

CONSIDERATIONS REGARDING THE DEPRIVATION OF LIBERTY OF JUVENILES IN CRIMINAL MATTERS, IN LIGHT OF NATIONAL AND INTERNATIONAL REGULATIONS*

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Abstract: *This article aims to identify the international legal framework, especially the European one, as well as the national framework regarding the deprivation of liberty of juveniles in criminal procedure proceedings, starting from the correct implementation of the principles that concern the interest of this category of persons and continuing with the situations in which it can be disposed, as well as the impact that such a measure has on the juveniles, but also on the families from which they come from.*

At the same time, this article presents, on the one hand, the vulnerabilities presented by juveniles in detention, and on the other hand, their main rights, both at European and national level.

The importance of monitoring the places in which the juveniles are detained is emphasized, as well as the need for alternatives measures to the deprivation of liberty of juveniles, depending on the different stages of the procedure in which they are involved. This goal is the hardest to achieve in practice, as there are few possibilities for implementing such alternative measures.

The criminal justice system for juveniles must be oriented entirely towards respecting the rights and safety of juveniles, to promote their well-being, both physically and mentally, and the deprivation of liberty should be used as a last resort, only in exceptional situations, when it is absolutely necessary to achieve the goals provided by the legislation in this matter.

Key words: *Public Law, Criminal Law, criminal executional law, juveniles, deprivation of liberty, rights, vulnerabilities.*

Introduction

Juveniles come into contact with the justice system in many different ways, for example, for family matters such as divorce or adoption, in administrative matters for nationality or immigration issues or in criminal matters as victims, witnesses or

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perpetrators of crimes. When faced with the justice system, juveniles are thrown into an intimidating adult world which they cannot understand.

The most important measure that can be ordered against a juvenile and with the biggest implications on his/her life and personality is deprivation of liberty, in criminal proceedings.

According to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty¹, „a juvenile is every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law”. At the same time, „the deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority”.

Deprivation of liberty can also be defined as any form of detention or imprisonment or a placement a person in a public custodial setting, from which the person is not permitted to leave at will, by order of any judicial authority.

The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort. Juveniles should only be deprived of their liberty in accordance with these principles.

This article intends to present first and foremost the legal framework, both at international level, especially at European level, and at national level, regarding the way of depriving the juveniles involved in criminal proceedings, the principles whose observance is required by these regulations, as well as their correct implementation in practice. Thus, we will refer only to the detention of juveniles as a result of their criminal liability, and not to the situations in which they are deprived of liberty in different correctional, medical, educational, therapeutic, social institutions, etc.

At the same time, it is important to emphasize that the mere implementation of these principles is not sufficient, since it is important that, after taking the measure of deprivation of liberty of the juvenile, their places of detention to be checked, monitored, to meet the purpose of the criminal sanction that was applied to them, taking into account their age, the degree of their personality development and the influence on the growth and development of juveniles, in an attempt to render the society fit for an adult life that would no longer interfere with the criminal environment.

Also for the purpose of correct and complete reintegration into society of juveniles who are involved, as active subjects, perpetrators of crimes of varying degrees of gravity, in criminal proceedings, it is important to identify alternative measures of deprivation of liberty that can be arranged by the judicial bodies.

¹ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by General Assembly resolution 45/113 of 14 December 1990

Moreover, all international and national regulations regarding the deprivation of liberty of juveniles in criminal proceedings emphasize that such deprivation can only be disposed of as the last solution of criminal policy, the period spent by a juvenile in detention affecting him/her in a way greater than it would affect a major, such a measure can be taken only if it is necessary and is commensurate with the gravity of the act the juvenile is accused of having committed, in the case of pre-trial detention, or for which he was definitively convicted by a court, in the case of detention as a criminal punishment.

Thus, deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

1. Deprivation of liberty of juveniles in criminal proceedings; guiding principles

Juveniles involved in criminal proceedings may be deprived of liberty only in situations where they are accused or convicted of a crime, either in so-called provisional detention - arrested and placed in a pre-trial detention, during the criminal trial, or as a result of a decision to convict them - by which it was decided, with definitive character, that they committed the offense for which they were investigated, the so-called detention - sentenced to custodial sentence.

Thus, deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement: it includes police custody, remand detention, imprisonment after conviction, house arrest.

Like adult charges, juveniles in criminal investigations are presumed innocent and shall be treated as such. First, as expressly provided by the Convention on the Rights of the Child, the leading international regulation on the rights of the child, adopted by the United Nations², no child shall be deprived of liberty illegally or arbitrarily. The arrest or detention of a child must be in accordance with the law and will only be as light and as short as possible.

It follows that the fundamental principle that governs the matter of criminal detention of juveniles is that the pre-trial detention of juveniles should be carried out only as a last resort, the judicial bodies should try to find, if possible, other options to keep the juvenile at their disposal and prevent him/her from committing other criminal acts. Also in the matter of criminal law, the principle of civil law is fully applicable, namely all judgments of the judicial authorities must take into account, first of all, the "best interests of the child".

² *Convention on the Rights of the Child* - The Convention on the Rights of the Child, adopted on November 20, 1989 by the United Nations, published in the Official Gazette of Romania no. 314 of June 13, 2001.

This principle results from both international and Romanian national regulations. Thus, United Nations Rules for the Protection of Juveniles Deprived of their Liberty provides that „detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When pre-trial detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles”.

Also, the Convention on the Rights of the Child stipulates in article 37 letter c) that "any juvenile deprived of liberty will be separated from adults, unless it is considered that it is in the best interest of the juvenile not to do so, and will have the right to maintain contact with his/her family through correspondence and visits, except in exceptional cases”.

In this regard, the Criminal Procedure Code³ provides for a special section, 8, within the chapter on preventive measures, entitled "Special provisions on preventive measures applied to juveniles", according to which "detention and pre-trial detention may be ordered against a juvenile, exceptionally, only if the effects that deprivation of liberty would have on his/her personality and development are not disproportionate to the purpose pursued by taking the measure. When determining the duration for which the measure of pre-trial detention is taken, the age of the defendant is taken into account from the date on which the measure is taken, prolonged or maintained "(article 243 paragraph 2-3).

Also, the aspects related to the execution of the preventive measure are regulated by Law no. 254/2013⁴, which stipulates that the detention and pre-trial detention during the criminal prosecution, including of the juvenile defendants, are carried out in centers of pre-trial detention and arrest that are organized and operate under the subordination of the Ministry of Internal Affairs, being established by order of the Minister of Internal Affairs. During the trial, the pre-trial detention is carried out in the special sections of detention in penitentiaries or in the pre-trial detention centers in the penitentiary, which are organized and operate under the National Penitentiary Administration.

Article 117 of the aforementioned law, entitled "Pre-trial detention Regime", stipulates that the juvenile persons detained or in pre-trial detention are usually housed separately from the adult persons. During the execution of the pre-trial detention, the juvenile is granted psychological assistance, under the conditions established by the regulation provided in article 107 paragraph 2, in order to

³ Law no. 135/2010, published in the Official Journal of Romania no. 486 of July 15, 2010, entered into force on 01/02/2014.

⁴ Law no. 254/2013 regarding the execution of the punishments and of the deprivation measures ordered by the judicial bodies during the criminal trial, published in the Official Journal of Romania no. 514 of August 14, 2013

diminish the negative effects of the deprivation of liberty on its physical, mental or moral development.

At the same time, according to article 123, "during the trial, the juvenile deprived of liberty execute the preventive measure in detention centers. For the presentation to the judicial bodies, the juveniles on pre-trial detention can be transferred to the special sections of pre-trial detention in penitentiaries for a period of maximum 10 days, being kept separately from the adults. In the interval stipulated, the juveniles execute the measure of the pre-trial detention, respecting the particularities of the age, with the assurance of the necessary psychosocial assistance, in order not to harm their physical, mental or moral development".

All regulations, whether national or international, expressly provide that juveniles in conflict with the law should be held in detention centers specifically designed for persons under the age of 18 years, offering a non-prison-like environment and regimes tailored to their needs and run by specialized staff, trained in dealing with juveniles. Such facilities should offer ready access to natural light and adequate ventilation, access to sanitary facilities that are hygienic and respect privacy and, in principle, accommodation in individual bedrooms. Large dormitories should be avoided.

An important support given to juveniles in detention is to maintain contact with parents and family through telephone, electronic or other correspondence, and regular visits at all the time. Juveniles should be placed in a facility that is as close as possible to the place of residence of their family.

2. The main rights of juveniles deprived of liberty in criminal proceedings

Even if they are deprived of liberty, juveniles, either during the criminal trial, or already convicted under a definitive judgment of the judicial authorities, benefit from various rights during the detention period. Many of them are common with those of the elderly in detention, being regulated at international level in the main documents regarding human rights, such as: Universal Declaration of Human Rights, European Convention on Human Rights, Charter of Human Rights, etc.

At the same time, the main international document on the rights of juveniles, Convention on the Rights of the Child regulates, at the level of the principle, the main rights enjoyed by juveniles in detention status as a result of criminal behavior, restoring common rights with those of others to the detained majorities, but also stipulating and emphasizing rights inherent in the minority status of the persons involved in the criminal proceedings.

The Convention on the Rights of the Child is *lex specialis* on the human rights protections afforded to juveniles.

The analysis of the main rights enjoyed by the juveniles in detention as a result of the criminal proceedings that are being carried out against them can only start

with one of the most important rights they enjoy, namely the right not to be subjected to torture or inhuman or degrading treatment.

Some international human rights treaties or regulations are relevant to torture and other ill-treatment in the context of juvenile deprived of their liberty. These include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights, as well as regional treaties, such as African, Inter-American and European regional instruments.

Convention on the Rights of the Child provides that no child shall be subjected to torture, punishment or cruel, inhuman or degrading treatment. Capital punishment or life imprisonment without the possibility of being released will not be pronounced for crimes committed by persons under the age of 18 years.

At national level, our country has also implemented this principle, firstly by prohibiting the death sentence of any person, both in the case of juveniles and those with life imprisonment. The Romanian Criminal code, which entered into force in February 2014, provided for the persons who committed crimes during the period when they were juveniles, the impossibility of applying some punishments, but only sanctioning them with educational measures.

Thus, according to the Romanian Criminal Code, the rule, in the case of juvenile offenders, is the application of non-custodial educational measures (article 116 paragraph 1), the deprivation of liberty measures being the exception and being reserved for the hypotheses of serious offenses or of juveniles who have committed multiple offenses (article 116 paragraph 2).

Secondly, like the other states, Romania regulated and sanctioned the commission of acts of torture or inhuman or degrading treatment against any person at criminal level, through the offenses of "submission to ill treatment" (article 281 Criminal Code) and "torture" (article 282 Criminal Code).

Last but not least, in article 5 of Law no. 254/2013, it is foreseen that the submission of any person in the execution of a punishment or other measure depriving of liberty to torture, inhuman or degrading treatment or other ill-treatment is forbidden.

In close connection with the right not to be subjected to torture or inhuman or degrading treatment, there is also the right to be treated with respect for dignity.

Article 40 paragraph 1 of the Convention on the Rights of the Child recognizes every child who is suspected, accused or has been found to have violated the criminal law the right to treatment according to the sense of dignity and personal value, which will strengthen respect for human or for human rights and freedoms fundamental of others and taking into account his age, as well as the need to facilitate his reintegration into society and him/her assuming a constructive role in society.

Also, article 37 paragraph 1 letter c) provides that any child deprived of liberty must be treated with humanity and with due respect for human dignity and in a manner that takes into account the needs of persons of his or her age.

Where the deprivation of liberty of a child can be justified as necessary, limited and consistent with the best interests of the child, the child must be treated with humanity and respect for his or her inherent dignity and in a manner that takes into account the needs of persons of their age and maturity.

A similar provision can be found in Law no. 254/2013, which in article 4 stipulates that the deprivation of liberty measures (the only criminal sanctions that can be applied to juveniles who have committed crimes) are carried out under conditions that ensure the respect of human dignity.

Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. They should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

In the same sense, in order to respect human dignity and a daily life as close as possible to that of freedom, the Special Rapporteur Juan E. Méndez recommended⁵ that children in detention should be provided throughout the day with a full program of education, sport, vocational training, recreation and other purposeful out-of-cell activities. This includes physical exercise for at least two hours every day in the open air, and preferably for a considerably longer time. Girls should under no circumstances receive less care, protection, assistance and training, including equal access to sport and recreation.

In addition to the rights presented above, an important place in the regulation of the rights of the child, like those of the major persons investigated in a criminal procedure, is occupied by the so-called procedural rights, which the person concerned benefits during the criminal procedure.

Thus, according to article 40 paragraph 2 of the Convention, the parties of the Convention shall, in particular, ensure that any child suspected or accused of a criminal law violation has at least the following rights guaranteed:

- (i) to be considered innocent until proved otherwise;
- (ii) to be informed in the shortest and most direct manner of the allegations against him/her or, where appropriate, through his/her parents or legal representatives and to receive legal assistance or any other appropriate assistance, in order to formulate and support the defenses;
- (iii) the right to examine, without delay, the case by an authority or a judicial authority, competent, independent and impartial, through a fair trial and fair

⁵ United Nations, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/28/68, available at <https://www.refworld.org/docid/550824454.html>

hearing procedure, in the presence of those who provide legal representation or legal assistance and if this is not considered to be contrary to the major interest of the child, taking into account especially his/her age or situation, in the presence of his/her parents or his/her legal representatives;

(iv) not being compelled to testify or confess that he/she is guilty; the right to interrogate or request the interrogation of the witnesses of the prosecution, to obtain the bringing and interrogation of the witnesses of the defense, under equal conditions;

(v) if he/she is found to be in violation of the criminal law, the right to have appeal to the decision and to any measures taken accordingly, before a competent, independent and impartial superior authority or court, according to laws;

(vi) the right to be assisted free of charge by an interpreter, if he/she does not understand or speak the language used;

(vii) the right to full respect for his/her private life, at all stages of the procedure.

Thus, it can be observed that among the most important rights regarding the period of the criminal proceedings, is the right to defense of the juveniles accused of committing crimes, including in the component to benefit from the specialized advice of a lawyer, even designated by the state and paid by this one, to communicate freely with the lawyer.

In this respect, United Nations Rules for the Protection of Juveniles Deprived of their Liberty provides that "juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications".

At the same time, the Convention on the rights of the children, in article 37 letter d) stipulates that "juveniles deprived of liberty must have the right to have quick access to legal aid or any other appropriate assistance, as well as the right to challenge the legality of their deprivation of liberty, before a court or other competent authority, independent and impartial, and the right to be judged in the urgent procedure of the case". The provisions are similar to those of the European Convention on Human Rights, regulated by article 5 regarding the right to freedom and security.

The Romanian legislation also provides for the obligation of the legal assistance of the juvenile accused (suspect or accused) for the entire duration of the criminal proceedings against him, his absence attracting by law the absolute nullity of the acts performed by the judicial bodies. In case the juvenile has not chosen a lawyer, the judicial body is obliged to take measures for the appointment of an ex officio lawyer. Also by virtue of respecting the right to defense, the lawyer has the right to benefit from the time and facilities necessary for the preparation and realization of an effective defense, including contacting his client under conditions of confidentiality at the place of detention, law no. 254/2013 stipulating at article

62 that the convicted persons, but the provision also applies to those in provisional detention, benefit from the space and facilities necessary to ensure the right to legal assistance. They can consult lawyers elected by them, in any matter of law deduced from administrative or judicial procedures, consulting with the lawyer, elected or ex officio, being made with the respect of the confidentiality of the visit, only under visual supervision.

3. The need to identify alternative measures for juvenile detention

Starting from the principle presented from the beginning of the this paper, namely, that the detention of juveniles involved in criminal proceedings should be the last measure to which the judicial authorities should go, all the regulations at international, universal or European level, emphasizing the need of identification and application by the national judicial bodies of alternative measures to the detention of these juveniles.

The Convention on the Rights of the Child emphasizes that each state must regulate, at national level, a whole range of provisions, such as those regarding care, guidance and supervision, probation periods, family placement, education programs, general and professional and to alternative solutions to those regarding detention, in the interest of protecting them and commensurate with their situation and with the crime committed.

Unfortunately, as in the case of adults, deprivation of liberty is often the first response of the judicial bodies against juveniles who commit crimes and last for too long. Detention is justified for a variety of reasons, starting from the need to prevent other criminal offenses, to protecting society, public order and security, and even the protection of the child in question.

However, most custodial systems are ineffective in preventing the repetition of the criminal behavior of the person who spent a longer or shorter period in custody. In practice, many times, the heavier, harsher the punishment, the less the effect sought - the reeducation of the condemned and his/her preparation for his/her return into society. This happens with greater repeatability in the case of juveniles, with reference to which, the specialists pointed out that the detention has a negative impact on their mental development, constituting a harm to the health of the juveniles. This is because, with the deprivation of liberty of juveniles, these rights are affected, in the alternative, by other rights, even if the authorities try to adopt regulations that protect them, such as: deprivation of education, access to adequate health, access to justice etc.

At international level it has been emphasized that the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence, but also to the circumstances and the needs of the juvenile as well as to the needs of the society. Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible

minimum. Deprivation of liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response. The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

For these reasons, it was stressed continuously, the need to find alternatives to detention.

At the national level, this decision was implemented with the entry into force of the current Criminal Code, the legislator establishing the sanctioning framework for juvenile offenders so that it corresponds to their psychophysical particularities, to ensure their education and re-education, in order not to reiterate in future criminal behavior.

Thus, article 115 of the Criminal Code regulates the general legal framework of the educational measures that can be taken against juveniles who commit crimes (with the mention that only juveniles between 14 and 18 years old, according to article 114 paragraph 1 of the Criminal code), stipulating that educational measures are not depriving of liberty, in the increasing order of their seriousness: the training period, supervision, registration at the weekend and daily assistance, and educational measures depriving of liberty: the admission to an educational center and the admission to a detention center.

Non-custodial educational measures can theoretically be taken for any crime committed by a juvenile. In contrast, the deprivation of educational measures can be taken only if the juvenile has committed a crime, for which an educational measure has been applied which was executed or whose execution began before the crime for which he is convicted (similar to the post-executing offense or post-convict) or when the punishment provided by law for the crime is 7 years or greater or life imprisonment. Even in these situations, the court is not obliged to take an educational measure depriving of liberty, since the legislator uses the phrase "may", which means that the application of such a measure is optional and not mandatory.

Conclusions

The fundamental principles that govern the deprivation of liberty of juveniles are: arrest or detention of a child shall be in conformity with the law, used only as a measure of last resort, for the shortest appropriate period of time; no child shall be deprived of liberty unlawfully or arbitrarily; deprivation of liberty is very rarely in the best interest of the child, nor necessary to protect public safety.

Under article 37 letter (b) of the Convention on the Rights of the Child and explained by the Committee on the Rights of the Child in its general comment No. 10 (CRC/C/GC/10), the deprivation of liberty of a child should be a last resort

measure to be used only for the shortest possible period of time. Similarly, the Havana Rules require that deprivation of liberty to be limited to exceptional cases. Both the Beijing Rules and the Riyadh Guidelines emphasize this principle. In addition, the best interests of the child must be a primary consideration in every decision on initiating or continuing the deprivation of liberty of a child.

The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations.

The principal criteria for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.

As the Special Rapporteur Juan E. Méndez recommended⁶, States must adopt child-friendly criminal court procedures and train police officers, border guards, detention staff, judges and others who may encounter children deprived of their liberty in child protection principles and a better understanding of the vulnerabilities of children to human rights violations, such as torture and other forms of ill-treatment.

Regular and independent monitoring of places where children are deprived of their liberty is a key factor in preventing torture and other forms of ill-treatment. Monitoring should be conducted by an independent body, such as a visiting committee, a judge, the children's ombudsman or the national preventive mechanisms with authority to receive and act on complaints and to assess whether establishments are operating in accordance with the requirements of national and international standards.

With regard to the vulnerability of children deprived of their liberty and policy reform, the Special Rapporteur calls upon all States:

(a) To ensure that deprivation of liberty is used only as a measure of last resort only in exceptional circumstances and only if it is in the best interests of the child;

(b) To ensure that child-appropriate age determination procedures are in place, and that the person is presumed to be less than 18 years of age unless and until proven otherwise;

(c) To promote preventive mechanisms, such as diversion and early identification and screening mechanisms, and to provide for a variety of noncustodial, community-based alternative measures to the deprivation of liberty;

(d) To ensure that pediatricians and child psychologists with trauma informed training are available on a regular basis to all children in detention, and to establish

⁶ *Ibidem*.

specialized medical screenings inside places of deprivation of liberty to detect cases of torture and ill-treatment, including access to forensic evaluation;

(e) To provide mandatory training to all persons dealing with children, including training on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the detection, documentation and prevention of torture and ill-treatment;

(f) To ensure that children in conflict with the law are charged, tried and sentenced within a State's juvenile justice system, never within the adult criminal justice system;

(g) To set the minimum age of criminal responsibility to no lower than 12 years, and to consider progressively raising it.