

**THE RIGHT OF THE CHILD TO FREEDOM OF
EXPRESSION UNDER THE NEW FAMILY LEGISLATION OF
THE REPUBLIC OF SERBIA**

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Abstract. *In the contemporary law, the child has been given the status of a legal personality which makes the child entitled to a corpus of independent and autonomous rights that are quite distinct from the rights of the parents and the family as a whole. In compliance with the contemporary concept of the rights of the child, there are two concurrent processes that can be observed in the field of expanding the legislative framework for the protection of these rights: the process of establishing special civil capacity of the child and the process of constituting the so-called participation rights of the child, with special reference to the right of the child to the freedom of expression.*

The new Serbian Family Act has recognized the child's right to the freedom of expression as a qualified right which can be exercised in the field of family and other relations as well as in judicial and administrative proceedings concerning the child's rights.

The analysis of the statutory provisions on the legal proceedings for exercising the right of the child to express his/her views shows that the legislator has not provided relevant legislative instruments which would enable the child to exercise this right. In particular, the most disputable legal solutions are those pertaining to the right of the child to seek and receive all the information necessary to form his/her own views. Although the new Family Act has envisaged the right of the child to receive relevant information for the purpose of forming one's own opinion, the scope of actual implementation of this right has been laid down too narrowly as this right was originally envisaged to be exercised only in judicial and administrative proceedings where the child is expected to form and express his/her own opinion. Moreover, the new Family Act has not envisaged appropriate instruments which could help the child in case when the competent bodies of authority fail to provide the necessary information to the child.

Key words: *rights of the child, Family Act, the opinion of the child.*

1. As a social and cultural category, the concept of childhood has stood significant changes in the course of the 20th century, which gradually resulted in shaping a specific concept of "the right of the child".¹ In order to assure the exercise of a sufficient degree of freedom of personality and self-determination of the child, the contemporary world has developed the idea of the child as an autonomous legal subject, which implies that the child is perceived as an independent holder of human rights and freedoms adapted to the developmental needs of the child. This idea has been normatively framed and strongly supported by the United Nations' Convention on the Rights of the Child² where, for the first time, the child has been guaranteed a wide range of civil and political rights. These so-called participation rights³ have ensured the child's active participation in the life of the social community and in his/her own development.

Some of the civil and political rights of the child include: the right of the child to seek, receive and impart information; the right to the freedom of expression, conscience and religion; the right to the freedom of association and peaceful assembly; the right of the child to form and express his/her opinion on all the issues directly affecting the child in accordance with the age and maturity of the child. The Convention particularly focuses on the child's right to be heard on all the issues directly affecting the child's life.⁴ The observance of the child's opinion is one of the four complementary governing principles in approaching the rights of the child which have been developed by the UN Committee on the Rights of the Child and applied in the practical assessment of the rights of the child.

The right of the child to the freedom of expression is set forth in Article 12 of the Convention on the Rights of the Child.⁵ This fundamental right is recognized and guaranteed in compliance with the contemporary concept on the rights of the child, which has been implemented through two concurrent processes: the process of expanding the

¹ For more information on the theoretical approaches in constituting the specific rights of the child, on the controversies accompanying the process, and on the classifications pertaining to the rights of the child, see: Freeman, M.D.A., *The Rights and Wrong of Children*, London, Frances Pinter, 1983; Janjić Komar, M.: *Prava dece u porodičnim odnosima (Children's Rights in Family Relations)*, Centar za publikacije Pravnog fakulteta u Beograd, Beograd, 1987; Obretković, M., *Šta su prava deteta? (What are the Rights of the Child?)*; Draškić, M.: *Prava deteta: Jugoslavija i Konvencija Ujedinjenih nacija o pravima deteta*, (The Rights of the Child: Yugoslavia and the UN Convention on the Rights of the Child), u: *Prava deteta u svetu i Jugoslaviji*, priređivač Nevena Vučković Šahović, Beogradski centar za ljudska prava, Beograd, 1997; Janjić Komar, M., Obretković, M.: *Prava deteta – prava čoveka (The Rights of the Child – the Rights of Man)*, Beograd, 1996.

² *The Convention on the Rights of the Child*; See: the Act on the Ratification of the UN Convention on the Rights of the Child, Official Gazette of SFRY, International Agreements, no. 15/90 and 2/97.

³ More: Vučković Šahović, N., *Prava deteta i međunarodno pravo (The Rights of the Child and International Law)*, Beograd, 2000. p. 77.

⁴ In the course of the legislative work on the text of the Convention on the Rights of the Child, the proposal for introducing this right was first promulgated by Poland in 1980 but, under the proposal, the scope of the right to the freedom of expression was quite narrow. Only upon a later proposal of Denmark, the scope of this right was expanded to include the standpoint that the child's opinion was also relevant in cases which are indirectly related to the child's own personality, such as: parents' divorce, change of residence, etc. More in: Vučković, Šahović, N., op. cit., p. 109).

⁵ In Article 12, section 1, the Convention has envisaged that "*The States Parties shall assure to the child who is capable of forming his/her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*" Section 2 reads that "*For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*"

boundaries of the child's civil and procedural capacity, and the process of constituting the so-called participation rights enabling the child to have a more significant impact on his/her own position. The child's right to the freedom of expression has been made operational by the European Convention on the Exercise of Children's rights,⁶ which has established a series of special procedural rights enabling children to freely express their own views and adequately participate in the proceedings affecting their rights and interests.⁷

2. The Republic of Serbia has recently adopted a new Family Act⁸, which has reformed the national family legislation after a period of almost a quarter of a century.⁹ The primary aim of the legislative changes has been to establish such a family law system which would be compatible with the contemporary European legislation and practice in the field of family relations, in full observance of the new character of family relations and the contemporary concept of human rights, particularly the rights of the child.¹⁰ Accordingly, among other alterations in the field of marital and family relations, the Serbian Family Act has introduced significant changes into the field of the rights of the child.

The Family Act has regulated the position of the child as a legal subject in family relations and redefined the legal framework of the child's civil capacity and his/her special rights. These provisions are a result of the legislator's endeavor to make the national legislation in this field consistent with the contemporary international and European standards pertaining to the rights of the child, particularly with the standards established in the UN Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights.

3. By adopting the Serbian Family Act, the corpus of the rights of the child has been normatively regulated on the national level for the first time.¹¹ One of the basic features of the new Family Act is that the rights of the child have been explicitly established as sepa-

⁶ The European Convention on the Exercise of Children's Rights (Council of Europe, ETS No. 160) was open for signature on 25th January 1996 but it entered into force on 7th January 2000. The Republic of Serbia has not ratified this important document, which has been used as the ground for developing the current national family legislations in a number of developed European countries. For more information on the procedural aspects of the Convention, see: Palačković, D., *Procesna prava deteta prema Evropskoj konvenciji o ostvarivanju dečijih prava* (Procedural Rights of the Child under the European Convention on the Exercise of Children's Rights), *Pravni život*, 9-2000, vol I, pp. 539-551.

⁷ In point 2 of Article 1 (subtitled "the Scope and Object of the Convention"), the European Convention on the Exercise of Children's Rights specifies that the goal of the Convention is to act "in the best interest of the child, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are informed, either on their own or by means of other persons or bodies of authority, about their rights and allowed to participate in the proceedings affecting them before relevant judicial authorities" In that context, the term "judicial authorities" includes "a court or an administrative authority having equivalent powers" (Art. 1, point 2 of the European Convention).

⁸ The Serbian Family Act, "Official Gazette of the RS", 18/2005 of 17th February 2005 (hereinafter referred to as FA)

⁹ Before the Family Act entered into force, the applicable law in this field was the Act on Marriage and Family Relations ("Official Gazette of RS", 22/80) which was, in the meantime, changed and amended on a number of occasions. (See, "Official Gazette of RS", 24/84, 11/88, 22/93, 25/93, 35/94).

¹⁰ See the Explanation of the Draft Family Act.

¹¹ Articles 59-66 of the Family Act

rate and independent personal rights, without being derived from the duties of the parents and other family members. Consequently, the rights of the child are complementary with the rights of the parents and other legal persons and institutions;¹² their contents are clearly stipulated and they include child-specific requirements prescribed in the positive law.

4. The right of the child to the freedom of expression is one of the rights which have been explicitly set forth and normatively framed in the new Family Act. This right of the child to freely express his/her views falls into the scope of those specific individual rights of the child whose provision and practical exercise confirm the willingness of the society to recognize the status of the child as an autonomous legal subject. It is one of the so-called participation rights, which is of crucial importance for exercising the legal subjectivity of the child and one of the necessary prerequisites for exercising all other rights and freedoms of the child.¹³

Considering the significance of the right of the child to freely express his/her views, in this paper the author analyses the provisions of the new Family Act regulating this area of law. This paper is aimed at examining whether the legal provisions on the rights of the child to the freedom of expression are in compliance with the international standards, and whether the legislator has managed to provide a clear normative framework for this Convention-based right of the child and make it fully operational.¹⁴

1. THE NORMATIVE FRAMEWORK OF THE RIGHT OF THE CHILD TO THE FREEDOM OF EXPRESSION

5. The right of the child to the freedom of expression is recognized and normatively framed in Article 65 of the Family Act. Apart from the general provision in section 1 of Article 65 which explicitly prescribes that "*the child who is capable of forming his/her own opinion has the right to freely express his/her views*"; Article 65 prescribes a series of "accompanying" rights or special privileges which ensure the exercise of the child's

¹² The Family Act has promoted a new concept of the parental right which has been derived from parental duties; however, the parents are entitled to this right only in case it is necessary for the protection of the personality, rights and interests of the child (Art. 67 of FA). On the contents of the parental right under the new FA, see: Ponjavić, Z., *Porodično pravo* (Family Law), Kragujevac, 2005, pp 246-252; Draškić, M., *Porodično pravo i prava deteta* (Family Law and the Rights of the Child), Beograd, 2005, pp. 277-288; Kovaček, Stani}, G., *Porodično pravo* (Family Law), Novi Sad, pp. 262-266. On the arguments used to justify the contemporary changes in the parental right, see: Black, J., Bridge, J., Bond, T., *Family Law*, Oxford University Press, New York, 2000, pp. 393-414).

¹³ In literature, the provision of the Convention recognizing the right of the child to the freedom of expression is, historically speaking, considered to be the most significant development not only for its contents but also because it recognizes the child as a compete human being with its own integrity and personality, who is able to fully participate in the social life."(See, Freeman, M.: *Whither Children: Protection, Participation, Autonomy?* Manitoba Law Journal, Vol. 22, 1993, p. 319).

¹⁴ As the new Family Act has been applicable for only about ten months, there is still insufficient quantum of judicial and administrative practice which would enable valid empirical research in this filed. For this reason, the conclusions given in this paper are based on the normative analysis employing the usual methods of juristic interpretation of legal provisions.

right to the freedom of expression. These accompanying rights include: the right of the child to receive all the information necessary for forming the opinion; the right of the child to freely and directly express his/her opinion in any judicial and administrative proceeding concerning his/her rights (this right applies only to children over the age of 10); the right of the child to refer to the court or an administrative body, either in person or through another individual or institution, and request assistance in exercising the right to the freedom of expression (this right applies to children over the age of 10).

In accordance with these rights, it is the duty of the competent judicial and administrative authorities, either in charge of the proceedings concerning the child or deciding on the children's rights, to give due attention to the opinion of the child, in compliance with the age and maturity of the child (in Article 65, section 2 of the FA, the legislator has used the term 'must', which is typically used in formulating cogent norms). Finally, the legislator has instructed all the bodies of authority which are in charge of deciding on the rights of the child to give due attention to the method of establishing the opinion of the child. In that respect, Article 65, section 6 of the FA prescribes that "*the court and the administrative body shall establish the opinion of the child in cooperation with the school psychologist or a court-appointed body of custodianship, family counseling services or another institution specializing in family mediation, in the presence of the person of the child's own choice.*"

The exercise of the right of the child to the freedom of expression is directly related to the right of the child to be provided relevant information necessary for forming the opinion. The right of the child to be duly and timely informed, which is generally recognized in Article 65, section 2 of the FA, has been clearly specified only in respect of the child's right to express his/her opinion in the judicial and administrative proceedings.

The Family Act prescribes special rules on the duties of the court, an administrative authority and the child's collision (legal) guardian or legal representative *pro tempore*, all of whom are obliged to give the child all the relevant information to enable the child to make an "informed" opinion. In Article 266, section 3, the Family Act prescribes the duty of the court to ensure that the child as a party in the proceedings shall receive all the necessary information if, in the course of the proceeding, it is determined that the child is capable of forming his/her own opinion, unless it is estimated that it would obviously be contrary to the best interest of the child. Besides, Article 267 of the FA prescribes that the child's collision guardian or temporary representative,¹⁵ who has determined that the child under representation is capable of forming his/her own opinion, is obliged to ensure that

¹⁵ The collision custodian and temporary representative are representatives which are appointed to the child by the court acting in the capacity of the body of custodianship, in case the court has established that there is a conflict of interests between the child and his/her legal representative. The rules pertaining to the collision guardian and temporary representative are among the provisions which regulate the proceeding in family lawsuits for the protection of the rights of the child and in the lawsuits for determining a parental right or depriving a person of a parental right (Articles 261- 273 of the FA), but they also apply in all other judicial and administrative proceedings related to the rights of the child in family relations (art. 268 of FA). For more details on the independent legal representation of the child, see: Salgo, L.: *Representing Children in Civil Protection Proceedings - Lessons from a Comparative Study of Systems Operating in USA, Australia, France, Germany and England and Wels*, *Representing Children*, Vol. 10, No. 4, pp. 230-233; Farrugia, R.: *Representation of the Child in the Family Court*, see the website: www.gu.edu.au/centre/flru/farrugia.doc; Petrušić, N., *Zastupanje deteta u parnici (Child Representation in Lawsuits)*, *Pravni život*, 12/2006, str. 732-755.

the child receives all the necessary information, to give the child all the necessary explanation regarding all the possible consequences of the action underway, and to inform the court about the child's opinion on the matter, in case the child has not expressed his/her opinion directly before the court. However, the collision guardian or a temporary representative will not perform the duties prescribed by the law regarding the child's right to form and express his/her views if the legal guardian or representative has determined that it would obviously be contrary to the best interest of the child, which is explicitly prescribed in Articles 266 and 267 of the Family Act (*in fine*).

2. THE APPLICATION AND THE SCOPE OF THE RIGHT OF THE CHILD TO THE FREEDOM OF EXPRESSION

6. The new Family Act has failed to clearly define the field of application of the right of the child to the freedom of expression. Article 65, section 1 of the FA has recognized the child's right to freely express his/her opinion but it does not explicitly determine the scope of issues and legal matters the child should be able to express his/her opinion on. For this reason, the scope of this right has to be inferred for the interpretation of the legal provision in Article 63, section 3 of the FA, which envisages the conditions under which the opinion of the child may be taken into account.

This provision has envisaged that "*the opinion of the child must be taken into account in all the issues affecting the child and in all proceedings where the rights of the child are decided on...*". It implies that the child has the right to freely express his/her opinion in all judicial and administrative proceedings concerning the rights of the child but, as this right refers to "*all the issues affecting the child*", it can also be inferred that the child is entitled to this right even outside the judicial and administrative proceedings. The right also implies the duty of the authorities deciding on the rights of the child as well as the duty of parents, legal guardians, other relevant individuals, government authorities and all social institutions in charge of decision-making processes or any measures concerning the child to enable the child to freely express his/her opinion.¹⁶

The analysis of the Family Act rules regulating the exercise of the right of the child to the freedom of expression, however, shows that the scope of this right is too narrow. Due to the narrow statutory limits, the standards of the national legislation are lower than the standards established in the Convention rules.

2.1. Exercising the Right of the Child to the Freedom of Expression in the Family Environment and in the Social Institutions

7. Even though the Family Act, in principle, recognizes the right of the child to freely express his/her opinion on all the issues affecting the child (Article 65, section 3 of FA), the normative framework of this right shows that the legislator has primarily perceived

¹⁶ In the Serbian textbooks on family law, the authors usually do not discuss the problems of the scope of the right of the child to the freedom of expression. The only exception is the textbook of Prof. Ponjavić, who points to the fluid boundaries in the domain of application of the child's right to the freedom of expression. (See, Ponjavić, Z., op. cit., p. 243).

this right as applicable in the judicial and administrative proceedings rather than as a general right of the child, which enables the child to be regarded as an autonomous legal subject, to express his/her free and authentic views, and to have impact on the contents of the decisions in issues concerning the child (in cases when the child cannot make such a decision independently), regardless of who is to reach the decision.

Such a conclusion is primarily based on the fact that the Family Act does not include a single provision which explicitly prescribes the duty of the parents, teachers, health care employees or officials in other institutions where the child exercises his/her rights to provide all the necessary information for the child to make an informed choice. There are also no provisions which would oblige the parents, social services or institutions to enable the child to express his/her opinion, to give due attention to the child's views and to take these views into account in decision-making processes.¹⁷

Considering the Serbian social and cultural environment which is traditionally dominated by patriarchal patterns of child treatment, it would be necessary to provide directive norms which would elaborate on the child's right to the freedom of expression in cases when it is exercised in the family environment as well as in educational, health, social and other institutions.¹⁸ If the legislator genuinely wants to direct the development of the social relations towards a greater autonomy of the child, it is necessary to fully observe and respect the child as an equal partner in social relations.

The negative effects will particularly ensue from the legislator's failure to normatively frame the right of the child to freely express his/her opinion on those daily questions which are usually decided within the inner family. Although the majority of questions concerning the child's present and the future life are decided within the family, there are no provisions in the Family Act on the obligation and responsibility of the parents to provide the child with relevant information concerning the important decisions which are usually brought by the adults; nor are there any provisions enabling the child to express his/her opinion on all the aspects of those decisions and ensuring that the child's opinion is taken into account in the decision-making process.

2.2. The Right of the Child to the Freedom of Expression in Judicial and Administrative Proceedings

8. The contents of the Family Act rules on the exercise of the child's right to freely express his/her opinion in the judicial and administrative proceedings show that the legislator has to a certain extent departed from the Convention standards.

¹⁷ As for educational institutions, the provisions of the Primary Education Act and the Secondary Education Act envisage that the child has some instruments in terms of grading and enrollment process, but there is no general provision which obliges the school authorities and teachers to enable the child to express his/her opinion in the course of deciding on all other daily issues concerning school life.

¹⁸ The research conducted by the end of the 1990s with an aim to examine the implementation of children's participation rights shows that the degree of exercising these rights in schools, health, social and other institutions is extremely low. According to the research results, the right of the child to express his/her opinion, and the corresponding willingness of the adults in these institutions to hear and take the child's views into account, is generally treated as a right which has to be "deserved" and granted for good and obedient behaviour. The results of this research were published in: Pešić, M. et al. *Participacija mladih pod lupom* (Participation of Young People under the Magnifying Glass), Jugoslovenski centar za prava deteta, 1999.

9. First of all, the legislator has limited the right of the child to personally and directly express his/her opinion before a competent court or an administrative authority because the right has been approved only to a child over the age of 10 (Art. 65, section 4 of FA). Besides, only a child over the age of 10 is entitled to refer, either in person or through a legal representative, to a court or an administrative body to request assistance in exercising the right to freely express his/her opinion (Art. 65, section 4 of FA). On the other hand, the UN Convention on the Rights of the Child does not impose any age limits on the right of the child to the freedom of expression but only introduces instruments for establishing the capacity of the child to form the opinion which rests upon the individual *evolving capacities of the child*.¹⁹ It is, therefore, obvious that the Serbian Family Act provisions are not in compliance with the Convention principles in respect of the right of the child to directly express his/her opinion.

10. Whereas under the provision in Article 65 of the FA the child has the right to express his/her opinion in all proceedings affecting the child, the provisions regulating the right of the child to express his/her opinion in judicial and administrative proceedings lead to a conclusion that the child has the right to express his/her opinion only if the child is a disputing party in the proceedings (Article 266, section 3 of FA; Art. 268 of FA).²⁰ It follows that the child has no legal right to express his/her opinion in all those proceedings where the child is not a disputing party but where his/her rights are to be decided on. It also follows that the court or an administrative authority has no duty to enable the child to express his/her opinion.

It is, therefore, necessary to take into account that under the new Family Act the child is not in the position of a disputing party in a number of judicial proceedings which directly or indirectly target the rights and interests of the child in many cases concerning the rights stemming from family relations, as well as in the cases which are initiated for the protection of the rights of the child. Thus, for example, in the lawsuit for the protection against family violence, the child can be a disputing party only if the child is the plaintiff, i.e. if the child has initiated the lawsuit for the protection against family violence through his/her legal representative (who is not an actual party in the dispute but acts as the legal representative of the child).²¹ As there is no specific rule that the child is required to be included in the complaint²², the child does not appear as a disputing party in the lawsuit for the protection against family violence which has actually been initiated for the protection of the child by some of the persons who are legally entitled to initiate the proceeding

¹⁹ The Convention rule on the evolving capacities of the child has established the basic principle for interpreting the Convention, under which the increase of the capacity of the child lowers the child's need for instruction and advice and increases the child's ability to take responsibility for the decisions concerning his/her own life. (More: Lansdown, G., *The evolving capacities of the child*, UNICEF, Save the Children, 2005, p. 5).

²⁰ Article 266, section 3 of FA reads that "if a court determines that a child who is capable of forming his/her own opinion is a party in the action for the protection of the rights of the child or in a dispute for..., the court is obliged to...)

²¹ The legal representative of a family member is authorized to initiate a lawsuit for the protection against family violence on his/her own, as a party in the dispute, because he/she is legally entitled under the procedural law to initiate such a proceeding.

²² This rule of FA is prescribed only for maternity and paternity lawsuits (Article 256 of FA)

(such as: the "non-violent" parent, a court-appointed body of custodianship or a public prosecutor).²³ In such a situation, in the lawsuit which is based on the two-party construction, the procedural position of the child is "vague" because the child is regarded as a "tacit" disputant²⁴ or a "party in lying".²⁵

11. The right of the child to freely express his/her opinion in judicial and administrative proceedings, including the right to obtain all relevant information, has been related in the legal provisions to the prior assessment of the child's capacity to form an opinion.

Namely, the provision in Article 266, section 3 of FA prescribes the duty of the court to assure that the child as a party in a dispute shall receive all the necessary information if it is determined in the course of the proceeding that the child is capable of forming his/her opinion. Similarly, under Article 267 of FA, the child's collision guardian and temporary representative are obliged to ensure that the child shall receive all the necessary information, to give the child all the necessary explanations regarding the possible consequences of the actions which are being undertaken and to present the child's opinion to the court (if the child has not directly expressed his/her opinion before the court), but only providing that the child who is being represented is capable of forming his/her own opinion. The capacity of the child to form his/her opinion is subject to prior assessment of a judicial or administrative authority; in case a child has been appointed a collision guardian or a temporary representative, they are to assess the capacity of the child to form an opinion. However, the legislator has envisaged neither the principles governing the assessment of this capacity nor the legal mechanism to be applied in case the court, collision guardian or temporary representative of the child make a wrong conclusion that the child is incapable of forming his/her own opinion.

12. The legal provisions which impose the greatest restrictions on the right of the child to freely express his/her own opinion in the judicial and administrative proceedings are, beyond any doubt, the provisions specifying that the court is released from the legal obligation to enable the child to express his/her opinion and the duty to give the child all the necessary information if the court has determined that it is contrary to the best interest of the child (Art. 266 of FA). Similarly, neither the collision guardian nor the temporary rep-

²³ Nor does the child have the position of a disputing party in a proceeding to deprive a person of the parental right, even though the proceeding has been initiated by the body of custodianship for the purpose of protecting the child.

²⁴ In many proceedings, the child has been reduced to an "object" of the proceedings even though the court actually decides on the child's rights. For this reason, the child is sometimes described in the legal literature as a "party in lying"; the expression clearly points to the specific position of the child in some adhesion litigation proceedings.

²⁵ At the time when the Act on Marriage and Family Relations was still applicable, the legal public pointed to the negative consequences that such a position of the child in the judicial proceedings would have in respect of the protection of child's rights. However, the legislator failed to take the opportunity to regulate the procedural position of the child in a satisfactory way. For this reason, in many proceedings the child does not have the position of a disputing party, which *inter alia* deprives the child of the possibility to be appointed a collision guardian or temporary representative, considering the fact that such a representative is appointed only in case the child is a party in a dispute.

representative have any obligation to fulfill all those duties which have been originally prescribed by the legislator in order to enable the child to form and express his/her own opinion (Art. 267 of FA).

By relating the exercise of the child's right to the freedom of expression to the principle of the best interest of the child, the legislator has obviously relied on the assumption that the child's right to the freedom of expression and the principle of the best interest of the child may be contradictory or mutually exclusive, in which case the principle of the best interest of the child should prevail. This standpoint, however, has long been abandoned both in legal theory and in the legislative practice.²⁶ In the contemporary law, the best interest of the child is not perceived as a passive principle; nor are the adults seen as the only ones who are to determine the contents of the principle of the best interest of the child. The contemporary law starts from the premise that these two principles are mutually related and that the observance and respect of the opinion of the child is most frequently in the best interest of the child.

The legal provisions specifying that only the right of the child to express his/her opinion is related to the best interest of the child, without including the right of the child to have his /her opinion taken into account, may in legal practice lead to some situations where the child may be without cause deprived of the right to express his/her views. It can be illustrated by the fact that the court and an administrative authority do not have a procedural duty to elaborate on what grounds they have determined that the child's freedom to express his/her opinion (as well as the right to receive information) is not in compliance with the child's best interest. Similarly, the child's collision guardian and temporary representative do not have the legal duty to present to the court or an administrative authority the circumstances which they had in mind in the course of assessing and determining that the expression of the child's opinion is not in compliance with the child's best interest. (Articles 266 and 267 of FA, *in fine*).

The inadequacy of these legal provisions (relating the child's right to the freedom of expression to the best interest of the child) may also be observed in the fact that the child is not provided a single procedural instrument which can be applied in order to effect a control of such a decision, either of the court/administrative authority or the child's collision guardian/temporary representative. In legal practice, such a discretionary decision which is not subject to any kind of control may cause that a child be unduly deprived of such an important right.

Another problem is that there are no clear criteria for establishing the best interest of the child. Thus, the court, the collision guardian or the temporary representative of the child do not have any guidelines for assessing whether the child's freedom of expression is (not) in compliance with the best interest of the child. It may, *inter alia*, jeopardize the exercise of the fundamental legal principles of legal safety and equality before the law.

13. Under the applicable rules of procedure, the child does not have a single legal instrument which may be used in case of a failure to observe the right of the child to the freedom of expression, the right of the child to be duly informed and the right to have his/her opinion taken into account and adequately valued in the judicial or administrative

²⁶ 26. See: Vučković Šahović, N., *op. cit.*, p. 110

proceeding. Thus, for example, the failure of the court to enable the child to express his/her opinion in the judicial proceeding affecting the child is not envisaged as a significant violation of the legal provisions in the litigation procedure; such a violation would actually result in repealing the decision and subjecting it *ex officio* to the ruling of a second instance court. In case the violation is found to be relatively significant, the case may be tried in a second instance court but only upon a complaint filed by the plaintiff. However, a child may independently file a complaint only if he/she is determined to be procedurally capable of taking part in the lawsuit and if he/she is a disputing party in the proceeding.

14. Under the provision in Article 267, section 1, point 3 of FA, the child's collision guardian or the court-appointed temporary representative have the duty to present the child's opinion to the court, in case the child has not directly expressed his/her opinion before the court.

This provision shows that there are situations where the child will not directly express his/her opinion, which is to some extent in discord with the provision in Article 266, section 3, point 2 of FA, prescribing the duty of the court to allow the child to directly express his/her opinion. Besides, the legal text does not provide the criteria for establishing when the child will be able to directly express his/her opinion and when it will be done through the child's collision guardian or temporary representative.

15. One of the most serious drawbacks of the new Family Act is that the legal provisions do not assure procedural guarantees that the opinion of the child will be truly given due consideration in legal practice. Neither the court nor an administrative authority is legally obliged to reason their decisions and elaborate on the reasons for not observing or taking into account the opinion of the child. Consequently, there is no possibility for a second-instance court or administrative authority to control how the first-instance court or administrative authority has valued the opinion of the child, nor the reason why the child's opinion has not been taken into account.²⁷ This rule is absolutely necessary because it is the only way to provide realistic conditions for the child's opinion to receive an adequate treatment, to be duly taken into consideration and valued, and to have an adequate impact on the contents of a respective decision.

16. The provision in Article 65, section 6 of FA prescribes that the court and an administrative authority establish the opinion of the child in cooperation with the school psychologist, a body of custodianship, family counseling services or other institutions specializing in family mediation, in the presence of the person of the child's own choice."²⁸

²⁷ At the time when the Draft Family Act was subject to a public debate, the author of this paper proposed that the legal text of the Family Act should (relying on the solution from the German legislation) include the provision that the courts should be explicitly directed to reason their final decision and elaborate on the reasons for the inobservance of the child's opinion. Such a rule would secure the procedural guarantee that the opinion of the child is taken into account and given due treatment in the proceeding, that it is to be duly considered and valued, and that it would have an appropriate impact on the contents of the judicial decision.

²⁸ In literature, the rule regulating the right of the child to be assisted and supported by a trustworthy person of the child's own choice is not interpreted as an imperative rule but rather as an option that such a person "may

Although it appears to be rather clear, this provision opens a number of issues. First, there is an issue how the child will choose the person who is supposed to assist and support the child in the process of forming and expressing his/her opinion, who the person will be proposed by and who will help the child choose the person. On the other hand, there is a question regarding the role and the duty of that person, particularly in cases when the child has already been appointed a collision guardian or a temporary representative – who both have specific legal duties in terms of the child's right to exercise his/her opinion. It is also rather vague who has the duty to inform the child of the right to choose a trustworthy person which would really help and support the child in the process of forming and expressing his/her opinion. All these questions could have been answered if the legislator had genuinely intended to make the *right of the child to the support of a trusting person* fully operational. This specific procedural right of the child is highly relevant and significant because it ensures that the child –as an extremely sensitive and vulnerable human being that can be additionally traumatized in every single contact with the court - may overcome the fears and freely express his/her opinion.

On the other hand, the legislator has not envisaged the directive rules to explain the techniques which should be applied by the court in the course of establishing the opinion of the child, in cases when the child directly expresses his/her opinion before the court. These specific instructions would greatly contribute to reducing the possible negative consequences of the child's appearance before the court, particularly in those proceedings where the child is provided legal protection against family abuse or neglect.²⁹

17. Finally, we shall look into the legal provisions envisaging the possibility that the child of the age of 10 may individually or through another person or institution refer to the court or administrative authority requesting assistance in exercising the right to the freedom of expression" (Article 65, section 5 of FA). The formulation of this provision is rather inadequate and insufficient in legal practice to actually provide the child with relevant assistance in exercising this fundamental right to the freedom of expression. The least the legislator has been expected to do is to envisage what kind of assistance the child is entitled to, who will help the child exercise this right, how this specific assistance will be provided, and what legal mechanisms will be used in deciding upon the claim for providing such assistance.

be present" in the process of establishing the opinion of the child. (See, Ponjavić, Z., op. cit., pp. 245).

²⁹ For this reason, the court has exert special consideration during the conversation with the child in order to secure that the examination process shall not have a detrimental effect on the child's mental state. A good psychological preparation of the child for the first appearance in court and the examination process are extremely important. Experience shows that children who have been well-prepared are significantly more aware of the court proceedings and less prone to generalized fears of being exposed to further abuse or violence. The preparation of the child for the proceedings is a complex work which should be done by a professional child psychologist. Using special techniques (such as: visit to the courtroom, review of case-related facts, explaining the roles and task of the participants in the proceeding, applying the techniques for reducing the anxiety of the child, self-encouragement, etc), a child psychologist can significantly contribute to reducing the child's possible trauma. (More: Žegarac, M., Mijanović, Lj., Obretković, M., Pejaković, Lj., Simović, I., Stevanović, I.: *Zaštita deteta od zlostavljanja* (The Protection of the Child against Abuse), Jugoslovenski centar za prava deteta, Save the Children, Beograd, 2004).

PRAVO DETETA NA SLOBODNO IZRAŽAVANJE MIŠLJENJA U NOVOM PORODIČNOM PRAVU REPUBLIKE SRBIJE

Nevena Petrušić

U savremenom pravu pravni status deteta uzdignut je na nivo pravnog subjekta, kome pripada korpus samostalnih prava, različitih i od prava roditelja i od prava porodice. Proširenje legislativnih granica autonomije deteta kao pravnog subjekta odvija se kroz dva paralelna procesa: kroz ustanovljavanje posebnih poslovnih sposobnosti deteta i kroz konstituisanje tzv. participativnih prava, među kojima poseban značaj ima pravo deteta da slobodno izrazi svoje mišljenje.

Novim Porodičnim zakonom Republike Srbije detetu je priznato pravo na slobodno izražavanje mišljenja, kao jedno kvalifikovano pravo, koje dete ostvaruje u sferi porodičnih i drugih odnosa, kao i u sudskim i upravnim postupcima u kojima se odlučuje o njegovim pravima.

Analiza zakonskih pravila kojima je procesno operacionalizovano pravo deteta na slobodno izražavanje mišljenja pokazuje da zakonodavac nije obezbedio valjane normativne instrumente koji bi omogućili da dete zaista ostvari ovo svoje pravo. Posebno su problematična zakonska rešenja u pogledu prava deteta da dobije informacije koje su mu neophodne da bi formiralo svoje mišljenje. Iako je Porodičnim zakonom predviđeno pravo deteta da blagovremeno dobije sva obaveštenja koja su mu potrebna za formiranje svog mišljenja, faktički dometi ovog prava isuviše su suženi jer je način njegovog ostvarivanja predviđen samo za slučaj da dete formira i izražava mišljenje u sudskom, odnosno upravnom postupku. Pored toga, zakonom nisu predviđeni instrumenti koje bi dete moglo upotrebiti za slučaj da oni koji imaju zakonsku dužnost da detetu pruže potrebne informacije ne ispune ovu svoju dužnost..

Ključne reči: *prava deteta, Porodični zakon, mišljenje deteta*