

**TO THE CONSTITUTIONAL COURT OF SERBIA
15 Bulevar kralja Aleksandra
Belgrade**

Submitter of the initiative: Non-governmental organisation Praxis from Belgrade, 7/III Alekse Nenadovića, represented by Executive Director Ivanka Kostić

**INITIATIVE
FOR INSTITUTING A PROCEDURE FOR ASSESSING
CONSTITUTIONALITY AND LEGALITY**

Pursuant to Article 168 paragraph 2 of the Constitution of the Republic of Serbia, the non-governmental organisation Praxis submits to the Constitutional Court of the Republic of Serbia an initiative for instituting a procedure for assessing the constitutionality and legality of:

Article 5 of the *Rulebook on the procedure for the issuance of birth notification and form of the issuance of birth notification in a health care institution* (*Official Gazette of RS*, nos. 25/2011, 9/2016, 16/2016 and 36/2016), and

point 10, paragraph 2 and point 24, paragraphs 1 and 2 of the *Instruction on administering registry books and forms of registry books* (*Official Gazette of RS*, nos. 109/2009, 4/2010 (corrigendum), 10/2010, 25/2011, 5/2013 and 94/2013).

These provisions of the *Rulebook on the procedure for the issuance of birth notification and form of the issuance of birth notification in a health care* and the *Instruction on administering registry books and forms of registry books* are not in compliance with the provisions of the Constitution of the Republic of Serbia, the Law on Family, the Law on Public Administration, or with generally accepted rules of international law and ratified international treaties, as follows:

- Article 21 of the Constitution of RS (prohibition of discrimination)
- Article 37 of the Constitution of RS (right to legal person)
- Article 38 of the Constitution of RS (right to citizenship)
- Article 64 of the Constitution of RS (rights of the child)
- Article 68 of the Constitution of RS (right to health care)
- Article 69 of the Constitution of RS (right to social protection)
- Article 76 of the Constitution of RS (prohibition of discrimination against national minorities)
- Article 3, paragraph 1 of the Convention on the Rights of the Child

- Article 7, paragraph 1 of the Convention on the Rights of the Child
- Article 24, paragraphs 2 and 3 of the International Covenant on Civil and Political Rights
- Article 26 of the International Covenant on Civil and Political Rights
- Article 13 of the Law on Family (personal name)
- Article 16, paragraph 2 of the Law on Public Administration (limitations in passing of legislation)
- Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (right to respect for private and family life)
- Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No.12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (prohibition of discrimination)
- Article 2, paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination
- Article 4, paragraph 1 of the Framework Convention for the Protection of National Minorities.

Disputed provisions

Article 5 of the *Rulebook on the procedure for the issuance of birth notification and form of the issuance of birth notification in a health care institution* (hereinafter: the Rulebook) stipulates the following:

The data on parents are entered into a birth notification on the basis of data from an ID card issued by the competent authority of the Republic of Serbia and data registered in birth registry books or marriage registry books or personal documents considered to be a proof of such data, and in case of foreigners, on the basis of data from a foreign travel document/ID card or identification document issued by the competent authority of the Republic of Serbia.

In the procedure of entering data into a birth notification, the authorised person of a health care institution shall determine the identity of the mother or father on the basis of ID card or travel document issued by the competent authority of the Republic of Serbia for citizens of the Republic of Serbia, and in case of foreigners, on the basis of foreign travel document/ID card or identification documents issued by the competent authority of the Republic of Serbia.

Point 10, paragraph 2 of the *Instruction on administering registry books and forms of registry books* (hereinafter: the Instruction) stipulates the following:

Personal data of child's parents, spouses and deceased persons are entered on the basis of data from civil registry books, birth certificates and ID card, and in case of foreigners, on the basis of travel document.

Point 24, paragraphs 1 and 2 of the Instruction provides as follows:

The fact of birth shall be entered in birth registry books on the basis of birth notification submitted by the person referred to in Article 47 of the Law on Registry Books. The data on parents shall be entered in a birth notification as written in their ID cards, or in case of foreigners, as written in their travel documents and birth certificates or marriage certificates.

In case of oral birth notification, a record shall be made in accordance with the law regulating general administrative procedures, and the data on parents shall be entered in the record as written in their ID cards, or in case of foreigners, as written in their travel documents and birth certificates or marriage certificates.

Effects of disputed provisions

The cited provisions prescribe the manner of entering the data on parents in a birth notification (Article 5, paragraph 1 of the Rulebook and point 24 of the Instruction) and in birth registry books (point 10 of the Instruction) and how the authorised person of a health care institution must determine the identity of parents in the procedure of birth notification (Article 5, paragraph 1 of the Rulebook).

Specifically, these provisions of the Rulebook and the Instructions stipulate that the data on parents shall be entered in a birth notification and birth registry books on the basis of their ID cards, birth certificates and marriage certificates, or in case of foreigners, on the basis of travel documents (the following is added in the Rulebook: on the basis of personal documents considered to be a proof of such data, and in case of foreigners, also on the basis of ID card or identification document issued by the competent authority of the Republic of Serbia). The Rulebook also prescribes that the authorised person of a health care institution is obliged to determine the identity of parents on the basis of their ID cards or travel documents (or, in case of foreigners, on the basis of identification document issued by the competent authority of the Republic of Serbia).

Hence, the said provisions of the Rulebook and the Instruction clearly condition the entering of data on parents in a birth notification and birth registry books with the parents' possession of ID cards, birth (or marriage) certificates or passports or other identification documents. It actually means that if the parents do not possess these documents, it will not be possible to enter their data in a birth notification and birth registry books. And if the data on parents are not recorded in a birth notification and/or birth registry books, it will not be possible to determine the child's personal name.

Thus, in cases where parents do not possess personal documents, it will not be possible to register newborn children in birth registry books immediately after birth with all required details including the personal name and data on parents. In other words, after birth these children will remain "legally invisible" and unable to get their birth certificate and citizenship certificate.

In such cases, in order to register a child into birth registry books, it is necessary to conduct one or more additional procedures. Thus, if a child is born

in a maternity hospital/ward and the parents are not able to determine its personal name within the statutory deadline due to the lack of documents, a procedure of determining the personal name has to be conducted before the social welfare centre.¹ In case of children born at home and not registered in birth registry books because their parents do not possess documents, a non-contentious court procedure for determining the date and place of birth has to be conducted.²

However, these procedures take a certain amount time, ranging from several months to significantly longer than a year. In addition to being lengthy, these procedures are also much more complicated than the regular birth registration procedure, and may also be unsuccessful. Moreover, sometimes a successfully completed procedure does not guarantee that the child will be registered in birth registry books. Sometimes, in practice, it happens that registry offices refuse to implement the final decisions on determining personal name, issued by social welfare centres, revoking precisely the disputed provisions of the Instruction and explaining that the reason for such refusal is the fact that the parents do not possess ID cards.³

In any case, the application of the disputed provisions of the Rulebook and the Instruction leads to the situation where the parents who do not possess personal documents will not be able to register their newborn children into birth registry books and determine their personal names several months after birth at best. Such a situation violates a large number of the rights guaranteed by the Constitution of the Republic of Serbia, laws and ratified international conventions.

Right to personal name and registration in birth registry books immediately after birth

The Constitution of the Republic of Serbia, the Law on Family and ratified international conventions guarantee the right of registration into birth registry books and personal name determination *to every child* and prescribe that it must be done *immediately after birth*. Thus, Article 64 paragraph 2 of the Constitution of the Republic of Serbia provides that *every child* shall have the right to personal name, entry in the registry of births, the right to learn about its

¹ Article 344 of the Law on Family, in connection with Article 54 of the Law on Registry Books.

² Article 71a-71lj of the Law on Non-Contentious Procedure.

³ See more about the problems related to the registration into birth registry books in Praxis' reports: *Procedures for Determining the Date and Place of Birth – A Brief Analysis of the Remaining Challenges*, 2014; *The Right to Citizenship in the Republic of Serbia – A Brief Analysis of the Remaining Challenges*, 2014; *Analysis of the Procedures for Determining the Date and Place of Birth and for the Exercise of Rights to Citizenship and Registration of Permanent Residence in 2015*, 2015; *Analysis of the Procedures for Determining the Date and Place of Birth and for the Exercise of Rights to Citizenship and Registration of Permanent Residence*, 2016; *Determining the Date and Place of Birth, the Exercise of Rights to Citizenship and Registration of Permanent Residence - Analysis of the Remaining Challenges*, 2017; all reports are available on Praxis' website: <https://www.praxis.org.rs/index.php/sr/reports-documents/praxis-reports>.

ancestry, and the right to preserve its own identity, while Article 13 of the Law on Family provides that every child shall have the right to personal name and that the right to personal name is *acquired by birth*. Article 7, paragraph 1 of the Convention on the Rights of the Child establishes that the child shall be registered *immediately* after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know his or her parents, while Article 24, paragraph 2 of the International Covenant on Civil and Political Rights provides that every child shall be registered *immediately after birth* and shall have a name.

Article 16 of the Constitution prescribes that generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and shall be applied directly, and Article 18 provides also that human and minority rights guaranteed by the Constitution shall be implemented directly and that in cases where the law may prescribe manner of exercising these rights, it may not under any circumstances influence the substance of the guaranteed right.

Therefore, both the Constitution of the Republic of Serbia and the Law on Family, as well as the aforementioned international treaties provide, in an unambiguous and mutually harmonised manner, that every child has the right to registration into birth registry books and to a personal name as well as the right to preserve his or her own identity, and also that the right to registration into birth registry books and to a personal name is acquired by birth and that the registration must be performed *immediately after birth*.

On the other hand, the disputed provisions of the Rulebook and the Instruction deny these rights to any child whose parents do not possess documents. This problem occurs particularly often in case of Roma national minority due to the fact that a large number of Roma remain without personal documents. The 2015 survey conducted by UNHCR in Roma settlements showed that as much as eight percent of under-four children living in Roma settlements are not registered in birth registry books.⁴ Also, the UN Committee on the Rights of the Child in its 2017 Concluding Observations expresses concern over the fact that approximately 8,500 persons in Serbia were not registered at birth, with the vast majority declaring themselves as Roma.⁵ The submitter of this initiative in its work continually encounters new cases of children who are not registered in birth registry books, and almost always the reason for not registering is that mothers do not possess personal documents.

We have mentioned above that special procedures will have to be conducted for children who are not registered immediately after birth because their parents do not possess documents, and that at least several months will pass from their birth till the moment of their (possible) registration into birth registry books and

⁴ See: S. Cvejić, *Persons at Risk of Statelessness in Serbia – Progress Report 2010-2015*, UNHCR, 2016; available at: http://www.unhcr.rs/media/docs/UNHCR_Brosura_Apatridi_SRPSKI.pdf.

⁵ Point 30 of the Concluding Observations on the combined second and third periodic reports of Serbia of the UN Committee on the Rights of the Child, available at: <http://www.ljudskaprava.gov.rs/sh/node/19966>.

personal name determination. However, there is no doubt that the rule of registration immediately after birth is violated if registration is performed one month after birth, not to mention a longer or multiple times longer period. The interpretation of legal standard *immediately after birth* was given by UNICEF in its Implementation Handbook for the Convention on the Rights of the Child: "According to Article 7, the child should be registered "immediately after birth" which implies a defined period of days rather than months." It is also stated that "universal registration requires that domestic law makes registration a compulsory duty both of parents and of the relevant administrative authorities."⁶ The interpretation of this standard was given also by the African Committee of Experts on the Rights and Welfare of the Child whose mandate includes the interpretation and monitoring of the implementation of the African Charter on the Rights and Welfare of the Child. Specifically, Article 6, paragraphs 1, 2 and 3 of the African Charter on the Rights and Welfare of the Child determine, in the same way as the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, that every child shall have the right from his birth to a name, that every child shall be registered immediately after birth and that every child shall have the right to citizenship. In the General Comments on Article 6 of the Charter, the Committee interprets "immediately" to mean as soon as possible, specifying that the drafters of the African Children's Charter intended to make birth registration occur within a few days or weeks after birth and not months or years later.⁷

Article 18 of the Constitution of the Republic of Serbia provides that provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation. Therefore, the submitter of the initiative believes that these interpretations by UNICEF and the African Committee of Experts on the Rights and Welfare of the Child must be taken into account in assessing the deadline for completing the registration into birth registry books.

Moreover, Article 3, paragraph 1 of the Convention on the Rights of the Child provides that in all actions concerning children, whether undertaken by public or private social welfare institutions (courts of law, administrative authorities or legislative bodies) the best interests of the child shall be a primary consideration, while the obligation of being guided by the best interests of the child is stipulated also in Article 6 of the Law on Family of the Republic of Serbia. The provisions of the Rulebook and the Instruction that prevent the timely registration in birth registry books of children whose parents do not possess personal documents are essentially contrary to the best interests of the child.

6 Implementation Handbook for the Convention on the Rights of the Child, fully revised third edition (2007), p. 100, available at:

http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf

7 African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/02(2014), 7-16 April 2014, paragraph 79; available at: <http://www.refworld.org/pdfid/54db21734.pdf>

It follows from all of the above that the disputed provisions of the Rulebook and the Instruction are contrary to Article 64, paragraph 2 of the Constitution of the Republic of Serbia, Article 7, paragraph 1 of the Convention on the Rights of the Child and Article 24, paragraph 2 of the International Covenant on Civil and Political Rights, which stipulate that every child must be registered in birth registry books immediately after birth.

The fact that the right to timely registration in birth registry books is violated in Serbia has been recognised also in many reports and recommendations of international organisations and treaty bodies. Thus, for example, the UN Human Rights Committee in its 2017 Concluding observations on the 3rd periodic report of Serbia expressed its concern about the continued difficulties faced by the Roma in Serbia in terms of registering births and acquiring identification documents, and recommended to the Republic of Serbia to enable registration of children born to parents without identification documents.⁸ Under the third cycle of the Universal Periodic Review by the Human Rights Council, which was completed in 2018, it was recommended to the Republic of Serbia to provide the registration into birth registry books immediately after birth, without discrimination and regardless of the legal status of parents, and whether parents had personal documents.⁹ The Committee on Economic, Social and Cultural Rights in its 2014 Concluding observations on the second periodic report of Serbia also recommended to Serbia to ensure effective access of refugees, returnees and internally displaced persons, in particular Roma without registered residence who lived in informal settlements, to procedures for birth and residence registration in order to facilitate access to personal documents, including birth certificates and identity cards.¹⁰

Rights to legal person and citizenship

The children whose right to timely registration into birth registry books is violated are also deprived of other rights: to legal person, citizenship and respect for private and family life.

Although Article 37, paragraph 1 of the Constitution provides that everyone shall have legal capacity and despite the rule that the capacity of being a right and liability holder is acquired by birth (exceptionally *nasciturus*), in cases where the fact of birth and personal name was not registered in birth registry books, this right is called into question, because without registration in birth

⁸ Points 14 and 15 of the UN Human Rights Committee's Concluding observations on the 3rd periodic report of Serbia, available at:

http://www.ljudskaprava.gov.rs/sites/default/files/dokument_file/zakljucna_zapazanja_komitetaccpr_c_srb_co_3_27019_e_srp.pdf.

⁹ Report of the Working Group of the UN Human Rights Council for the Universal Periodic Review for Serbia of 18 April 2018, recommendation 114.28; available at:

<https://www.ohchr.org/EN/HRBodies/UPR/Pages/RSindex.aspx>.

¹⁰ Point 13 of the Concluding observations on the second periodic report of Serbia of the Committee on Economic, Social and Cultural Rights, available at:

https://www.praxis.org.rs/images/praxis_downloads/Concluding%20observations%20on%20the%20second%20periodic%20report%20of%20Serbia_23%20May%202014.pdf.

registry books and established identity, in practice it is not possible to access a series of rights (or be a liability holder) whose exercise requires a birth certificate and other personal documents.

Moreover, without entering personal name and details about parents into birth registry books, it is not possible to establish a legal connection with the country of birth, and consequently, children who are not registered in birth registry books remain deprived of the right to citizenship. Thus, the disputed provisions of the Rulebook and the Instruction prevent the application of Article 38, paragraph 3 of the Constitution whose purpose is to prevent statelessness and guarantee the right to citizenship to every child born in Serbia if conditions to acquire citizenship of some other country have not been met, since without being registered into birth registry books, children cannot acquire citizenship. This prevents also the exercise of the right referred to in Article 24, paragraph 3 of the International Covenant on Civil and Political Rights, according to which every child shall have the right to citizenship, and Article 7, paragraph 1 of the Convention on the Rights of the Child, determining that the child shall have the right to acquire a nationality from birth.

Child's right to learn about its ancestry, to preserve its own identity and right for respect for private and family life

Personal name is one of the basic elements of the identity of every natural person, a feature that distinguishes the person from other people, but also allows him or her to connect with other members of the family and with the wider community. Without a determined personal name, the child cannot establish a legal relationship with his or her parents. Article 64, paragraph 2 of the Constitution guarantees the right to every child to learn about his or her ancestry, and the right to preserve his or her own identity, while Article 7 of the Convention on the Rights of the Child provides that the child has the right to know and be cared for by his or her parents. Given that personal name is acquired by registration into birth registry books and that it is a constitutional right, in cases where a child's personal name is not registered into birth registry books, he or she is deprived of his or her identity in legal transactions and of possibility to establish a legal relationship with parents and other ancestors and relatives.

Although Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to respect for private and family right, but does not explicitly mention the right to personal name, the European Court of Human Rights, through its case law clearly confirmed that the right to personal name was an unavoidable element of the right to private and family right. Thus, in the case *Stjerna versus Finland* (18131/91), the Court notes: "Article 8 does not contain any explicit reference to names. Nonetheless, since it constitutes a means of personal identification and a link to a family, an individual's name does concern his or her private and family life"; the Court took the same position in the cases *Burghartz versus Switzerland* (16213/90), *Guillot versus France* (22500/93) and *Unal Tekeli versus Turkey*(29865/96). The case law of the European Court of Human Rights

confirmed also that other rights, which could not be exercised without the determined personal name and registration into birth registry books, constituted an element of the right to respect for private and family life: the right to establish family legal relations with parents and to learn about his or her ancestry. In the case *Marckx versus Belgium* (6833/74), the Court found that respect for family life implied in particular the existence in domestic law of legal safeguards that rendered possible as from the moment of birth the child's integration in his family. In the case *Mikulić versus Croatia* (53176/99), the Court held that respect for private life required that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information was of importance because of its formative implications for his or her personality. In this case, the Court stressed that the right to respect private life implied the right of determination of the legal relationship between a child born out of wedlock and the child's natural father. In the case *Mennesson versus France* (65192/11), the Court also established that preventing the establishment of legal parent-child relationship constituted the violation of the right to respect for their family life, and emphasised that the children faced a worrying uncertainty as to the possibility of obtaining recognition of French nationality, although their father was a French citizen, and that such situation had negative repercussions on the definition of their personal identity. The judgement particularly stressed that in that case the child's best interests were seriously compromised and that any decision related to children must be guided by their best interest.

Therefore, the provisions of the Instruction and the Rulebook that prevent children from being registered at birth and get a personal name also lead to the violation of the child's right to learn about his or her ancestry and preserve his or her own identity (Article 64, paragraph 2 of the Constitution) and the right to respect for private and family life (Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Prohibition of discrimination

The fact that the disputed provisions of the Instruction and the Rulebook lead to non-registration at birth of children whose parents do not possess personal documents constitutes the violation of non-discrimination principle (Article 21 of the Constitution). In fact, as reiterated, the right to a name and registration into birth registry books is guaranteed to every child immediately after birth, without discrimination on the basis of the status of parents. However, the disputed provisions of the Instruction and the Rulebook put the children whose parents do not possess documents in an unequal position compared to all other children whose parents possess personal documents and, therefore, are not denied registration into birth registry books.

In addition, we have already said that the problem of not possessing personal documents affects almost exclusively the Roma population.¹¹ The impossibility

¹¹ See also the Protector of Citizens' Report on the Situation of Legally Invisible Persons in Serbia, Belgrade 2012, which states that "most persons who do not possess personal documents or have never

of being registered into birth registry books, due to the lack of personal documents, actually does not affect the members of other nations and national minorities and constitutes an institutional discrimination against Roma, i.e the violation of the principle of prohibition of discrimination against national minorities (Article 76 of the Constitution).

At the same time, the provisions of numerous ratified treaties are violated: International Convention on the Elimination of All Forms of Racial Discrimination (Article 2, paragraph 1); Framework Convention for the Protection of National Minorities (Article 4, paragraph 1); European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14) and Protocol no. 12 to the Convention (Article 1); International Covenant on Civil and Political Rights (Article 26).

The existing situation not only constitutes the violation of the principle of non-discrimination, but also requires the state to undertake measures that will be aimed at achieving equality of all citizens. Thus, for example, the Framework Convention for the Protection of National Minorities (Article 4, paragraph 2) provides that the Parties undertake to adopt adequate measures in order to promote full and effective equality, while the Constitution of the Republic of Serbia (Article 21, paragraph 4) provides that special measures which may be introduced to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination.

Moreover, the case law of the European Court of Human Rights has shown that under certain circumstances, the state's failure to rectify this inequality may lead to the violation of the prohibition of discrimination (the so-called *Belgian Linguistic Case, Thlimmenos versus Greece* (34369/97), *Stec and Others versus United Kingdom* (65731/01 i 65900/01)). A general policy or measure that is seemingly neutral but has disproportionately more harmful effects on individuals or groups of persons that are recognisable only by their ethnicity may be considered discriminatory even if it is not specifically directed towards that group. Although the disputed provisions of the Rulebook and the Instruction are seemingly unbiased, their effects prevent almost exclusively Roma children from timely registration in birth registry books and exercising a series of other rights. According to the Committee on the Elimination of All Forms of Racial Discrimination, in seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin¹²; this undoubtedly refers to the disputed provisions of the Instruction and the Rulebook that set forth the conditions for registration into birth registry books, which cannot be fulfilled only by children whose parents are without documents and who almost exclusively belong to the Roma national minority. The 2014 survey conducted by the Statistical Office of the Republic of Serbia and UNICEF has shown that the births of 99

been registered in birth registry books are Roma" (p. 11):

http://www.ombudsman.rs/attachments/2222_Izvestaj%20o%20polozaju%20%20pravno%20nevidljivi%20u%20RS.pdf.

¹² General Recommendation no. 14 of the Committee on the Elimination of Racial Discrimination

percent of under-five children in Serbia have been registered and that “there are no significant variations in birth registration across different background characteristics apart from ethnicity where Roma have the lowest birth registration rate (94 percent).”¹³ This information undoubtedly corroborates the fact that the problem of registration into birth registry books disproportionately affects the Roma population.

Other rights

By denying the possibility of registration into birth registry books of children whose parents do not possess documents, the disputed provisions of the Rulebook and the Instruction hinder or prevent the exercise of their other rights that require the possession of birth certificate (and citizenship certificate). Thus, the children whose birth remains unregistered will, in the most vulnerable period of their life, be deprived of health care and social protection (Articles 68 and 60 of the Constitution); their freedom of movement will be limited (Article 39 of the Constitution); they will not be able to acquire or inherit property (Articles 58 and 59 of the Constitution); in other words, they will be deprived of all rights whose exercise requires the possession of personal documents. The development and future of a child largely depend on the possibility to be registered into birth registry books immediately after birth, while the prevention of timely birth registration has a negative impact on very important aspects of life and constitutes an essential contradiction to the best interests of the child.

Limitations in passing of legislation

We have pointed to the fact that the provisions of the Instruction and the Rulebook, which stipulate that the data about parents are to be entered into birth notification and birth registry books on the basis of their personal documents, contravene numerous articles of the Constitution and international conventions and prevent the exercise of a large number of guaranteed rights.

However, it is also important to stress that by-laws must absolutely not regulate certain issues by introducing any obligations to citizens or compromising the possibility of exercising the rights guaranteed by the legal acts of higher power. And as can be seen, this is precisely the effect of the disputed provisions of the Rulebook and the Instruction, because they establish a condition that must be fulfilled in order to exercise a large number of rights. As such, these provisions are contrary to Article 16, paragraph 2 of the Law on Public Administration (in connection with Article 15, paragraph 1 of the said Law), which provides that the ministries may not impose on natural persons and legal entities, through regulations, any rights and obligations that are not already established by law.

¹³ Statistical Office of the Republic of Serbia and UNICEF, 2014 *Multiple Indicator Cluster Survey of Women and Children 2014 and Multiple Indicator Cluster Survey of Women and Children in the Roma Settlements in Serbia 2014, Final Report*, available at: http://www.stat.gov.rs/media/3475/srbija-mics-2014-i-srbija-romska-naselja-mics-2014_srpski_web.pdf.

Effects of repealing the disputed provisions

In addition to highlighting the fact that the disputed provisions of the Rulebook and the Instruction are not in compliance with higher legal acts and therefore must be repealed, the submitter of the initiative stresses that the repealing of these provisions would not lead to a legal vacuum and that the procedures for registering children in civil registry books could be conducted without obstacles.

In fact, point 10, paragraph 1 of the Instruction on administering registry books provides that “before registration, the registrar shall establish all facts and data to be entered into civil registry books in accordance with the law regulating general administrative procedure”. In other words, all means of evidence envisaged by the Law on General Administrative Procedure, including witness hearing, party’s statement and documents, are available to the registrar for establishing data about parents. It actually means that in case of children whose parents possess documents, data about parents could be entered as done so far (on the basis of their ID cards and birth certificates), while in case of children whose parents do not possess documents, data about parents could be established by other means, such as party’s statement and hearing of witnesses. The legislation of the Republic of Serbia already includes such solutions for determining the identity of persons who do not possess personal documents. Thus, for example, Article 8, paragraph 1 of the Law on Certification of Signatures, Manuscripts and Transcripts provides that in cases where the identity of the submitter of a document cannot be established on the basis of an official document with a photo, the identity shall be established by hearing two witnesses. Also, Article 71d of the Law on Non-Contentious Procedure provides that, in order to determine the date and place of birth of a person whose birth is to be proved, the court shall hear at least two adult witnesses.

Moreover, in late 2016, there was an attempt to solve, in a similar way, the problem of registration into birth registry books of children whose mothers did not possess personal documents. At that time, the Ministry of Public Administration and Local Self-Government and the Ministry of Health presented the project *Baby, Welcome to the World*, which aimed at simplification of birth notification and registration in birth registry books, whereas the new system of birth notification was supposed to allow the birth registration of children whose mothers did not possess personal documents. The procedure of simplified registration in birth registry books was regulated by the Instruction for conducting administrative procedures related to the child’s birth according to the “one-stop” system, which envisaged that in cases where new mothers did not possess personal documents, their data should be entered into the birth notification form only on the basis of their statements, and parents would also be allowed to determine the child’s personal name in a health care institution.

However, the said Instruction failed to provide the practical possibility of birth registration for children whose mothers did not possess documents, precisely because of the unconstitutional and unlawful provisions of the Rulebook and the Instruction challenged by this initiative. Moreover, the Ministry of Public

Administration and Local Self-Government, in its letter sent to the submitter of the initiative, stated that the Instruction, prepared within the framework of the project *Baby, Welcome to the World*, was a “certain kind of help in the work of authorised health care professionals, registrars and other project participants, while competent authorities and institutions act in accordance with relevant laws and other general acts”.¹⁴ This means that the Ministry of Public Administration and Local Self-Government, an authority responsible for the tasks related to civil registry books, despite its participation in the project *Baby, Welcome to the World*, which included the preparation of the said Instruction, stated that the provisions of that Instruction (which would allow the registration into registry books of children whose mothers did not possess personal documents) were not binding. The failure of an attempt to ensure birth registration in cases of undocumented mothers through the project *Baby, Welcome to the World* has shown that this issue cannot be solved by a project, but that it is necessary to do it in a systemic way, that is - by repealing the unconstitutional and unlawful provisions of the by-laws that prevent the registration into birth registry books of every child immediately after birth.

Proposal

Based on all the above, the submitter of the initiative proposes to the Constitutional Court of Serbia to render a decision initiating a procedure for assessing the constitutionality and legality of Article 5 of the *Rulebook on the procedure for the issuance of birth notification and form of the issuance of birth notification in a health care institution*, as well as point 10, paragraph 2 and point 24, paragraphs 1 and 2 of the *Instruction on administering registry books and forms of registry books*, and after the conducted procedure, to render a decision establishing that the disputed provisions are not in accordance with the Constitution of the Republic of Serbia, law, generally accepted rules of international law and ratified international treaties.

In Belgrade, 27 July 2018

Executive Director of NGO Praxis
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¹⁴ Letter of the Ministry of Public Administration and Local Self-government no. 07-00-676/2017-33 od 26.09.2017.