

ACCESS TO JUSTICE FOR CHILDREN: SERBIA

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

Article 16 of the Serbian Constitution provides that “[r]atified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.”¹

B. Does the CRC take precedence over national law?

The CRC appears to take precedence over national law, as the Serbian Constitution provides that national laws may not contradict ratified international treaties or general principles of international law. In addition, the Constitution also states that human rights guaranteed by ratified international treaties shall be directly implemented and that national law may only prescribe the manner of exercising these rights but may not under any circumstances influence the substance of the relevant rights.²

C. Has the CRC been incorporated into national law?

The CRC is incorporated by the Serbian Constitution. However, the UN Committee on the Rights of the Child has noted that Serbian legislation is not fully in compliance with the Convention.³

D. Can the CRC be directly enforced in the courts?

Yes, by virtue of being considered an integral part of the Serbian legal system, ratified international treaties, such as the CRC, are directly enforceable in national courts.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Although the Supreme Court has cited the Convention on at least two occasions,⁴ it is not clear whether the courts rely on the CRC on a regular

¹ Constitution of the Republic of Serbia, Article 16, available at: http://www.srbija.gov.rs/extfile/en/29554/constitution_of_serbia.pdf.

² Constitution of the Republic of Serbia, Article 18.

³ UN Committee on the Rights of the Child, *Concluding Observations on the initial periodic report of Serbia*, CRC/C/SRB/CO/1, 20 June 2008, para. 7, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSRB%2fCO%2f1&Lang=en.

⁴ Case No. U. 3661/2004 from 9 December 2004 and Case No. Rev. 1949/2009 from 1 July 2009.

basis. Prior to 2009, the courts cited the Convention rarely, however, it is now cited by the court far more often.⁵

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

All natural persons, including children, may be parties to civil proceedings,⁶ subject to the limitations described in part II.B below.

Furthermore, under the 2005 Family Act of Serbia, an action for the protection of any right of the child granted by the Act may be initiated by: the child, the child's parents, the public prosecutor or the guardianship authority.⁷

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

Under Serbian law, minor children are considered competent for litigation only within the limits of their recognised disposing capacity.⁸ A party without litigation capacity shall be represented by its legal representative.⁹ Therefore, it appears that children may be able to bring a case by themselves, if they are deemed sufficiently capable by the Court. Furthermore, under the Family Act, parents have the right and the duty to represent their children in all proceedings exceeding the limits of the legal capacity of the child.¹⁰ In cases of conflict of interest between the child and their parent, the guardianship authority may appoint a temporary guardian to act on behalf of the child.¹¹

C. In the case of infants and young children, how would cases typically be brought?

Infants and young children are unlikely to have their disposing capacity recognised for the purposes of bringing a case to court. Therefore, a case on their behalf could be brought by a parent or by the public prosecutor or by the guardianship authority. These bodies can bring actions concerning the protection of the child from violence, deprivation and restoration of parental rights, exercise of parental rights, disputes over the protection of a child and others.¹²

⁵ Information provided to CRIN by the Office of the Protector of Citizens of Serbia.

⁶ Civil Procedure Law, Article 73, available at: http://arhiva.mpravde.gov.rs/images/Civil%20Procedure%20Law_180411.pdf.

⁷ Family Act of 2005, Article 263, available at: <http://www.iasjf.org/cases/serbiafamilyact.pdf>.

⁸ Civil Procedure Law, Article 74.

⁹ Civil Procedure Law, Article 75.

¹⁰ Family Act, Article 72.

¹¹ Family Act, Article 132.

¹² Family Act, Part Ten: family Relations Proceedings.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Every person has the constitutional right to legal assistance and special provisions for free legal assistance shall be stipulated by law.¹³

Currently, there does not appear to be any mechanism in place to provide free or subsidised legal assistance and representation. However, the Serbian government is debating a proposed “Law on Free Legal Aid.”¹⁴

Regarding children accused of crime, the law provides that children have the right to a court-appointed defence counsel with special expertise in matters of juvenile justice from the first questioning throughout the criminal process.¹⁵ The law also makes provision for free legal representation of child victims of crime.¹⁶

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

No further conditions or limitations were identified.

III. How can children’s rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Under the Civil Procedure Law, parties have the right to lawful, fair and equitable protection of their rights¹⁷ and all natural persons may be parties to civil proceedings.¹⁸ Citizens may also challenge decisions of public authorities in administrative proceedings.¹⁹

The Family Law Act specifies that any court proceedings concerning the rights of a child must be initiated by a legal action,²⁰ which may be brought by the child, the child’s parents, the public prosecutor and the guardianship

¹³ Constitution, Article 67.

¹⁴ World Bank Multi-Donor Trust Fund for Justice Sector Support, Serbian Free Legal Aid Fiscal Impact Analysis, p. 2, available at: <http://www.mdtfjss.org.rs/archive//file/resources/Serbian%20Free%20Legal%20Aid%20Fiscal%20Impact%20Analysis.pdf>.

¹⁵ Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles, Article 49., available at: <http://www.refworld.org/pdfid/4b56c9952.pdf>.

¹⁶ Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles, Article 154.

¹⁷ Civil Procedure Law, Article 2.

¹⁸ Civil Procedure Law, Article 73.

¹⁹ Vučetić, D., ‘Serbian Judicial review of Administrative Acts and European Standards for Administrative Disputes’, 2005 *Law and Politics* Vol. 3(1) pp. 73-90, available at: <http://facta.junis.ni.ac.rs/lap/lap2005/lap2005-08.pdf>.

²⁰ Family Act, Article 262.

authority.²¹ However, there are no other specific provisions detailing how a child may initiate the action or who the filing should be submitted to.

For violations of children's rights which amount to a criminal offence under national law, the injured party may report criminal offenses by submitting a criminal complaint with the police²² or a private lawsuit.²³ The complaint, which may be written orally or in writing, is submitted to a public prosecutor.²⁴ If the complaint is provided initially to the police, the police will receive the complaint and deliver it to the public prosecutor.²⁵

There are no specific provisions concerning children in the Code of Criminal Procedure, however the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles contains special provisions on the protection of minor victims in criminal proceedings. Criminal prosecution of adults accused of committing one of a number of criminal offences against a minor shall be carried out before a bench, presided by a judge with special skills in the field of the rights of the child and criminal protection of juveniles.²⁶ Furthermore, the state prosecutor and the judges are under an obligation to treat the child victim with care, having regard to his age, character, education and living circumstances, and to endeavor to avoid all possible prejudicial consequences of the proceedings on the child's character and development.²⁷

The institution of the Protector of Citizens was established in 2007 as an independent ombudsman body for the purpose of protecting human rights in the country.²⁸ The law emphasises that the protector's duties shall in particular focus on "the protection of rights of persons deprived of their liberty, gender equality, children's rights, rights of national minorities and rights of persons with disability."²⁹ Any citizen, including a child, who considers that their rights have been violated by an act or a failure to act of an administrative authority, may file a complaint with the Protector of Citizens.³⁰ Complaints concerning child rights violations may be submitted by the child's parent or legal representative.³¹ It is generally required that complainants must first endeavor to protect their rights in appropriate legal proceedings and the Protector of Citizens will not begin an investigation of a complaint, unless all domestic remedies have been exhausted.³² Exceptionally, the Protector of Citizens may initiate proceedings even before all legal remedies have been exhausted if the complainant would sustain irreparable damage or if the complaint is related

²¹ *Id.*, Article 263.

²² Criminal Procedure Code, Article 280, available at: <http://www.legislationline.org/documents/id/8918>.

²³ *Id.*, Article 65.

²⁴ *Id.*, Article 281.

²⁵ *Id.*

²⁶ Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles, Article 150.

²⁷ *Id.*, Article 152.

²⁸ Law on the Protector of Citizens, Official Gazette of the Republic of Serbia, No. 79/2005 and 54/2007, Article 1, available at: <http://ombudsman.rs/index.php/lang-en/o-nama/normativni-okvir-za-rad/643-2009-10-27-16-01-21>.

²⁹ *Id.*, Article 6.

³⁰ *Id.*, Article 25.

³¹ *Id.*

³² *Id.*

to violation of good governance principle, in particular inappropriate or unethical treatment of the complainant by an administrative authority.³³ Nonetheless, the Protector treats complaints concerning children's right violations as falling into the scope of the exception, given that children's rights violation typically entail the threat of irreparable or hardly reparable damage.³⁴

Additionally, the Commissioner for Protection of Equality can receive complaints concerning a violation of the principle of non-discrimination, as provided for by the Law on the Prohibition of Discrimination.³⁵ However, children are not able to submit such complaints independently if they lack disposing capacity and must instead be represented by an adult.

Finally, the European Court of Human Rights decides cases concerning alleged violations of any of the rights contained in the European Convention on Human Rights.³⁶ Any individual, group of individuals or an NGO who is a victim of a violation of one of these rights may submit a complaint to the Court,³⁷ but the complaint will be admissible only if all domestic remedies have been exhausted.³⁸ Anonymous complaints are not permitted.³⁹ The procedural rules for the Court do not make any child-specific provisions. Persons may initially present an application themselves or through a representative, however, all applicants must be represented at hearings thereafter.⁴⁰ After examining the case, the Court renders a judgment which is binding on the State⁴¹ and also has powers to award monetary compensation to the victims of human rights abuses.⁴² It is also worth noting that the Court has an established practice of referring to other international human rights instruments, including the CRC, as guides to interpretation of the European Convention.

B. What powers would courts have to review these violations, and what remedies could they offer?

Civil courts may award compensation⁴³ and protective measures against domestic violence, including a warrant for eviction of person committing the violence, restraining order and injunctions, among others.⁴⁴

³³ *Id.*

³⁴ Information provided to CRIN by the Office of the Protector of Rights of Serbia.

³⁵ Law on the Prohibition of Discrimination, Article 33, available at:

http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_128034.pdf.

³⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), 1950, Articles 19 and 32, available at:

http://www.echr.coe.int/Documents/convention_ENg.pdf.

³⁷ *Id.*, Article 34.

³⁸ *Id.*, Article 35.

³⁹ *Id.*

⁴⁰ Rules of Court, July 2014, Rule 36, available at:

http://www.echr.coe.int/documents/rules_court_eng.pdf.

⁴¹ European Convention on Human Rights, Article 46.

⁴² *Id.*, Article 41.

⁴³ Civil Procedure Law, Article 45.

⁴⁴ Family Act, Article 201.

After examination of a citizen's complaint, the Protector of Citizens can deliver recommendations to the administrative authority concerned on steps to be undertaken in order to rectify the noted irregularity and the authority is obliged to reply within 60 days stating what measures have been taken to eliminate the irregularity, or reasons why the Protector's recommendation cannot be followed.⁴⁵ The Protector may also initiate proceedings before the Constitutional Court for the assessment of constitutionality and legality of laws.⁴⁶

The Commissioner for Protection of Equality may make recommendations for a breach of the principle of non-discrimination to be redressed.⁴⁷

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Research did not identify any provision allowing a court case to be brought on behalf of an unspecified victim. The Protector of Citizens may, however, keep the identity of the complainant secret⁴⁸ or he may also decide to launch an investigation on his own initiative regarding a rights violation of an unspecified victim or group of victims.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Research did not identify any specific legislation in Serbian law providing for group litigation or class action lawsuits. However, the Civil Procedure Law allows for several people to file a case as co-litigants.⁴⁹

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

Research did not identify any legal provision which explicitly permits non-governmental organisations to intervene in or file cases concerning children's rights violations. The Civil Procedure Law states that any person, having a legal interest that one of the parties succeeds, may intervene in the civil proceedings,⁵⁰ however, it is unclear whether this provision extends to legal, as well as natural, persons and what could constitute a 'legal interest'. Under, the Law on the Prohibition of Discrimination, however, human rights NGOs are explicitly allowed to initiate lawsuits concerning discrimination matters in the local courts of general jurisdiction.⁵¹

Serbian law expressly lists the persons who can bring an action for the

⁴⁵ Law on the Protector of Citizens, Article 31.

⁴⁶ Law on the Protector of Citizens, Article 19.

⁴⁷ Law on the Prohibition of Discrimination, Article 40.

⁴⁸ Law on the Protector of Citizens, Article 29.

⁴⁹ Civil Procedure Law, Article 199.

⁵⁰ Civil Procedure Law, Article 208.

⁵¹ Law on the Prohibition of Discrimination, Article 46.

protection of a child's rights: the child, the child's parents, the public prosecutor or the guardianship authority.⁵² However, the same provision also stipulates that "[a]ll children's, health and educational institutions or social service institutions, judicial and other state authorities, associations and citizens, have the right and duty to inform the public prosecutor or the guardianship authority on reasons for the protection of a child's rights."⁵³ It is unknown whether a non-governmental organisation may be considered an 'association' for the purposes of this provision and thus able to inform the prosecutor of children's rights violations.

Legal persons can submit complaints to the Protector of Citizens, but only if they consider that their rights have been violated by an act, action or failure to act of an administrative authority.⁵⁴ However, it is unlikely that this provision may be interpreted to allow an NGO to bring a complaint on behalf of a child victim of human rights abuses, because the Law on the Protector of Citizens explicitly provides that, in cases of child rights violations, the complaint may be submitted by the child's parent or legal representative.⁵⁵

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Serbian children have multiple avenues for seeking redress for rights violations. The Family Law Act allows the child, the child's parents, the public prosecutor or the child's guardian to initiate court proceedings.⁵⁶ In general, a civil case can be brought in the one of the 34 Basic courts with territorial jurisdiction for the place of residence of the respondent.⁵⁷ Civil proceedings are instituted through a complaint.⁵⁸ Complaints filed at the Basic courts must be in writing and include, inter alia, the full name of the parties and their legal representatives and the subject of the dispute.⁵⁹

As previously stated in part III.A, prosecution of adults for certain crimes against children are conducted in accordance with the special provisions for protecting minors in criminal courts.⁶⁰ The Criminal Procedure Code also allows for private lawsuits to be filed with the appropriate court.⁶¹

Lastly, children or their guardians may also file complaints with the

⁵² Family Act, Article 263.

⁵³ *Id.*

⁵⁴ Law on the Protector of Citizens, Article 25.

⁵⁵ *Id.*

⁵⁶ Family Act, Articles 263 and 266.

⁵⁷ Civil Procedure Law, Articles 24, 39 and 187.

⁵⁸ Civil Procedure Law, Article 186.

⁵⁹ Civil Procedure Law, Article 100.

⁶⁰ The Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles, Official Gazette of the Republic of Serbia No. 85/05, Part 3, available at: <http://www.refworld.org/pdfid/4b56c9952.pdf>.

⁶¹ Criminal Procedure Code, Article 65.

Protector of Citizens. A complaint may be filed in writing or orally on the record and is free of charge.⁶² The complaint cannot be anonymous,⁶³ but if the Protector receives an anonymous complaint which provides sufficient information regarding a children's rights violation, he may choose to launch an investigation on his own initiative.⁶⁴ Complaints should typically include information about the administrative authority against which it is made, a description of the violation of the right which is alleged to be violated, as well as any other facts and evidence supporting the complaint.⁶⁵

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

As previously stated in part II.D, Serbia does not have a legal aid system.

Courts may exempt a party from payment of the cost of the proceedings or from payment of court fees if that party's financial status does not allow it to bear such costs.⁶⁶

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practicing lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Some pro bono legal services for refugee children are available through a number of organisations.⁶⁷ However, there appears to be no legal regulation of the provision of pro bono services in Serbia.

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

The general limitation period for civil cases appears to be 10 years.⁶⁸ Research did not identify any provision suspending the limitation period in relation to violations of children's rights until the child reaches the age of 18.

The Criminal Procedure Code requires that a motion for prosecuting criminal offences which are prosecuted on the basis of a motion by the

⁶² Law on the Protector of Citizens, Article 26.

⁶³ Law on the Protector of Citizens, Article 25.

⁶⁴ Information provided to CRIN by the Office of the Protector of Citizens of Serbia.

⁶⁵ Law on the Protector of Citizens, Article 27.

⁶⁶ Civil Procedure Law, Article 164.

⁶⁷ International Refugee Rights Initiative, Rights in exile programme, available at: <http://www.refugeelegalaidinformation.org/serbia-pro-bono-directory>.

⁶⁸ AIDA, *Limitation period in reinsurance: A comparative study*, p. 3, available at: www.aida.org.uk/docs/Limitation%20Report.doc.

victim is submitted within three months of the date “when the injured party learnt about the criminal offence and the suspect.”⁶⁹ However, the statute of limitations for crimes which are prosecuted by the State is much longer.⁷⁰

Most notably, no statutes of limitations are applicable to offences of sexual acts against children.⁷¹

Finally, complaints to the Protector of Citizens must be not later than one year from the day the violation occurred, and/or from the date of the last action undertaken by the administrative authority in respect of the violation.⁷²

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

In the course of a civil trial, the parties are required to present all facts on which they base their claims and propose evidence supporting such facts.⁷³ Family law disputes are based on an investigative model, meaning that the family courts may independently investigate facts which have not been presented by the parties.⁷⁴

Oral testimony may be heard only from persons capable of relaying information on the facts subject to proof.⁷⁵ Therefore, whether a child will be permitted to testify will be assessed on a case-by-case basis.

In criminal cases, there are particular rules and procedures in place to protect children witnesses, including questioning through an intermediary, use of a psychologist or other skilled professional, and limiting the number of times that the child victim may be interrogated.⁷⁶ In cases involving child victims, the assigned state prosecutor and investigative judge must have specialised training in the field of the rights of the child and in criminal protection of minors.⁷⁷ Children may also be accorded the status of ‘especially vulnerable witness’ on the basis of age, which means that special measures will apply in relation to the examination of the child witness.⁷⁸

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

According to the Family Law Act, proceedings involving the protection of a

⁶⁹ Criminal Procedure Code, Articles 53 and 65.

⁷⁰ Criminal Code, Article 103.

⁷¹ Law on Special Measures for the Prevention of Crime against Sexual Freedom Involving Minors No. 32/2013 and Criminal Code, Article 108. Information provided to CRIN by the Office of the Protector of Citizens.

⁷² Law on the Protector of Citizens, Article 26.

⁷³ Civil Procedure Code, Article 7.

⁷⁴ Family Law, Article 205.

⁷⁵ Civil Procedure Law, Article 236.

⁷⁶ Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles, Article 152.

⁷⁷ Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles, Articles 150-151.

⁷⁸ Criminal Procedure Code, Articles 103-105.

child's rights are considered to be "particularly urgent" and are adjudicated on an expedited basis.⁷⁹ The first hearing must take place within eight days from the day an action was filed in court and the court of second instance must make a decision within 15 days.⁸⁰ There are no corresponding provisions in the Civil Procedure Law and the typical duration of a case heard in the basic courts is unknown.

G. Appeal. What are the possibilities for appealing a decision to a higher court?

Appeals of judgements of the civil courts must be lodged within fifteen days from the date of serving the judgment transcript on the party seeking the appeal.⁸¹

The Family Law Act allows decisions to be appealed to a court of second instance and such appeals are heard on an expedited basis, as mentioned in part IV.F.⁸²

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Research did not identify any reliable information to answer this question.

I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

The Criminal Procedure Code specifies that a final judgment becomes enforceable from the date of delivery and is enforced by the court.⁸³

V. Additional factors. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

No additional factors were identified.

This report is provided for educational and informational purposes only and should not be construed as legal advice.

⁷⁹ Family Act, Article 269.

⁸⁰ Family Act, Article 269.

⁸¹ Civil Procedure Law, Article 355.

⁸² Family Act, Article 269.

⁸³ Criminal Procedure Code, Article 275.