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TEMATSKI ZBORNIK RADOVA MEĐUNARODNOG ZNAČAJA

INTERNATIONAL SCIENTIFIC CONFERENCE “ARCHIBALD REISS DAYS”
THEMATIC CONFERENCE PROCEEDINGS
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PENALTY REACTION ON CHILD ABUSE IN SERBIA

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Abstract: This paper analyzes the penal and legal response of the society to the child abuse with a special emphasis on the role of the state institutions in the prevention and protection of children. Violence, child abuse and neglecting of children threaten and undermine the physical and mental integrity and are violation of fundamental rights of the child. The response of the society is heterogeneous and causes complex consequences. Beside the analysis of legislation regulating the protection of child rights in Serbia, this paper explains the main international conventions governing different segments of life and the rights of the child. Protecting rights means above all, a variety of social activities aimed at preventing and eradicating these phenomena, and to organize and direct the implementation of protective intervention in specific cases of abuse and neglect.

This paper explores aspects of the criminal justice responses in regard to protection of children from abuse and focuses on the special needs and specific forms of protection.

Keywords: penalty and legal response, child abuse, child protection, child victims, etiology of violence against children, the human rights of children, the role of institutions in the protection of children.

INTRODUCTION

Child abuse is present during the whole history of human kind, but it has only been recognized during the last years of past century, when Henry Kempe, an American pediatrician, described the term “battered child syndrome” (or BCS) by documenting drastic cases of child abuse with fatal outcome. This case represented an overlap in reaction to child abuse. Many experts raised their voices against child abuse and negligence and started an action to pass a law about mandatory report on child abuse suspicion¹. All forms of violence, abuse or negligence, which distort child’s physical and psychological integrity, represent one of the fundamental violations of children’s rights, rights to life, existence and development.

The protection of children’s rights implies different social activities that are directed to preventing and exterminating these phenomena, as well as organizing and conducting preventive interventions in cases of abuse and negligence. The Convention on the Rights of the Child has different regulations that predict modules for prevention of physical and mental violence, abuse and negligence; prevention of illegal use of narcotics and psychoactive substances; prevention of all forms of sexual exploitation and abuse, kidnapping and trafficking; prevention of “all forms of abuse that are harmful by any means for child welfare”; prevention of inhumane and degrading treatment and punishment; measures of support for physical and psychological recovery of child - the victim of violence and its social reintegration. In the Protocol on Child Protection from Abuse and Neglect, the definitions of certain forms of abuse and negligence were accepted by the World Health Organization (WHO)². Child misuse or abuse includes all forms of physical and/or emotional abuse, sexual abuse, negligence as well as commercial or any other exploitation, which leads to real or potential violation of child health, its survival, development or dignity that includes responsibility, trust or power³. On Consultation about child abuse prevention, apart from general definition of child abuse, different types of child abuse were defined: physical abuse, sexual abuse, emotional abuse and child neglect. In some classifications, exploitation stands out as a particular form of abuse, as well as bullying. Child abuse is a phenomenon which is affected by complex set of conditional factors, and that is why multidisciplinary and intersectoral approach is essential. It is of a key value that all participants in this process have shared understanding and unique approach on child abuse. The most impor-

1 In the U.S. in 1974, the act was passed on mandatory reporting of child abuse that contributed to the creation of a system for the protection of children.

2 Consultation on the Prevention of Child Abuse held in Geneva in 1999.

3 Ispanović-Radojković V. I Ignjatovi, T. (2011), Forms and indicators of abuse and neglect, protect children from abuse and neglect, Child Rights Centre, Belgrade. p. 11.

tant condition for a successful child protection is concurrence. System of preventing interventions would have to include different levels of preventions, detection and investigation of cases, providing with legal protection, and health and social rehabilitation of abused children, as well as abusers. In that sense, abuse protection would include activities of multiple institutional systems: education, health care, social protection, police and justice. Beside, this problem draws attention of nongovernment organizations, professional association and citizens association⁴. The UD study data about violence over children shows that between 133 and 275 million of children a year worldwide testify about family abuse. Partner violence is increasing the risk of child violence inside family, and research shows that there is a close connection between violence over women and over children.

Social reaction and prevention of violence, misuse and abuse, is a main task of modern society, because only with healthy population the civilization has a perspective. All subjects in child protection should create a unique strategy for successful violence ending, and provide adequate protection for a child, with as less as possible additional traumatic consequences. All activities should be connected in a holistic process of professional recognition, research- detection and decision. The baseline in building a social mechanism in child protection is certainly normative definition of violence and abuse terms, as well as clear differentiation of crime and any other responsibility for violence over children. The development of legal protection starts on penalty level where the changes are common and significant.

INTERNATIONAL ACTS OF AND NATIONAL LEGAL FRAMEWORK ON THE CHILDREN PROTECTION

Violence and child abuse have been recognized as a serious social problem on a global scale, according to the United Nations (UN) adopted Convention on the Rights of the Child, which in Article 19 obliges Member States to take all appropriate legislative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. In the Convention, these measures fall into social programs for the support for the child, together with all forms of prevention, identification, reporting, referral, investigation, treatment and follow-up on reported cases of child abused, and accordingly involvement of the court. The United Nations in its guidelines on justice and matters that regards child victims and witnesses of crimes, obliged its members to respect the principle of the best interests of the child, which includes a right to protection and the right to healthy development, as well as right to participation. The Convention specifically emphasizes respect for children's right to dignity, the right to protection from discrimination, the right to information, the right of the child to be heard and express their views, the right to privacy, the right of the child to be protected from exposure to harmful additional procedures during the court procedure, the right to safety, the right to reparation, the right to special preventive measures etc. Furthermore, Member States shall ensure that uncertainty as to the age of the victim shall not prevent the initiation of criminal proceedings, including investigations aimed at establishing the age of the victim, so that in the treatment by the criminal justice system, with children victims of unlawful acts, the child's best interest will be a priority. Member states are obliged to take measures to ensure appropriate measures to insure adequate training, in particular legal and psychological, for persons working with victims of unlawful acts prohibited under the Protocol on the Rights of the Child and to adopt measures to protect the security and integrity of the victims of such unlawful acts. With the advent of a pronounced presence of violence against children in the countries of Europe, the activities on the adoption of conventions, recommendations and resolutions of the Council of Europe on the protection of children and minors from all forms of violence and abuse have been intensified. As a regional international body, the Council of Europe pays much of the attention to the particular forms of crime and the protection of victims of violence, and has recognized that it is necessary to determine the victims' rights and obligations of Member States to protect all forms of abuse and violence against children. In recent years, the Council of Europe has adopted a number of regulations governing the protection of the minor rights who are each dealing with a particular type of

⁴ Igrački, J. (2012), Police - the subject in prevention of child abuse, Journal of the Institute for Criminological and Sociological Research, No. 2. pp. 259-275.

violence against children: Rec (2001) 16 on the protection of children from sexual exploitation; Rec (2005) 5 on the rights of children living in state institutions, Recommendation 1778 (2007) on child victims: the suppression of all forms of violence, exploitation and abuse, Rec (2009) 10 on integrated national strategies for the protection of children from violence, Recommendation 1905 (2010) on children who witness violence. The Council of Europe, on 17/11/2010 adopted the Guidelines on child friendly justice based on the same principles and rights as well as the UN Guidelines on Justice⁵ in matters regarding child victims and witnesses of crime⁶. As these are all recommendations that are called soft law, the Council of Europe has started to develop a set of legally bounding documents and conventions whilst the most important being:

- European Convention on The Realization of Children's Rights (ETS No. 160, 1996)⁷, which in the Article 3, guarantees children the right to be informed of the court proceedings and to possibility to express their opinions;
- Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197, 2005)⁸, which includes specific provisions with regard to child victims of trafficking;• Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS no. 201, 2007)⁹, with special emphasis on the protection of such forms of violence within the family;
- Council of Europe Convention on Preventing and Combating Violence against Women and National Violence (ETS No. 210, 2011)¹⁰, in which, for the first time, the obligation of States Parties to protect children witness domestic violence victims was clearly established¹¹.

Building an efficient criminal justice model for protection of children from violence and abuse means to accurately determine the obligations of all participants in the legal protection of minors. The Republic of Serbia has ratified the Convention on the Fight against Human Trafficking and the Protection of Children from Sexual Exploitation and Sexual Abuse and is well on the way to incorporate new solutions in its legal systems that will adopt all relevant EU standards in the field of protection of children from violence and abuse. New solutions incorporated in the Law on Juvenile Offenders and Criminal Protection of Minors (further as Juvenile Justice Code)¹² represent a foundation for future reforms in this area, which will in large part be implemented in our criminal justice system. Also, it is important to note that in June 2009, the Minister of Justice rendered the Special Protocol for Operation of the Judicial Authorities to Protect Minors from Abuse and Neglect, which should ensure, above all, coordinated management procedures that protect minors from further victimization and provide them with adequate support¹³.

The Juvenile Justice Act provides that certain bodies of the proceedings must have special knowledge in the field of child rights and legal protection of minors. Thus, for example, the Juvenile Justice Act states that in the investigation of criminal offenses against minors, a specialized police authorities who have special skills in the field of child rights and legal protection of minors must participate when certain actions are entrusted to these bodies (Article 151, Paragraph 3). Specialization is designed also for the public prosecutor, the investigating judge, the presiding judge and a

5 Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, <http://www.coe.int/t/>.

6 UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (ECOSOC resolution 2005/20), http://www.apav.pt/portal/pdf/ECOSOC_RESOLUTION_2005-20.pdf.

7 European Convention on the Exercise of Children's Rights, GETS No. 160, 1996, http://untreaty.un.org/unts/144078_158780/17/8/8234.pdf.

8 Law on Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings "Official Gazette of the Republic of Serbia - International Treaties", No. 19/2009.

9 Law on Ratification of the Council of Europe Convention on the protection of children from sexual exploitation and sexual abuse "Official Gazette of the Republic of Serbia - International Treaties", No. 1/2010.

10 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 2011, <http://conventions.coe.int/Treaty/EN/Treaties/HTML/DomesticViolence.htm>

11 Jovanović, S., Simeunović-Patić, B., Macanović, V. (2012), The criminal justice response to domestic violence in Vojvodina, Novi Sad, pp. 104-111.

12 Službeni glasnik RS. No. 85/05.

13 Petrušić, N. Stevanović, I. (2011), Legal Protection of Children in Serbia and the International standards, victims' rights and the EU challenges of providing assistance to victims, Belgrade, p. 97.

representative plaintiff. However, in this request for specialization, a single judge who leads criminal proceedings against juveniles for certain types of offences, is omitted.

In practice, the problem arises in the application of the Article 154 of the Juvenile Justice Act, which expressly provides that a minor as a victim shall have a representative from the first interrogation, and that if a juvenile does not have a representative, one should be assigned on the decision of the President of the Court appointed from the ranks of lawyers who have special skills in the field of child rights and legal protection minors. The costs of representation in such cases shall be paid from the budget, as directed by the Law on Juvenile Justice. What one notices is that this provision is not applied accordingly, that is that the proxies to juvenile victims are not placed for those cases where it is required by law.

In addition to demands for specialization, (Article 157), the law contains provisions on the prohibition of dealing with juvenile victim with the offenders in a hearing of the statutory requirements (Article 153). Unfortunately, the Juvenile Justice Act does not explicitly exclude the possibility of a minor victim facing the defendant (Article 153 of the Juvenile Justice provides that: "If a witness is questioned as a juvenile due to the nature of the offense, or the result of other circumstances, particularly sensitive or is in a particularly difficult state of mind, it is forbidden to carry out confrontation between him and the defendant"), which is the failure of the legislature. Our opinion is that, at least with respect to minor victims of crimes against sexual freedom, like all criminal offenses with elements of violence or criminal human trafficking, this explicitness must be established by law (that is, explicitly prohibit the possibility of dealing with the offender). Likewise, in the Juvenile Justice Act there is no prescription of explicit professional obligation to face and introduce the juvenile to the process, which would also be covered by the changes and amendments to the law in accordance with international obligations.¹⁴

The Law on Juvenile Justice paid special attention to the judicial authorities and law enforcement agencies and their training for working with minors, the treatment and all the important elements that can affect the overall protection of minors. The law provides specialization of internal affairs officers, prosecutor, investigating judge, the presiding judge and attorneys. It is important to note that the Minister of Justice issued a special Protocol on Handling the Judiciary in Protecting Minors from Abuse and Neglect¹⁵, which should ensure, above all, coordinated management procedures that protect minors from further victimization and provide them with adequate support. In accordance with the obligations arising under the National Action Plan for Children, the strategic document of the Government of the Republic of Serbia, which defines the general policy of the state towards children and young people, as well as the basic principles and guidelines of the General Protocol for the Prevention of Child Abuse and Neglect, the Minister of the Internal Affairs issued a Special Protocol on the Conduct of Police Officers in Protecting Minors from Abuse and Neglect.¹⁶

The primary tasks of the police as a public service are to safeguard the life of citizens and prevent crime. Children are citizens with the right to protection provided by the Magistrates, Family and Criminal Code. The police have a duty and responsibility to investigate cases of child abuse. Such investigations should be carried out carefully, thoroughly and professionally. While working on the offenses of which the victim is a child, the police are obliged to cooperate with the centre for social work and other agencies and institutions that are supplied by public authority to protect children from abuse and always take into account the best interests of the child. The police have a favourable position to recognize and detect cases of child abuse, because it is in the community and at the same time can take all the necessary actions in terms of prevention of violence against them. Preventive action of the police is unthinkable without the cooperation of the service centres for social work, as well as with all other agencies and institutions authorized to protect children from abuse. This cooperation is reflected in good communication, information sharing, as well as joint participation in prevention programs in this area. The police must be prepared to share information and sensitive data with the centre for social work, as well as all other authorized services and institutions. In relation to this is the duty of the police and all government bodies, institutions, organizations, and every citizen, to report every case where a juvenile is in need of protection to the Centre for Social

14 Petrušić, N. Stevanović, I. (2011, Legal Protection of Children in Serbia and the International Standards, victims' rights and EU challenges of providing assistance to victims, (U)-Ristanović Nikolić, Čopić, S.) pp. 97-99.

15 The Protocol was adopted in June 2009.

16 The Protocol was adopted in October 2005.

Work (guardianship authority). In the process of securing legal protection of children from abuse, it is necessary, first of all, to discover the crimes and their perpetrators. One of the main tasks of the police is to detect and identify offenders. In this sense, the police takes the series of operational and technical and tactical actions, but in any case, their performance is related to the fact of the good cooperation with the representatives of centres for social work, other authorized government agencies and institutions, as well as representatives of nongovernment organizations that deal with issues of child abuse, victim protection services, as well as citizens who can be entrusted with a child (relatives, friends, neighbours). One of the most important roles of the police and the implementation of certain pre-trial investigation, in order to provide evidence that should enable initiation of criminal proceedings by filing criminal charges against the suspect for child abuse, or those that are essential for conducting misdemeanour proceedings. Police collects and provides all the evidence relevant to the initiation of criminal proceedings or proceedings for petty offenses. This especially applies to the collection of physical evidence which is of particular importance for the future criminal proceedings. Criminal procedure, as a rule, is preceded by taking a series of actions which are primarily implemented by the police. This type of procedure is commonly known as pre-trial proceedings. Its goal is to eventually enable a prosecution. The actions in this procedure are primarily characterized by operational actions, but do not have the credibility of evidence in criminal proceedings, although some of them could be made in procedural form, i.e. characteristic for inspection prior to the investigation.

If there is reasonable suspicion that a criminal offense of abuse has been conducted and there is sufficient evidence, the police initiate criminal proceedings by filing criminal complaints to the competent prosecutor. Also, the police have the authority to arrest the abuser – perpetrator of abuse. Sometimes the arrest of the suspect will be enough to protect the child, so that it would be not necessary for the child to be taken away from his/her home. There are situations that require immediate separation of the child from the environment in an abusive relationship. Such situations sometimes require close cooperation between the police and representatives of the centre for social work in terms of providing assistance to the Police Centre for Social Work (guardianship authority) in the conduct of its own jurisdiction. The Ministry of Internal Affairs of the Republic of Serbia, as a public service, is supplied with rights to protect children from abuse and neglect. Application of the authorization for the officer for juvenile and young adults is determined primarily by the police. On the basis of this law, authorized officers specially trained to work with juveniles apply police powers to minors, young adults in cases of legal protection of children and minors. Police officers who have special skills in the field of child rights and the criminal-law protection of minors, in collaboration with the directors and psychological educational offices of the educational institutions at the territory of the Republic of Serbia, implement the preventive activities among school children and adolescents, according to the model workshops¹⁷.

The public prosecutor is in charge for the criminal proceedings in subjects of criminal protection of minors from violence and abuse. The basic principle in the work of the public prosecutor is the principle of legality, that is, Deputy of the Public Prosecutor who acts in the legal protection of individuals from abuse and neglect is required to assess each received criminal application. Criminal application is submitted to the public prosecutor, but the citizens can also submit it to the Court and police, who will forward it to the competent body. A proposal for prosecution shall be filed with the public prosecutor, while the private complaint goes to the competent court. Public prosecutors and deputies, specialized in handling this type of matter work closely with centres for social work, the Ministry of Internal Affairs, the Ministry of Justice, the Ministry of Education and other institutions and organizations which are competent to care for the young and family. According to the General Protocol, if the results of the initial assessment indicate that there is a need to protect minors from abuse or neglect, the centre for social work calls for a conference for planning services and measures to protect minors from abuse and neglect. It is desirable that a case conference is attended by a specialized prosecutor. In the event of his/her absence, he/she shall receive the report. The investigation is the stage of the preliminary procedure, carried out by the court, on request of the competent public prosecutor against a person reasonably suspected of having committed a criminal offense of harming a minor. The aim of the investigation is to gather evidence and information that will form

17 Igrački, J. (2012), The role of the police in the prevention of juvenile delinquency, tort, fines and the possibility of social prophylaxis, Institute for Criminological and Sociological Research, p. 355.

the decision whether to bring an indictment or initiate the proceedings against certain persons who are suspected of having committed a criminal offense to harm a minor. The aim of the investigation is also collecting evidence for which there is a danger that cannot be repeated at trial, as well as other evidence that may be used for the procedure, and whose performance, given the circumstances of the case, shows as expedient (Code of Criminal Procedure, Article 241).

Crimes “to the detriment of children and minors (minors)”, represent those criminal offenses in which the victim (passive entities) may be minors. These are the offenses for which a minor is the constituent element of the offense, in which he/she was victim; in connection with this we mean, first of all, the offences included in the Criminal Code in sections called “crimes against life and body”, “crimes against sexual freedom” and “offenses against marriage and the family” (Stevanović, I. 2005, Stevanović, I. 2008). According to the Law on Courts, the Law on Public Prosecution and the Law on Seats and Territories of Courts and Public Prosecutors, trial jurisdiction in criminal proceedings in which a minor appears as a victim, or the victim, of 1 January 2010, is divided among 34 primary (main court in the first instance for criminal offenses for which the main punishment is fine or imprisonment up to ten years and ten years, unless some of them are not assigned to another court) and 26 high courts (higher courts for crimes for which a principal penalty of imprisonment is exceeding ten years; higher court in the first instance always act in criminal proceedings against juveniles as offenders), or basic and higher prosecution. Appellate courts (in Belgrade, Novi Sad, Kragujevac and Niš) decide on appeals against decisions of the higher courts and the main court decisions in criminal proceedings if the decision of the appeal court does not have jurisdiction irises¹⁸.

Protecting children from violence and abuse in practice encounters certain difficulties, because there is still no set procedure on how to collect evidence in order to prevent secondary victimization of child victims or witnesses. Child testimony in court often requires expertise in determining the truthfulness of statements, there are no available services for the reintegration of children who are victims of violence, children and their caregivers cannot provide the necessary information about the process and their rights, etc.

CONCLUSION

Attitude toward children, in contemporary world, is assessed as strategic issue of development of civilization and it requires a comprehensive approach to minor protection in their development. According to that, contemporary system of social protection of minors must be based on multidisciplinary approach, with need for continued education of all subjects in system. Social reaction and prevention of child violence, abuse and neglect should create a unique strategy for efficient ending of violence and provide adequate protection for a child, with as less as possible traumatic consequences. All activities should be linked to an independent process of professional recognition, research, detection and determination. The baseline in development of social mechanism in child protection is normative definition of terms violence and abuse, as well as clear differentiation of criminal and any other criminal liability for committed violence against children. The development of legal protection against child violence and abuse starts on a penitentiary level where the changes are frequent and significant. In child violence and abuse protection system, legal protection has a very important place, in which mechanism of legal protection of children has a special significance. The level of legal child protection efficiency certainly depends on several factors, where their relationship with other institutional systems of protection is most important, such as system of social protection, health protection, educational system, etc. Very important segments in child protection are non-governmental organizations, associations of profession, individuals and experts in various fields. Only in collaboration of all relevant social factors in child protection process, there is a real possibility of normal mental and physical development of children.

18 Stevanović I., Vujović, R. (2011), The role of the judicial system to protect children from abuse and neglect, protect children from abuse and neglect of general-application protocol, the Center for Children's Rights, Ministry of Labour and Social Policy, Belgrade, pp. 154 -159.

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