

ASSESSMENTS ON THE RIGHTS OF JUVENILES IN DETENTION

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Abstract

The method of resorting to other penalties penalty instead of imprisonment represents an important one for reducing the criminal antecedents, as studies show that the minors detained are more likely to commit new offences. School and family are two important factors for juvenile integration into society..

Criminological research has shown that delinquency among minors must be prevented primarily through measures of protection, education and rehabilitation of juvenile offenders.

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International documents extensively regulate children's rights also in the case of committing an offense stipulated by the criminal law. The main international documents in this field are: the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).

I. *The Convention on the Rights of the Child* was adopted by the UN General Assembly on 20 November 1989² and entered into force on 2 September 1990.

This Convention stipulates rights such as: the right to life (article 6), child protection against all types of discrimination regardless of race, gender, language, religion (article 2), the right to express one's views freely (article 12); to seek and impart information and ideas of all kinds (article 13); the right to freedom of thought, of conscience and religion (article 14); the right to have access to any information source, to rest and to vacation (article 31), etc. These rights are protected both during times of peace and war.

The signatory countries in this Convention are obliged to harmonise their national legislation with its provisions.

There is special protection against deprivation of liberty done unlawfully or arbitrarily. Thus, article 37 letter b. of the Convention on the Rights of the Child states that: "no child shall be deprived of liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child under the law shall only be a last resort measure and shall be as short as possible." Further on in the article, at letter c. and d., it is mentioned that treatment with respect of any child deprived of liberty according to his/her age is absolutely necessary. Children deprived of liberty shall be separated from adults unless it is considered preferable not to be separated; they have the right to keep in touch with their family through mail and visits, as well as the right of access to legal assistance. Article 37 letter a. also stipulates that the death penalty or life imprisonment does not apply to people aged under 18. In the same paragraph of the article it is also mentioned that the child shall be protected against torture, punishment or cruel, inhuman or degrading treatment.

A number of criminal procedural guarantees are stipulated in article 40 point 2 letter b: the child must be informed of the charges against him/her and be given legal assistance; he/she must benefit from the presumption of innocence; the case must be settled without delay; he/she shall not be compelled to confess his/her guilt; he/she must be given the right to appeal, the right of his/her views to be taken into account, etc. Particular importance is given to the child's right to be heard in any judicial or administrative procedure, a right which

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²Romania ratified this Convention by Law no. 18 of September 25, 1990, published in the Official Gazette no. 109, Part I, from 28 September 1990.

before the adoption of this Convention was inserted only in special laws, but not in a treaty.

Mainly speaking, the rights of the minors are considered as a whole. However, the novelty brought by the Convention on the Rights of the Child is that “it introduced in the international law new rights that had not existed before, such as the right of children to preserve their nationality, name and family relations, as well as the right of local children to maintain their own culture (article 8 and 30) (Brutaru, 2012).”.

II. *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* was approved by the UN General Assembly Resolution no. 40/33 of 29 November 1985 and adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders.

The Beijing Rules are divided into six sub-sections: general principles; instruction and prosecution; trial and resolution of the causes; treatment in an open environment; treatment in institutions; research, planning, policy development and assessment.

The articles from the beginning, especially 1.1 and 1.3 focus on the need to ensure the welfare of the minor and the effective, human and equitable treatment of the person in conflict with the law.

Article 1.4 states that juvenile justice is an integral part of the national development process of each country and it contributes to the protection of young people. The rules in this set are expressed so as to take into account the existence of economic, social and cultural conditions of each Member State (article 1.5)

The minimum rules apply to juvenile offenders impartially, regardless of race, colour, gender, language, religion, political or other opinions, national or social origin, wealth, birth or other status (article 2.1). The terms of “minor” and “offense” are defined in article 2.2, at the end of it, by joining the two terms the meaning of “juvenile offender” is outlined. Thus:

- “the minor” is a child or a young person who may be responsible for an offense under a system of sanctions different from those applicable to an adult;

- “the offence” means any conduct that may be action or inaction and which is punished according to a legal system;

- “the juvenile offender” may be a child or a young person accused or found guilty of an offense.

The adoption of national laws is necessary to ensure a better applicability of this set of minimum rules (article 2.3).

The limit of criminal liability greatly differs depending on periods and cultures. In order to determine the age of criminal liability we take into account a child’s capacity of discernment and understanding in order to see if he/she can bear the moral and psychological consequences of the criminal liability, that is to say if he/she can be held responsible for an antisocial behaviour. When the age of criminal liability is set too low or there is no age limit, then the concept of criminal liability does not make much sense. There must be a relation between the notion of criminal liability and other social rights and responsibilities (for example the civil adulthood, the marital status, etc.).

The threshold of criminal liability should be set at a reasonably low limit and be applicable in all countries (article 4.1).

Article 5.1 aims at two important objectives of juvenile justice. The first objective is to ensure the welfare of the minor by making a sanctioning system appropriate for minors. The second objective considers “the principle of proportionality” of the punishment. It is necessary to take into account the seriousness of the offense and the personal circumstances, as well as the social situation, the family situation or other factors (for example, to take into account the offender’s effort to compensate the victim or his/her desire to return to a healthy and useful lifestyle).

Juvenile justice must be effective, reasonable and humane, as highlighted in article 6.1, 6.2 and 6.3. Responsibility and professionalism are some of the most important qualities in applying fair justice to juvenile offenders.

Fundamental procedural warranties to ensure a fair trial are set out in article 7.1: the presumption of innocence, the right to be informed about the charges brought, the right to remain silent, the right to defence, the right to the presence of a relative or guardian, the right to examine and confront witnesses and the right to trial in two levels of court. The presumption of innocence is emphasised, which is also included in article 11 of the Universal Declaration of Human Rights, as well as in paragraph 2 of article 14 of the International Covenant on Civil and Political Rights.

The minor's right to privacy must be respected at all stages of the trial, especially since young people are particularly sensitive when qualified as "delinquent" or "offender". This conclusion was reached based on criminological research. Young people must be protected against the harmful effects of the media; no information should be made public if it may lead to the identification of a juvenile offender, such as the name of the minor in preventive or final detention (article 8.1 and 8.2).

Article 10.3 stipulates matters related to the conduct of the police officers or other agents of coercive services in cases of juvenile delinquency. It is necessary to respect the legal status of the minor and to avoid causing damage, by this one can understand verbal aggression, physical violence, psychological violence etc. By this expression we must understand that the aim is to do justice and less harm to the minors.

Recourse to extrajudicial means can be taken at any time by the police, the prosecutors and other services responsible for delinquency problems (courts, tribunals, commissions or councils), without applying the formal criminal proceedings (article 11.2).

The custodian or parent must give his/her consent for sending the minor to community services, without this consent the decision is contrary to the Convention on the Rights of the Child. Juveniles should not be forced to give their consent, this being specifically underlined in article 11.3.

Article 11.4 recommends developing community programmes, especially those that provide temporary supervision and guidance for children not to come into conflict with the law or returning the goods and indemnities to victims. Recourse to extrajudicial means can also be justified in case worse offences were committed.

All those involved in the administration of juvenile justice must have good special training, especially the police, being the first body notified in performing juvenile justice. The police officers must act according to the situation, so as not to endanger the physical or mental integrity of the minor (article 12).

Preventive detention should be the last measure that could be taken on a short period of time. There must be the possibility that preventive detention be replaced by other measures, such as close supervision, assistance granted with utmost care or placement in a family, institution or educational home (article 13.1 and 13.2) .

Juveniles in preventive detention should receive all the rights and guarantees set out in the Standard Minimum Rules for the Treatment of Prisoners and the International Covenant on Civil and Political Rights (article 9 line b paragraph 2 and article 10 paragraph 3) (article 13.3).

The adult offenders' harmful influence should be removed so that juveniles shall be separated from adults. This is necessary because during preventive detention juveniles shall receive care, protection and full personal care, on social, educational, vocational, psychological, medical and physical level, taking into account their age, gender and personality (article 13.4 and 13.5).

The 6th Congress of the United Nations for crime prevention and treatment of offenders highlighted in the 4th Resolution regarding the Standard Minimum Rules for the Administration of Juvenile Justice that there is no need to resort to detention prior to trial and that juveniles should be separated from adult offenders taking into account the child's stage of development.

The right to be represented by a lawyer or of asking to be appointed a lawyer is required during the entire procedure. The parents or legal guardians may participate during the proceedings, but if their presence has a negative effect during the hearing, for example they have an attitude that frightens the minor, they may be excluded (Article 15.1 and 15.2).

Social inquiry reports aim at informing the competent authorities on issues such as the minor's antecedents, the conditions in which he/she lives, the school situation, the family situation, the circumstances in which the offense was committed, etc. The role of the social inquiry is to facilitate the trial. Article 16.1 recommends that the accomplishment of these reports be done by certain social services such as probation services officers (article 16.1).

For the juvenile offender the proceedings shall be conducted according to certain guidelines (article 17.1):

- to have proportionality between the court decision and the circumstances, the seriousness of the offense, the offender's circumstances and needs;
- restrictions on the personal liberty of the juvenile shall not be made until thorough examination of the case;
- in case there is no other alternative, imprisonment shall be imposed to the juvenile only if it is estimated that by the offense committed the minor caused damage to another person or he/she is a recidivist;
- the decisive criterion in the examination of the case shall be the welfare of the minor.

The purpose of the principles laid down in article 17.1 is to ensure the protection of the fundamental rights of young people and to define a procedure as close as possible to the universally accepted principles.

Article 17.2 completely prohibits the application of the juvenile death penalty. A similar statement is found in article 6, paragraph 5 of the International Covenant on Civil and Political Rights.

Corporal punishment is prohibited (article 17.3), an aspect also met in article 7 of the International Covenant on Civil and Political Rights, as well as in other international documents: the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child.

The family is the most important element in the minor's development (article 18.2) or "the natural and fundamental element of the society" (article 10 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights). The minor's separation from his/her parents is a serious measure and can be applied only in exceptional cases (for example maltreatment of the minor applied by his/her parents).

The admission of a juvenile in an institution shall be a measure of last resort, and its duration should be as short as possible (article 19.1). The 4th Resolution of the Sixth United Nations Congress states that no young offender shall be incarcerated in a penitentiary unless there is no other appropriate means.

The rapidity of the procedure is extremely important for the minor. A long time taken in the procedure is an obstacle for the minor in terms of intellectual and psychological aspects. The lack of celerity makes the transition from the deed to the procedure that led to his/her sanctioning more difficult to overcome (article 20.1).

The mode of execution of the court decision must be carefully supervised by the competent authority or body (article 23.1 and 23.2). Thus, in certain countries there has been appointed a judge specifically charged with the enforcement of the sentences.

The 9th Resolution of the 6th Congress of the United Nations directs the states to ensure equitable treatment for the juvenile offenders during the course of the court proceedings and to pay extra attention to the problems of these offenders. There is a special requirement to ensure fair treatment for female offenders in order to avoid any form of discrimination. This is included to some extent in the recommendation contained in the Declaration of Caracas, which explicitly required ensuring equal treatment in the administration of criminal justice, and in the Declaration on the Elimination of Discrimination against Women and the Convention on the Elimination of all Forms of Discrimination against Women (Zlătescu, 1998).

Article 26.1 and 26.2 underline the importance of treatment in an institution in the harmonious development of the minors. Medical and psychological care is extremely important for young drug addicts, violent and mentally ill people admitted in an institution.

The 4th Resolution of the 6th Congress of the United Nations recommends avoiding the negative influences of adult offenders and encourages the social reintegration of juveniles placed in institutions.

Article 30 draws attention to the review and development of programmes for juveniles and of planning juvenile justice in the context of global development. It is necessary to ensure community support for the successful implementation of the programmes adopted.

III. *The principles of the United Nations for preventing juvenile delinquency*, also known as the *Riyadh Principles or Guidelines* adopted by Resolution 45/112 of 14 December 1990 by the General Assembly of the United Nations.

The principles emphasise that the prevention of juvenile delinquency requires efforts from the whole society, which must ensure the harmonious development of teenagers. For the children to be reintegrated into society it is suggested to attract the family, the school and the community in this process.

The Riyadh Guidelines recommend the following:

- minors and young people should have an active role in partnership with the society and not be considered as objects of socialisation or control (paragraph 3);
- implementation of the principles will be done in accordance with the national systems, having as main objective the welfare of the young people (paragraph 4);
- the policies of progressive delinquency prevention and their study are necessary (paragraph 5).

For the measures to be effective it is recommended that they be implemented along with other fundamental documents in the field: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on Children's Rights and the Child's Rights Convention and the United Nations Standard Minimum Rules on the Administration of Juvenile Justice (the Beijing Rules) (Part 2: Purpose of Principles).

The prevention policies should facilitate socialisation and integration of children and youth, especially with the help of the family, community, compatible groups, schools, voluntary organisations, training and employment system (paragraph 10).

The 4th part of these principles, called Socialisation processes, has a section entitled Family. Thus, the principles want to emphasise that the family is the nucleus of the society, "the basic unit responsible for the primary socialisation of children" (paragraph 12). The society must give priority to the needs and welfare of the family and its members. If there is not a stable family environment and the family did not fulfil its role and the society failed in

its mission to assist the parents in this conflict, there will be taken alternative placement measures including careful supervision and adoption (paragraph 14). The family performs the socialisation function, an aspect emphasised in this section.

Education and learning are key factors in preventing psychological failures, in emotionally supporting youth and their training.

Community services will be directed to advise young people and their families. The media should encourage the positive contribution of young people in society and to minimise the level of drugs, pornography or violence and to present violence and exploitation adversely (paragraph 41-43).

Legislation will be developed in preventing the victimisation, abuse, exploitation and use of children and youth in criminal activities (paragraph 53).

IV. The 8th Congress of the United Nations on the Prevention of Crime and Treatment of Offenders adopted the New Standards Minimum Rules for Non-custodial Measures, appointed on the recommendation of the Committee on Crime Prevention and Control, Tokyo Rules.

The Tokyo Rules were adopted by the United Nations General Assembly Resolution 45/110 within the 68th plenary session of 16 December 1990. The fundamental objectives of these rules are:

- encouraging the community to get involved more in the criminal justice process and in the treatment of offenders (rule 1.2);
- achieving a fair balance between the rights of the offender, the rights of the victims and the concerns of the society for the public safety and crime prevention (rule 1.4);
- development of non-custodial measures to rationalise criminal justice strategies taking into account the observance of human rights (rule 1.5);
- application of non-custodial measures shall be done in compliance with the offender's and his/her family's right to privacy (rule 3.10);
- provisional detention can only be a measure of last resort in criminal proceedings, taking into account the protection of society and of the victim (rule 6.1).

Conclusions:

The international documents presented in this study reflect best the juvenile offenders' rights internationally. Thus, the Convention on the Rights of the Child introduced new rights in the international legislation in this area; the Beijing Rules emphasise that juvenile justice is an integral part of the national development process of each country and contributes to the protection of young people; the Riyadh Guidelines emphasise that the prevention of juvenile delinquency requires efforts from the entire society; the Tokyo Rules reveal that the implementation of certain rules in this area is absolutely necessary in a modern and civilized society; the European Prison Rules provide the legal framework at EU level for juvenile offenders.

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