

The rights of the child and the administration of justice – what role for judges?

Catarina de Albuquerque

The Convention on the Rights of the Child (hereinafter, the “Convention” or “CRC”), was adopted by the General Assembly of the United Nations with Resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990 in accordance with Article 49. As of November 2005, the Convention had been ratified or acceded to by 192 States. It is the most ratified human rights instrument in history. The Convention was ratified by Romania on 28 of September 1990.

More than a decade later Romania adopted two fundamental and groundbreaking laws in this area: the Law on the Protection and Promotion of the Rights of the Child and the Law on the Legal Status of Adoption. Moreover, the United Nations adopted other standards – also applicable to Romania – in this field, namely the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the Guidelines for Action on Children in the Criminal Justice System.

All these standards call for a child-oriented system that recognizes the child as a subject of fundamental rights and freedoms and ensures that all actions concerning him or her are guided by the best interests of the child as a primary consideration.

The above mentioned standards are essential tools for the promotion of the rights of children in general and in particular to ensure respect for the rights of those children who are affected by the administration of justice through criminal, separation of adoption proceedings. They focus on the specific needs and interests of the child which differ in important areas from those of adults.

However, and in spite of the wide range of instruments ensuring the rights of the child, in many aspects these rights are not always respected nor taken into account. Sometimes children are just seen as “small citizens with small rights” and their particular needs are simply disregarded.

In this short article we will take a closer look at the situations of children victims or witnesses in judicial proceedings, of separation from parents and of adoption and also at how the international and national legal standards in the area of child rights protect children in these very specific situations. Moreover, we will also analyze the role of the judiciary in this regard.

1. The Child as Victim or Witness in a Judicial Proceeding

The Guidelines for Action on Children in the Criminal Justice System, adopted in 1997 by the United Nations Economic and Social Council¹, which develop some of the principles contained in the UN Convention on the Rights of the Child, provide some useful

¹ Economic and Social Council resolution 1997/30 of 21 July 1997.

principles which should inspire the work of police, prosecutors, lawyers and judges at the domestic level, when faced with child victims or child witnesses.

1.1. With regard to **child victims** the Guidelines provide that they should be treated with compassion and respect for their dignity. The

“victims [shall be] provided with appropriate access to justice and fair treatment, restitution, compensation and social assistance”².

Moreover, “[c]hild victims should have access to assistance that meets their needs [...]. Special assistance should be given to those children who are disabled or ill”³.

Furthermore, “[j]udicial [...] mechanisms should be established and strengthened where necessary to enable child victims to obtain redress through formal or informal procedures that are prompt, fair and accessible. Child victims and/or their legal representatives should be informed accordingly.”

According to paragraph 48 of the Guidelines,

“[a]ccess should be allowed to fair and adequate compensation for all child victims of violations of human rights, specifically torture and other cruel, inhuman or degrading treatment or punishment, including rape and sexual abuse, unlawful or arbitrary deprivation of liberty, unjustifiable detention and miscarriage of justice. Necessary legal representation to bring an action within an appropriate court or tribunal, as well as interpretation into the native language of the child, if necessary, should be available.”

Finally, child victims should be informed

“of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved”⁴.

1.2. In relation to **child witnesses** the Guidelines state that children

“need assistance in the judicial and administrative processes”.

In this regard

“States should review, evaluate and improve, as necessary, the situation for children as witnesses of crime in their evidential and procedural law to ensure that the rights of children are fully protected. [...] Direct contact should be avoided between the child victim and the offender during the process of investigation and prosecution as well as during trial hearings as much as possible. The identification of the child victim in the media should be prohibited, where necessary to protect the privacy of the child. Where prohibition is contrary to the fundamental legal principles of Member States, such identification should be discouraged. “

Moreover, the Guidelines encourage States to consider allowing

“videotaping of the child's testimony and presentation of the videotaped testimony in court as an official piece of evidence. In particular, police, prosecutors, judges and magistrates should

² See paragraphs 43 and 45.

³ See paragraph 46 of the Guidelines.

⁴ See paragraph 51 of the Guidelines.

apply more child-friendly practices, for example, in police operations and interviews of child witnesses.”⁵

Lastly, the Guidelines state that the judicial process should

“Encourag[e] the development of child witness preparation schemes to familiarize children with the criminal justice process prior to giving evidence. Appropriate assistance should be provided to child victims and witnesses throughout the legal process;

Allow[...] the views and concerns of child victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and in accordance with the relevant national criminal justice system;

Tak[e] measures to minimize delays in the criminal justice process, protecting the privacy of child victims and witnesses and, when necessary, ensuring their safety from intimidation and retaliation.”⁶

2. The Child who is separated from his or her parents

Both the Convention and the Child Rights law recognize the parent’s main responsibility to

“raise and ensure the proper development of the child; they have the duty to exercise their rights and to fulfill their duties towards the child, having the child’s best interests as a primary consideration”⁷

as well as the fact that parents have the

“primordial responsibility [...] to observe and guarantee the rights of the child”.⁸

In fact, the family is recognized as

“the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children “⁹

However, in exceptional situations the separation between the child and his or her family may be necessary. In fact, article 9 of the Convention on the Rights of the Child determines that

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”

According to the Convention such separation might be necessary in a case

⁵ See paragraph 50 of the Guidelines.

⁶ See paragraph 51 of the Guidelines.

⁷ See article 5 (2) of Law 272/2004 of 21/06/2004.

⁸ See article 6 d) of Law 272/2004 of 21/06/2004.

⁹ See 5th preambular paragraph of the Convention on the Rights of the Child.

“involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence”.

The Law on the Protection and Promotion of the Rights of the Child (hereinafter referred to as “Child Rights Law”) also recognizes that children may be separated from their parents in

“special and limited cases stipulated by the law, under the reserve of judicial revision and only if this is required by the best interest of the child.”¹⁰

According to the Child Rights Law, the

“public social security service will undertake all the necessary measures for the early identification of risk situations, which may determine the separation of the child from his or her parents”.¹¹

The separation of the child from his or her parents must be preceded by granting of services and assistance stipulated by the law (and specially informing, providing counseling, therapy and mediation to the parents) which is based on a service plan, which is drafted by the public social security system¹². In those cases where the public social security service or representatives of the general department for social security and child protection (GDSSCP) (after undertaking visits to a child in his or her residence) arrive at the conclusion that the

“child’s physical, mental, spiritual, moral or social development is endangered, the public social security service must immediately notify the general department for social security and child protection”.

Following this, the GDSSCP must refer the case to the court in case it

“considers that the conditions required by the law regarding the partial or complete termination of the parental rights of one or both the parents are met”¹³.

According to article 38 of the Law, the court

“is the only competent authority which may issue a decree, taking into primary consideration the best interests of the child, concerning:

- a) the person who exercises and fulfills the parental rights and duties, in case the child is deprived, either temporarily or permanently, of the protection of his or her parents;
- b) the ways in which the parental rights and duties are exercised and fulfilled;
- c) the partial or complete termination of the exercise of parental rights;
- d) the recovery of the exercise of parental rights.”

It is important to note that according to the UN Convention on the Rights of the Child, laws on separation must not be discriminatory nor be applied in a discriminatory manner. This idea is fully reflected in the Child Rights Law, namely in its article 7. In fact

¹⁰ See article 33 of Law 272/2004 of 21/06/2004.

¹¹ See article 34 of Law 272/2004 of 21/06/2004.

¹² See articles 34 (2) and 35 of Law 272/2004 of 21/06/2004.

¹³ See article 36 (3) of Law 272/2004 of 21/06/2004.

homelessness, poverty, financial situation, social or ethnic origin must not *per se* be grounds for removing a child from his or her parents.

In this context it is also important to note that

“all interested parties shall be given an opportunity to participate in the proceedings and make their views known”¹⁴

This includes, obviously, the child himself or herself. This idea follows from reading article 9 (2) in conjunction with article 12 (2) of the CRC, according to which

“the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body [...]”.

Also article 6 h) of the Child Rights Law mentions that the observance and guarantee of the rights of the child should be conducted in accordance of the principle of

“hearing the opinion of the child and giving it due weight, in accordance with the age and maturity of the child.”

Article 24 (2) of the Law also states that

“The child has the right to be heard in any judicial or administrative procedure which involves him or her. The hearing of the child who has reached the age of 10 years is mandatory. Nevertheless, the child who has not attained the age of 10 years may also be heard, if the competent authority deems it necessary, in order to solve the case.”

Finally, it is important to note that according to the Convention on the Rights of the Child¹⁵ and the Child Rights Law

“[t]he child who has been separated from both of his/her parents or from just one of them, as a result of a legal measure, has the right to maintain personal relations and direct contacts with both parents, except when this is contrary to the best interests of the child.”¹⁶

According to the law, the exercise of these rights may be limited by the court

“if there are rigorous reasons which may endanger the physical, mental, intellectual, moral or social development of the child”¹⁷.

3. The Child and the Adoption Proceedings

According to the Child Rights Law, children have the right to alternative protection in those cases where he/she cannot be left to her or his parents care¹⁸. This alternative protection includes adoption and

¹⁴ See article 9 (2) of the Convention on the Rights of the Child.

¹⁵ See article 9 (3) of the Convention on the Rights of the Child.

¹⁶ See article 16 (1) of Law 272/2004 of 21/06/2004.

¹⁷ See article 16 (2) of Law 272/2004 of 21/06/2004.

¹⁸ See article 39 (1) of Law 272/2004 of 21/06/2004.

“when choosing [the type of alternative protection] the competent authority will appropriately take into account the need to ensure a certain continuity in the child’s education, as well as his or her ethnical, religious, cultural and linguistic background.”

The Law on the Legal Status of Adoption (hereinafter referred to as “Adoption Law”)¹⁹ states that

“adoption is the legal operation through which a filial relationship is created between the adoptee, and a kinship relationship is created between the adoptee and the adopter’s relatives.”²⁰

According to the Convention on the Rights of the Child, adoption shall be regulated by domestic law, which must give paramount consideration to the best interests of the child, to the exclusion of other interests such as economic gains. The legislation on adoption must also

“[e]nsure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary”²¹

Adoption must also be based on the informed consent of the persons concerned in order to prevent children from being wrongfully removed from their parents. The lack of this consent is considered as a violation of article 7 and 9 of the Convention on the rights of the Child, which is based on the presumption that children’s best interests are served by being with their parents wherever possible. As to the views of the child they are required under the Convention and the Child Rights Law and must be considered essential also in connection with adoption procedures. The Adoption Law enumerates a number of individuals whose consent must be obtained in order for an adoption to be performed, namely:

- a) The biological parents, or, if the case, the legal guardian of the child whose parents are deceased, not known, have been declared dead or missing or under interdiction, according to the law;
- b) The child who has reached the age of 10 years;
- c) The adopter or, if the case, the adopting family.”²²

In certain exceptional cases the court might bypass the refusal of the parents or legal guardians, namely in those cases where it is proven that “they are abusively refusing to give their consent for adoption and the court considers that adoption is in the child’s best interest”²³ On the other hand, the child’s biological parents must be informed “on the consequences of adoption, especially on the termination of all kinship relations of the child” and their consent must be given “freely [and] unconditionally”²⁴. In relation to the obligatory nature of the child’s consent, “the adoption will

¹⁹ Law No. 273/2004, of 21/06/2004. Published in the Romanian Official Gazette, Part I, no. 557.

²⁰ *Idem*, article 1.

²¹ See article 21 a) of the Convention on the Rights of the Child.

²² See article 11 of Law No. 273/2004, of 21/06/2004.

²³ See article 13 of Law No. 273/2004, of 21/06/2004.

²⁴ See article 14 of Law No. 273/2004, of 21/06/2004.

not be approved without the consent of the child who has reached the age of 10 years” and this consent shall be expressed “in front of the court of law”.²⁵

This is precisely what the Adoption Law stipulates, namely that adoption procedures must obligatorily observe “the principle of the child’s best interests” and that “the adoption will be performed only if it is in the child’s best interests.”. The Law also determines that “the principle of informing the child and taking the child’s views into account in accordance with his or her age and maturity” must be observed in this context.

In relation to inter-country adoption, the Convention also recognizes that

“[it] may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”²⁶

In this context the United Nations Committee on the Rights of the Child has indicated that inter-country adoption should be seen as a measure of last resort to provide care for a child and States parties to the Convention are not obliged to permit such adoptions. The Committee has also expressed concern for the lack of a normative framework to implement the Convention’s provisions in the area of adoption in general and in the area of inter-country adoption in particular. In the Committee’s opinion this creates a risk of illegal inter-country adoptions and trafficking in children.

The CRC stipulates equally that a

“child concerned by inter-country adoption [must] [enjoy] safeguards and standards equivalent to those existing in the case of national adoption.”²⁷

This means that the above-mentioned rules in relation to adoption must also be respected in cases of inter-country adoptions.

Moreover, States must

“[t]ake all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it”²⁸.

As is mentioned in the “Implementation Handbook for the Convention on the Rights of the Child”,

“[w]hile payments by adoptive couples may be made in good faith and without harm to the child, a system that puts a price on a child’s head is likely to encourage criminality, corruption and exploitation.”²⁹

The Adoption Law does not completely exclude, but greatly restricts the cases where inter-country adoption may be performed, namely to those situations when the child’s

²⁵ See article 17 of Law No. 273/2004, of 21/06/2004.

²⁶ See article 21 b) of the Convention on the Rights of the Child.

²⁷ See article 21 c) of the Convention on the Rights of the Child.

²⁸ See article 21 d) of the Convention on the Rights of the Child.

²⁹ Implementation Handbook for the Convention on the Rights of the Child, pp 275-276.

domicile is in Romania and “the adopter or one of the spouses in the adopting family who have the domicile abroad is the grandparent of the child for whom the petition for internal adoption initiation had been approved.”

Conclusion

In conclusion, judges and prosecutors have an essential role for the protection of the rights of all persons who come in contact with the judicial system. They have namely to make sure that the law is applied, and that all the existing procedural guarantees aimed at protecting children’s rights are respected. But their responsibility is particularly great when the judicial proceedings concern children – all persons under 18 years of age – who are in trouble with the law or involved in separation or adoption procedures. Therefore knowledge of and training on the Child Rights Law and the Convention on the Rights of the Child is of paramount relevance in this regard. Well informed and well prepared competent judges decisively contribute to creating a fair justice system for all – and especially for children.

The Child Rights Law was instrumental to place children’s rights “on the map” in Romania. Now, all professionals – including judges and prosecutors – have to transform the legal principles into practice and let their work be inspired by the defence of children’s rights.