks both special regulations to govern the protection of juveniles as victims and/or witnesses in criminal proceedings, and the provisions stipulating the specialisation of the relevant authorities and services (exception to this rule is Article 16 of the *Police Act*, which *inter alia* lays down that: "The police authorities in respect of juveniles and younger adults, and in cases concerning criminal justice protection of children and juveniles ... shall be exercised by police officers specially trained for suppression of juvenile delinquency."<sup>15</sup> In taking actions in respect of a juvenile, and especially in interrogating the juvenile, the police officer shall act with caution, taking account of mental development, sensitivity, personal characteristics and privacy of the juvenile. As a rule, the police authorities are envisaged to be exercised in the presence of a parent or a legal representative"). Nevertheless, Article 101 of the *Criminal Procedure Code*, governing the examination of witnesses, sets out in a separate paragraph that: "When a minor is examined, especially if a minor is the injured party, a special care shall be taken in order not to have an adverse effect on the minor's mental condition. If necessary, the minor shall be heard with assistance of a pedagogue or other professional" (Article 101, paragraph 4, of the CPC of the Republic of Montenegro). The *Code* also includes provisions pertaining to questioning of protected witnesses (regulated separately under the *Witness Protection Act* – "protection programme may be applied in respect of a juvenile only subject to the consent of a parent or a guardian" (Article 2, paragraph 4)) – and a general norm according to which special methods of participation and examination of protected witnesses (examination of witnesses under pseudonym, examination of witnesses by using audio and video equipment, and the like), and of data protection may apply *mutatis mutandis* to the participation and examination of the victim in the criminal proceedings, and analogously to juveniles (Article 112 of the CPC). Summoning of a juvenile who is a witness, in a sense that if the juvenile has not attained 16 years of age, he or she has to be sum-

<sup>15</sup> However, an exception to this rule is stipulated, in a sense that: where a specially trained police officer cannot act, the police authorities in respect of juveniles may be exercised by other police officers, when the reasons of urgency and other circumstances warrant so.

moned through a parent or a legal representative, provided, however, that the rule may not apply in cases where it is impossible to apply due to urgency of the matter or other circumstances (Article 110, paragraph 2, of the CPC), and the exemption of juveniles of the duty to testify (“a juvenile who, considering his age and mental development is unable to comprehend the importance of his privilege not to testify may not be examined as a witness, unless so required by the defendant” (Article 97, paragraph 3, of the CPC)) are also governed under the *Criminal Procedure Code*.

The special provisions governing the questioning of vulnerable victims and witnesses, who juveniles certainly are, is an achievement of modern procedural legislations. That particularly refers to the situations when their further traumatising in the criminal proceedings should be prevented, with the aim to achieve more humane treatment of this particularly vulnerable category of the injured parties and/or witnesses, and at the same time ensure good quality of the statements given by such parties. *The Criminal Procedure Code* acknowledges this need but nevertheless insufficiently. Hence, we believe that this is yet another area that should be covered by a future comprehensive reform of juvenile justice in the Republic of Montenegro.























































