

THE CONSTITUTIONAL PROTECTION OF CHILDREN RIGHTS IN EUROPE

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Abstract

Twenty six years after the adoption of the Convention on the Rights of the Child, the analysis of the protection of children's rights at the constitutional level offers an interesting picture not only of great and complex variety but also of recent and continuing evolution. As societies continue to evolve dynamically and as new threats to children's well being keep emerging, the question arises of whether the law and constitutions offer sufficient protection. as they stand today. The analysis of constitutional provisions reveals that there is clearly no single way to express children's rights in national constitutions and every country will have a range of factors to take into account in deciding what rights to enshrine at a constitutional level, how to express those rights and the state's corresponding duties and how to ensure that those rights are enforced.

Key words: constitutional protection, children's rights, education, constitutional provisions

The constitutional protection of children rights in Europe represents a very interesting and important topic from the comparative point of view. As an expression of the constitutionalization of law in general we are looking for to identify what kind of provisions are raised to fundamental norm in the field of children protection. However, we are analyzing whether the law and constitutions offer sufficient protection as they stand today.

The constitutional provisions are divided in several categories (European Commission for Democracy through Law (Venice Commission), Table of Constitutional provisions on Children's Rights, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2014\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2014)009-e), 17th of February 2016), which will also represent the start point of this analyze: dedicated provision on children; family provision; education; equal status; exploitation; protection from harm; incorporation of international law.

In direct relation with the section dedicated provision of children there are 16 states that do not include in their fundamental laws this kind of provisions (Andorra, Austria, Bosnia and Herzegovina, Cyprus, Denmark, Estonia, Finland, France, Germany, Liechtenstein, Luxembourg, Monaco, Netherlands, Norway, San Marino, United Kingdom). The choice of constituent power in these countries is at least questionable, because the more consideration should be given to greater protection of the child in relation to ensuring the child's best interest. The child's best interest must

prevail in all actions concerning children (For more informations about child's best interest, please see L. Irinescu, *Curs de dreptul familiei - Family law*, ed. Hamangiu, Bucharest, 2015, p.9).

We can observe that in Romania in post communist years the protection of children has represented a major objective for the Government. As an example we can mention the provisions of the law no. 272/2004 for the protection and the promotion of children's rights. The Romanian constitutional provisions are presented in art. 48 and 49 and these provisions are: (1) *Children and young people shall enjoy special protection and assistance in the pursuit of their rights.* (2) *The State shall grant allowances for children and benefits for the care of ill or disabled children. Other forms of social protection for children and young people shall be established by law.* (3) *The exploitation of minors, their employment in activities that might be harmful to their health, or morals, or might endanger their life and normal development are prohibited.* (4) *Minors under the age of fifteen may not be employed for any paid labour.* (5) *The public authorities are bound to contribute to secure the conditions for the free participation of young people in the political, social, economic, cultural and sporting life of the country* (Article 49 of Romanian Constitution: Protection of children and young people, http://www.dreptonline.ro/en_resourses/en_romani_an_constitution.php, 17th of February 2016).

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A special case in the context of the constitutional protection of children rights in Europe is represented by Norway. We can all see specially at this moment that the Norwegian state manifests special care for children's education and for children place in society. The Child Welfare Act applies to all children in Norway. The reason for this is the paramount principle that all children in Norway, regardless of their cultural background, nationality or citizenship, have the same right for protection against abuse or mistreatment. The UN Convention on the rights of the Child, which is implemented in Norwegian law, also underlines that the state where the child resides has a duty to protect the child in accordance with its legislation. In Norway, all forms of corporal punishment have been made illegal – in the home, in schools or in any other place (<http://www.norwayemb.org.in/PageFiles/634628/Visiting%20Norway%20with%20family.pdf>, 18th of February 2016). Even so, with this kind of special care for children, Norway has decided that the Constitution does not include any kind of provision related to children's protection. In fact, Norway is the only country that is situated in such a position.

At the opposite side we can find Portugal, as an example of country that has included in the Constitution provisions for all categories mentioned above. The relevant articles here are 36(4), 69 & 70 (dedicated provision for children), 36, 67, 68 (family provision), 73 & 74 (education), 36(4) – (equal status), 70(1) – (exploitation), 69(2) – (protection from harm), 8 (incorporation of International Law). The most important provisions related to children are those express dedicated to this topic: article 69 - Childhood - *(1) Children have the right to the protection of society and the State with a view to their full development. (2) Children, particularly orphans and abandoned children, are entitled to special protection by society and the State against any form of discrimination and oppression and against abuses of authority in the family and other institutions* (<http://www.tribunalconstitucional.pt/tc/crp.html>, 18th of February 2016) & Article 70 - Young People - *(1) Young people, especially young people at work, receive special protection for the purpose of effective enjoyment of their economic, social, and cultural rights, notably with respect to: a) Education, vocational training, and culture; b) Access to a first job, work, and social security; c) Physical education and sports; d) The use of leisure-time.*

(2) The prime objective of youth policy is to develop in young people their character, a liking for unfettered creation, and a sense of service to the community, as well as to create the

prerequisites leading to their effective integration in active life.

(3) In conjunction with the families, schools, businesses, neighbourhood organizations, cultural associations, and trusts, recreational and cultural groups, the State promotes and assists the youth organizations in pursuing the above-mentioned objectives, as well as the international exchanges of young people (Idem).

There is another category of states where the constituent power has opted for making reference to some provisions of the international treaties and conventions: Austria, France, and United Kingdom. This option can be explained in France by the creation of so called „block of constitutionality” referring to the incorporation in the category of constitutional laws of other 3 acts: The Declaration of the Rights of Man and the Citizen of 1789; The Preamble to the Constitution of 27 October 1946; The Charter of the Environment 2004. So, in France there is a single provision in the Constitution which indicates that the applicable texts should be searched in the international law. Article 55 of French Constitution provides: „Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party” (<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/la-constitution-du-4-octobre-1958.5071.html>, 18th of February 2016).

Another observation related to the constitutional protection of children in Europe targets that except the countries mentioned above and Norway, all other states (Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine) underline the importance of education, this topic being an essential part for the society. So, the education in every state is defined as an important pillar for the society and the presence of this principle in the fundamental laws reveals another aspect of the constitutionalization of law in this field.

In every Constitution the articles related to education focus on the school aspects. As an example, article 7 from the Basic Law of Germany develops the School system (http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_

federal_republic_of_germany.pdf, 18th of February 2016): „(1) *The entire school system shall be under the supervision of the state.* (2) *Parents and guardians shall have the right to decide whether children shall receive religious instruction.* (3) *Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.* (4) *The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the state and shall be subject to the laws of the Länder. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.* (5) *A private elementary school shall be approved only if the educational authority finds that it serves a special pedagogical interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality.* (6) *Preparatory schools shall remain abolished*”. In our opinion this kind of development is a little bit too large. We consider that in the fundamental laws shall be presented only the principles and then, in the organic laws the legislative power could make such large legislative provisions. In this regard, we can give as an example the Constitution of Italy (http://www.cortecostituzionale.it/documenti/download/pdf/Costituzione_della_Repubblica_italiana_agg2014.pdf, 18th of February 2016). Article 34 provides that the school is open for everybody and that 8 years of school are compulsory and free of charge (The original text is: „La scuola è aperta a tutti. L'istruzione inferiore, impartita per almeno otto anni, è obbligatoria e gratuita. I capaci e meritevoli, anche se privi di mezzi, hanno diritto di raggiungere i gradi più alti degli studi. La Repubblica rende effettivo questo diritto con borse di studio, assegni alle famiglie ed altre provvidenze, che devono essere attribuite per concorso”).

A very interesting position concerning the protection of children is present in the Constitution of Poland. As a general remark there are a few

states that provided in Constitution principles regarding protection of harm (Albania, Belgium, Hungary, Montenegro, Poland, Portugal, Serbia, Slovenia, Switzerland, Turkey, Ukraine). A hard line in this regard is drawn by Poland in article 72 (1) of Constitution: „*The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense*” (<http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>, 19th of February 2016).

CONCLUSIONS

Children represent in every country a central topic for the constituent power. The role of the children in society is very important and this thing is reflected also in the basic laws in Europe. However we underline the possibility of a discrepancy between the constitutional provisions and compliance in practice, but we are observing the complexity and the evolution of this kind of guaranties in Europe.

The position of children in the constitutional provisions can be considered privileged: on one hand because of the fact that children are the object of special protection and on the other hand children are holders of rights. It is important for every state to continue assuring this privileged position and to continue implementing the provisions of the Convention on the Rights of the Child.

REFERENCES

- Irinescu, Lucia., 2015** - *Curs de dreptul familiei (Family law)*, ed. Hamangiu, Bucharest, p. 9.
- ***,2016 - <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>, 19th of February 2016
- ***,2015 - http://www.dreptonline.ro/en_resourses/en_romanian_constitution.php
<http://www.norwayemb.org.in/PageFiles/634628/Visiting%20Norway%20with%20family.pdf>
<http://www.tribunalconstitucional.pt/tc/crp.html>
<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/la-constitution-du-4-octobre-1958.5071.html>
http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf
http://www.cortecostituzionale.it/documenti/download/pdf/Costituzione_della_Repubblica_italiana_agg2014.pdf
- ***,2014 - [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2014\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2014)009-e)