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Dossiê

“Prova testemunhal no processo penal, entre o direito interno e supranacional: testemunhas protegidas, interferência midiática, direito ao contraditório”



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Status of a child witness involved in the offence of an adult in criminal procedure – European Union standards

Situação da testemunha infantil ouvida no processo penal de delito cometido em coautoria com adulto – parâmetros da União Europeia

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ABSTRACT: Giving special importance to the rights of the child, international and European instruments set certain standards aimed at strengthening their guarantees. The standards improving the juvenile offender's status intend to ensure procedures that take account of the child's welfare and strengthen their procedural position which, otherwise, because of their age and psychophysical development may be more vulnerable than in the case of an adult's one. They refer directly to a juvenile offender in case of whom legal proceedings are conducted. This paper aims to clarify underlying issues of a specific procedural configuration, where separate proceedings are conducted regarding a juvenile offender, and separate criminal proceedings before a criminal court are run against an accused adult whose act is related to the juvenile's act. It attempts to answer, in the context of European standards, the question on the most important rights of a juvenile whose punishable act is in a close relation to an act of an adult offender, and who, for this reason, appears in a criminal trial as a witness. This paper takes into account the European Union standards which result from international children's rights instruments binding across the EU, the child-specific case law of ECtHR as well as the psychological aspects related to the psychophysical development of minors.

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KEYWORDS: juvenile; juvenile justice system; juvenile offender; juvenile witness; international safeguards for juveniles.

RESUMO: *Considerando a importância dos direitos da criança, os instrumentos internacionais e europeus estabelecem normas destinadas a reforçar as suas garantias. Tais regras, que melhoram a situação da pessoa jovem delinquente, pretendem assegurar procedimentos que tenham em conta o bem-estar da criança e reforçar a sua posição processual que, caso contrário, pela sua idade e desenvolvimento psicofísico, pode ser mais vulnerável do que no caso de um adulto. Essas normas se referem diretamente a um delinquente juvenil submetido a um procedimento judicial. Este trabalho visa a esclarecer questões subjacentes a uma situação processual específica, em que ocorrem processos separados em relação a um jovem infrator e contra um adulto acusado, cujo ato está relacionado com o ato do menor. Procura-se responder, no contexto das normas europeias, à questão sobre os direitos mais importantes de um jovem cujo ato infracional está em estreita relação com um ato de um adulto e que, por esse motivo, participa de um processo criminal como testemunha. Este artigo considera as normas da União Europeia que resultam dos tratados internacionais dos direitos da criança vinculantes em toda a UE, a jurisprudência específica da criança do TEDH, bem como os aspectos psicológicos relacionados com o desenvolvimento psicofísico dos jovens.*

PALAVRAS-CHAVE: *jovens; justiça juvenil; jovem infrator; testemunha infantil; garantias internacionais para jovens e crianças.*

SUMÁRIO: 1. Introduction, 2. European procedural safeguards for juvenile offenders, 3. Scope of procedural guarantees of a juvenile as a witness in criminal procedure, 3.1. The right of silence and privilege against self-incrimination, 3.2. The right of access to a lawyer, 3.3. Exclusion of the public hearing, 4. Conclusions, References

1. INTRODUCTION

In recent years, children's rights² have developed considerably. "During this process, it has become clear that children have unique needs

² In this paper, the author is using the terms 'child' and 'minor' in the same meaning. These are the notions used in several international instruments,

which should be taken into account, *inter alia* when they come into contact with the justice system”³. A special treatment is required especially when children commit a punishable act or are involved in any other way in the offence. For this reason, the legal situation of a child who participates in the criminal justice system “has been specifically addressed in a number of international and regional children’s rights instruments”⁴.

Despite the existence of a number of international instruments on children’s rights, the Council of Europe has noted that the position of the child in the administration of justice is not always sufficiently secured. For this reason, in 2010 it adopted the Guidelines on child-friendly justice⁵, “specifically to ensure that justice is always friendly towards children, no matter who they are or what they have done”⁶. It indicates that child-friendly justice refers to “justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level (...) giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting

in particular the Convention on the Rights of a Child, referring to all young people under the age of 18. Also, in international and European legal acts, the term ‘juvenile justice’ is in use. However, as a rule, ‘juvenile’ in this meaning refers to such a child who is involved in a punishable act, and the ‘juvenile justice system’ refers to a model of children liability. In this paper, the author using the notion of a juvenile refers to a meaning in the sense of Article 40(3) UNCRC: “children alleged as, accused of, or recognized as having infringed the penal law”.

³ SCHENNACH, Stefan. *Child-friendly juvenile justice: from rhetoric to reality*, Report of Parliamentary Assembly of Council of Europe, 19 May 2014, Doc. 13511, p. 3. Available at: <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnNveG1sL-1hSZWYvWDJILURXLV4dHIuYXNwP2ZpbGVpZD0yMDkxNCZsY-W5nPUVO&xsl=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnNveG1sL-3hzbC1mby9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xslt-params=ZmlsZWlkPTIwOTE0>. Accessed on: 27 June 2022.

⁴ *Ibidem*.

⁵ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted on 17.11.2010, p. 7, <https://rm.coe.int/t/16804b2cf3>. Accessed on: 16 September 2022.

⁶ Foreword to the Guidelines.

the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity”⁷. The values referred to in this definition apply to all types of proceedings, both within the scope of criminal justice and juvenile justice.

One of the principles of child-friendly justice is the diversion from judicial proceedings. Whenever it is possible, children should be directed away from the formal criminal proceedings and prosecution towards community support services⁸. However, it is not always possible or advisable.

In accordance to international standards, proceedings in case of a juvenile offender who committed a prohibited act should be conducted at least as part of separate model of liability, so that the juvenile is not a subject to criminal liability and a criminal trial under the rules applicable to adults. The aim is not to hold the juveniles responsible or to punish them, but rather to create conditions preventing them from demoralisation, to protect, care for and educate them in order to change their social attitude⁹. As Sarah Freitas concludes, unlike the adult penal system, the juvenile justice system has philosophical roots in the doctrine of *parens patriae* – the parental power of the state¹⁰. There is no doubt that such a procedure should ensure that juvenile offenders have rights that will guarantee just and fair court proceedings, taking account of the child’s welfare and their cognitive capabilities resulting from their age, as well as physical and mental development. The standards improving the juvenile

⁷ Guideline II(c).

⁸ Commentary to the Beijing Rules, Section 11; F. Dünkkel points to six theoretical assumptions seen as a basis for the diversion. See: DÜNKEL, Frieder. *Diversion: A Meaningful and Successful Alternative to Punishment in European Juvenile Justice Systems* [in:] JÜNGER-TAS, Josine and DÜNKEL, Frieder (eds.). *Reforming Juvenile Justice*, Springer Dordrecht Heidelberg London New York 2009, p. 149.

⁹ The welfare and rehabilitative treatment model instead of criminal justice model is commonly recommended in case of juveniles. This directly results from the international instruments, in particular UNCRC.

¹⁰ FREITAS, Sarah. *Extending the Privilege against Self-Incrimination to the Juvenile Waiver Hearing*, *The University of Chicago Law Review* Vol. 62, No. 1 (Winter 1995), s. 303 and the literature indicated there.

offender's status intend to ensure procedures that take account of the child's welfare and strengthen their procedural position which, otherwise, because of their age and psychophysical development, may be more vulnerable than in case of an adult's one.

At the same time, international law allows, in strictly defined and justified cases, a possibility of conducting criminal proceedings against a juvenile before a criminal court. In such a case, however, in Europe, it is indicated by the Council of Europe, the European Parliament and the Council that, in addition to a "fair and public hearing within the reasonable time by an independent and impartial tribunal established by law"¹¹, the provisions of law should ensure that all the guarantees are in the interest of a juvenile, taking into account their special status. In this respect, there are a number of instruments in international law that are designed to strengthen and increase procedural rights of a juvenile offender. On the European level of particular importance are Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice of 17 November 2010 ("Guidelines")¹² and the Directive of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings ("Directive 2016/800")¹³.

At the same time, the international legislator notices the need to strengthen the rights of a witness child who is obliged to testify in the course of criminal proceedings. A particular emphasis is placed on the protection of a child victim of a crime. This subject was of interest to many international bodies, which resulted, at the global level, in the adoption of, among others, UNO's Guidelines on Justice in Matters involving

¹¹ Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (European Convention on Human Rights, as amended) (ECHR).

¹² Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies. Available at: <<https://rm.coe.int/16804b2cf3>>. Accessed on: 14 September 2022.

¹³ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, v. 59, p. 1–20.

Child Victims and Witnesses on Crime of 22 July 2005¹⁴. On the other hand, on the European level, there was an adoption of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)¹⁵, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims¹⁶ or Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime¹⁷ which are not specifically addressed to children but contain provisions referring to special needs of child victims.

However, it should be stressed out that in certain situations, a punishable act of a juvenile may remain in a close relation with a punishable act of an adult. First of all, this applies to a situation where a juvenile is a co-perpetrator of an act committed together with an adult who is a subject to criminal liability. However, it may also apply to other forms of criminal cooperation, such as aiding, abetting but also parallel perpetration. Without going into details of individual cases, it should be emphasised that these are situations in which the act of a juvenile is so closely related to the act of an adult that there are certain elements of their joint action or omission, significant from the point of view of the features of the prohibited act. As different rules apply to juveniles, two separate proceedings are conducted in such a case: one, in case of the juvenile offender before the juvenile court, the other, the criminal proceeding against the adult before the criminal court. In such a situation, the juvenile may participate in the criminal proceedings of an adult as a witness. Then, the status of the juvenile is not only determined by

¹⁴ ECOSOC Resolution 2005/20, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. Available at: < <https://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf> >. Accessed on: 1 July 2022.

¹⁵ Council of Europe, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007.

¹⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101, p. 1.

¹⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315, p. 57.

the regulations referring to the hearing of a child witness but also by provisions regulating the hearing of a co-perpetrator. Undoubtedly, this is a situation that requires special diligence and protection. A conflict of interests is obvious. On the one hand, there is a need to ensure the right to defence, including the right of silence and privilege against providing evidence against oneself, on the other hand – there is a need to fulfil the procedural obligations on the part of a witness called before a prosecution agency or a court, including the obligation to give evidence and not to hold back the truth¹⁸.

This paper refers to such a specific procedural configuration, in the context of international safeguards, where separate proceedings are conducted regarding a juvenile offender; and separate criminal proceedings before a criminal court are run against an accused adult. It aims to systematise and emphasise the most important procedural rights of such a child witness in the context of European standards, taking into account special procedural needs of the child. It attempts to draw attention to individual rights that should be directly guaranteed in national legislations to provide real protection for minors who find themselves in such a procedural configuration. Moreover, this paper takes into account the European Union children's rights standards, the child-specific case law of ECtHR as well as the psychological aspects related to the psychophysical development of minors.

In order to understand the position of a child witness in such a configuration, one should first understand the scope of guarantees ensured for the juvenile offender being accused or suspected in the course of criminal proceedings under the international and European instruments. If such a child were a co-accused in the trial, they would use certain rights that would strengthen their position in the trial. Section 2 briefly indicates the basic rights of a juvenile in such a criminal trial. Then, section 3 indicates the main problems related to the presence of a juvenile offender of a punishable act as a witness in separate criminal proceedings, followed by some concluding remarks related to the required procedural safeguards in this respect.

¹⁸ PAWELEC, Szymon. Procedural Aspects of Participation of Juvenile Offenders in Criminal Proceedings: General Remarks. In: JANUSZ-POHL, Barbara. (ed.). *Juvenile Justice Systems: Poland-Brazil-Portugal*, Peter Lang 2021, s. 97.

2. EUROPEAN PROCEDURAL SAFEGUARDS FOR JUVENILE OFFENDERS

“The right to a fair trial is a core pillar of a democratic society”¹⁹ and should, in no way, be differentiated according to the age of the accused. The safeguards referred to in the international and European instruments relating to children are mainly designed to make sure that juvenile offenders have the right to a fair trial, with the right to defence being its most significant aspect. National legislations should not only take account of the minimum standards provided for accused adults, but, above all, create conditions that allow the genuine and real exercise of the right of defence by juveniles, adapted to their age and psychophysical development.

At the global level, the attention should be paid, first of all, to the United Nations Convention on the Rights of the Child adopted by the UN General Assembly on 20 November 1989 (“UNCRC”). And, although it concerns a number of rights of a civil, political, economic, social and cultural nature, various Articles of the UNCRC distinctly resonate with juvenile justice, both in relation to the child witness and juvenile offender. Moreover, at this level, the standards in respect of the juvenile justice system are directly established by – but not limited to:

1. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the ‘Beijing Rules’) adopted by the United Nations General Assembly in 1985²⁰,
2. United Nations Guidelines on the Prevention of Delinquency (the ‘Riyadh Guidelines’) adopted by the United Nations General Assembly in 1990²¹,

¹⁹ SAMARDŽIĆ-MARKOVIĆ, Snežana and O’FLAHERTY, Michael. *Handbook on European law relating to the rights of the child*, Publications Office of the European Union, 2017, p. 197.

²⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) adopted by General Assembly resolution 40/33 of 29.11.1985. Available at: <<https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/beijingrules.pdf>>. Accessed on: 14 September 2022.

²¹ United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) adopted by General Assembly resolution 45/112 of 14.12.1990. Available at: <<https://www.ohchr.org/en/>>

3. United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the ‘Havana Rules’) adopted by the United Nations General Assembly in 1990²²,
4. General Comment No. 10 adopted by the United Nations Committee on the Rights of the Child in 2007²³.

“The United Nations instruments were further buttressed within the European context by a movement towards child-friendly justice driven by the Council of Europe”²⁴. When analysing European legal instruments, both EU law and CoE law should be taken into account. On the EU level, first of all, the EU Charter of Fundamental Rights (“Charter”)²⁵ should be pointed out, which “establish[es] basic rights of access to justice which sustain fair trial guarantees for both adults and children”²⁶, and as well the Directives, which directly relate to the procedural position of the

instruments-mechanisms/instruments/united-nations-guidelines-prevention-juvenile-delinquency-riyadh>. Accessed on: 14 September 2022.

- ²² United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) adopted by General Assembly resolution 45/113 of 14.12.1990. Available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-rules-protection-juveniles-deprived-their-liberty>>. Accessed on: 14 September 2022.
- ²³ General Comment No. 10 (2007): Children’s Rights in Juvenile Justice adopted by the United Nations Committee on the Rights of the Child on 25.04.2007, CRC/C/GC/10. Available at: <<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>>. Accessed on: 14 September 2022.
- ²⁴ SCHENNACH, Stefan. *Child-friendly juvenile justice: from rhetoric to reality*, Report of Parliamentary Assembly of Council of Europe, 19 May 2014, Doc. 13511, p. 5. Available at: <<http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnVvcveG1sL-1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDkxNCZsY-W5nPUVO&xsl=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnVvcveG1sL-3hzbC1mby9QZGYvWFJlZi1XRc1BVC1YTUwYUERGlnhzbA==&xslt-params=ZmlsZWlkPTIwOTE0>>. Accessed on: 27 June 2022); GOLDSON, Barry and KILKELLY, Ursula. International human rights standards and child imprisonment: Potentialities and limitations, *International Journal of Children’s Rights* 2013, vol 21 issue 2, pp. 345-371.
- ²⁵ Charter of Fundamental Rights of the European Union, OJ 2016 C 202/389.
- ²⁶ SAMARDŽIĆ-MARKOVIĆ, Snežana and O’FLAHERTY, Michael. *Handbook on European law relating to the rights of the child*, Publications Office of the European Union, 2017, p. 197.

accused, including the child, that is Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings²⁷, Directive 2012/13/EU on the right to information in criminal proceedings²⁸, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (“Directive 2013/48”)²⁹ and the most important the Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (“Directive 2016/800”)³⁰. Of high importance are also the Guidelines mentioned already, which are not legally binding, however, “they represent a stepping stone in ensuring that justice proceedings, including those part of the criminal justice system, take into account the specific needs of children”³¹. Under the CoE level, the most significant is a fair trial guarantee defined in Article 6 of ECHR. Its rights and guarantees apply to both adults and children³², however, on the basis of ECtHR jurisprudence, the child-specific case law has developed which recognises a particular importance of the right to effective participation, as well as, the right of access to a lawyer.

In the above mentioned UE instruments, it is generally emphasised that a child-offender should be perceived and treated as a person with full rights, and they should also be entitled to exercise all their rights

²⁷ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1-7.

²⁸ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1–10.

²⁹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1–12.

³⁰ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1–20.

³¹ SAMARDŽIĆ-MARKOVIĆ, Snežana and O’FLAHERTY, Michael. *Handbook on European law relating to the rights of the child*, Publications Office of the European Union, 2017, p. 199.

³² *Ibidem*.

in a manner that takes account of their ability to express their opinion, and the circumstances of the case³³. “The juvenile offender must have the right to be heard and present their opinions, which also entails the need to make such statements adequately important, taking account of the child’s maturity and any communication problems, so that the child’s participation in the proceedings and their use of their rights should have a genuine and real impact on the proceedings”³⁴.

The main and most important procedural guarantees are: the right to information, which should be presented in the manner adapted to the age and ability to comprehend, the right to defence, including the right of access to a lawyer who should be available from the first possible moment, also, effective participation of a defence lawyer, the right to be presumed innocent until proven guilty according to law, the right to inform parents or guardians about the conducted proceedings, which should not replace the child’s right to information, and as well as the right to hold the court hearings in the absence of the public in order to protect child’s privacy and dignity³⁵.

When analysing the Strasbourg jurisprudence related to juvenile offenders, it should be pointed that, as a general rule, national criminal proceedings must be organised in such a way to respect the principle of the best interests of the child. “It is essential that a child charged with an offence is dealt with in a manner which fully takes full account of his

³³ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers on 17 November 2010 (guideline III.A.2).

³⁴ GŁĘBOCKA, Justyna. Procedural Aspects of Participation of Juvenile Offenders in Criminal Proceedings: Selected Specific Institutions, [in:] JANUSZ-POHL, Barbara (ed.). *Juvenile Justice Systems: Poland-Brazil-Portugal*, Peter Lang 2021, p. 118.

³⁵ For more on this respect, among others see: LIEFAARD, Ton and KILKELLY, Ursula. *Child-Friendly Justice. Past, present and future* [in:] GOLDSON, Barry (ed.). *Juvenile Justice in Europe: past, present and future*, Routledge 2019. p. 57 et al.; DÜNKEL, Frieder. *Young People’s Rights: The Role of the Council of Europe* [in:] JUNGER-TAS, Josine and DÜNKEL Frieder (eds.). *Reforming Juvenile Justice*. Springer Dordrecht Heidelberg London New York 2009, p. 33–44; JUNGER-TAS, Josine. *Reforming Juvenile Justice: European Perspectives* [in:] JUNGER-TAS, Josine and DÜNKEL Frieder (eds.). *Reforming Juvenile Justice*. Springer Dordrecht Heidelberg London New York 2009. p. 215-233.

age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings³⁶. Concrete examples of ‘effective participation’ requirements in respect to the juvenile in the course of criminal proceedings “include the child’s presence during the hearings, holding of in camera hearings, limited publicity, ensuring that the child understands what is at stake and limited formality of court sessions”³⁷. The right of a juvenile defendant to participate effectively in their criminal trial requires from authorities to deal with the juvenile with due regard to their vulnerability and capacities from the first stage of their involvement in a criminal investigation and, in particular, during any questioning by the police. “The authorities must take steps to reduce, as far as possible, the child’s feelings of intimidation and inhibition and to ensure that he has a broad understanding of the nature of the investigation, of what is at stake for him”³⁸. This should include the capacity of understanding the significance of any potential penalty as well as the scope of the right of defence, in particular, the right to remain silent.³⁹.

Of course, the above enumeration does not exhaust all the rights and guarantees mentioned in the European instruments and resulting from the ECtHR jurisprudence, however, they constitute a certain foundation which together set certain limits for a discretionary regulation of the procedural rights of juvenile offenders by national legislations. All these guarantees are mainly designed to ensure that the juvenile offender has the right to a fair trial, with the greatest emphasis on the broadly understood right to defence. National legislations should not only take account of the minimum standards provided for accused adults, but above all, create conditions that allow the real exercise of the right of defence by juveniles, adapted to their age and psychophysical development.

³⁶ Case of *V. v the United Kingdom*, ECtHR judgment of 16.12.1999, app. no. 24888/94, para. 86.

³⁷ SAMARDŽIĆ-MARKOVIĆ, Snežana and O’FLAHERTY, Michael. *Handbook on European law relating to the rights of the child*, Publications Office of the European Union, 2017, p. 202.

³⁸ Case of *Blokhin v Russia*, ECtHR judgment of 23.03.2016, app. no. 47152/06, para. 195.

³⁹ *Ibidem*.

3. SCOPE OF PROCEDURAL GUARANTEES OF A JUVENILE AS A WITNESS IN CRIMINAL PROCEDURE

Committing a punishable act by a juvenile which is in a close connection with the act of an adult may lead to a situation where separate proceedings are conducted against both offenders. The juvenile subjected to proceedings before a juvenile court should be provided with higher standards, taking into account their age and psychophysical abilities. Such proceedings are also geared towards other goals. Theoretically, it should be assumed that the status of the juvenile in the course of proceedings before the juvenile court is more favourable than in case of the adult against whom the criminal proceedings are conducted. Thus, calling such a juvenile offender as a witness in criminal proceedings against an adult may turn out to be less beneficial for them and, in a way, distort the sense of separating the judiciary of adults from the one of children.

For this reason, it is important to outline the most important rights of such a minor which should be clearly guaranteed by domestic legislators and exercised by national investigative and judicial authorities. They result from the combination of two sets of guarantees: one of the juvenile co-perpetrator testifying as a witness in criminal proceedings of an adult, and the other one of a child witness – which in general results from the standard of a child-friendly justice. In accordance to a special need of protection of the right to defence, it cannot disappear from sight that child's psychophysical development differs from that of an adult, so the need to secure their fundamental rights is higher. Evidence given in the course of criminal proceedings, although it may be important from the point of view of the principle of substantive truth, and often in relation to the right of the accused to defence, may at the same time have a negative impact on the procedural situation of a juvenile and may be used against them in proceedings before a juvenile court.

For this reason, taking into account international and European instruments related to the rights of a child taking part in criminal proceedings, the minimal standards for a juvenile offender acting as a witness are at least: the right of silence and privilege against self-incrimination, the right to be accompanied by the third person, in particular by the counsel, and also the right to exclude the public hearing in the

judicial stage of the proceedings. These rights should be directly included in a domestic law. It is not sufficient to admit that certain international rights must be respected, even if they do not arise directly from national law⁴⁰. Moreover, at the international level, some of them result not only from directly binding law, but also from ‘soft law’, which may be largely ignored or limited by domestic law enforcement or judiciary authorities when applying it⁴¹.

3.1. THE RIGHT OF SILENCE AND PRIVILEGE AGAINST SELF-INCRIMINATION

Both on the basis of international and European instruments, the right of silence and privilege against self-incrimination are undoubtedly guaranteed to the juvenile offender against whom the proceedings are conducted. Such a conclusion results from the general rule of applying at least the same rights to the child as to adults, especially those falling within the scope of the right to a fair trial. It is also directly ensured in the above-mentioned legal acts, both at the CoE and EU level. At the Strasbourg level, ECtHR repeatedly confirmed that general requirements of fairness included in Article 6 of ECHR apply to all criminal proceedings, irrespective of the type of offence at issue⁴², including the right to remain silent and not to contribute to incriminating oneself⁴³. In the light of the comments presented in section 2 above, a juvenile who is a subject

⁴⁰ Regarding the right against self-incrimination: ESCOBAR VEAS, Javier. A Comparative analysis of the Case Law of the European Court of Human Rights on the Right against self-Incrimination. *Revista Brasileira de Direito Processual Penal*, vol. 8, n. 2, p. 875, mai./ago. 2022.

⁴¹ Emma BELL, Juvenile (in)justice and neoliberal austerity in the European Union [in:] Barry GOLDSON (ed.), *Juvenile Justice in Europe: past, present and future*, Routledge Taylor & Francis Group, Abingdon, New York, 2019p.. 136-138.

⁴² Among others see: case of Blokhin v. Russia, ECtHR judgement of 23.03.2016, app. no. 47152/06, case of Negulescu v. Romania, ECtHR judgement of 16.02.2021, app. no. 11230/12, case of Buliga v. Romania, ECtHR judgement of 16.02.2021, app. no. 22003/12.

⁴³ See: case of Funke v. France, ECtHR judgment of 25.02.1993, app. no. 10828/84, case of O’Halloran and Francis v. the United Kingdom, ECtHR judgement of 29.06.2007, app. nos. 15809/02 and 25624/02.

to criminal proceedings, as well as a juvenile in proceedings before a juvenile court, have both the right to remain silent and the right not to accuse themselves.

Firstly, it should be acknowledged that the Strasbourg case-law allows a possibility of limiting the rights of defence and the general principle of substantive truth in order to protect a witness who, acting as an accused in other proceedings, enjoys the rights of defence. In some circumstances, a witness' refusal to give a statement or answer questions in the course of criminal proceedings may be justified in the view of the special nature of the witness' status⁴⁴. According to the ECtHR jurisprudence, this will be the case if a co-accused uses their right to protection against self-incrimination⁴⁵ or a former co-suspect refuses to give a statement or answer questions at the hearing as a witness⁴⁶.

In this context, two questions should be asked. Firstly, do juvenile court proceedings justify the exercise of the right to silence and privilege against self-incrimination? Secondly, is a juvenile able to make a decision regarding the exercise or waiver of their right independently and consciously?

The first question should be answered affirmatively. Undoubtedly, if a minor is a subject to criminal proceedings, their procedural status comes down to being a suspect or accused who fully enjoys all the rights under Article 6 of ECHR, including the right to defence and, resulting from it, the right to remain silent and not to submit evidence against themselves. In the event of conducting separate proceedings against a person whose act is related to the act of a juvenile, the latter should have the right to refuse to testify, which, if it were truthful, would often have negative consequences for them. Certain doubts may arise in a situation where no criminal proceedings are pending against a juvenile, but she or he is a subject to proceedings before a juvenile court which meets

⁴⁴ Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb), published by Council of Europe/European Court of Human Rights, 2022, p. 98.

⁴⁵ Case of Vidgen v. the Netherlands, ECtHR judgment of 10.07.2012, app. no. 29353/06.

⁴⁶ Case of Sievert v. Germany, ECtHR judgment of 19.07.2012, app. no. 29881/07.

educational and correctional goals. Regardless of the specificity of such proceedings and their goals in relation to such a juvenile, it should be considered that the proceedings are similar to criminal proceedings as they concern the commitment of a punishable act. The status of a juvenile, however, although not the same, is similar to the status of an accused in a criminal case. ECtHR concluded in this spirit, considering that juvenile delinquency proceedings are criminal prosecution proceedings, even though they are not so classified under national legislations. Consequently, rights guaranteed in Article 6 of ECHR should be fully respected in such proceedings. It should be further concluded that a juvenile being a witness may exercise their right to remain silent and privilege against self-incrimination if the testimony infringed their right to defence in separate proceedings before a juvenile court.

The right of silence and the right to freedom from self-incrimination are necessary derivatives of the right of defence. They provide defence against coercion and abuse⁴⁷, especially in relation to a child. Even if we admit that a juvenile acting as a witness has these fundamental rights, considerable doubts may arise as for the minor's psychophysical abilities to assess the situation and make a prudent decision regarding their use. Even in case of seventeen-year-old adolescents their capacities are heavily influenced by a lack of future-orientation, a lack of risk-aversion, impulsivity and suggestibility⁴⁸. Barry C. Feld referring to *Miranda* rights, emphasises the importance of the juvenile's ability to understand and exercise the ensured rights that have been repeatedly referred to. The child's reduced competency increases their vulnerability and renders them less able than adults to exercise rights effectively and consciously⁴⁹. In addition, "juveniles are often incapable of understanding

⁴⁷ THOBIN, John and READ, Cate. The Rights of the Child in the Juvenile Justice System [in:] THOBIN, John (ed.). *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press 2019.

⁴⁸ WEIJERS, Ido. Requirements for Communication in the Courtroom: A Comparative Perspective on the Youth Court in England/ Wales and The Netherlands, *Youth Justice* 2004, 4, 1, p. 25.

⁴⁹ FELD, Barry C. Procedural Rights in Juvenile Courts: Competence and Consequences [in:] FELD, Barry C. and BISHOP Donna M. (eds.). *The Oxford Handbook of Juvenile Crime and Juvenile Justice*, Oxford University Press 2012, p. 665.

the significance of their right to silence”⁵⁰ and privilege against self-incrimination. They also “do not appreciate the significance of rights in the same way as adults do, which may cause juveniles to waive their rights (...) more often and less deliberately”⁵¹. Even if a juvenile is instructed about the right to refuse to testify, they may find it strongly difficult to understand their status in the proceedings and the consequences of testifying or refusing to do so. Very often they do not consider reasonable arguments but rather their willingness to end the procedural act as fast as possible⁵². The problem of coercion may occur especially during the pre-trial stage of criminal proceedings. “Juveniles are generally more vulnerable than adults to intimidation and interrogation practices”⁵³. As indicated in the literature, “juveniles generally lack the competence to make autonomous decisions due to their particular susceptibility to external, social influences”⁵⁴. They have a general eagerness to comply with adult authority figures. “This makes juveniles particularly vulnerable when subjected to suggestive and (psychologically) coercive interrogation techniques, which might cause them, for example, to (falsely) confess in order to get the much-wanted approval of the interrogator”⁵⁵.

Taking into account the above considerations, it should be concluded, that undoubtedly, a juvenile offender, being a source of evidence in criminal proceedings with the position of a witness, and not

⁵⁰ FREITAS, Sarah. Extending the Privilege against Self-Incrimination to the Juvenile Waiver Hearing, *The University of Chicago Law Review* Vol. 62, No. 1 (Winter 1995), s. 317.

⁵¹ LIEFAARD Ton and van den BRINK, Yannick. Juveniles’ Right to Counsel during Police Interrogations: An Interdisciplinary Analysis of a Youth-Specific Approach, with a Particular Focus on the Netherlands, *Erasmus Law Review* 2014, 4, p. 215 and the literature indicted there.

⁵² PASZEK Krystyna and PAWELEC, Krystyna. Prawo małoletniego do odmowy złożenia zeznań, *Prokuratura i Prawo* 2008/12, p. 122.

⁵³ FREITAS, Sarah. Extending the Privilege against Self-Incrimination to the Juvenile Waiver Hearing, *The University of Chicago Law Review* Vol. 62, No. 1 (Winter 1995), s. 317.

⁵⁴ LIEFAARD Ton and van den BRINK, Yannick. Juveniles’ Right to Counsel during Police Interrogations: An Interdisciplinary Analysis of a Youth-Specific Approach, with a Particular Focus on the Netherlands, *Erasmus Law Review* 2014, 4, p. 215 and the literature indicted there.

⁵⁵ Ibidem.

an accused, should have the right to fully exercise their rights of defence. Moreover, limited psychophysical possibilities that would allow them to take an informed and consistent decision for their use is an important problem. This issue is of particular importance in relation to police interrogations during which a juvenile may be particularly exposed to coercion. For this reason, it is also extremely important to grant such a juvenile the right to be assisted by an adult person, for example a parent or guardian, in the course of procedural activities with their participation, in particular a lawyer.

3.2. THE RIGHT OF ACCESS TO A LAWYER

Referring to the role of a witness in which a juvenile offender may be, first of all, attention should be paid to the need to ensure the presence of a parent or guardian during any activities conducted by the interrogators or judicial authorities. In accordance to the international standards, a child witness should be assisted by an adult in procedural acts. This, firstly, increases the sense of their safety, which, in principle, may have a positive influence on the effectiveness of the act itself; and, secondly, it guarantees the exercise of their rights. In the EU, the need to ensure the presence of a parent or guardian in activities involving children is indicated indirectly in Article 24(3) of the Charter, in accordance to which, every child shall have the right to maintain, on a regular basis, a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests. At the CoE level, this right is emphasised even more strongly. The Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure⁵⁶ in Article 8 directly recommends: “whenever possible and appropriate, children (...) should be questioned in the presence of their parents or guardians or other persons qualified to assist them”.

Barry C. Feld, referring to a number of empirical studies, argued that the presence of parents or another adult in the course of procedural

⁵⁶ Council of Europe Committee of Ministers Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure of 28.06.1985.

acts may succour a child in exercising rights in their legitimate interest. “It is assumed that a parent’s presence enhances juveniles’ understanding of their rights, mitigates the dangers of unreliable statements, provides an independent witness of what occurs and reduces police coercion”⁵⁷. Furthermore, the active presence of parents in the course of the proceedings may significantly affect the factual exercise of the right to a counsel. While these comments were made in relation to juveniles who are accused, they can also be applied successfully to juvenile offenders who are witnesses at the same time in a separate proceedings and may not understand nor foresee the consequences of exercising or not exercising their right to remain silent and not to incriminate evidence against themselves. The presence of a parent or guardian may be necessary in this respect. Moreover, in the event of a waiver of rights, the role of a parent or guardian may be indispensable.

At the same time, it should be borne in mind that the actions of the parent or guardian do not always take into account the best interests of the child. There is a risk that parents’ or guardian’s advices during the police interrogations or court hearings are not in the child’s best interest. As John Thobin and Cate Read raise, this is a strong argument for the right to be accompanied by an independent third person, in particular the professional counsel, to ensure that they are able to exercise effectively their rights, especially the privilege against self-incrimination⁵⁸. And, although this position was presented in relation to a juvenile who is an accused, not a witness, it seems that it should also be taken into account in the case of a juvenile offender being a witness in criminal proceedings, whose legal situation should be similar to what it would be like if they had been a co-accused.

As indicated in section 2, the right of access to a lawyer is an indisputable right of any accused, in particular, in relation to juvenile

⁵⁷ FELD, Barry C. Procedural Rights in Juvenile Courts: Competence and Consequences [in:] FELD, Barry C. and BISHOP, Donna M. (eds.). *The Oxford Handbook of Juvenile Crime and Juvenile Justice*, Oxford University Press 2012, p. 668.

⁵⁸ THOBIN John and READ, Cate. The Rights of the Child in the Juvenile Justice System [in:] THOBIN, John (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press 2019.

offenders. At the EU level, the exact scope of the right of access to a lawyer in case of a juvenile is specified by the Directive 2016/800, which performance should take account of the provisions of the Directive 2013/48. As a general rule, juvenile offenders should have access to a lawyer from the first possible moment. Under the ECHR level, the right of access to a lawyer from the initial stage of the criminal procedure is considered as an essential part of the right of defence, and, thus, of a fair trial. The emphasis on the initial stage of the process, primarily led by law enforcement authorities, is of particular importance with regard to juveniles who need enhanced protection.

The ECtHR judgment in the *Salduz v Turkey*⁵⁹ case was of key importance in shaping the scope of the right to a lawyer in the EU law. And, although in the following years the ECtHR departed from the rigorous thesis presented in the above-mentioned judgment⁶⁰, in case of minors, it pays special attention to the need to ensure access to a lawyer from the first investigative acts⁶¹ as an expression of the need to guarantee them appropriate and adequate conditions for conducting the trial, taking into account the degree of maturity and psychophysical development. Particular attention is also paid to the waiver of the child's rights. "The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct"⁶².

In the scope of special juvenile offender rights, international standards also indicate the need to provide assistance of a parent or legal guardian in the performance of any procedural steps. Beijing Rules

⁵⁹ Case of *Salduz v Turkey*, ECtHR judgment of 27.11.2008, app no. 36391/02.

⁶⁰ Case of *Ibrahim and others v the United Kingdom*, ECtHR judgement of 16.02.2016, app. nos. 50541/08, 50571/08, 50573/08 and 40351/09.

⁶¹ Case of *Panovits v Cyprus*, ECtHR judgment of 11.12.2008, app. no. 4268/04, case of *Salduz v Turkey*, ECtHR judgment of 27.11.2008, app no. 36391/02.

⁶² *Ibidem*.

recognised the right to the presence of a parent or guardian as basic procedural safeguard that should be guaranteed at all stages of proceedings (Article 7.1). At the EU level “the right to be accompanied by the holder of parental responsibility during court hearings” where a juvenile offender is involved is indicated directly in Article 15(1) of the Directive 2016/800.

Summarising the above, it should be considered that the need to ensure a juvenile offender, acting as a witness in separate proceedings, the right to assistance of an adult, during procedural acts with her or his participation, is necessary for the protection of their basic procedural rights. First of all, the participation of the parent or guardian in all activities involving the child should be ensured, so as to assist them in exercising their rights, as their immaturity may negatively affect her or his pleading decisions in court⁶³. However, due to a special procedural role of such a witness, the risk of misunderstanding of the nature of the rights and, as a consequence, unknowing self-indictment or providing evidence that could then be used against them in their ongoing separate proceedings, it would be advisable to provide them with the right of access to a lawyer at a similar level as in case of a juvenile offender in criminal proceedings.

3.2 EXCLUSION OF THE PUBLIC HEARING

Last but not least is the issue of a public hearing. According to Article 47 of a Charter and Article 6 of ECHR, the right to a fair trial consists of the right to public hearing. However, as it is rightly mentioned in the literature, with regard to a juvenile, there is a justified need to protect privacy and limit the stigmatisation. As a rule, juvenile justice systems should exclude the public hearing in case of juveniles. This is referred

⁶³ As an example, T. Grisso points out that in research conducted in Australia, juveniles aged 15 years and younger are significantly more likely than older adolescents and adults to have compromised ability to act as competent defendants in court. See: GRISSE, Thomas (ed.), *Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants*, *Law and Human Behavior* 2003, 27(4), pp. 333–363, as referred to in: RICHARDS, Kelly. What makes juvenile offenders different from adult offenders, *Trends & issues in crime and criminal justice*, No 409, February 2011. Available at: <<https://www.aic.gov.au/publications/tandi/tandi409>>. Accessed on: 15 July 2022).

both in Article 40(1) of UNCRC in respect to the right of every child to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, and in Article 40(2)b vii) of UNCRC obliging to fully respect the child's privacy at all stages of the proceedings. Also, the Beijing Rules in Rule 8.1 include the juvenile's right to privacy which should be respected at all stages in order to avoid harm being caused to them by undue publicity or by the process of labelling. On the European Union level, above all, the following provisions of the Directive 2016/800 should be mentioned: Article 14(1), in accordance to "Member States shall ensure that the privacy of the children during the criminal proceedings is protected" and Article 14(2), under which, as a rule, Member States should "either provide that court hearings involving children are usually held in the absence of the public or allow courts or judges to decide to hold such hearings in the absence of the public".

Respecting the privacy of a child appearing in court is inextricably related to the theory of 'labelling', developed by sociologists during the 1960s. Children and adolescents who are labelled 'criminal' by the criminal justice system are likely refraining from social rehabilitation and continuing their criminal behaviour. "The stigmatisation engendered by the criminal justice system therefore produces a self-fulfilling prophecy — young people labelled criminals assume the identity of a criminal"⁶⁴.

In the light of the above comments, there should be no doubt that the proceedings in juvenile offenders' cases should be conducted in the absence of publicity. However, the obligatory exclusion of the public hearing should apply, for the same reasons, to any hearing involving a child, irrespective of its procedural role. As it has already been indicated many times, the status of a juvenile offender acting as a witness is, in many respects, similar to that of an accused. In such a procedural configuration, the juvenile's testimony regarding a punishable act in the course of criminal proceedings against an adult clearly refers to issues related to their person and their participation in the criminal behaviour, and, therefore, their needs related to protection against stigmatization remain valid.

⁶⁴ RICHARDS, Kelly. What makes juvenile offenders different from adult offenders, *Trends & issues in crime and criminal justice*, No 409 February 2011. Available at: <<https://www.aic.gov.au/publications/tandi/tandi409>> (accessed: 15.07.2022).

4. CONCLUSIONS

International instruments concerning children's rights do not directly regulate the legal situation of a witness who is also a juvenile offender of a punishable act against whom separate proceedings are conducted, both before a juvenile court or a criminal court. This does not mean, however, that they can be deprived of any real protection that would ensure minimum standards of fair procedural play. The above considerations are an attempt to compile general assumptions resulting from the adopted rules regarding proceedings with the participation of children, and particular requirements resulting from this procedural configuration.

Status of a witness who is also a juvenile offender in separate proceedings is undoubtedly specific. On the one hand, such a juvenile is not an ordinary child witness. On the other hand, they are not co-accused in a given case who benefit from the procedural guarantees granted to an offender. However, this does not change the fact that juveniles in such a procedural configuration deserve a special treatment, which will not deprive them of their rights. A different assumption and refusal to grant individual rights, in particular those described above, would lead to an unjustified different treatment of a juvenile, which could have serious negative consequences. Acceptance of such a situation and the lack of appropriate domestic regulations in this respect could even create a temptation to deliberately exclude the juveniles' case from separate proceedings, so that, after calling them as witnesses, one may obtain evidence of their guilt by depriving them of the guarantees that are fundamental from the point of the right to defence. Therefore, national legislations should directly support the right of silence and the privilege against self-incrimination to a child-witness, against whom separate juvenile proceedings are conducted. Due to the lack of psychophysical maturity, in order to implement these guarantees, additionally the right of access to a lawyer is highly important. Not without significance, from the point of view of the minor's welfare and their interests, there is also a need to secure the right to privacy by excluding the openness of court proceedings for the time of the juvenile's questioning.

In conclusion, it is worth recalling and emphasising that the long-term analyses of juvenile cases, their behaviour and susceptibility

to social rehabilitation show that minors have a broad predisposition to grow out of crime and adopt law-abiding lifestyles as young adults. “As juveniles are neither fully developed nor entrenched within the criminal justice system, juvenile justice interventions can impact upon them and help to foster juveniles’ desistance from crime”⁶⁵. *A contrario*, however, bad experience with the justice system, undermining trust in the authorities resulting from an inappropriate treatment, depriving juvenile of fundamental rights and not understanding their specific needs may lead to disruption of the rehabilitation process and result in serious difficulties in the future. For this reason, it is extremely important how the juveniles, regardless of their procedural role, will be secured in the course of criminal proceedings.

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