
Legal and Practical Challenges in Safeguarding the Rights of Juvenile Witnesses

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Abstract: *The right to a fair trial is the cornerstone of the rule of law, without which the democratic development of the country is impossible. The mentioned fundamental right is instrumental in equipping persons in conflict with the law with various important opportunities to protect themselves from unjustified interference in their rights by the state. A minor, as a legal subject, has the right to a fair trial and enjoys exactly the same legal guarantees as any other person in conflict with the law. However, a minor, in accordance with his development, needs special protection, so he cannot be treated in the same way as an adult. When children come into the justice system, the authorities must be guided by the "principle of the best/true interest of the juvenile". This article will address the legal and practical challenges in the field of realizing the right to protection of minors.*

Keywords: *Human rights; Fair trial; Rule of Law; Criminal justice; Juveniles justice standards.*

The right to a fair trial constitutes a fundamental element of the rule of law. Without it, a country's democratic progress can be stifled. This essential right is instrumental in protecting individuals in conflict with the law. It empowers them to safeguard themselves against unwarranted state interference in their rights and freedoms.

Juveniles, as full-fledged subjects of legal relations, have the right to a fair trial and are guaranteed the same legal protections as any other individual in conflict with the law. However, because juveniles are still developing, they need special protection, meaning we cannot treat them the same way as adults. When children enter the justice system, those in authority must recognise that they differ from adults, whether as victims, witnesses, or accused individuals. Protecting the child's rights should be the top priority throughout the entire process of participating in the justice system. To ensure this, the justice system must urgently prioritize the "principle of the best/true interest of the juvenile," as outlined in Article 3(1) of the Convention on the Rights of the Child. This principle mandates that the child's best interests be considered at all stages of the justice process in which the child participates. This means that, in many cases, we should consider the issue beyond the essential legal norms. Taking into account the child's best interest also implies the involvement of not only legal representatives but also lawyers and professional psychologists or social workers, if necessary, working with children. The guarantees of the right to a fair trial begin with the child's first contact with the justice system, continue throughout the trial process, and extend beyond it.

European institutions have established specific requirements to guarantee that member states adequately meet the needs of children within their jurisdiction. The Charter of Fundamental Rights of the European Union contains provisions that define the core rights of access to justice and strengthen the guarantees of the right to a fair trial for juveniles. Article 47 establishes effective legal protection mechanisms for children, including a fair and public trial within a reasonable period, rights to protection, representation and consultation, and other guarantees of legal protection and support. It is worth noting that the EU directives establish unique guarantees of a fair trial in criminal

proceedings, including the Directive of the Right of Access to a Lawyer in Criminal Proceedings¹. Under section 11.2.2 of the Directive, Member States must comply with the Charter of Fundamental Rights of the European Union to implement the directives, even without special child-friendly norms. When considering cases where children are subject to the scope of the said directive and fall within its jurisdiction, the observance of the child's best interest principle should be given special attention. The proposal of the European Commission regarding developing a directive containing procedural protection mechanisms for charged or potentially charged juveniles is also essential. The recommendation aims to provide children with mandatory access to a lawyer at any stage of the criminal justice process.² According to the recommendation, children should have the right to receive information about their rights immediately, with the help of parents or legal representatives, and the right to testify in a child-friendly environment, among other things.

The Council of Europe Guidelines on Child-Friendly Justice address children's rights to effective participation in the criminal justice process and access to a lawyer.³ Though these guidelines are not legally binding, it is vital to ensure that the criminal justice system considers the specific needs of children. The guidelines are based on the European Court of Human Rights case law and other internationally recognised principles and norms. This document is a helpful resource for professionals involved in juvenile justice. According to the guidelines, information on any charges against the child must be given promptly and directly after the charges are brought. This information should be given to both the child and the parents in such a way that they understand the exact charge and the possible consequences (Section IV. A.1.5). The child also has the right to be questioned in the presence of a parent, attorney, or guardian (Section C(30)), the right to speedy justice (Section D(4)), and the right to interview and trial in an environment that meets the child's needs (Section D(5)). Additionally, in June 2014, the Parliamentary Assembly of the Council of Europe adopted a resolution on child-friendly justice, emphasising the importance of treating children in conflict with the law in a manner that is friendly and based on their rights.⁴ The Parliamentary Assembly of the Council of Europe calls on the Member States to implement international mechanisms to protect human rights in the juvenile justice system and to ensure the harmonisation of national legislation and practice with international standards.

In the UN Convention on the Rights of the Child, Article 40(1) and (2)(b)(III), (2)(b)(IV) state that State parties recognise the rights of every child (every individual under the age of 18 (Article 1)) who is alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. To this end, the State shall ensure that every child alleged as or accused of having infringed the penal law, on the one hand, is informed of the charge against him and, on the other hand, has at least the guarantees to access legal or other appropriate assistance for the defence and the guarantee not to be compelled to give testimony or to confess guilt.

According to Article 7 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), essential procedural safeguards such as the presumption of

¹ 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 2013 L 294/1.

² European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822 final, Brussels, 27 November 2013.

³ Council of Europe, Committee of Ministers (2010), Guidelines on child friendly justice, 17 November 2010.

⁴ Parliamentary Assembly of the Council of Europe, Resolution 2010 (2014), "Child-friendly juvenile justice: from rhetoric to reality."

innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. The right to have a guardian present, the right to confront and cross-examine witnesses, and the right to appeal to a higher court. According to Article 15.1 of the same Rules, throughout the proceedings, the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such assistance in the country.⁵

According to the UN CRC General Comment No. 24 on children's rights in the child justice system, many children lack legal assistance, which is a minimum law guarantee that all children shall have access to. The Committee recommends that States provide adequate legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities. Child justice systems should not permit children to waive legal representation unless the decision to waive is made voluntarily and under impartial judicial supervision (paragraph 51).⁶

To comprehensively review contemporary international child protection standards, it is essential to examine the European Court of Human Rights precedent judgment on the *Panovits v. Cyprus* case (Application 4268/04, 11/12/2008)⁷. The case involved a 17-year-old boy who was accused of robbery and murder. The juvenile was taken to the police station with his father and questioned without legal representation. The applicant argued that the court convicted him based on his testimony obtained without a lawyer or guardian present, thereby violating his right to a fair trial.

In the mentioned decision, the European Court of Human Rights explained the following:

“66. Regarding the applicant's complaints about the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of a lawyer's assistance already at the initial stages of police interrogation. The lack of legal aid during an applicant's interrogation would constitute a restriction of his defence rights without compelling reasons that do not prejudice the overall fairness of the proceedings.”

“67. The Court notes that the applicant was 17 years old at the material time. In its case law on Article 6, the Court has held that when criminal charges are brought against a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings...”

“68. The Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any substantial public interest, must be established unequivocally and must be attended by minimum safeguards commensurate to the waiver's importance... Moreover, before an accused can be said to have impliedly, through his conduct, waived an essential right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. The Court considers that given the vulnerability of an accused minor and the imbalance of power to which the very nature of criminal proceedings subjects him, a waiver by him or on his behalf of an essential right under Article 6 can only be accepted where it is expressed unequivocally after the authorities have taken all reasonable steps to ensure that they are fully aware of his rights of defence and can appreciate, as far as possible, the

⁵ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 29 November 1985, Supreme Court of Georgia, website: <https://www.supremecourt.ge/files/upload-file/pdf/arasrw.mart15.pdf>

⁶ General Comment No. 24 of the UN Committee on the Rights of the Child, 2019, Supreme Court of Georgia, website: <https://www.supremecourt.ge/files/upload-file/pdf/arasrw.mart14.pdf>

⁷ *Panovits v. Cyprus*, No. 4268/04, 2008, European Court of Human Rights search engine <https://hudoc.echr.coe.int/>

consequence of his conduct. The applicant (the juvenile) was not advised that he was allowed to see a lawyer before saying anything to the police and before he had his written statement taken.”

“73. Accordingly, the Court finds that the lack of provision of sufficient information on the applicant’s right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant’s defence rights. The Court, moreover, finds that neither the applicant nor his father acting on behalf of the applicant had waived the applicant’s right to receive legal representation before his interrogation explicitly and unequivocally.”

In this particular case, the European Court of Human Rights found that although the applicant had the benefit of adversarial proceedings in which he was represented by the lawyer of his choice, the nature of the detriment he suffered because of the breach of due process at the pre-trial stage of the proceedings was not remedied by the subsequent proceedings, in which his confession was treated as voluntary and was therefore held to be admissible as evidence. When considering the merits of the case in national courts, the applicant's conviction was based on several pieces of evidence, including a statement he made shortly after being arrested. Although the applicant challenged the voluntary nature of this statement, it played a significant role in his conviction. Based on the above, the European Court found that the lack of legal assistance during the police interrogation led to the violation of Article 6(3)(c) and Article 6(1).

The national legislation governing the protection of juvenile witnesses (potential accused) is noteworthy.

Article 31(3) of the Constitution of Georgia guarantees the right to a defence.

Article 15(1) of the Juvenile Justice Code, as a general provision, states that at any stage of criminal proceedings, if a juvenile is being questioned or is a witness in a case and their hired lawyer doesn't participate (known as a defence by agreement), they have the right to free legal assistance if they cannot afford it or if they are being questioned for crimes outlined in Chapters XIX, XX, and XXII and Articles 144¹-144³ of the Criminal Code of Georgia.

It is worth mentioning that the national laws related to juvenile justice define various methods and clearly distinguish between the responsibility of safeguarding the right to defence of a juvenile witness during the procedural action and the investigation/interrogation. In particular:

As per Article 23(1) and Article 52(9) of the Juvenile Justice Code of Georgia, a juvenile *being interrogated or being a witness* has the right to have a lawyer present during the proceedings. If a juvenile cannot afford a lawyer, they have the right to free legal assistance as per Article 15(1) of the Code. Furthermore, according to Article 52(3) of the same Code, the juvenile’s questioning or interrogation must be conducted in the presence of their legal representative and lawyer. In the case provided by Article 15(1) of the Code, i.e. if a juvenile being interrogated or being a witness cannot afford a lawyer or is being questioned for crimes mentioned in Chapters XIX, XX, and XXII and Articles 144¹-144³ of the Criminal Code of Georgia, they are entitled to free legal assistance during the questioning or interrogation.

The above legal provision regarding the questioning/interrogation of a juvenile witness is imperative and does not allow for any exceptions. Article 52(3) of the Juvenile Justice Code is a particular norm that specifically addresses the procedure for questioning or interrogating a juvenile. Through grammatical, logical and teleological interpretation methods, it is clear that no other interpretation of the provision is possible. The provision mandates that a juvenile witness must be questioned or interrogated in the presence of their legal representative and lawyer. If the witness cannot afford a lawyer or is being questioned for a crime under Chapters XIX, XX, and XXII and Articles 144¹-144³ of the Criminal Code of Georgia, they have the right to free legal assistance during questioning or interrogation. However, Article 52(3) of the Juvenile Justice Code also allows a juvenile witness to refuse the services of a defence attorney appointed at the state's expense and invite

a lawyer of their own free will (defence by agreement). This article also doesn't limit the right of the legal representative (procedural representative) to independently select and invite a lawyer, ensuring the best interests of the juvenile witness are considered (Article 28(1) of the Juvenile Justice Code).

Realising the right to defence becomes a critical issue when a child is exposed to the commission of a crime and is in the custody of the investigative body, who has personally appeared or is presented to the investigative body with voluntary consent; however, initially, the child is considered a witness, and their status as "an accused person" largely depends on their questioning. In the current investigative practice, juveniles with the status of a witness (but may potentially be accused) are questioned without a lawyer present after formally declining legal representation. However, a legal or procedural representative may still be present during the questioning if a lawyer by agreement is not present. In most cases, before questioning, the juvenile is provided with a printed text outlining their rights as a witness, which includes their right to free legal assistance if they cannot afford but wish to have a lawyer. After obtaining the juvenile's refusal to a lawyer, the interrogation protocols will note in the "Information provided by the person to be questioned" column that the juvenile does not require the assistance of a lawyer during the questioning. However, as a juvenile, their legal representative will attend the questioning. Suppose the investigation leads to the juvenile's arrest as an accused. In that case, a lawyer will be assigned to them at the state's expense, and their further questioning will take place with the participation of a treasury lawyer upon the investigator's request. Thus, with this kind of practice, the right of defence of a juvenile in the custody of the investigative body (as a potential accused) depends solely on their status and whether they have formally refused a lawyer at the questioning. This approach goes against the values outlined in the Convention on the Rights of the Child, does not meet international standards for children's rights, and goes against the fundamental principle of protecting the child's best interests. Besides, it is unclear what the investigative body should do if a juvenile requests the presence of a lawyer during interrogation but cannot afford one by agreement. According to existing practice, juveniles are entitled to free legal assistance during the interrogation/questioning only if they are insolvent or being questioned for specific crimes listed in Chapters XIX, XX and XXII and Articles 144¹-144³ of the Criminal Code of Georgia.

According to the criminal procedure laws of Georgia and the international standards for juvenile justice, the right to have a legal or procedural representative is not a substitute for receiving legal assistance. In the above cases involving a juvenile witness (who may also be a potential accused), it is vital to consider their vulnerability and power imbalance in the criminal justice system. Refusing to have a lawyer present during their interrogation as a witness could have serious consequences, which the juvenile may not understand or foresee. Therefore, it is crucial to ensure they are provided with proper legal representation and assistance. A juvenile's decision to waive their fundamental right to defence can only be considered acceptable if the investigator takes all necessary steps to ensure that the juvenile fully comprehends the importance of this right and understands the potential consequences of their actions. However, due to the physical and mental development of children caught in the justice system, this is often difficult to achieve. Failing to provide adequate information about the right to defence during questioning, mainly when dealing with a juvenile witness (who may also be a potential accused), constitutes a substantial violation of the minimum safeguards of the right to defence outlined in Article 6 (3) (b, c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In such a case, the imperative requirement of Article 52(3) of the Juvenile Justice Code is materially violated, which requires the presence of a lawyer during the questioning or interrogation of a juvenile, regardless of their status as an accused (charged, acquitted), victim, or witness. Suppose a juvenile is questioned as a witness without a lawyer present, especially when it is evident from the initial evidence gathering that they are a

“potential accused”. In that case, they are essentially deprived of their fundamental right to defence. This goes against the values established by the Convention on the Rights of the Child.

CONCLUSION

After analysing national and international legal regulations, European Court decisions, and international guidelines, recommendations and directives, we formulate the following opinions to prevent shortcomings in investigative and judicial practices:

The right to legal defence constitutes a fundamental aspect of the right to a fair trial, empowering a juvenile within the justice system to safeguard their rights against unwarranted state interference. As fully recognized legal entities, juveniles possess the right to a fair trial and are entitled to the same legal safeguards as any other individual in conflict with the law.

When children are involved in legal proceedings, those in authority must understand that juveniles differ from adults, regardless of their role as victims, witnesses, or accused.

The juvenile justice system should prioritise the protection of a child's rights rather than determining winners and losers.

To achieve this, the justice system must be guided by the “principle of the best/true interest of the juvenile,” which means that the child's best interests should be considered at all stages of the justice process. This ensures that the child's rights are protected and respected throughout their participation in the justice system.

It is vital to protect the child's best interests in legal proceedings. Legal representatives and lawyers must be involved in investigative or procedural actions during the trial to achieve this. This safeguard of the right to a fair trial must begin once the child first interacts with the justice system and continue throughout and after the trial.

The Juvenile Justice Code must define unambiguous, stringent, and predictable standards to safeguard the fundamental right to a fair trial and protect a child's legal interests. These standards should grant a juvenile, especially a potential accused, the right to receive free legal assistance during questioning and interrogation.

Children who become involved in the justice system require the support of a lawyer not because of their status as victims, witnesses, or accused, as is often interpreted under the provisions of the Juvenile Justice Code of Georgia, but simply because they are children.

It is not justifiable that a juvenile witness being questioned or interrogated is entitled to legal assistance based on the category and severity of the crime they have witnessed. This approach can be considered a violation of Article 2 of the Convention on the Rights of the Child, which prohibits discrimination. To avoid this violation, the above changes to the legislation are necessary.

Until clear and foreseeable national legal provisions are introduced, existing norms should be interpreted under international standards, with a firm commitment to the child's best interests. All children involved in the justice system, whether as victims, witnesses, or accused, should be allowed to exercise their fundamental right to protection during questioning and interrogation.

BIBLIOGRAPHY/REFERENCES:

1. Unicef Guidance Note for CEE/CIS on responses to children who have infringed the law but are under the minimum age of prosecution as a juvenile offenders (2010)
<http://www.slideshare.net/unicefceecis/unicef-cm-jj-responses-web>
2. The Role of Social Work in Juvenile Justice, the United Nations Children's Fund, 2013
http://www.unicef.org/ceecis/UNICEF_report_on_the_role_of_social_work_in_juvenile_justice.pdf
3. Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (2005)
https://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf

4. International Human Rights of Children (1st ed. 2018 Edition) - Ursula Kilkelly (Editor), Ton Liefwaard (Editor);
5. Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child (Stockholm Studies in Child Law and Children's Rights) - Said Mahmoudi (Editor), Pernilla Leviner (Editor), Anna Kaldal, Katrin Lainpelto (2015)
6. Juvenile Justice Today – Gennaro F.Vito & Julie C. Kunselman (March 2011);
7. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010);
8. UNODC, UNICEF - Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary (2009);
9. International Handbook of Juvenile Justice – Josine Junger –Tas & Scott H. Decker – editors (2008);
10. Ton Liefwaard, Deprivation of Liberty of Children in Light of International Human Rights Law and Standards, 2008;
11. UNODC/UNICEF – Handbook on restorative Justice Programmes (2006);
12. 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 2013 L 294/1.
- ¹³ European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822 final, Brussels, 27 November 2013.
- ¹³. Council of Europe, Committee of Ministers (2010), Guidelines on child friendly justice, 17 November 2010.
14. Parliamentary Assembly of the Council of Europe, Resolution 2010 (2014), “Child-friendly juvenile justice: from rhetoric to reality.”
15. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 29 November 1985, Supreme Court of Georgia, website: <https://www.supremecourt.ge/files/upload-file/pdf/arasrw.martl5.pdf>
16. General Comment No. 24 of the UN Committee on the Rights of the Child, 2019, Supreme Court of Georgia, website: <https://www.supremecourt.ge/files/upload-file/pdf/arasrw.martl4.pdf>
- ¹⁷ Panovits v. Cyprus, No. 4268/04, 2008, European Court of Human Rights search engine <https://hudoc.echr.coe.int/>