

THE PROTECTION OF JUVENILES IN A CRIMINAL PROCEEDINGS

ABSTRACT: In recent years a significant attention has been paid to the protection of juveniles in the context of a criminal procedure. It cannot be denied that the participation of juveniles in these proceedings could be the cause of secondary victimization and trauma. In addition, the specific position of the child established by the UN Convention on the Rights of the Child requires the minors to be allowed to actively participate in a criminal proceedings and to be adequately informed about various aspects and consequences of the procedure. The paper first gives a brief overview of the relevant international documents on the rights of juveniles in a criminal procedure, followed by the analysis of the domestic normative framework in the same field. A formal dogmatic approach has been applied. Afterwards, the author summarizes the state of the rights of minors in a criminal procedure in practice in Serbia. The aim of this paper is to point out the possible improvements of the position of juveniles in a criminal proceedings in Serbia.

Keywords: *criminal procedure, juveniles, witness, victim.*

1. Introduction

The role of the victim in criminal procedure has been traditionally well recognized in Serbia, which is also known to be a characteristic of criminal procedures in other countries whose legal systems are based on the civil law tradition (Škulić, 2013, p. 183). With the adoption of Law on Juvenile

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Offenders and Criminal Protection of Juveniles (2006), the step has been made in the direction of further improvement of the position of juveniles as victims and witnesses in criminal proceedings. This legal text has been inspired by relevant international standards and modern scientific considerations on the position of juvenile offenders and juveniles as victims in criminal procedure (Bojić & Ahmed, 2015, p. 52). In that sense, the absolute priority is to enable fulfillment of the principle of the best interests of the child. The best interest of the child by all means implies the active participation of the child in all sorts of justice proceedings concerning the minor (Rap, 2016, p. 94).

Bearing in mind that the procedure in which minors appear as victims is in principle conducted in accordance with the provisions of the Criminal Procedure Code (2011, short: CPC) and that victim and witness protection services are still not sufficiently and evenly developed in Serbia, the question arises whether juveniles are appropriately protected during their participation in criminal procedure. This matter is of great importance because adequate protection could help to reduce stress experienced by the witness while giving evidence, resulting at the same time in an improvement in the quality of the testimony (Smith & Tilney, 2007, p. 2).

2. International framework

When it comes to the protection of child victims and witnesses of crimes in the international legal context, we should undoubtedly acknowledge the UN Convention on the Rights of the Child (1989, short: CRC), bearing in mind that this is a specific document that deals with all areas of children's rights. Namely, art. 39 provides that the contracting parties shall take all appropriate measures to encourage the psycho-physical recovery and social reintegration of the child victim, and that recovery and reintegration shall be carried out in conditions which promote health, self-respect and dignity of the child. Of special importance are art. 3, which obliges all authorities to take into account the best interests of the child in any decision-making process in which the child is involved, and art. 12, which obliges states to allow a child who is capable of forming an opinion to express his view in all relevant proceedings in accordance with the national positive legal framework. There is also an obligation to pay due attention to the expressed opinion of the child. Although the remaining articles of the CRC regarding procedure in criminal matters refer to children as defendants, they are also of great importance because they prohibit child to be forced to testify or admit guilt, and also guarantee the child's right to a free interpreter and protection of privacy (article 41).

The Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (UN ECOSOC Resolution 2005/20) are based on the standards established by the UN Declaration on the Fundamental Rights of Victims of Crime and Abuse of Power (1985), CRC and other relevant international instruments in order to establish the minimum of necessary conditions for the protection of child victims and witnesses in criminal proceedings, while, at the same time, striving to continuously raise the level of protection and quality of services. The terms “victim” and “witness” in criminal proceedings in this resolution denote children and adolescents under the age of 18 who are victims or witnesses of a criminal offense, regardless of their role in the criminal matter, or participation in criminal proceedings against a particular person or group of persons. The basic principles of involvement of minors in criminal procedure are:

- dignity
- prohibition of all forms of discrimination
- best interests of the child
- right to participation in accordance with the age and personal capacities of the child.

Guidelines insist on a timely and complete informing of children as participants in the judicial process. Also, it is extremely important to establish procedures and measures that take into account children’s vulnerability, which includes: adequate interview rooms, interdisciplinary support services for children united under one roof, specially adapted courtrooms, breaks during testimony and appropriate deadlines and measures taken in order to reduce the number of court visits to the necessary minimum. In connection with the above, it is recommended to frequently use video recordings of previously given statements, as well as to establish procedural rules that prevent cross-examination of children, while at the same time taking into account the rights of the defendant. Furthermore, it should be possible for children to testify in the absence of the suspect, which usually implies for children to stay in special waiting rooms and special rooms that guarantee privacy.

Directive 2012/29 EU establishing minimum standards on the rights, support and protection of victims of crime (of the European parliament and of the Council of 25 October 2012) stipulates that victims of crime should be treated in a fair, sensitive and professional manner and without discrimination of any kind. Personal situation and personal needs, age, gender, disability and maturity of victims must be taken into account and with full respect for physical, mental and moral integrity of the victim. Crime victims should

be protected from secondary and repeated victimization, intimidation and retaliation, and should receive appropriate support to facilitate their recovery and access to justice. It has been emphasized that minors should also enjoy protection as crime victims, all in accordance with the principle of the best interests of the child and by taking into account the minor's ability to express his opinions.

Relatives or close persons of direct crime victims are also recognized as indirect victims by Directive 2012/29 EU, so they should as well be provided with protection intended for victims, in accordance with the national legal framework. It is envisaged that victims should receive all relevant information on the nature and consequences of judicial process at the moment of first contact with the competent authorities or other relevant persons related to the criminal prosecution. Information should be given in a clear and receptive manner. Victims have the right to be informed about the release of convicted persons if it is assessed that there is a risk to their safety, which should not apply to criminal offenses that fall under petty crime. Protection should be provided in a variety of ways, without excessive formalities and with equal representation of services in all parts of the country. Particularly vulnerable categories of victims need to be provided with specific expert services to reduce trauma and avoid secondary victimization, which includes the provision of medical services, emergency accommodation, legal advice and child protection. The right of children to testify or to express an opinion should not be denied on the assumption that their age prevents them from participating in criminal procedure. The technical aspects of procedure in criminal matters should be designed to minimize the possibility of contact between suspects and victims. Certain categories of victims, such as victims of trafficking in human beings and children, are, as experience shows, often particularly exposed to the risk of secondary victimization, intimidation and revenge. Therefore, these risks should be assessed with particular caution-starting from the assumption that special measures will be needed to protect these persons.

When it comes to children as victims, Directive 2012/29 EU provides that the same natural or legal person could be both the child's representative in criminal procedure and his guardian. States should take measures to encourage reporting of victimization, while the criminal reporting process itself should be structured in a way that takes into account specific needs of victims. Article 10 of the directive provides the right of victims to be heard in judicial process and to contribute to the collection of evidence. When the decision of authorities is not to prosecute, victim should be given the opportunity to request a review of such decision, Article 11, 12 and 13 provide that victims

have the right to legal aid and reimbursement of appropriate costs. Article 20 regulates the right of victims to be accompanied by a trustworthy person during the implementation of relevant actions, unless there are reasons that exclude this possibility, as well as the obligation of authorities to minimize the number of medical examinations to which victims are subjected. When assessing the need for protection, special consideration should be given to the personal characteristics of the victim, as well as to the nature and circumstances of the crime.

Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice, adopted on 17 November 2010, have been developed under the auspices of the Council of Europe and with the participation of eminent experts. The mentioned text refers not only to child witnesses and victims in criminal procedure, but also to the participation of children in administrative and civil processes. The document has also been based on the principles of the respect for dignity, non-discrimination, best interests and participation of the child, but it additionally emphasizes principle of the rule of law.

Guidelines imply that children should also enjoy the benefits of the principle of the rule of law, so that the legal guarantees that apply to them must not be weaker than the guarantees that apply to adults. The right to appeal and the right to use legal aid must be guaranteed to children, so that denial or restriction of these rights cannot be justified by the best interests of the child. The guidelines suggest that audio-video technologies should be used in all situations where their application could ensure the avoidance of trauma for the child. Suggestive questions should be avoided and it should be possible for the judge to decide whether a child should testify, guided by the best interests of the child. During the procedure, children should be treated with respect and recognition of their needs and capacities, while keeping in mind that there could be some communication problems caused by their age. It is necessary to create a non-intimidating and child-friendly environment, with a prior acquaintance of children with the purpose, nature and methodology of court proceedings.

3. Normative framework in the Republic of Serbia

The position of child victims and witnesses in criminal procedure in Serbia is regulated by the provisions of two legal texts: the Law on Juvenile Offenders and Criminal Protection of Juveniles and the CPC.

CPC contains provisions on particularly sensitive witness, starting from the assumption that: age, life experience, lifestyle, gender, health condition,

nature and consequences of the committed crime and other circumstances of the case could make the witness particularly sensitive. Procedural body may *ex officio*, or at the request of the parties or the witness himself, determine the status of a particularly sensitive witness (art. 103, par. 1).

However, more detailed provisions on the status of juvenile victims and juvenile witnesses of criminal offenses are contained in the Law on Juvenile Offenders and Criminal Protection of Juveniles, which deals only with juvenile victims and juvenile witnesses, and not with other categories of particularly vulnerable witnesses. In fact, if we examine the terminology used in the Law on Juvenile Offenders and Criminal Protection of Juveniles, we could come to a conclusion that its provisions refer primarily to the protection of juvenile victims, which speaks in favor of the complementary application of these two laws in the field of protection of juveniles who participate in criminal procedure primarily as witnesses.

Adequate interpretation of legal provisions at first requires clarification of some terminological ambiguities. The international normative framework uses the terms “child victims” and “child witnesses of crime”, while the term “victim” is only sporadically used in the Serbian positive legal framework. As a matter of fact, the CPC does not actually use the term „victim” at all, although it defines the injured party/victim as a person whose personal or property rights have been violated or endangered by criminal offense (art. 2, para. 1). However, as this definition of the “injured party” is much wider than the definition of the victim in the criminological sense and the notion of passive subject in the criminal law sense, there is no doubt that the protection guaranteed by the domestic national framework applies to victims of crime as defined in the international context (Škulić, 2015, p. 2). Thus, according to the Declaration on Fundamental Principles of Justice for Victims of Crime and Abuse of Power, victims of crime are persons who have individually or collectively suffered harm, and above all an attack on their physical and mental integrity, moral suffering, material loss or gross attack on their basic rights by acts or omissions that constitute a violation of the criminal law of a member state, including laws prohibiting criminal abuse of power. In victimological sense, on the other hand, the term “victim” has been broadly defined, so that the victim is any person who suffers any restriction in his rights (Nikolić Ristanović, 2019, p. 86). The literature also points out that the use of the term “injured party” essentially expands the circle of persons being able to enjoy specific protection for victims. This is the case with minors who have actually just witnessed certain crimes, but could also be the “injured party” if passive

subjects of the crime are their closest relatives, as it often is the case with domestic violence (Škulić, 2015).

CPC defines “witness” as a person who is likely to give information about criminal offense, perpetrator or other facts which should be established in the proceedings (art. 91). It is not disputed that a child in certain cases may be able to reproduce previously perceived facts, so there is no need for the special definition of the child witness. According to the positive legal framework in Serbia, a “child” is a person under the age of 14, while the notion of a “juvenile” or “minor” is broader because it includes all persons under the age of 18. In the international legal framework, a “child” is considered to be a person under the age of 18, in accordance with the CRC, which implies that Serbian legal framework does not deviate from international protection standards because it guarantees specific protection to all persons under the age of 18.

Therefore, the child could be provided with appropriate protection both through the application of the CPC and through the application of the Law on Juvenile Offenders and Criminal Protection of Juveniles. However, the Law on Juvenile Offenders and Criminal Protection of Juveniles is *lex specialis* in matters referring both to juvenile offenders and to juveniles as victims, which implies that the provisions of Law on Juvenile Offenders and Criminal Protection of Juveniles should be applied as a priority when it comes to protecting juveniles in criminal procedure.

The Law on Juvenile Offenders and Criminal Protection of Juveniles provides that the provisions of the Criminal Code (2006), CPC, the Law on the Execution of Criminal Sanctions (2014) and other general regulations should be applied in criminal matters concerning juveniles – unless they are in conflict with the Law on Juvenile Offenders and Criminal Protection of Juveniles. However, the CPC itself also recognizes certain protective mechanisms established in favor of a minor. Thus, a minor who, given his age and mental development, is not able to understand the significance of the right to be released from the duty to testify, cannot be examined as a witness, unless the defendant himself requests so, pursuant to art. 94, para. 2. In the spirit of respecting the special vulnerability of minors, it is provided that an oath is not to be given by a witness who is not of legal age at the time of the hearing (art. 97).

A minor as a witness has the right to basic witness protection in accordance with art. 102 of CPC, so that the body of procedure is obliged to protect the injured party/victim or witness from insults, threats and any other attack, and the public prosecutor or the court may request that the police take

measures to protect the injured party or witness. Although Law on Juvenile Offenders and Criminal Protection of Juveniles is predominantly applied, there are no legal obstacles for a public prosecutor, presiding judge or single judge to make a decision on determining the status of a particularly sensitive witness in concordance with art. 103 of CPC. The rules on the examination of a particularly sensitive witness are also important, according to which questions should be asked to a particularly sensitive witness only through a body of proceedings that will treat witness with special care and while trying to avoid possible harmful consequences on the witness's personality, physical and mental condition.

Furthermore, the examination may be conducted with the assistance of a psychologist, social worker or other expert, which is decided by the body of the procedure, which also may decide to examine witness by using technical means for video and sound transmission. Examination may be implemented without the presence of parties and other participants in the room in which the witness is located in or in an authorized institution suitable for the examination of particularly sensitive witnesses. Witness enjoys specific protection in the form of a ban on confrontation with the defendant, unless the defendant himself requests so, and the procedural body allows it, taking into account the degree of sensitivity of the witness and the rights of the defense (art. 104 of CPC).

Court may grant witness the status of a "protected witness" or some other special protection measure due to circumstances indicating that witness could expose himself or others close to himself to significant harm. These measures include examination of a protected witness under special conditions and in a manner that ensures that his identity is not publicly disclosed, and exceptionally even not disclosed to the defendant and his defense counsel. When applying this and other similar measures, one must not act in a way that calls into question the right to a fair trial, or in a way that leads to the exclusion of the principle of contradiction (Matijašević Obradović & Subotin, 2020, pp. 36–37).

On the other hand, the Law on Juvenile Offenders and Criminal Protection of Juveniles envisages a number of specific rules which guarantee special protection to the minor injured party/victim during the implementation of appropriate criminal proceedings.

First, the judicial panel that judges an adult in the case of specific criminal offenses that have harmed minors will be presided over by a judge who has acquired special knowledge in the field of children's rights and protection of minors. These crimes include: crimes from the group of crimes against life

and body (aggravated murder, encouraging or assisting *suicide* and grievous bodily harm), crimes against the rights and freedoms (kidnapping), crimes against sexual freedom (such as rape and child sexual abuse), offenses against marriage and family (such as domestic violence and incest), offenses against property (such as robbery), crimes against health (enabling the use of narcotics) and offenses against humanity and other values protected by international law (such as human trafficking). It should be added here that the public prosecutor who has acquired special knowledge in the field of children's rights and protection of minors is also authorized to initiate proceedings that include special protection of minors for other criminal offenses, if he assesses that it is necessary in order to protect juveniles (art. 150).

Secondly, it is envisaged that the investigation should be conducted by an investigating judge who has acquired special knowledge in the field of children's rights and protection of minors. Bearing in mind that after entry into force of the current law on minors there have been some substantial changes in the very concept of criminal procedure, so that there is no longer an institute of an investigating judge and that now investigation is led by public prosecutor – in the particular case public prosecutor should be adequately trained. Furthermore, specialized police officers who have acquired special knowledge in the field of children's rights and criminal protection of minors should participate in the investigation of criminal offenses to the detriment of minors, pursuant to art. 151. It has already been noticed that the police, according to the existing concept of criminal procedure which includes prosecutorial investigation, does not have a significant contact with juvenile victims in the investigation phase, which means that police officers participating in pre-investigation procedure should be adequately trained (Škulić, 2015).

Third, the public prosecutor and judges will treat juvenile victim in a manner that takes into account his age, personality traits, education and circumstances in which he lives, especially trying to avoid possible harmful consequences of the procedure for his personality and development. The interrogation of juveniles will be conducted with the help of a psychologist, pedagogue or other expert, and in the case of a juvenile witness who has been harmed by the above listed criminal offenses, the interrogation may be conducted no more than twice, or just exceptionally several times if necessary for criminal procedure purposes. However, in case that juvenile is interrogated more than twice, the judge is obliged to take special care of the protection of personality and development of the juvenile, pursuant to art. 152.

Fourth, if it is assessed that it is in the interest of the minor, the principle of taking evidentiary actions directly before the court and the parties may be

deviated from. Namely, if, considering peculiarities of the criminal offense and personality traits of the juvenile, it is deemed necessary, judge shall order the juvenile to be heard using audio-video technology, so that hearing shall be conducted without the presence of parties and other participants. Parties and other entitled persons may ask witness questions through a judge, psychologist, pedagogue, social worker or other professional. Moreover, minors may also be interrogated in their apartment or other premises or in an authorized institution-organization professionally trained for the examination of juveniles with the use of technology for the transmission of images and sound. If a minor is interrogated in special premises or by means of audio and video technology, his testimony will always be read at trial or a recording of the interrogation will be played.

Fifth, if a juvenile is examined as a witness who is particularly sensitive or is in a particularly difficult state of mind, it is prohibited to confront him and the defendant, in terms of art. 153.

Sixth, the juvenile victim must have a legal representative from the first hearing of the defendant. When the juvenile does not have a representative, he will be appointed by the president of the court. Representation costs are borne by the court's budget. The obligatory engagement of a legal aid provides an additional guarantee that juvenile will be able to exercise his rights, which is in concordance with international documents that insist on respecting the principles of the rule of law when it comes to minors.

The seventh specificity refers to the identification of the defendant by the juvenile victim, in which case the court must act with special caution and in a manner that completely prevents the defendant from seeing the juvenile. It is clear that this protective measure prevents additional trauma and, in some cases, intimidation of a minor.

The eighth feature of the criminal procedure for acts by which minors have been damaged is that process must be urgent (art. 157). It is clear that urgency is insisted on because it would be inhumane to treat a juvenile in a way that requires him to be involved in criminal proceedings in a long-term manner.

4. Serbia – The state of affairs

Although the normative framework does contain appropriate measures in order to protect juvenile victims and juvenile witnesses, in practice it cannot be said that these vulnerable persons actually enjoy adequate protection.

National Strategy for the Realization of the Rights of Victims and Witnesses of Criminal Offenses in the Republic of Serbia for the period from 2020 to 2025 (2020), states that the current situation in this area is such that a network of assistance services for victims and witnesses of criminal offenses has not been fully established. In fact, the provision of assistance and support is still based on the engagement of services established in higher courts and prosecutor's offices such as: the War Crimes Prosecutor's Office, the Organized Crime Prosecutor's Office and the First Basic Public Prosecutor's Office in Belgrade and through individual civil society organizations, legal clinics and social welfare centers.

The National Strategy further states that there is no precise data on the number and structure of service providers for victim support and that it is also known that the geographical distribution and diversity of services are extremely uneven. Also, the criteria of professional qualification of service providers and the quality of services they provide are not defined, as well as the procedures for needs assessment and referrals to services. There are no precise mechanisms for the cooperation of service providers, as well as there is no system of coordination and financing of service providers. Supervision over the provided services lacks too. Training programs in the field of victim/witness protection have not been standardized.

When it comes to informing both the general public and the potential service users, information on available types of support is not systematized. There is also a significant problem in the area of financing, bearing in mind that in recent years certain services have been provided in *ad hoc* manner by using funds from international projects, so that the completion of a certain project negatively affects the sustainability of services.

The review of the current situation in the text of National Strategy indicates that the situation regarding the protection of crime victims and witnesses, including minors, has not changed significantly since 2015, when the research study on the protection of child victims in criminal proceedings was conducted under the auspices of UNICEF in Serbia. The results of the study indicated that juvenile victims were not adequately informed in most cases concerning criminal matters (Banić & Stevanović, 2015, p. 41). Moreover, examined court papers confirmed that children were *pro forma* informed. Also, the study pointed out that the possibility for a child to testify in a special room in court or other place was scarcely used, although at least in Belgrade there have been appropriate technical preconditions in place for the application of this measure. It was also noted that during the interrogation of juvenile victims in criminal proceedings before some basic courts, the services of

appropriate experts, such as psychologists and pedagogues, were not used at all. Furthermore, minors had to attend court in multiple sessions due to previous delays, whereby measures of separating a minor into a special room or other measures defined by law were not applied (Banić & Stevanović, 2015, p. 42).

5. Conclusion

There is an appropriate normative framework in the field of protection of juvenile victims and witnesses in Serbia. Proper implementation of such framework could provide full and meaningful protection of juveniles in criminal proceedings. The aforementioned framework is largely in line with relevant international documents, in particular with the Directive 2012/29 EU and CoE Guidelines on child-friendly justice.

However, there is some room for improvement of the normative framework, primarily through modernization of certain provisions of Law on Juvenile Offenders and Criminal Protection of Juveniles which have not been adapted to conceptual changes of criminal procedure coming from the adoption of the CPC in 2011, but also through adoption of appropriate bylaws. It is necessary to adopt new rulebooks and protocols that would, among other things, define professional qualifications for persons working in the field of juvenile victims and witnesses protection. In doing so, conditions of professional qualifications should not be such to focus only on formal education, but also on personal and professional qualities of service providers. In that sense, the scope and field of work of civil society organizations should be defined in particular.

Furthermore, appropriate protocols should define order of actions and mechanisms for cooperation between the state and civil sector, and should also define cooperation of judicial system with educational system and systems of social and health care.

In order to provide the youngest persons with appropriate protection which they deserve, in extremely difficult moment when they suffer consequences of crime or participate in criminal process in various capacities, appropriate education of official actors is also needed.

In addition, it is necessary to adequately inform not only the professionals, but also the wider public about the rights of both adult and juvenile victims and witnesses of crime. Implementation of appropriate media campaigns is extremely important given the huge impact of modern media on general population and especially on young people (Joksić & Rajaković, 2020, p. 46).

It is also necessary to design educational content in order to draw attention to protecting witnesses and victims in criminal proceedings, which would undoubtedly result in greater appeal of interested persons to competent services and consequently in more intensive development and expansion of services for witnesses and victims.

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ZAŠTITA MALOLETNIH LICA U KRIVIČNOM POSTUPKU

REZIME: Tokom poslednjih godina značajna pažnja se posvećuje zaštiti maloletnih lica u krivičnom postupku, s obzirom da se ne može poreći da učestvovanje u krivičnom postupku može biti uzrok sekundarne viktimizacije i traumatizacije. Osim toga, specifičan položaj deteta ustanovljen Konvencijom UN o pravima deteta iziskuje da se maloletnim licima omogućući aktivno participiranje u postupku koji se neposredno odnosi na njih same. Nužno je i da maloletno lice bude informisano o prirodi, svrsi i mogućim ishodima krivičnog gonjenja. Izlaganja u radu su koncipirana tako da nakon predstavljanja relevantnih međunarodnih dokumenata o pravima maloletnih lica u krivičnom postupku sledi analiza domaćeg normativnog okvira primenom normativno-dogmatskog metoda. Potom autor ukratko ukazuje na ostvarivanje prava maloletnih lica u krivičnom postupku u praksi u Srbiji. Cilj rada jeste da se ukaže na načine unapređivanja položaja maloletnih lica u krivičnom postupku u Srbiji.

Ključne reči: krivični postupak, maloletna lica, svedok, oštećeni.

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