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The UN-Convention on The Rights of the Child; legal impact and interpretations within the scope of criminal justice systems.

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- **Introduction**

In this article we shall take a brief look into the UN-Convention on the Rights of the Child and the impacts this has managed to have on legal systems mostly in a national level and secondary on an international level. Since the CRC lacks its own court contrary to the EHRC, its implementation and interpretation is mostly detected indirectly through reforms and setting of standards on an international level. One of the most tangible effect the Convention has had on the lives of children is the reform it initiated regarding the position of minors within the criminal justice systems. Both regarding the minors themselves as defendants in cases of juvenile delinquency and children whose parents are being incarcerated, the Convention has had an impact even if the national legislator doesn't completely conform with its dictum. After all the Convention has only a limited number of self-executing stipulations, thus allowing the State Parties to implement the Convention as they see fit, but according to basic minimums it sets.

Within the spectrum of international human rights law, the CRC has been the cause of legal by-products succeeding in "slipping through" the cracks, while laying down basic foundations of children's rights in the face of the state. As every aspect and instrument of international legislation regarding human rights it seeks to protect whilst promoting and installing minimum standards in the face of the state. The State Parties are responsible for the implementation of the Convention according to their national rule of law.

In the following points we will succinctly address how the CRC influences the very sensitive issue of minors within the criminal justice system in the national legislative cadres of Greece, Austria and Germany. The reason for the selection of this topic is that children's well-being has been and still remains a very sensitive and problematic aspect of the criminal justice system; the CRC managed to set boundaries and minimum requirements when it came to minors in such extreme and potentially damaging situations.

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- The CRC as a legal novum

The UN-Convention on The Rights of the Child is a relatively new instrument of international law, adopted in 1989 by the UN. Through a teleological perspective, its aim was, has been and will be to extend and specify children's rights in the light and in accordance with international treaties of human rights. The UN through the adaptation of the Treaty both recognized and acted in the name of individuals that despite the existence of other human rights treaties, were in need of a more specific instrument of protection and regulation of their rights. Children do indeed unequivocally find protection as any other human being with regards to international law within the broader scopes of human rights treaties -such as the ECHR-, that have already been in place for a very long time.

However, the novelty and the pioneering character of the treaty lies in its numerous clauses that were "tailor-made" addressing problems and inadequacies regarding the protection of a more fragile and susceptible social group, namely children. One of the primary goals of this treaty was to assure that within the international community minimum standards that would be favourable for children would be maintained.¹ The CRC tries to legally engulf and regulate every aspect of children's lives that has been commonly known to harm their development and their well-being by addressing problems of children in every aspect of their lives; from the very core of their development within a family unit to extremities such as slavery, armed conflict and criminal procedure as defendants or children of defendants. Beginning with the family unit, the CRC tries to bridge the notion of family in its traditional sense with that of its social function, as an "incubator" that shall prepare children for their lives as adults.² In other words, the Convention strives to combine subjective cultural characteristics with an objective societal feature, in an effort to balance the various and numerous international understandings of "family" with a term that would cover a key functional attribute of the family within every social milieu.

The CRC manages to become a legal medium, suitable enough to remedy existing deficiencies in the field of human rights law. By enhancing already existing rights, secured and inscribed in international conventions such as the ICCPR through their direct application on children the CRC furnishes state parties as well as courts with the possibility to already have a ready-made interpretation of legal terms for cases where minors are mostly affected. A very good example poses the efforts put forward by the convention regarding the child's position in the case of transnational adoption; according to the CRC and the state parties, every case of intercountry adoption shall not be commercialised whilst the child's future and its well-being within a familiar environment must be guaranteed.³ This legal notion managed to transcend the boundaries of the CRC and lay the foundation for important instruments of international private law, such as the HCCH, which evidently has been proven to be an efficient regulating legal institution on matters concerning Conflict of Laws in the respective area.

- The CRC within the legal system

It is of paramount importance to bear in mind that every instrument of international law has to be interpreted autonomously and within its unique legal boundaries; to that end the VCLT provides us with sufficient tools. Bearing in mind Articles 31 and 32 of the Convention legal practitioners as well as the CRC itself

¹ Bennouna M., *La convention des Nations Unies relative aux droits de l'enfant*. In: *Annuaire français de droit international*, volume 35, 1989. pp. 433-445;

² *ibid.*

³ *ibid.*

are enabled to develop a system of implementation that stems from and is based upon the CRC itself. Many of the CRC's clauses are self-executing and can be introduced by state parties into national legal systems without the need for additional adaptations.⁴ Yet, despite the existing tendency of some international conventions, such as the ECHR that managed to additionally establish a court tasked with the direct implementation of the treaty's legal cadre, the CRC has not and probably will not introduce in the foreseeable future any institutions similar to the ECHR that would have the ability to directly adjudicate regarding matters within the legal purview of the CRC.

Still, through the introduction of the Committee on the Rights of the Child the CRC is not completely "toothless" in the field of implementation. By being able and legally bound to publish General Comments and holding yearly Days of General Discussion, progress and deficiencies regarding proper implementation and improvement of children's rights, in accordance with the legal requirements of the CRC, the UN is able to indirectly promote proper implementation. The governments of the state parties will usually try to maintain a democratic appearance, that would be reflected on the General Comments, for purposes of internal politics and favourable status.⁵ This way the CRC is equipped with a legal solution that takes into consideration the multiple difficulties a court similar to the ECHR would have had with regards to adjudicating on matters such as "the good of the child"; cultural relativism and the multiple interpretations this term can have in various legal systems internationally would have possibly rendered the CRC an object of political discourse amongst nations within the different politico-ideological perceptions that formulate the foundations the different notions of the rule of law.⁶ In other words, children's rights would have directly become a topic of very "uncomfortable" legal but first and foremost political debates both nationally and internationally.

The CRC manages despite of its "soft" and mostly indirect legal normative power to find its way through and influence legal opinions on the highest echelons of international human rights law; a very strong example remains the ECHR decisions in the cases *T & V. vs the UK*. Despite the fact that the Court didn't directly rely its decisions on the norms and terms designated by the CRC it did not disregard the Convention, when it came to juvenile justice. In the issue at hand the Court represented the opinion that juvenile justice even when the defendant stands trial as an adult has to be administered according to the defendant's capabilities. National judicial systems have to take into consideration the position of a minor and if he or she can fathom the scope of his actions and actively participate in his or hers own defence, regardless of their status in a criminal procedure. This clearly indicated the will of the ECHR to take into consideration legal standards introduced by the CRC in its respective legal cadre.⁷ Furthermore, in the ECHR's *Keegan* case the Court formed a direct link with the CRC, especially with Article 7 of the Convention, supporting its already adopted legal principle established in *Marckx* (1979) with an argument based on legal positivism, since CRC can be arguably

⁴ Schmahl S., *Auswirkungen der UN-Kinderrechtskonvention auf die deutsche Rechtsordnung – Eine Analyse jüngster gesetzgeberischer und judikativer Entwicklungen*, RdJB 1/2014

⁵ Bennouna M., *La convention des Nations Unies relative aux droits de l'enfant*. In: *Annuaire français de droit international*, volume 35, 1989. pp. 433-445;

⁶ Mc Goldrick D., *The United Nations Convention On The Rights of the Child*, *International Journal of Law and the Family* 5 (1991), 132-169

⁷ Kilkelly U., *The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, *Human Rights Quarterly*, Vol. 23, No. 2 (May, 2001), pp. 308-326

considered the product of applied legal positivism in the level of international human rights law.⁸

The legal normative power that the systematic and functional-teleological interpretation of the CRC “generates” can be also seen in article 18, where the parents are designated as the primary persons responsible to safeguard the child’s best interests; thus the wording allows the national legislator and international courts to take into consideration yet another possible custodian of the child’s best interests, namely the state itself. Hence, the national legislator and governmental stakeholders may be viewed as subsidiary actors tasked with the same objective.⁹ This is also made evident in article 27 where again the CRC tries to institute legal remedies whenever the parents -who remain the primary caretakers and guardians entrusted with representing its rights according to its best interest- are unable to provide the conditions under which the child shall exercise its right to have an adequate living standard.

- **The CRC as an institution with indirect effects**

Through its normative power and if we take into consideration that both the contracting parties and the addressees of international human rights law have been traditionally state actors -as legal subjects- the Convention manages to have an effect within national legal systems. Pursuant to article 26 of the VCLT the CRC has to be upheld and introduced within the national rule of law to the best of the state parties abilities, especially regarding the non-self-executing clauses and parts. Yet, it must not be omitted that this has to happen according to the best abilities of the states involved, since it would be an illusion to believe that states facing grave existential threats have the resources to administer the best possible conditions for authorities to fulfil the subsidiary roles as per the Convention. This however mustn’t be confused with a thesis that might justify a statement such as “in times of existential threat and unsurmountable political problems human rights are a luxury enjoyed by the West”.

The CRC manages to address specific wrongdoings throughout the international community that affect a very narrow but extremely crucial part of the planet’s population. By turning human necessities such as basic access to education, health and sustenance that have been perceived as granted especially after the introduction of “bulwark” international legislations such as the ICCPR into positive law the CRC has managed to become a milestone in the field of human rights.¹⁰ However, as in every human rights law project the inherent vices cannot be ignored. As McGoldrick very astutely observes experience shows that once international human rights organs are established, they tend to take on a life of their own. In the case of the CRC the Committee is this organ and its General Comments do occasionally manage to find their way in national legislations affecting national as well as international jurisprudence, as we briefly mentioned above.

One of the most important legal domains the CRC can be seen as having drastic effects is the legislation regarding prison administration and overall Correctional Law. The cases of both Germany and Austria shall be thus expounded under the scope and in accordance with the CRC, in an effort to examine even the indirect repercussions the Convention has upon these very important legal domains, especially taking into consideration the broad social scope and the high intensity legal norms have on shaping human behaviour within a controlled environment; in such an environment, both minors and their parents are met with challenges. The

⁸ *ibid.*

⁹ Mc Goldrick D., *The United Nations Convention On The Rights of the Child*, *International Journal of Law and the Family* 5 (1991), 132-169

¹⁰ *ibid.*

national legislator is therefore called upon to find solutions that will both serve its viewpoint on the matter of Correctional Law and not contradict the CRC, a legal instrument which both countries are party to.

In the cases of Germany, Austria and Greece the CRC has indeed managed -even inadvertently- to influence the position of children within the correctional system. The Austrian Law of Corrections as many of the local German legislations on the same legal domain, since prison administration is a matter of local legislative procedures does take heed of the CRC's approach regarding the contact between parents and their children especially according to article 9 of the convention. As in Germany, §74 (2) of the Law on prison administration does provide female inmates serving their sentence in a correctional facility the right to live with their child within prison walls until his/hers second year, unless this would be detrimental to the child's wellbeing.¹¹ Furthermore, if the prison warden approves a female inmates demand, it is possible that she may be allowed to extend the time period *intra muros* until the child reaches the age of three if the inmate's remaining sentence doesn't exceed one year. The child's interest is for the warden's decision again a decisive factor.

Under the same conditions and bearing in mind article 9, the inmate may serve her/his sentence under house arrest if he or she are responsible for the upbringing of minors; legal guardianship belongs to the factors to be considered according to the demonstrative cases mentioned in §156b (1) of the Law on prison administration. Both §74 and §156b remain true to the CRC's stipulations in two ways;

- a) by providing legal remedies for the time that a female inmate and her newborn child would have to be separated
- b) by maintaining the child's connection to at least one of its parents in accordance with article 8 and 37 (c) *e contrario*.

The legal standpoint is similar if not identical in Germany, where according to legal provisions, Correctional legislation is enforced and applied on a localised level due to constitutional reforms. In the case of Germany, the vast majority of local legislations follow the standards set by the CRC even if this occurs not directly because of the CRC's application in German national law.¹²

In Greece the situation is quite identical with Austria; article 13 §3 of the Code of Corrections, where female inmates are allowed to maintain contact with their children *intra muros*.¹³ Especially in cases where the female inmate lacks any other relatives and the minor isn't older than 3 years, legal prescriptions dictate that special spaces shall be provided for the children and their mothers. By reaching the age of three the minor becomes a ward of the state or any other relatives according to the decision of a competent judge. The wording of the statute allows us to interpret it as follows; children until the age of three are to stay with their mothers within the correctional facility, whereas minors that exceed that limit are in the care of the state. Through this interpretation that is aligned and conformed with the CRC we are able to understand that the role of the state is secondary as the Convention dictates. Familiar and parental connections are to be maintained, unless the child's wellbeing and its best interests can no longer be upheld within the family unit.

¹¹ Strafvollzugsgesetz (StVG)

¹² Schmahl S., *Auswirkungen der UN-Kinderrechtskonvention auf die deutsche Rechtsordnung – Eine Analyse jüngster gesetzgeberischer und judikativer Entwicklungen*, RdJB 1/2014

¹³ Ν. 2776/1999, Σωφρονιστικός Κώδικας

In all of the cases mentioned above we may observe that the CRC has an indirect impact when one takes into consideration not its stipulations per se but the standards they have set. Most importantly these standards have managed to be adopted on an international level finding their way into the legal domain of correctional law in connection with the primacy of maintaining contact between minors and their families. If one takes into consideration that a prison environment is by definition a milieu where a convicted felon's freedom is vastly curtailed for the purposes of reform and rehabilitation, maintaining the relation between female inmates and their children would seem rather secondary. The CRC therefore manages to implement the priority of children's rights even within this scope.

- **Juvenile detention and correctional law through the scope of the CRC**

Another very important subject is the Convention's implementation and interpretation when it comes to juvenile detention, pursuant to a criminal conviction by an appropriate court. The CRC sets again minimum standards required to protect the rights of the child within detention centres. In the general spirit of the CRC the Convention adapts overall stipulations of international human rights law to the needs and particularities of a minor as an inmate, in cases where juvenile delinquency leads to a conviction. Even in that case the CRC dictates that "[...]The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time [...]"¹⁴. As a result the national legislator in all three national legal systems, but especially in the German one considers imprisonment as the last resort; according to §17 (2) of the German Juvenile Penal Law¹⁵ two other ways of sentencing supersede imprisonment; educational and disciplinary measures are the first two options that the adjudicating judge has to consider before resulting to a prison sentence. Even when the court has to impose a form of imprisonment the Law on Juvenile Courts dictates that maximum sentences of the German Penal Code are not to be considered and that the absolute maximum even for felonies that would ensue a sentence exceeding ten years is ten years in total. However according to a grammatical as well as a teleological interpretation this kind of sentencing is supposed to be the exception since the same statute dictates that maximum sentence is five years.¹⁶ Hence, yet again we witness the effect that the CRC has on national legal systems, first and foremost by setting standards to be followed. Still, the Convention's impact doesn't stop there; Article 37 lit (c) clearly dictates that juvenile inmates are to be separated from adults, unless there are reasons that serve the child's interests. Thus, the national federal legislator in Germany stipulates that every and any juvenile detention pursuant to a conviction has to be served in specified correctional facilities designated for that purpose.¹⁷ The legislator tasks the state and the judiciary with the obligation that lies primarily with his/her family regarding his/her education and upbringing. Through §90 (1) JGG the state takes on its subsidiary role yet again throughout the juvenile's detention with regards to the family's objective as an incubator for the child's future life as an adult. In general, German law provides the court with numerous alternatives to avoid the minor's detention in a juvenile facility, thus indicating through a systematic interpretation that confinement is indeed to be perceived as the last resort.

¹⁴ Article 37 (b) CRC

¹⁵ Jugendgerichtsgesetz(JGG)

¹⁶ §18 JGG

¹⁷ §90 (2) JGG

The Austrian legislator follows put by upholding the standards set by the CRC. With the Law on Juvenile Courts¹⁸ judges and practicing lawyers are given the chance to help delinquent children to avoid imprisonment. As in the German case priority is given to educational measures that would both remedy the character flaws and problems the child might be experiencing, which evidently led him to become a defendant. In multiple occasions, in order for the child to avoid imprisonment the Austrian Law on Juvenile Courts predicts national legislation rules that an appropriate parole service can organize a social conference¹⁹. The conference shall lay down a plan that would help the child avoid confinement through measures that would counter the problems that caused the delinquent behaviour that is in casu sanctioned by law. This conference includes many actors from the child's environment including his family circle. Its purpose is even more important in cases of pretrial confinement, where the measure can be substituted by a milder one that would serve the same purpose but not *intra muros*.²⁰

The Austrian legislator takes also into consideration the dictum of the CRC for minimizing the child's time spent in correctional facilities is reflected in two ways, similar to German legislation;

- a) §5 JGG takes the necessary precautions by installing lower sentences -or even forbidding correctional confinement²¹- compared with the overall prison sentences that would be normally imposed on adults according to the Austrian Penal Code.
- b) §12 and §13 JGG allow the court to convict a minor without imposing a (juvenile prison) sentence or proviso that a sentence could be imposed in the future.

Hence, like in Germany Austrian adheres to the CRC both as a State Party - thus allowing the CRC to directly influence childrens rights within the national criminal legal system- and by adopting measures and legal remedies in accordance with the standards promoted by the Convention.

Greek law doesn't stay far behind in that matter. According to the Greek Code of Corrections²² juvenile inmates are to be confined in specialized correctional facilities. In these facilities educational measures are to be imposed aiming at the reform, education and rehabilitation of the juvenile delinquent. The Greek penal code follows similar if not identical points with the German and the Austrian Laws on Juvenile Courts; pursuant to Articles 122-127 the primacy of reform through educational, psychiatric or similar measures is maintained. Confinement comes according to article 127 only for reasons of special prevention, i.e. due to circumstances directly connected with the facts of the case and with character flaws of the convicted minor that led him to commit the crime he/she has been accused of. In other words, the court has a last resort to take into consideration if the defendant's criminal behaviour cannot be thwarted if he/she remains outside of a specialized correctional facility. It has to be underlined however that confinement is applicable only under the objective condition that the person convicted has reached puberty.²³ Contrary to Austrian law, the Greek legislator doesn't provide the court with the option to completely avoid any minimum sentence as in § 5 JGG; Article 54 of the Penal Code dictates that confinement in a specialized juvenile correctional

¹⁸ *öJugendgerichtsgesetz (JGG)*

¹⁹ *§29e Bewährungshilfegesetz*

²⁰ *§35a JGG*

²¹ *§5 Z. 5 JGG*

²² *Article 12, §1-4*

²³ *Art. 127 §1, Greek Penal Code*

facility shall be at least six months (minimum sentence) but in the cases where legal statutes prescribe life in prison, maximum sentence shall not exceed ten years in total.

Although, a minimum sentence is seemingly incompatible with the CRC, Greek legislation seems to take heed of the Conventions dictum and abolish life sentences for children, thus remaining true to the CRC's spirit. This doesn't mean that there aren't legal remedies where the minor can completely avoid criminal charges; according to Article 45a Code of Criminal Procedure, the state prosecutor is allowed to not prosecute in misdemeanours, unless there are reasons of special prevention, applicable for the defendant. As a result, it is in his prosecutorial "discretion" to decide if he/she is to bring charges or not, whereas in the Austrian case minors avoid confinement been primarily dependant on decisions during or post-trial and not pre-trial as in the Greek case.²⁴

- **Conclusions, Remarks**

The Convention on the Rights of the Child has been a pioneering instrument of international law, aimed to both improve and directly implement the rights of children. In this contribution we presented the legal influence it has had on a very sensitive matter; how children and minors are treated according to criminal and penal prescriptions. Children can be affected in two ways through criminal law, either as defendants themselves or as family members of adult inmates serving a sentence. In both cases the CRC has managed through the cultivation of international standards based upon "tailor-made" international human rights law to introduce new viewpoints regarding the status of children within the scope of criminal procedure and correctional law.

Despite the fact that the problems and shortcomings of the international community when it comes to implementation of international human rights law are vast and numerous, the CRC manages to have a tangible effect on children and minors at least in some parts of the world. By putting forward the best interest of the child, national legislators saw both the opportunity and the contractual obligation to act through reforms in their criminal justice systems. In the cases presented here, where all of the states are also State Parties one can indeed observe that there is indeed substantial progress, especially regarding legal approaches and enforcement when children are passively affected. A differentiation between direct and indirect influences in the case of correctional law -i.e. children as defendants or as children of adult inmates- is rather redundant; the minor is directly affected regardless if he/she is being confined or if he spends time with a parent in confinement according to correctional laws.

In this regard, there still is much work to be done to adhere even more to the spirit of the Convention and completely remove if possible juvenile delinquency from penal statutes and laws of criminal procedure. This seems to be also represented by the national legislator, who considers confinement in all three cases as the last resort and provides the judiciary with numerous alternatives. These alternatives should ultimately become the only form of sentencing, since the overall point of imprisonment is rehabilitation in an environment of confinement that serves the dual purpose of sanctioning illegal behaviour while dealing with

²⁴ It has to be mentioned however that the measure of a PPD is very popular on the prosecutorial level. The Law on Juvenile Courts, adapts the overall stipulations in the Austrian Code of Criminal Procedure on the realities and conditions of a minor (§8 ÖJGG)

character flaws of the individual that have brought him to this position. It is thus even more important to adhere to this principle of rehabilitation, since in the eyes of the law -in almost every legal domain- minors are entitled to special treatment for a very good reason.

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