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Oana Elena GĂLĂȚEANU

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SOME ASPECTS REGARDING THE EUROPEAN LAW OF THE CHILD

Oana Elena GĂLĂȚEANU[1]

Abstract

Children's rights are a real concern worldwide. The present study presents the modalities and normative acts issued at European level that aims to defend and respect these rights, and especially in the case of criminal proceedings, in the plan of the law of the European Union, as well as at the level of the law of the Council of Europe.

In the end of the study there are presented the author's conclusions, shaped following to studying the concerns on the protection of the children's rights existing at European level within penal proceedings.

Keywords

Child; rights; international protection; penal procedures.

I. Guidelines

A concern on children's rights and their protection has existed at international level and obviously at European level where the observance of the legal norms is sought, norms which guarantee and support these rights in Europe. To this sense, we give as examples the norms of the Treaty on the European Union (TEU) which impose on the EU the obligation to encourage the defense of children's rights, the Charter of Fundamental Rights of the EU, the directives and regulations of the Union's institutions in this matter, the case law of the Court of Justice of the European Union (CJEU), the multitude of conventions at the level of the Council of Europe (CoE) focusing on specific issues for the protection of the rights of the child, the European Convention on Human Rights (ECHR), the

[1] Ph.D. Associate Professor, Faculty of Legal, Social and Political Sciences, "Dunarea de Jos" University of Galati, Member of the Legal, Administrative, Social and Political Research Center of „Dunarea de Jos" University of Galati

jurisprudence of the European Court of Human Rights, the European Social Charter and the decisions of the European Committee of Social Rights (ECSR).

Specifically, children enjoy the full range of human rights and, in addition, benefit from their own specific provisions.

The UN Convention on the Rights of the Child defined the child at international law level, in its Article 1, as representing "any human being under the age of 18". This legal interpretation is also embraced in Europe. In here, EU law is not a legal and exclusive definition of the term neither in law, in jurisprudence nor in treaties, being various normative acts[2] that give children different rights according to their age[3].

In CoE law, the legal documents issued take over the definition given by UN Convention, the same as the European Court of the Human Rights has analogously proceeded, allowing as criterion the age of 18.

The European Law of the Child was mostly created by the UE and CoE. Within the EU, the UE Charter of Fundamental Rights, entering into force by the enforcement of the Treaty of Lisbon, acquired a legal status equal to the one of the Union's Treaties, includes the first references brought to the rights of children in Union's institutional plan[4]. The importance of the Charter is given by the provisions included in Article 24, where three fundamental principles on the rights of the child are acknowledged:

1. The right to express views freely, in accordance with their age and maturity (paragraph (1));
2. the right to priority of the child's best interests in all actions relating to children (paragraph (2));
3. the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents (paragraph (3));

The Charter was followed by the Treaty of Lisbon who, through the amendments brought to TEU and TFEU, allowed the Union to support more the rights of the child. Accordingly, in Article 3, paragraph (3) TEU

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[2] For example, Council Directive 94/33/EC of 20 August 1994 on the protection of young people at work, OJ L216, 1994, Article 3

[3]*Young person* – term attributed to any person under 18 years of age*, adolescent*- any young person of at least 15 years of age but less than 18 years of age, who is no longer subject to compulsory full-time schooling and*children* – young people of less than 15 years and whose employment is prohibited in most cases.

[4] For example, its provisions which prohibit work that exploits children or those that acknowledge to children the free and non-discriminatory transiting through compulsory education.

(amended by the Treaty of Lisbon), the protection of the rights of the child is regarded as one of the general objectives of the EU. Also, the provisions included in TFEU on the rights of the child give the possibility to the Union to take those legislative measures necessary for combating children's sexual exploitation (Article 83, point (1), paragraph 2) and trafficking in persons, in particular children (and women, according to Article 79, paragraph 2).

Finally, at UE level, many directives have been adopted, having as objectives: 1. Combating children's sexual abuse, infant sexual exploitation and pornography (Directive 2011/93/EU, OJ L 335, 2011); 2. Preventing and combating trafficking in persons and the protection of its victims – provision comprising decisions also regarding the needs specific to child victims (Directive 2011/36/EU, OJ L 101, 2011); 3. minimum standards regarding the rights, support and protection granted to the victims of crimes and which target children through their provisions (Directive 2012/29/EU, OJ L 315, 2012).

Another more important stage in the area of protection of the rights of the child at EU level is represented by the concern on this problem at the strategic level of the Union's policies. Initially, this protection was found on the agenda of the external cooperation policy of the EU, the Council adopting "EU Guidelines for the Promotion and Protection of the Rights of the Child"[5]. Subsequently, it was also highlighted internally, the European Commission adopting the Communication "A special place for children in UE external actions", to the Council, European Parliament, Economic and Social Committee and Committee of the Regions[6], which had as objective the inclusion of the rights of the child in all actions developed by the Union and third party countries. Also, the European Commission adopted in 2011 the EU Agenda on the rights of the child, which decided the basic priorities in the development of the law and policies on the rights of the child on the territory of the Member States.[7]

[5] Brussels, 10 December 2007
[6] Brussels, 5 February 2008
[7] In 15 February 2011, Brussels

As it is known, according to the provisions of the European treaties[8], the Union has competency in regulating only these sectors for which the Member States have empowered it. The area of the rights of the child is a multidisciplinary problem, reason for which the UE's competency to act is necessary to be decided in each and every situation. Until 2015 at least, important areas for the rights of the child where EU has adopted legislative acts have been (European Union Agency for Fundamental Rights and Council of Europe. (Union Agency for Fundamental Rights and Council of Europe, 2015): protection of data and consumers, asylum and migration and cooperation in civil and penal areas.

CoE has received, since its creation, the competency to defend and support human rights. Its main treaty related to these and ratified by all Member States is the Convention for the Protection of Human Rights and Fundamental Freedoms or ECHR. It included specific provisions on children, being able to mention the most important ones:

- Article 5, paragraph (1), letter d, provides that: nobody can be deprived of his/her freedom, except for the cases when it is about "the detention of a minor by lawful order for the purpose of educational supervision or his[/her] lawful detention for the purpose of bringing him[/her] before the competent legal authority";
- Article 6, paragraph (1), provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (…)" and that "(…)the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society" and when "the interests of minors so require";
- Article 2 of Protocol no. 1 to ECHR regarding the fact that "No person shall be denied the right to education" and "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

The other provisions of the Convention are general in nature, being applicable to any person, therefore to minors. Out of these, the provisions

[8] Articles 2 - 4 from the Treaty on the Functioning of the European Union (TFEU)

of Article 3 which prohibit torture, inhuman or degrading treatment or punishment have in our opinion great importance.

Another important area for the rights of the child, of the CoE, is the European Social Charter, which also includes provisions on the rights of the child, such as, for example, Article 17 thereof, which compels the States to take all necessary measures for ensuring the assistance, care, education and proper preparation of the children, for protecting children and young people from neglect, violence or exploitation and for guaranteeing the protection of children without the support of their own family.

CoE has initiated also a political plan named "Building a Europe for and with children", aiming at making reference to the theme of the rights of the children and comprising the appeal to procedures which would establish the benchmarks from a great number of sectors (Council of Europe, 2007). The program has reexamined the taking of many practical measures on the rights of the child, meant to complete these legal rules mandatory at European level, as for example: Guidelines on justice and the interest of the child[9] and Guidelines on medical assistance in the interest of the child.[10]

II. The rights of the child and their compliance within penal procedures

Obviously, there can be no real protection of the rights of the child acknowledged at international level without the observance of their rights in the penal area and in penal proceedings' area. Therefore, in the following we will try to highlight ways to achieve the observance of these rights at European level.

When we refer to children in criminal proceedings, we consider those minors who are either criminally prosecuted, charged or convicted for committing a crime / crimes, or who are participating in legal or related proceedings as injured persons or witnesses.

Within penal justice, the position of children is provided in the provisions on human rights, which are important and have effects for adults and minors. A first right recognized in the judicial proceedings to any person, therefore to children, is the guarantee of a fair trial, acknowledged in Article 6 of the European Convention on Human Rights. Based on this, children have the right to a fair and proper treatment. They have the right that the

[9] Issued by the Committee of Ministers, 17 November 2010

[10] Of the Committee of Ministers, 2010

judicial procedures - including penal procedures - are in accordance with their needs, so that to be facilitated their effective participation to them.

At the same time, children have the right to a lawyer throughout the criminal judicial procedure, from the preliminary stages, from the first interrogation taken by the Police Investigation Bodies.

This right - of all - to a fair trial is fundamental to the evolved and democratic society. It is an extremely important right for children because of their vulnerability. This vulnerability requires that, in the case of a child who has broken the law, he or she will benefit from extra-protection. For this reason, at international level, the European bodies have formulated for States different obligations to come directly and actually to the aid of such children and to solve their specific problems.

Thus, at the level of the European Union, the Charter of Fundamental Rights of the Union has included rights on access to justice designed to support this guarantee in a fair trial including for children. They are included in Articles 47 and 49 of the Charter. Article 47 of the Charter specifically addresses the right to an effective remedy at law and a fair trial, setting out important conditions for children, such as those regarding the right to a fair trial, publicly and within a reasonable time, the right to any person to be defended, represented and advised and given the necessary legal assistance.

Article 49 of the Charter presents the principles of legality and proportionality of offenses and punishments. They are of particular importance in what concerns children.

Also, in order to guarantee the fulfillment of these rights in a fair criminal trial, for the children at EU level, several Directives were also adopted, among which we mention:

- Directive on the right to interpretation and translation (Directive no. 2010/64/EU of the European Parliament and of the Council of 20 October 2010, OJ L 280/1,2010)

Directive on the right to information (Directive no. 2013/13/UE of the European Parliament and of the Council of 22 May 2012, OJ L 142/1,2012)

- Directive on the right of access to a lawyer (Directive no. 2013/48/UE)

In order to implement these Directives, the Member States are compelled, even if they do not have express provisions for children, to comply with the provisions of the EU Charter of Fundamental Rights. This implies the obligation that Article 24, which refers to the rights of the child, will be complied with in cases with children to which the specified Directives are applicable.

Also, in 2013, in order to ensure the guarantee - also for children - of a fair criminal trial, a proposal for a Directive was elaborated by the European Commission[11], which refers to the procedural guarantees for suspected or accused children in criminal proceedings. It sought to guarantee the assistance of a lawyer in all phases of the criminal trial. This proposal also aimed at the minors to enjoy the necessary information regarding their rights, the assistance of parents or other close persons and the hearing with closed doors, in secret meeting. Moreover, children deprived of their liberty must benefit from proper education and training, medical care and detention regime separately from adults.

Under the CoE law, the guarantees regarding a fair trial are provided in Article 6 of the European Convention on Human Rights. In paragraph 1 of the respective article, a series of such guarantees is presented, for example: "judging its case fairly, publicly and within a reasonable time, by an independent and impartial Court established by law , which shall decide either on the violation of its civil rights and obligations or on the merits of any criminal prosecution against it". Also, "the decision must be made publicly", but access to the meeting room can be restricted, throughout the trial or in a certain part of it, for reasons stated expressly in the aforementioned law text, for reasons that concerns morals, national security or public order.

In paragraph 2, the essential guarantees for a fair trial regarding the presumption of innocence are mentioned, and in paragraph (3) the rights of "any accused" are listed.

These guarantees are also acknowledged for minors, but for them a greater significance has the right of access to a lawyer and the one of effective participation. The ECHR has drawn up, on the basis of Article 6 of the Convention, a series of conditions for ensuring the actual, effective participation of children to criminal proceedings. It has been established as a general rule that it must be guaranteed in the procedures that the age, the emotional evolution and the degree of maturity of the child are taken into account.

For the children investigated as suspected or accused, the Guidelines of the Council of Europe on justice in the interests of the child (CoE, Committee of Ministers, 2010), which, without being compulsory, are also important as a preliminary step in ensuring that judicial procedures, including criminal ones, take into account the children's own needs. These Guidelines were created on the basis of ECHR jurisprudence and other

[11] Brussels, 27.11.2013,COM(2013) 822 final

international and European norms such as the UN Convention on the Rights of the Child[12]. From the contents of these Guidelines, the following are particularly important for children in criminal proceedings:

- the right to be communicated any information regarding the accusations brought to it, both to it and its parents, so that they can understand the real accusation;
- the right to be heard only in the presence of a lawyer or parents or a trusted adult;
- the right to enjoy the principle of celerity;
- the right to enjoy hearings or interrogations adapted to the child.

The Parliamentary Assembly of the CoE (PACE) adopted in January 2014 a Resolution on justice adapted to minors, which highlights the need of children who have problems with the law, to receive a treatment based on respecting their rights and adapted to their needs[13]. It calls on Member States to apply international human rights rules in the field of juvenile justice, including the CoE Guidelines on justice in the interests of the child. It also asks them to adapt their domestic laws and judicial practice to these standards. It also suggests that children's deprivation of liberty is only an exceptional measure and for the shortest period of time allowed, setting the minimum age of criminal responsibility at 14 years old, without exceptions in the case of serious crimes, and introducing a specialized justice system for minors, the existence of personnel trained and specialized in juvenile justice, as well as extrajudicial instruments and liberty non-privative measures.

In what concerns the observance of the rights of the child in criminal proceedings, it cannot be also overlooked the observance of their rights related to the detention regime, respectively its modality, duration and conditions. With regard to minors, the deprivation of liberty and their detention can be made only exceptionally, under a legal court order, in an authorized institution from which the minor cannot leave any time it wishes so[14].

Currently, there is no mandatory legal framework at EU level for child detention.

The CoE admits that the detention of children in criminal proceedings is justified only in accordance with the provisions of Article 5 of the Convention, for one of the situations mentioned in paragraph (a) -

[12] Adopted by the General Assembly of the United Nations of 20 November 1989

[13] Res. 2010(2014) "Child-friendly juvenile justice: from rhetoric to reality."

[14] Rule 21.5 of CoE, Committee of Ministers (2008). CM Recommendation / Rec (2008)11 on the European regulations for minors who are object to some sanctions or measures disposed by the judicial bodies, 5 nov.2008

determined on the basis of the sentence given by a competent Court; (c) preventive detention; (d) determined detention for its education under supervision.

With regard to the conditions of detention of children, in EU law it is stipulated, in Article 4 of the Charter that torture and inhuman and degrading treatment are prohibited, provisions which are obviously applicable in this context.

In CoE law, the ECHR has ruled that their detention together with adults may lead to non-compliance with the provisions of Article 3 or Article 5 of the Convention, and the lack of medical care required during the detention could generate non-compliance with Article 3 of the Convention, which could also be violated by not providing sufficient space available in the cell or lack of lighting or recreational activities (European Union Agency for Fundamental Rights and Council of Europe, 2015).

In criminal cases, attention must also be paid to the rights of the participating children as injured persons or witnesses. The rights to recovery, social reintegration, stopping victimization and effective participation in the proceedings are acknowledged to them. These rights are also recognized in EU law, as evidenced by Directive 2012/29 / EU on the rights of the victims and by CoE law, where they are set out in Article 2 and 8 of the European Convention on Human Rights.

Conclusions

In conclusion, there is a concern for the promotion and compliance of the rights of the child at international level, proof being the activity of different international organizations through which they impose to the States the compliance with certain legal norms in the area, the harmonization of their internal legislations for the achievement of an effective protection by these rights and taking the necessary measures for the creation of an institutional system specialized in problems specific to children, including at legal level. On the European continent, the proof in the sense of the interest for the acknowledgement and defense of the rights of the child is achieved in the law of the European Union through the provisions included in the UE Treaties, through normative acts issued by the European institutions for putting to practice the provisions of the Treaties (of directive, regulation, communication's type) and through the jurisprudence of the Court of Justice of the EU, and at the level of the law of the Council of Europe, through the European Convention on Human Rights, the jurisprudence of the European Court on Human Rights and through many Guidelines and Conferences which had as object these rights.

Two issues have particularly attracted our attention. The first refers to establishing the minimum age from which a minor can be criminally liable. In this issue we found not a divergence, but different views both at European and international level. Thus, if, at the international level, the UN Committee on the Rights of the Child recommends (UN Committee on the Rights of the Child 2007) as the minimum age of criminal liability the age of 12 (although specifying that it would be preferable to be older, but not foreseeing it), the Parliamentary Assembly of the Council of Europe (PACE) established that 14 years old is the minimum age of criminal liability of minors, without admitting exceptions from it, even in the case of serious crimes. In our opinion, it may be advisable to reduce the minimum age from which a person can be criminally responsible to 12 years old at minimum, considering at least two aspects: the first is related to the current stage of the evolution of human society, in which children are much more psychologically and mentally evolved, which is why, we believe, there is an increasing number of criminal offenses committed by children under the age of 14, or in which such children are involved. The second is related to the fact that, in our opinion, there is the possibility of being subject to the rigors of the law from a younger age, and being advised by specialized people from a younger age, their re-education and correction could be easier, thus achieving the preventive and educational purpose of penal law.

The second aspect that drew our attention is the emphasis put on the achievement of a penal justice of specialized bodies in the problems which children are faced with and in meeting their needs, including at the level of the Courts that give sentences in concrete penal cases with minor offenders - this emphasis is put righteously in our opinion, for precisely defending the specific rights of children, both at European level and worldwide. However, unfortunately, not all States have specialized Courts to judge just such cases with minor offenders. In these situations, we consider that the primary interest of child's protection and education in the spirit of the respect for the moral norms and natural legal order, and for their beneficial evolution, is not proven. An example at European level in this regard is, unfortunately, Romania, a Member State of the European Union and of the Council of Europe.

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