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Committee of Ministers
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The implementation of the ECHR judgement in the Zorica Jovanovic vs Serbia case ("Missing babies")

YUCOM – The Lawyers' Committee for Human Rights, founded in 1997, is a professional, voluntary, non-governmental association of citizens, associated to protect and promote human rights in accordance with universally accepted civilized standards, international conventions and national law. Since the establishment, YUCOM is providing free legal assistance to victims of human rights violation, as well as developing cooperation with national and international organizations involved in human rights protection and promotion. YUCOM has profiled itself and gained much recognition as human rights defenders' organization. As it has already successfully represented before the ECHR, the Belgrade group of parents of "missing babies", a local NGO, turned to us and asked for legal help and support.

In its judgement, the ECHR holds that there has been a violation of Article 8 of the Convention – Respect for family life, by the continuing failure to provide information concerning the fate of newborn babies in maternity wards. The Court also ordered remediation. Given the significant number of potential applicants, Serbian authorities had to take appropriate measures to establish a mechanism to provide individual redress to all parents in a similar situation, within one year of the judgement becoming final, which was on the 9th of November 2013.

The Republic of Serbia has not yet enacted the special law, *lex specialis*, which should establish the mechanism capable of investigating the "missing babies" cases upon parents' complaints (applications), which means that there is currently no effective mechanism for successful implementation of the ECHR judgement.

The State authorities, with a significant delay, issued some Draft laws that are, in our opinion, not adequate. The last Draft law on "missing babies", was



presented on 10th of February 2016, at a round table, where YUCOM, parents and representatives of the Ombudsman were present. We have serious concerns about this Draft law, which I will outline here. Just to note, the meeting itself was very disappointing, and the assistant of the Minister of Justice, Mr Balinovac was uncooperative.

By virtue of this Draft law on determining the facts on the status of newborns suspected to have disappeared from the maternity wards in the Republic of Serbia it is prescribed that establishment of the facts of these cases should be carried out through the existing Court, non-litigation procedure. The problem with this existing procedure in this particular matter is that it does not empower the Court to conduct adequate investigations. (obtaining biometric and biological samples.) This shortcoming requires the Court to delegate this activity to the special police unit that will be established, with no defined model of operation for the investigation process. The establishment of this new special police unit is not enough to secure the true and holistic investigation that is needed.

The ratio of this non-litigation procedure is not to investigate or to establish which party has a right, but the sense is to establish the status or the right only by virtue of those facts which are not problematic/disputable. If the case is disputable, the Court would refer them to the litigation – civil procedure.

The absence of special investigatory powers which this non-litigation Court lacks, will not in any way create the conditions needed to determine the truth about each and every case with circumstances consistent with those from the case of Zorica Jovanovic v Serbia.

Apart from this substantial issue regarding the Draft law, other weaknesses of the proposed solution are as follows:

1. **The circle of possible applicants** – according to the Draft law, only parents (and if they are not alive, brothers, sisters, grandparents) who previously officially contacted State authorities, are eligible for this proceeding.
 - It is necessary to expand the circle of possible applicants in a manner that even a child who believes they are a “missing baby” is eligible, but also other close family members even if the parents are alive;
 - It is necessary to allow even those applicants who did not previously contact the State authorities, or those who did but do not have any written document to prove this, to use the procedure. This follows from the opinion of the ECHR, that an ineffective legal remedy cannot be the requirement for the exercise of rights in other proceedings.
2. **The decision by which a court concludes that it cannot determine the status of a child** – in our opinion it is completely inappropriate to have this kind of decision in a procedure where the obligation of the Court/State is to determine the truth/all facts regarding the specific missing child.



3. **Legal remedy** – the Draft law does not allow representatives the right to appeal to the Supreme Court of Cassation, even when the Higher Court over turns the judgement.
4. **The principle of hearing the parties** – Is prescribed as such. But it is also prescribed that the Court may organize hearings IF it is necessary. This is *contradictio in adjecto*.
5. **Non-pecuniary damage** – this Draft law prescribes that 10.000 EUR is the maximum award for non-pecuniary damage. According to the standards of a fair trial and the principle of the free judicial opinion, it is not possible to determine in advance the highest amount of damages. This limitation is explained by the possibilities of budgetary funds of the Republic of Serbia. In our opinion, these arguments in no way influence the amount of non-pecuniary damages to be awarded to the applicants in those cases. If such an argument were to be enforced, it would imply that no State in a poor economic situation could be fully responsible for addressing human rights violations or be responsible for awarding damages.

The opinion of civil society organizations, academics, the Ombudsman of the Republic of Serbia and parents, is that it is necessary to establish one *sui generis* mechanism, a special court, with a mandate to perform a special procedure to fully investigate the status of newborns suspected to be missing from the maternity wards in the Republic of Serbia.

Committee should remind the State and reiterate its expectations that more efficient approach should be taken by the Serbian government in complying with ECHR ruling in this case and establishment of the investigative mechanism as recommended.

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