

# Particularities on Child-Friendly Justice Concerning Inoperability of Judicial Procedures

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**ABSTRACT:** If the purpose of applying a punishment to a felon is firstly retributive, then restorative, when it comes to a child perpetrator, the primary concern to specialists in the legal, psychological and social assistance field must be the effective protection and social reintegration of the minor. The courts for minors are meant to be able to determine the needs of every child who falls under the law, regardless of its quality (perpetrator, victim, witness, collateral victim). Creating a child-friendly justice system gives the child a safe and ideal space where all his rights are respected and his voice is heard, regardless of age, maturity or social status, benefiting from social and legal assistance for the entire duration, prior, incipient and subsequent to a judicial procedure in which the child takes part. In general, court proceedings may be delayed due to certain intervening factors that may have a negative impact on the parties, which is in contradiction with the act of justice. In this context, we point out that the delays in the court proceedings involving children brings with them the victimization and traumatization of the child. Finally, institutional actors have a duty to keep away a child from the rigid and traumatic side of applying justice and transforming it into child-friendly justice.

**KEYWORDS:** child, victim, juvenile justice, child-friendly justice, human rights

## Introduction

Children come into contact with the justice system in different contexts, ranging from family issues, adoption or divorce, administrative issues related to nationality or immigration, to committing antisocial acts in which the child is the perpetrator or victim. At the time of effective confrontation of a child with the justice system, they may undergo a re-victimization, so it is necessary that the operation of the justice system be adapted to their interests and needs (Council of Europe 2010, 7). We opted for the term of *justice for children*, considering that this expression is different from *juvenile justice*, the latter concept referring only to children in conflict with the criminal law, while the former takes into account an overview, including and child victims or witnesses.

In addition to the implementation of legislative acts that contain protective norms for the child's rights, it is necessary to develop the skills of practitioners such as policemen, lawyers, prosecutors, judges (PRI 2013, 15) who work in the justice field, at the moment of contact with a minor, whose main objective should be to approach the child as a friend throughout his experience with the system, before and after, turning it into a *child-friendly justice* (EU FRA 2016, 146).

The purpose of this paper is to promote the best interests of the child, along with other principles that every child should enjoy and also it bends to what it means to implement child-friendly justice, in particular, how it should be accessible, age adapted and appropriate to the needs and rights of a child (EU FRA 2017, 13), being applied promptly and without delaying the procedures related to the execution of justice (Council of Europe 2010, 17).

The normative framework that protects the rights of the child in his interaction with justice can be implemented effectively, as long as it is considered primarily to protect the child from the rigid field of law by approaching a friendly attitude and creating a protective space for him. Also, at EU level there are various legislative acts, directives, conventions that encourage Member States to create a justice system adapted to the children's interests.

In addition to the need not to traumatize a child by applying rigid judicial procedures, it is of most importance also their effective participation in these procedures, considering that the professionals involved must adopt a certain behavior, show empathy and understanding to what a

child really needs in order to feel safe. Only when they feel respected and gain trust in these specialists, the children are able to express their opinions freely and to effectively participate in the procedures (EU FRA 2016, 25).

### **European and national legal framework on child-justice**

All Member States of the European Union have an obligation to ensure that the best interests of the child are considered a priority in any action that concerns them. This priority becomes especially important when children are involved in civil and criminal court proceedings.

The way children are treated in court proceedings is an important human rights issue, which was promoted by the United Nations in the Convention on the Rights of the Child (UNCRC) document ratified by all EU Member States (EU FRA 2015, 3).

Addressing issues concerning children is an important aspect in terms of respect for human rights, which has been taken over by the UN by transposing it into the *Convention on the Rights of the Child* (Law no. 18/1990) ratified by all EU Member States. The convention is built on a series of principles that mainly refer to *human dignity* (Arts. 39 and 40 para. 2 letter b) of the UNCRC), *prohibition of torture and inhuman or degrading treatment* (Art. 37 of the UNCRC), *the right to freedom and security; respect for private and family life* (Art. 8 of the UNCRC), *protection of personal data; non-discrimination* (Art. 2 of the UNCRC), *the right to an effective remedy*.

European Commission representatives conducted a study on the involvement of children in civil, administrative and criminal proceedings in all Member States of the EU (European Commission, 2015). With the support of the European Commission, it was possible to implement directives and communications of the Council and the European Parliament (Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime; Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings).

The European Commission prioritised child-friendly justice in its *EU Agenda for the Rights of the Child*. Among other efforts, it committed itself to promoting the Council of Europe's Guidelines on child-friendly justice, which focus on children's rights to be heard, to be informed, to be protected and safe (EU FRA 2017, 3).

The EU Agency for Fundamental Rights (FRA) has collected and analysed data to determine to what extent these rights are fulfilled in practice. It did so by way of interviews with professionals and children who have been involved in judicial proceedings (Art. 25 of the Directive 2012/29/EU). FRA's first report on its research centred on the perspective of professionals (EU FRA 2017, 10).

European Court of Human Rights jurisprudence shows the importance of having effective judicial procedures when children are involved (EU FRA 2016, 146). In a claim for the return of children to Norway under the International Child Abduction Convention, the ECHR emphasised the critical and major importance of the passage of time in these types of proceedings (ECHR 2015, para. 28). The Committee of Ministers of the Council of Europe issued a recommendation offering practical guidance to states on the length of proceedings in terms of redressing the manner specialists act when children are involved (Committee of Ministers 2010).

Treaty on European Union (TEU), The Charter of Fundamental Rights of the European Union (EU), UE regulations and directives, jurisprudence of the Court of Justice of the EU (CJEU), Conventions issued by Council of Europe, European Convention on Human Rights and the European Social Charter, jurisprudence of the European Court of Human Rights (ECHR), decisions of the European Committee of Social Rights (ECSR) these are legal standards that promote the fact that children are full-fledged holders of rights (EU FRA 2015, 3).

In Romania we find legal provisions regarding the minority in the regulation of the Penal Code (Law no. 286/2009), Title V - The general Criminal Code part, articles 113-114, also in the Code of Penal Procedure (Law no. 135/2010), Title V articles 243-244 and in the The Special

Part of the Code of Penal Procedure found in Title V articles 504-520, in the content of Law no. 272/2004 on the protection and promotion of the rights of the child, law transposing into national regulation the UN Convention on the Rights of the Child.

### **Child-friendly justice - best interest of the child**

Child Friendly Justice means better support from adults so that young people understand different laws and how to challenge them if they are not happy with how they are treated (Stalford, Cairns, Marshall 2017, 222).

As for a child, the state should act as *parens patriae*, not as a foe (ECHR 2016, para. 218). For example, redeeming important rights of a child that revolve around criminal matters, prevails over civil matters, so that a court cannot rely on a question of opportunity to include a case involving a child that belongs to civil matters and to exclude the criminal sphere, thus violating the right of the child to be able to express his opinions (Supreme Court of the USA 1966).

Furthermore, we reason with the idea that the origin of the legislation regarding specialized courts for minors, has its roots in the philosophy of social protection rather than in the *corpus iuris*, the courts having in particular the purpose of adopting measures of assistance and reintegration of the child into society, rather than to establish the prevailing of criminal liability. In principle, specialized courts for minors have a duty to determine the needs and interests of the child and the society rather than to judge criminal behavior (Art. 40 para. 1 of the UNCRC).

No doubt that in Europe there are a variety of rules and practices in the field of child-friendly justice, which Member States must implement in national law, but their application must take into account a broad spectrum, which includes all children who interact with the justice system, regardless of their status, whether victim, witness or perpetrator (Arts. 18-23 of the Directive 2012/29/EU), either with its own specific needs (SCM of Romania 2013, 124). In support of this idea, a *sine qua non* condition for taking steps towards child-friendly justice is for legal professionals to have professional training, to raise their awareness on the needs of vulnerable victims and to allow them to treat children in contact with the law in a respectful, impartial and professional manner (Art. 25 of the Directive 2012/29/EU).

Guidelines of Council of Europe Committee of Ministers promote policies that take into account the age, maturity (Art. 12 of the UNCRC), opinions, needs and concerns of a child involved in a judicial procedure. For example, the right of the child to be heard is paramount in such procedures (UNICEF 2018, 21), however repeated hearings can produce him trauma, reaching right up to re-victimization. Therefore, the policies developed must take into account the particularities of the case and impose a number of hearings in accordance with each child's personality. Video and audio recording is a sustainable solution to avoid repetition of hearings and to guarantee the admissibility of testimonies as conclusive evidence for the effective settlement of the case (EU FRA 2012, 50).

The legislative frameworks, usually have a high degree of generality, in all areas of law, so that specialists have to customize the applicability of the legislative norms according to the subject of law, and this is achieved through a multidisciplinary approach of the cases in which a child is involved. It is necessary the presence of both legal and social workers specialists, even psychologists and doctors. The latter can inform the child about his / her rights before, during and after a judicial procedure, in a language of their understanding (EU FRA 2012, 50).

It was stated that the legal system is dysfunctional due to the lack of collaboration between the services that come in to support a child involved in a judicial procedure. Correctional, mental health, welfare and education systems have difficulties in collaborating in these types of cases and if it is desired to implement an effective proceduralism, which responds to the individual needs of a minor, it is essential that the practice be inspired by sociological research and by training of specialists who elaborate or apply laws regarding children (Hill, Lockyer, Stone 2007, 80).

Child-friendly studies have concluded that children want to be heard when participating in court proceedings, but that they need to feel safe and comfortable, so everyone involved should contribute to creating safe and friendly hearing conditions in order to facilitate the children's participation. This includes hearing children in separate special equipped rooms, use of video recordings as evidence, having only one trained professional hearing the child, avoiding having too many people present, have a trusted person accompany the child, informing and appropriately asking the child about the procedural safeguards and verifying the child's understanding of the rights and procedures (EU FRA 2018, 6).

### **Judicial procedures deficiencies in promoting the best interest of the child**

The rigor of applying judicial procedures prior to the beginning of the criminal trial, thus understanding the activity of the criminal investigator, prosecutors, forensic experts, can create the minor a re-victimization if the physical examination is performed invasively, relevant examples constituting taking of evidence from the human body for the investigation of main biological traces or even judicial photography (Turvey, Petherick 2009, 130).

During judicial proceedings in cases involving minors, the best interests of the child must be protected, taking into account the degree of maturity, the emotional and intellectual capacities, encouraging its effective participation (UNCRC, articles 9 and 12), precisely in terms of guaranteeing compliance with this principle (ECHR 2010, para. 80). If a legal provision is open to more than one interpretation, the construction which most effectively serves the child's best interests should be chosen (Art. 41 of the UNCRC).

In addition to the fact that the courts are obliged to provide the child in conflict with the criminal law, free legal assistance, it must be kept in mind that a lawyer is required to inform him about his rights throughout his contact with the law (Zermatten 2008, 100), even from the first police inquiry (ECHR 2008, para. 62). In light of this idea, as long as the juvenile is in police custody to file a statement, he must be accompanied by one of the parents, legal guardian or social worker and when the situation imposes, even by a doctor (Council of Europe 2003, para. 15).

In a study carried out by FRA regarding the experiences and perspectives of children in judicial proceedings, we can extract from their testimonies the fact that there is a lack of communication skills from the judges when they hear a child, thus resulting in deficiencies in the effective cooperation of minors (EU FRA 2017, 48). In civil cases, when a child is brought to court as a witness or when the case directly concerns him, the court hearing must be closed, but from the children testimonies, it appears that this aspect is not respected by all courts, so that at the time of the hearing, foreign persons, irrelevant to the case, are present in the courtroom (EU FRA 2017, 54), in this situation the hearing is shortened and the child is not given the time and space needed to express himself in an unrestrained way. The increase on the lack of protection and the appearance of fear can occur when the minor victim meets the accused party, being followed by the inappropriate behavior of the practitioners and the intimidating environment in which the minors are located (European Commission 2014, 15).

Non-discrimination can come from the judges' idea that the opinion of a child is not important or cannot be a conclusive means of proof, thus leaving the child with the impression that they do not matter. For example, when the child's parents or siblings are present in the courtroom, the judge asks questions only to them, and the presence of the minor is not taken into account (Unicef 2010, para. 9). Of course, discrimination can also come from the stigmatization of the child based on race, religion ethnicity, health or financial condition.

### **Conclusions**

We promote the idea that the right of the child to enjoy a special treatment that is in accordance with his needs and concerns should not be proven or negotiated, therefore we must take steps towards an

effective implementation of such rights, which should be rather of intervention, of concretization of results obtained from studies, specialized research, legislative frameworks and good practices. The existence of specialized courts for minors in the Member States but also outside the EU area remains a problem that does not seem to have a concrete solution. We consider that the basis of respecting the best interests of the child is the creation of a space in which, unequivocally, the protection of all his rights should be a priority, even before the court's ruggedness.

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