Deprivation of Liberty from a Children's Rights Perspective

The analysis of the international instruments through the examples of England-Wales and Romania

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LIST OF ABBREVIATIONS

CRC	United Nations Convention on the Rights of the Child
DTO	Detention and Training Order
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
P	Page
Par	Paragraph
SCH	Secure Children's Home
STC	Secure Training Center
VCLT	Vienna Convention on the Law of Treaties
UN	United Nations
UNICEF	United Nations Children's Fund
YOI	Young Offender's Institutions
YOT	Youth Offending Teams

EXECUTIVE SUMMARY

The topic of this thesis is children's deprivation of liberty in the universal framework as well as its analysis in two national contexts. The aim is to cover, present and analyze all the international instruments and their related comments, as well as to illustrate the degree of esteem with two European countries who are parties to all the conventions and treaties used.

The first part includes the description and analysis of children's rights in general. Emphasis is put on their path of appearance and on those theories which influenced most the evolution of children's rights as we know them today. The second fragment consists of the examination of the universal right to liberty. For this purpose the Universal Declaration of Human Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights will be used as a source of information. Each of these instruments is addressed and scrutinized separately, so that by the end of this chapter it will be clarified what the universal right to liberty means and what its most important components and related case law are.

The third chapter analyzes the children's rights to liberty and their limitations, namely their deprivation of liberty. I present the instruments which deal with this topic, and analyze the most important parts that play a relevant role in the assessment of a national children's rights system. The last chapter covers the situation of the two countries: England-Wales and Romania. Their legal systems will be presented through the past and existing legislation and then contrasted with the given international requirements.

INTRODUCTION

> Deprivation of liberty of children is a global issue. It is estimated that at least one million children are deprived of their liberty worldwide. These children often are confronted with (gross) violations of their human rights. They are detained for obscure reasons and held for long periods of time in inadequate, overcrowded facilities together with adults; they are denied family contact, legal or other assistance, health care and education; and they are subjected to violence, abuse and neglect by guards or other inmates. Children deprived of their liberty, often adolescents, are at serious risk of being damaged for the rest of their lives.[1]

I chose this quote as the introduction of my introduction because I think that Ton Liefaard has expresses a valid point and justifies the relevance of this thesis topic: children are not only at a high risk to be incarcerated but also the circumstances in which this happens lacks the requirements of the international human and children's rights standards. And that is why I find it important to do research in this subject matter. I find it not only relevant but also challenging as there are so many aspects (legal, psychological, social etc.) that have to be taken into account when someone wants to draw an appropriate conclusion in this area. Due to this complexity, my paper covers a wide range of topics, which at first might not seem closely related, but ultimately my intention is to bring the disparate elements together.

First I will speak about children's rights from a more general point of view. I will start with the theoretical background where I argue for the justification of children's rights as a separate field of the human rights law. While doing this, I will look at the historical aspects: to what extent were children oppressed and how this has slowly changed. In the next subchapter I will go deeper into the theory of children's rights. Despite the fact that it is a relatively new field of law, the number of scholars who have wrote about it, hence the amount of professional material is even higher. Therefore, I will concentrate on the most important works, like the one of Barbara Bennett Woodhouse, who claims for example that children's rights as such cannot exist.

[1] Ton Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia, 2008), p.1

Then there is fortunately the other side of this divided professional community, like Foster and Freed (in a book written by Jane Fortin), who claim that exactly because children are exploited they should be subject to a special and separate legal regime. As a next idea, it is crucial to present the most important theories which explain and justify the existence of children's rights: the will theory and the interest theory to which Eekelaar's perception of three different interests will be added: basic, developmental and autonomy interests. Through these I will argue that most of these theories and related disputes could be settled if the perspective of the best interest of the child is made a priority.

After addressing the universal aspects of children's rights, the second chapter will include an analysis of the theoretical background of the right to liberty. This might seem redundant, but as I will further explain in this chapter, for a proper understanding of children's deprivation of liberty, first it is necessary to describe and see how the 'general' right to liberty functions. Only then can we have a suitable presentation of children's rights to liberty (as all of the non-children's rights instruments also apply to children, and therefore sometimes not every right is included in the children concerned treaties).

After emphasizing the significance of the right to liberty, I will analyze the three most important human rights instruments which include this human right: the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). In the case of each of these treaties (and declarations) the description will include not only its specific requirements regarding the right to liberty but also its history of emergence. In this way, it will be easier to understand the 'big picture' of this human right.

I will start with the 'presentation' of the UDHR. Its importance is unquestionable: as it is the first international human rights declaration, the right to liberty is accordingly mentioned for the first time, therefore its importance to the present paper is immediately recognized. In this part emphasis will be put on the historical description, namely on how the working group ended up with this exact text choice. It will be relevant as later almost everything that had been kept outside of the text was included in the later text of the ICCPR. Also this whole 'negotiation' process will reflect how the right to liberty was perceived by the different countries. This section will also give us the explanations to the question: what were the main issues that had to be settled?

The ECHR goes one step further than the universal declaration. It includes a much more detailed regulation of this right and its limitations. In this subchapter, I will not put so much emphasis on the historical development as on the scholar's view. I will include the most important treaty comments which shed light on the original intention of the drafters. As expected, besides this the case law and the description of the most important cases will also appear in the context of this subchapter. Step by step, I will analyze each paragraph excluding those which do not play such a big role in the topic of my thesis (like the right to security) and accentuating those which refer expressly to children (Article 5(1)(d)). I will also define important notions like 'liberty' or 'lawfulness', so when it comes to the description of the Convention on Children's Rights (CRC) these will already be ascertained.

The last convention I included in my thesis, and which does not expressly refer to children, is the ICCPR. It is included not only because it is the first binding universal instrument concerned with the right to liberty, but also because it has influenced the realization of the CRC, and therefore its understanding in the context of children's rights to liberty becomes inevitable. As the number of

similarities with the ECHR is quite high, in this subchapter I will concentrate more on those issues which are regulated in a different way (certainly, briefly I will also address the similarities). The approach used will be the same as in the case of the ECHR: I will go from paragraph to paragraph and include the most important case laws and scholarly comments. Reference will also be made to the General Comments that appeared in relation to this article (General Comment 8 and the most recent one General Comment 35) and address article 10 next to article 9 as some additional requirements in relation to deprivation of liberty are included in the previous one (with specific reference to children).

After the cognizance of the universal right to liberty, the third chapter will go into specifics, and elaborate on children's rights to liberty and its limitations. The first subchapter will include the CRC's drafting history. It will become clear that although the convention has existed for more than 25 years, it still has a long road ahead to solve all the arising issues and controversies (age of criminal liability, the number of reservations made to it etc.). Naturally, its positive influences and solutions will also take place.

In a logical path, the next topic is the analysis of Article 37 of the CRC which includes the right of a child deprived of his or her liberty. Here I will not only list the components of the article but also show how it would fail to effectively protect children if other rules were not present. Although it is true that the most important parts of this right are included in this article, but for the purposes of legal certainty and clarity it would be more appropriate to expand the text of the convention. This is one of the reasons why as a last step I will elaborate briefly on the Beijing and the Havana Rules as they will be more important in the two countries' legal system analysis. Their description will be short and to the point as they cover a wide range of topics, and it would

be hardly possible to include them in the given limits. But during the country analysis I will constantly refer to these specific rules.

As it is obvious from the title of my thesis, I will conclude my work with the examples of two countries: England-Wales and Romania. In the last subchapter I will explain in a more detailed way why I chose these two; at this moment it is enough to say that it was more challenging to draw a parallel between two considerably different yet in a way similar legal systems. The approach will be analogous: I will present some general statistics, so the reader could form a general idea about the situation of children deprived of their liberty. As it was not possible to find exactly the same statistics, sometimes they refer to different years and different topics, but they serve the aim very well. Then I will proceed to the presentations of the legal systems. A short historical description will always be included as it is important for a better understanding of the current legal system.

My work will continue with the presentation of the current laws and regulations in force. It will be expounded how the two legal system works: which courts are responsible for children, what types of laws regulate deprivation of liberty, what is the length of a custodial type of detention, what types of detention facilities are present in the system etc. If necessary, criticism will always be offered, but at the end of each subchapter I will always repeat the formulated critics in a more structured and direct way.

My concluding remark will emphasize the most important findings of this thesis. In addition to a general conclusion, some recommendations will be made which could influence the current international and national children's rights system.

CHAPTER 1. CHILDREN'S RIGHTS

Children's rights as such, is a relatively new field of law. It has emerged in the second part of the 20th century, especially after which the civil rights movements in the United States took place in the '60s and '70s. And only in 1989 did it become a concrete part of the United Nations human rights system, when the Convention on the Rights of the Child was adopted.

As the aim of my thesis is to address and analyze the situation of children deprived of their liberty, first it is essential to evaluate in a general way what children's rights are and how they emerged. In this chapter, first of all I will shortly describe the theoretical background, and the process of how children's rights after all 'appeared on the stage of human rights'. Then in the second part, I will briefly address the most important theories related to children's rights, as this will give more space to a better understanding of the general framework.

1.1. Theoretical background

Children and their rights, until the second part of the 20th century, had not been acknowledged. Children were regarded as mere objects 'that' have to be disciplined in order to make them good, 'which' can later grow up and do the same with their own children. Not to mention the discrimination between boys and girls, where the latter were regarded as harm to the whole family because of her 'cost' (on a very basic level: she has to be married somehow).

With the change of historical periods, the perception of the family and the kid's role in it has also slowly changed. As Philippe Aries's "pioneering and revolutionary"[2] work states: "childhood did not exist before the 17th century"[3], when that time in Europe: "the special nature of children was

[2] UNICEF, *Protecting the World's Children, Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (Cambridge University Press, 2007), p. 105
[3] Ibidem

ignored and children were treated as miniature adults"[4]. A meaningful illustration would be the description of the attitude of the people in the Roman law period:

> The ancient Roman laws gave the father a power of life and death over his children, upon this principle, that he who gave has also the power of taking away. Moreover a son could not acquire any property of his own during the life of his father, but all his acquisitions belonged to the father or at least the profits of them for his life.[5]

This fortunately changed in the following centuries, especially in the 18th when, as the UNICEF study[6] points out, even paintings altered. For example in the paintings of the Spanish painter, Velazquez, the child appeared as a different individual in family portraits, with different clothing and style, so it 'gained' a separate and clear place within the family.

Despite this, the law did not treat children at all. An adequate example is the 'Mary Ellen Fair' in the United States, where a child's parents could only be prosecuted, (for keeping their daughter chained to a bed and fed with bread and water) if the prosecutor drew an analogy with the existing law for the prevention of cruelty against animals.[7] So the United States adopted a law concerning the torture of animals earlier than one concerning children. This was everything, but not a normal and acceptable situation (from a modern human rights point of view).

Unfortunately, all the achievement of the 19th century was the acceptance of the fact that children have incapacities: "I acknowledge you for what you cannot do, for what you do not know, for what you are incapable of."[8] Then this moved to the direction of protection, care and control rights especially in the beginning of the 20th century, after the First World War, when lots of children had died. Then in the second part of the century, scholars, through the adoption of the

[4] Antonella Invernizzi and Jane Williams, *The Human Rights of Children, From Visions to Implementation* (Ashgate Publishing Limited, 2011), p. 39
[5] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition). p. 6
[6] UNICEF, *Protecting the World's Children, Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (Cambridge University Press, 2007), p. 105
[7] Antonella Invernizzi and Jane Williams, *The Human Rights of Children, From Visions to Implementation* (Ashgate Publishing Limited, 2011), p. 40
[8] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 105

United Nation's Children's Rights Convention tried to combine these categories, plus add the so called 'autonomous rights'. Therefore it is quite obvious that children were not protected for a long time. But was this because there was no human rights protection at all at that time, or because they lacked the additional, special protection system? To be able to give an adequate answer, I consider it necessary first to argue for the necessity of special group rights, namely for children's rights and then, to look at the most important theories which arose in this field of law.

The purpose of all the existing international human rights instruments is to protect all human beings. So if we need a further convention to have adequate protection for a special group (like children, women, and minorities), does it mean that they are not regarded as human beings? The answer is definitely an affirmative no. We need that additional instrument because a general human rights convention cannot address all the specific problems of a certain group, therefore for a truly effective protection there is a need of listing all the relevant, specific rights (and in some cases even their procedural requirements). For example, in the case of the CRC this additional element, which made a huge change towards other conventions, was the introduction of the principle of the 'best interest of the child'.

Laws are generally viewed as a solution for "forbidding inequality and providing for equality; where one ends the other begins"[9], moreover:

> …law holds its legitimacy and validity by virtue of its coercive potential, its rational claim of acceptance as rights. The legitimate legal order is found in its reflexive process; therefore, we must all believe that equality is a good and necessary thing, which is essential to the very growth of society.10

Scholars have highlighted the importance of special rights. Carrie Menkel-Meadow, a well-known law professor, states that: "each time we let in a new excluded group, each time we listen

[9] Anne Marie Mooney Cotter, Little Angels, An international Legal Perspective on Child Discrimination (Ashgate Publishing Limited, 2012), p. 4
[10] Ibidem

to a new way of knowing, we learn more about our current way of seeing".[11] A good example for this would be slavery. Despite the fact that the American society was so constitution focused throughout centuries, by excluding a group of people just because of their origin or their situation within the community, has stamped the whole country, and questioned its humanity. Once this was abolished, the general attitude of the people towards slaves and colored people slowly changed, therefore a 'new way of knowing and seeing' has emerged.

A similar example would be the emergence of women's rights and their acceptance as 'whole' citizens within a country's border. Without going into detail, it is enough to think about the differences between Europe and the Middle East simply from this perspective. As there are of course other factors which contribute to the differences, I am certain that one of the factors is how society in general perceives and deals with women.

So taking just this idea, of including new groups and changing as a result our way of thinking, it should be enough to analyze the situation of children and their rights in one society, and then one should be able to draw a conclusion from the build-up of the entire system. Here again I would like shortly to refer to the United States. Although, as we will later see[12], the United States was one of the main voices to 'give rise to' a children's rights convention, they have never ratified the convention itself. And the concrete facts and the situation of children (deprived of their liberty) clearly reflects this. Speaking only in numbers, the United States is the leading country regarding the number of imprisoned children.[13] It would be interesting to conduct a separate research, and see if this number could be changed just by the United States' adoption of CRC,

[11] Antonella Invernizzi and Jane Williams, *The Human Rights of Children, From Visions to Implementation* (Ashgate Publishing Limited, 2011), p. 21
[12] See Chapter 3
[13] Kristin A. Bates, Richelle S. Swan, *Juvenile Delinquency in a Diverse Society* (Sage Publications, 2014), p. 335

and the recognition of children and their rights internationally as a separate, vulnerable group with special needs.

Focusing back our attention on the general topic of the role and the need of rights, it can also be stated that generally rights are a forum for deeds: "to accord rights is to respect dignity, to deny right is to cast doubt on humanity and integrity"[14]. It is very simple: if you do not have a right, you cannot claim it; if you cannot claim it you cannot enforce it; and if there is nothing to enforce, it is clear that there are simply no rights, and for this reason you are stuck in a 'vicious circle'. In this situation one would be dependent on the "charitable nature of others: they can request, they can beg, but they cannot demand, they lack the entitlement to do so".[15]

Moreover it belongs to the very basic essence of rights in general that when one right is denied that can have an impact, or even "totally undermine other rights"[16]. So by the denial of these special rights the existence of the general human rights could be actually even more undermined. For example if one country does not accept the fact that children need special protection in prison, or that their deprivation of liberty has to be subject to a different, special regime, then the general human right of not being subject to torture, degrading or inhuman treatment is probably instantly undermined and violated.

For all these reasons, I would argue that children's rights were undermined in the beginning due to the lack of any human rights protection at all[17]; and later because of the lack of specific provisions and treaties. While the acceptance for the need of human rights brought some changes in society (French Revolution, American Revolution etc.) children were still not considered full

[14] Ibid, p. 22
[15] Ibid p. 23
[16] Ibid, p. 21
[17] This is a logical conclusion. While a society was characterized through massive and systematic discrimination in general, one cannot really speak about any kind of human rights protection.

members of a society. Before a separate protection system started to emerge, there was no real protection, because the acknowledgments of these rights were only dependent on society and on parents. Shortly that is why, the existence of these separate group rights are justified, and should be considered as a priority also in the future.

While this seems palpable and acceptable, a complicated and interesting issue subsequently arises: even if there is an agreement on the fact that children do need special rights, whose rights are we actually talking about? Is it the parent's (because he/she is anyway the one who can judicially enforce it) or is it indeed the children's own right? Are these rights or rather moral principles, and how should a conflict, arising from two antagonistic rights (children v. parent's rights), be solved? The best way to approach this is to look at the children right's theories, and how scholars divide in this dispute and what their main arguments are (which is the topic of the next subchapter).

1.2. Children's rights theories and their relevance

Even today the dispute about who children's rights belong to has not been settled. It is important to emphasize the fact that the dispute is not about whether there is a need for special children's rights (that has been addressed in the previous subchapter), the question is what form it should take: children or their parents should be the right bearers? For example, in a book published in 2001[18], Barbara Bennett Woodhouse, a children's rights experts, still thought that the term itself (children's rights) is an oxymoron:

> The very term "children's rights' sounds like an oxymoron. In the American system of laws, the notion of "right" seems to presuppose an autonomous part capable of exercising his or her powers through informed and independent choice. But children are born into dependency, and the infant's helplessness is a fact of life in every human society. Adding to children's essential dependency, modern Americans have set aside the life stage called "childhood" as a

[18] Susan O'White (edited by), *Handbook of Youth and Justice (*Kluwer Academic/Plenum Publishers, 2001)

> special time of innocence coupled with incapacity, during which the young are to be protected from their own immaturity and sheltered from adult experiences and adult responsibilities.[19]

Despite the fact that I have my doubts regarding this idea, I still consider it important to look at both sides of the arguments. For this, first of all I will present the most important theories, how they emerged, their benefits and downsides. In the end I will argue for my own opinion, and I will describe what my personal view on this issue is.

Although the CRC is a landmark in the 'life' of children's rights, the civil rights movement in the United States in the '60's and 70's left its print mark and influenced the development of several of today's prevailing children's rights theories (in a child friendly way.) Since children are separate human beings, they should be regarded and treated even in the judicial system as a separate 'entity' and not like peoples whose rights depend on another person. This was later also, even more clearly reflected in the CRC itself.

For example Foster and Freed were among the representatives of this idea. They claim that children need their rights, because adults exploit them: "[C]hildren are persons and the law should recognize that fact, although it will take some doing. The status of minority is the last legal relic of feudalism"[20]. Or it is also important to cite the famous In re Gault US decision[21] where the court held that: "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"[22]. Similarly, Michael Freeman has pointed out Robert Ollendorf's argument from 1972:

> …whether such a right was good for a children was beside the point, children should be granted rights for the same reason that adults were, ideological belief in the value of freedom, with the acknowledgment that freedom is a difficult burden for adults as well for children[23].

[19] Barbara Bennett Woodhouse, *"Children's Rights"* in *Handbook of Youth and Justice,* ed. Susan O'White (Kluwer Academic/Plenum Publishers, 2001), p. 377
[20] Jane Fortin, *Theoretical Perspectives. In: Children's Rights and the Developing Law* (Butterworths, 1998), p. 4
[21] In re Gault, 387 U.S. 1 (1967)
[22] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 576
[23] Michael Freeman, *Children's Rights: A Comparative Perspective* (Dartmouth Publishing Company Limited, 1996), p. 3

One of the best known and important theories are the will and the interest theory. The will theory puts emphasis on the capacity of an individual's autonomy, if someone is capable of making decisions. If not, then the person is not in a position to claim rights; in this case we can only talk about needs of others, therefore adults, have the responsibilities to fulfill these needs. On contrast the interest theory states that the simple fact that a right exists is enough, because then there is an interest and its corresponding duty which has to be fulfilled.[24]

As it can be seen the will theory is a more practical one, while the interest theory seems more theoretical. But even in the case of the will theory, several questions can be raised: from what point can you actually say that someone is capable of making decisions? Is it the maturity age (which itself varies from one country to another) or should it be an earlier one? Or if someone is already capable of making decisions, does it mean that he or she has no needs anymore?

Exactly because of all these uncertainties, I would be inclined to accept and use the interest theory. For me it is evident and unquestionable that by the acceptance of a right, the interest and its corresponding duty is immediately justified. So from this perspective, there is no need to answer the above questions. And then naturally, the whole legal certainty principle is more easily fulfilled. MacCormick, adequately, has also argued for the existence of children's rights in this case:

> … that each and every child is a being whose needs and capacities command our respect, so that denial to any child of the wherewithal to meet his or her needs and to develop his or her capacities would be wrong in itself (at least in so far as it is physically possible to provide the wherewithal) and would be wrong regardless of the ulterior disadvantages or advantages to anyone else- so to argue, would be to put a case which is intelligible as a justification of the opinion that children have such rights[25].

[24] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 83

[25] Neil MacCormick, *Children's Rights: A Test-Case for Theories of Rights*, Archiv fur Rechts- und Sozialphilosophie, 32: 305–317 (1976); reprinted in his Legal Right and Social Democracy: Essays in Legal and Political Philosophy (Oxford: Clarendon Press, 1982), p. 310

Naturally, even in this case when the rights as such are accepted, different scholars have slightly different views regarding the justification of the existence of children's rights. According to the famous law lecturer, John Eekelaar, the "key perception for rights in his theory, is the social perception that an individual or class of individuals has certain interest"[26]. But these interests have to be separable, 'be capable of isolation'[27], so that is why he identified three separate kinds of interests: basic (minimal standards of being able to grow up), developmental ("all children should have an equal opportunity to maximize the resources available to them during their childhood, including their own inherent abilities, so as to minimize the degree to which they enter adult life affected by avoidable prejudices incurred during childhood"[28]) and autonomy interests ("the freedom of choice, to select his own lifestyle and to enter social relations according to his own inclinations uncontrolled by the authority of the adult world, whether parents or institutions"[29]).

Another important and similar view to the previous one, is presented in a book written by Michael Freeman: The Rights and Wrongs of Children[30]. This point was overtaken by Andrew Bainham, who together with Freeman stressed that rights are needed in order to have an entitlement to demand a certain right, without being forced to ask for favors or beg. So he produced a fourfold classification: rights to welfare, rights of protection, right to be treated like an adult and rights against parents.[31]

These two categorizations of Eekelaar and Freeman in fact overlap (rights to welfare are in fact basic rights, and developmental rights overlaps with protection rights etc.). But what is very

[26] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 85
[27] Ibid, p. 85
[28] Ibid, p. 86
[29] Ibid, p. 86
[30] Michael Freeman, *The Rights and Wrongs of Children* (Frances Printer, 1983)
[31] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 87

important in both of these classification methods is that finally the autonomy interests ("choosing to enter into social relations uncontrolled by the adult world"[32]) got a separate place, and are indeed accentuated. And this is what actually made a difference in the general context of debate about children's rights.

On the other hand, there are specialists who still argue for a will grounded theory approach. One of them is the philosopher Onora O'Neill, who argued that children's rights are best "grounded by embedding them in a wider account of fundamental obligations"[33]. She claims that:

> … many of the rights promulgated in international documents are not perhaps spurious, but they are patently no more than "manifesto" rights… they cannot be claimed unless or until practices and institutions are established that determine against whom claims on behalf of a particular child may be lodged. Mere insistence that certain ideals are rights cannot make them into rights.[34]

This passage brightly points out the problem of lack of 'practices and institutions' behind children's rights (in fact this is a big problem for the whole human rights field). But using this argument as undermining a whole area of special rights is too convenient. In my opinion this should be a theoretical dispute, and that theory should be defended and promulgated, which serves the best, the general interest of the child. If that is reflected at all in practice or not should already be a second stage approach. And the goal should be to implement the best theory into practice, and not to find excuses for non-implementation just because currently there are obstacles in their realization.

And last but not least, I will list McCall Smith's approach who makes the difference between child-centered and parent-centered rights. While the first obviously benefits the child, the second's aim is to benefit the parent, but ultimately it might also benefit the child.[35] While this is

[32] Ibid, p. 86
[33] Ibid, p. 92
[34] Ibid, p. 92
[35] Ibid, p. 103

in a way a further expansion of the will and interest theory, it draws our attention to certain problems. First of all, it seems problematic that such a division exists at all. If we make this distinction, then that would imply that in most cases we are speaking about antagonistic rights, and one should always choose which one should prevail. This is inconsistent with the whole idea of children's rights. As women's rights, or minority rights imply that those rights serve the interest of women or minorities, similarly children's rights should imply that they serve the interest of the child. It is of course evident that in case of children, parent's rights automatically appear, but they should appear as complementary support for children's rights. Otherwise, if we try to contrast them, regrettably both of them are undermined[36].

In conclusion, it can be stated that all these theories presented have identified common areas which are alarming for everyone. They all have raised the issue of balancing one set of rights against another, namely how to solve the tension between children's and adults' rights. [37] Although there is no one right solution, as generally in the field of science, everyone can have their arguments. What matters is that one should always be cautious to understand and listen to the other type of argument, otherwise the children's rights field, as a whole, cannot be properly understood.

This listing of theoretical approaches is not exhaustive at all, but in conclusion it still can be identified that there are two sides: on the one hand there are the ones who claim, even today, that paternalism should prevail, children have interests rather than rights; and on the other hand there are the ones who fight for the total liberationist view, claiming that: "children had a far greater

[36] A typical example for this would be the right of the child to freedom of thought, conscience and religion and the parent's right to educate his or her child as he or she wishes. If we approach this as two contrasting right, none of them will be realized, but if we approach them as two rights which support each other, than none of the essence these rights will be disregarded.

[37] Jane Fortin, *Theoretical Perspectives. In: Children's Rights and the Developing Law* (Butterworths, 1998), p. 3

ability for self-determination than most societies cared to admit and there was little reason to exclude them from the freedoms granted by the state to adults"[38].

I would argue for an approach which lies somewhere in the middle. I admit the importance of paternalism under a certain degree: when it serves the best interest of the child. And I think that this view is best supported by Eekelaar's threefold grouping approach. It is useful because that is how one is actually able to establish in every particular circumstance which right should prevail and which ones might have less importance. Obviously basic rights should be always the first to be fulfilled, because very simply put: without proper nourishment the child is not able to concentrate and learn in school. In reference to this, I will note Rawls' objective evaluation, namely that "primary social goods" related rights should always prevail.[39] This is inspiringly correctly formulated.

The same approach can be applied when a decision has to made between developmental and interest rights: sometimes in the best interest of the child, certain rights could be denied (as the choice of his/her lifestyle) in order to give them a full chance of development first. Although generally in the human rights area it is not accepted (especially on a theoretical level) that one right is more important than another, this cannot always be considered practical. In the area of children's rights, this has to be given up on some level due to the special situation of children (vulnerability, not having the full competence of decision making, transitional period etc.).

In conclusion the best approach would be a mix of paternalistic and liberalist one, which could and should mostly benefit the future adult life of a child. The question of how this should in practice look like is another issue about which a whole separate thesis could be written.

[38] Ibid, p. 5
[39] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition) p. 89

CHAPTER 2. INTERNATIONAL INSTRUMENTS CONCERNING DEPRIVATION OF LIBERTY

The right to personal liberty is one of the oldest human rights, which was already recognized as early as 1215 in the Magna Carta Libertatum: "No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land (par. 39)"[40] Or later in the Declaration of the Rights of the Men from 1789 in article 7: "No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law"[41].

Despite this early recognition of this right, very interestingly, imprisonment as a form of deprivation of liberty, has gradually become the most common means of a state to fight against criminality and maintain its internal peace and security.[42] This can be explained by the fact that the death penalty or other cruel punishments (present especially in the medieval time) have gradually disappeared, so alternatives had to be found.[43]

The right to personal liberty is not an absolute right. In contrast to the right to life, or the prohibition of cruel, inhuman and degrading treatment, it would be pointless and unreasonable to argue that deprivation of liberty should be abolished. This idea is supported by a number of scholars, like for example Manfred Nowak who highlighted, that: "Since the realization of a

[40] http://www.orbilat.com/Languages/Latin/Texts/06_Medieval_period/Legal_Documents/Magna_Carta.html, accessed 07.04.2014
[41] http://avalon.law.yale.edu/18th_century/rightsof.asp, accessed 07.04.2014
[42] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary,* 2nd revised edition (N.P. Engel, Publisher, 2005), p. 211
[43] See also M. Foucault, Discipline and Punish: *The birth of the prison* (London, Penguin Books)

society without prisons seems utopian, deprivation of personal liberty will also in the future continue to be one of the legitimate means for exercising sovereign state authority"[44].

Therefore, in this context, the questions and the issues related the right to personal liberty become more complex. Although at this point the reality is that imprisonment is and probably will stay the main form of punishment, its effectiveness and consequences still have to be assessed. Especially in the children's context, where, as it was described in the previous chapter, the subjects are especially vulnerable and exposed to greater danger not just physically but also mentally. So as I will argue at the end of this chapter, despite the fact that the right to liberty has good and exhaustive international protection, the tendency and the willingness to use and (re)invent non-custodial measures should be enhanced.

Moreover, the right to liberty raises a number of legal, especially procedural questions. For a better understanding of this aspect, in this section, I will compare the concrete texts of the different conventions. I will look at the original intent of the drafters and at the existing case law of the diverse monitoring bodies. By doing this, we will be able to understand how these protection mechanisms work, and what are the most important elements that each of these international instrument emphasizes.

But then the question inevitably arises: is there a real need for this, or would not it be enough to go directly to the CRC mechanism? My answer here is undoubtedly, no, the main reason for this being, that the CRC was highly influenced by previous conventions. So logically, if we want to have a correct and accurate 'dissection', this step of analyzing all the currently existing mechanisms cannot be avoided.

[44] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary,* 2nd revised edition (N.P. Engel, Publisher, 2005), p. 211

An additional reason in the support of this chapter would be that, not just did these instruments highly influence the drafting of the CRC itself, but they themselves do apply to children as well. When it comes to children's rights, it is easy and more convenient to look only at the CRC, but one should never forget, that the CRC (or any other Convention and Protocol) in itself is not enough for an effective protection. Conventions like the ICCPR and the ECHR (in the European context) have to be taken into account; and all these provisions can only have a correct interpretation if they are put in the light of each other. I will elaborate more on this point later, especially in the next chapter.

Accordingly, in the following pages, I will generally address all the above listed issues: how were the relevant articles of the specific conventions drafted, what was the original intent, how does the language influence the realization of this right, what are the differences between the mechanisms, what the case law is etc. In addition, so that the visibility of the 'evolution' of the right to personal liberty can become even clearer, I will do this in a chronological order: first I will 'explore' the UDHR then the ECHR after which the ICCPR and finally the UN General Comments and additional rules.

Although due to the limited length of this paper I will not give an exhaustive description, but I will try to include all elements which will be more important in the children's rights context. That is why I will not write about the specific fair trial rights components which could be invoked here, nor about the theoretical debates which arose in relation to unlawful deprivation of liberty (extradition, surrender etc.). My aim is to give an introductory theoretical knowledge about the conditions of deprivation of liberty in general, which then, can be contrasted to the specific situation of children.

2.1. Universal Declaration of Human Rights – Article 9

The first important and really meaningful human rights convention was the Universal Declaration of Human Rights. As to why it was adopted in the first place, and how did the need emerge for it, a very simple explanation would be the occurrence of the Second World War:

> When the United Nations was founded in San Francisco in 1945 there was a tremendous pressure on the delegates to that founding conference to include an international bill of rights in the Charter of the United Nations. The national and international pressure for such bill has been steadily building throughout World War II.[45]

The Economic and Social Council was mandated to create the Human Rights Commission, whose task was eventually to create the Declaration[46]. The whole process, namely how this was created and realized, was rather complicated. What is important here, is that quite a number of different countries were called upon to serve in this Commission; between them Australia, Byelorussian Soviet Socialist Republic, Chile, China, India, Iran, Lebanon, Philippine Republic, United Kingdom, United States of America, Union of Soviet Socialist Republics etc.[47] And then the process consisted of seven formatting drafting stages, after which the final text was adopted by the General Assembly in 1948[48].

In the context of deprivation of liberty there are two important articles. The first is article 3: "Everyone has the right to life, liberty and security of person" and the other one is article 9: "No one shall be subjected to arbitrary arrest, detention or exile".[49] Although both of them refer to the right to liberty, in our context article 9 has more importance that is why in the followings that will be addressed in more detail.

[45] Johannes Morsink, *The Universal Declaration of Human rights, origins, Drafting, and Intent* (University of Pennsylvania Press, Philadelphia, 1999), p.1
[46] Ibid, p. 4
[47] Ibidem
[48] Ibidem
[49] http://www.un.org/en/documents/udhr/index.shtml#a3, accessed 08.04.2014

As it is described by scholars, article 9 is: "[…] short and vague. It only prohibits arbitrary arrest, detention and exile without giving any guidance as to the meaning of these expressions."[50] Although in the early drafts, as explained by Asbjorn Eide and his cowriters, this article was formulated in a much more precise way: "In the first draft before the Commission we can find the requirement of lawful arrest; the right to an immediate judicial hearing in front of a judge and the right to a trial within a reasonable period of time."[51] For a better understanding, I wish to describe briefly how and why did the Commission opted for this particular text.

Originally this right was included in article 8 the following: "Everyone who is detained has the right to immediate judicial determination of the legality of his detention. The state has the duty to provide adequate procedures to make this right effective".[52] In the comments following this passage (in the travaux preparatoires), it was noted that this right is included in the constitutions of thirty-four countries, and they included further explanations to some notions like for example: "immediate determination means not only that he shall have access without delay to a competent tribunal but also that the tribunal shall promptly decide the question"[53]. This explanation and further detailed description served as justification for the inclusion of this right in the Convention. And in the following steps the question was not whether this right should be included at all or not, but it was more focused on its concrete realization: which words would fit best the purpose and aim if this convention?

Later the text was changed in the following way: "Every person accused of crime shall have the right not to be arrested except upon warrant duty issued in accordance with the law, unless the

[50] Asbjorn Eide et al., *The Universal Declaration of Human Rights: A commentary* (Scandinavian University Press, 1993), p. 148
[51] Ibidem
[52] William A. Schabas OC MRIA, *The Universal Declaration of Human Rights, The travaux preparatoires, Volume I, October 1946 to November 1947* (Cambridge University Press, 2013), p. 26
[53] Ibidem

person is arrested flagrante delicto[54]. He shall have the right to a prompt trial and to proper treatment during the time he is in custody"[55]. Later the draft outline prepared by the Division of Human Rights sounds followings: "Everyone shall be protected against arbitrary and unauthorized arrest. He shall have the right to immediate judicial determination of the legality of any detention to which he may be subject"[56]. The changes continued and almost every time when the committee sat down (especially in the beginning) this article was altered, but its essence remained the same: arrest can only occur with a procedure prescribed by law, and that there is a right to an immediate judicial review in case of an arrest.

In the third meeting of the working group on the Declaration of Human Rights a few very interesting ideas and objections were addressed. I will include them here, as I think later on, these will have importance. Mr. Easterman from the part of the World Jewish Congress raised the problem that there is a danger in opting for the usage of the word 'law'. He cited the example of the very recent Second World War events, where the actions of the Nazi regime were formally speaking lawful.[57] Similarly, Mr. Bogomolov from the part of the Union of Soviet Socialist Republics observed that: "the meaning to be attached to the word "law" appearing in texts of the declaration was the laws of the State or of democratic society the first duty of which was to develop and consolidate democracy"[58]. This was even more detailed by the Soviet proposals through their document E/800, in which they expressly stated that this article should be much more descriptive and include the right to establish the detentions legality, the right to bring the

[54] Caught in the act of committing an offence.
[55] Ibid, p. 102
[56] Ibid, p. 282
[57] William A. Schabas OC MRIA, *The Universal Declaration of Human Rights, The travaux preparatoires, Volume II, October 1946 to November 1947* (Cambridge University Press, 2013), p. 1179
[58] Ibidem

case immediately before a court, no imprisonment for contractual obligation plus the right to be entitled to compensation if the deprivation of liberty turns out to be illegal.[59]

In 1948 in May, the Chinese Delegation was the first which in its submission for the draft declaration already used the short form: "No person shall be subjected to arbitrary arrest or detention".[60] Very interestingly though the idea to delete this article (not the right itself but the words describing it) has been raised several times. For example, in the thirty fifth meeting of the Drafting Committee Mir Wilson (United Kingdom representative) as well as Mr. Wu (China) were in favor of deleting, mostly arguing that the same idea is already included in the previous article: "Everyone has a right to life, to liberty and security of person", and that this idea is already included in the Covenant.[61] Mr. Pavlov (Union of Soviet Socialist Republics) was this article's defendant, arguing that by keeping this article an additional force is given to this right even though it is already included in the Covenant.[62]

Ultimately, the Third Committee of the General Assembly was "concerned with the general style of the Convention"[63], and they preferred that it should rather contain: "general principles, precise legal definitions should rather be included in the covenant"[64] said the delegate from New Zealand[65]. In one of the final debates Mr. Davies, United Kingdom representative, explained the following idea which in fact will become the majority view:

[59] William A. Schabas OC MRIA, The *Universal Declaration of Human Rights, The travaux preparatoires, Volume III, October 1946 to November 1947* (Cambridge University Press, 2013), p. 2117
[60] William A. Schabas OC MRIA, *The Universal Declaration of Human Rights, The travaux preparatoires, Volume II, October 1946 to November 1947* (Cambridge University Press, 2013), p. 1475-1476
[61] Ibid, p. 1537
[62] Ibidem
[63] Asbjorn Eide et al., *The Universal Declaration of Human Rights: A commentary* (Scandinavian University Press, 1993), p. 148
[64] Ibidem
[65] This idea has been expressed several times during the negotiations. For example the French representative Mr. Cassin expressed the following idea: "The Bill of Rights should for the present be in the form of a resolution, which would be sent to the General Assembly rather than in the form of a complete code with all the laws which that

> He agreed with the representatives of the Philippines, Lebanon and the United States that the ideas in the amendments presented would be more appropriate in the covenant. It was not a question of a longer or shorter article, but whether the declaration should contain solely a statement of principle or should also include measures for implementation. […] The delegation believed that the covenant was essential in the international protection of human rights but it should be remembered that it formed only one part of the international bill of rights. […] The declaration should be simple, inspiring statement of principles, excluding measures for implementation. Therefore in the final voting every specific limitation was excluded and left for the future conventions to describe them precisely.[66]

I fully agree with this statement, and for that reason I claim that the Commission opted for the proper solution. First of all this Convention is not legally binding. Therefore creating a declaration with too much detail could undermine its universality, because countries may have different practical solutions for the realization of the same right. And secondly the right to liberty entails so many details (right to a judicial hearing, the requirement of the procedure of being prescribed by law, no detention for non-compliance with contractual obligation etc.) that it would have been subject to too much and too long debates about what to include and what not.

In conclusion it could be said that the Universal Declaration of Human Rights from a children's rights point of view has two major importance. The first is that it is the first international human rights instrument to acknowledge that arbitrary detention is a human rights violation (without this it would have been much more difficult to declare it for the first time only for children), and second of all through its debates and initial texts it creates a universal basis of what should someone understand by an arbitrary detention, and what rights are linked to it. But unquestionably, it is the duty of the concrete, legally binding conventions to describe it in a detailed way. Every other treaty and convention uses this as a basic source, therefore it is important to be familiar with its history and content.

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embodies… We need a certain ideal, and that I think would be diminished if there were too great an enumeration of all the various details." (Human Rights Committee, 8th Meeting, V.R., p. 8231, January 1947)

[66] William A. Schabas OC MRIA, *The Universal Declaration of Human Rights, The travaux preparatoires, Volume III, October 1946 to November 1947* (Cambridge University Press, 2013), p. 2357

2.2. European Convention of Human Rights – Article 5

The European Convention was the first big regional human rights treaty adopted after the Universal Declaration of Human Rights. It was signed on the 4th of November 1950, and entered into force in 1953[67]. By today it has 47 signatory countries, and although its effectiveness receives a number of critics[68], it still has a huge influence on the member states' legal system, and the citizens' possibility to challenge their government.

This Convention has a detailed description of the right to liberty, and also its jurisprudence serves as a very important basis for the complex understanding of this right. Article 5 as follows:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

[67] Helen Keller and Alec Stone Sweet (edited by), *A Europe of Rights, The impact of the ECHR on National Legal systems* (Oxford University Press, 2008), p. 3

[68] The biggest current problem is that the enforcement of the judgments highly depends on the political will of the governments. This is why one cannot speak about a wholly effective system (the typical example of Russia, or the United Kingdom).

> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.[69]

In order to better apprehend the meaning and the purpose of the article, in the following paragraphs I will describe the most important theoretical and jurisprudential knowledge scholars have identified (putting emphasis logically, on subparagraph 5(1)(d), which explicitly deals with minors). I will do it in a more exhaustive way, then in the case of the Universal Declaration, mainly because in the last chapter the two countries which I will analyze are part of this Convention. Therefore it will be interesting to see the contrast and the similarity between the European jurisprudence's 'prescription' and the national laws and their case law reality.

2.2.1. General aspects

Article 5 has an interesting approach as regards the rights structure. First it states that everyone has the right to liberty, after which it enumerates all the cases (6 possibilities) which could be considered lawful for deprivation of liberty. Then the remaining four paragraphs describe the concrete rights of the person who eventually still has to suffer from a liberty deprivation. This remarkable because it limits the possibilities when a deprivation of liberty can be considered lawful. Generally, as we will see in the other conventions, the treaty texts are much more flexible, and give the possibility to states to determine in their own legislation the category of lawful deprivation of liberty. But the European Convention took this out of the hands of the states and gives a restrictive list which has to be observed.

This means that any type of deprivation of liberty which is not part of the above six categories will violate the convention.[70] Although this might seem obvious it is not that clear. During the

[69] European Convention of Human Rights, Article 5, http://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed 22.08.2014

analysis of each paragraph it will become much clearer that there might be possibilities for multiple interpretations. It might not be for example that clear what is a deprivation of liberty. This 'problem' has also come up in the case law of the court, for example in the case of Riera Blume and others v. Spain[71]. Here the question has been whether the family members of the six applicant, belonging to a religious cult, had the right to keep the applicants in custody (aided by the police) with the aim of "deprogramming them by psychiatrists"[72]. And as this case did not fall under any of the allowed categories of deprivation of liberty, the court has found a violation.

I included this example to demonstrate that this detailed enumeration has a very strong impact on the European perception of lawful deprivation of liberty. I definitely think that long term, this precise and concrete formulation might be a much more efficient solution than the text of the ICCPR for example. The clearer a judicial text is the lesser the possibilities for abuse are. If a text only prohibits arbitrary detention in general way that might be easily abused.[73] In other words, I think that the text of the ECHR from a clarity point of view is really good and should serve as a good example for countries' domestic legal system or for future international treaties. Unsurprisingly though, every treaty lacks perfection, therefore a thorough and deep analysis of the text is needed.

The first sentence of Article 5 speaks not only about liberty but also about security. For that reason at this point of my thesis, I wish to specify the fact that I will not elaborate (in either of the conventions and treaties) about the problematic of the word and the right to security. For the

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[70] Jacobs and White, *The European Convention on Human Rights* (Fourth Edition, Oxford University Press, 2006), p. 127

[71] *Riera Blume and others v. Spain*, Application no. 37680/97, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58321, accessed 22.08.2014

[72] Ibidem

[73] I am not speaking here only about international treaties' texts, because in this case the countries are of course bound by the case law or the legal customs of the given system. The real danger appears if a country opts for a similar formulation, and therefore the law enforcement agencies could easily hide behind vague text of the laws.

purposes of this topic it is enough if I solely concentrate on the notion of liberty and its concrete circumstances and corollary.

"The key issue raised by article 5 is how the right to freedom from arbitrary arrest and detention, and its associated procedural guarantees, are to be defined" [74] marks Steven Greer in his book about the European Convention. While I agree with the fact, that this is a very important question (and I will also address the questions of notion definition), I will start the analysis of this article from a different angle. What is in fact understood under liberty? Is there an important legal difference between restriction and deprivation of liberty from the Convention's point of view and are there any specific situations which could fall into the gray area between these two 'groups'? The same analysis is also incorporated in the significant book of Peter van Dijk and others about the theory and practice of the European Convention. They made the following observation:

> With respect to the right of person, in the Court's opinion Article 5 affords protection exclusively against deprivation of liberty, not against other restrictions of the physical liberty of person. The court infers this from the further elaboration of Article 5, where the terms 'deprived of his liberty', 'arrest' and 'detention' are used, and also from the fact that Article 2 of Protocol No. 4 contains a separate provision concerning the restriction of freedom of movement. The right to liberty refers to the individual liberty in its classic sense, the physical liberty of the person.[75]

This implies that liberty is understood by the convention in a narrow way, it addresses only the physical liberty of a person and also that merely in specific circumstances. That is why a mere restriction of freedom does not fall under this article (otherwise it wouldn't make any sense to have a separate Protocol about this). Consequently due to the court's jurisprudence the starting point in analyzing whether there was or was not a deprivation of liberty must always be the individual situation of the person concerned as described in the cornerstone case of Guzzardi v. Italy: "account must be taken of a whole range of

[74] Steven Greer, *The European Convention on Human Rights, Achievements, Problems and Prospects* (Cambridge University Press, 2006), p.249

[75] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 458

criteria such as the type, duration, effects and manner of implementation of the measure in question"[76]. The same question has come up in the Engel and others v. The Netherlands case[77].

Of course the classical 'jail time' is very clear, but there could occur so many other situations. Especially in the context of children, where due to their age and sensitive nature even a house confinement could fall under article 5, while in the case of an adult a house arrest not necessarily. Thus as the jurisprudence formulates it: "the dividing line between deprivation of liberty and other restrictions of liberty is by no means clear-cut; the distinction is one of degree or intensity rather than one of nature or substance"[78].

Subsequently, the conclusion is that the first thing what the court does is that they analyze whether there has been a deprivation of liberty at all or not, and while doing so takes into consideration every possible detail[79]. But the second step is not this clear. The subject of this second stage varies from case to case. So before addressing the special exceptions from the general rule to the right to liberty, I will describe some additional general observations, which could eventually fall under this second stage.

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[76] *Guzzardi v. Italy*, Application no. 7367/76, par. 92, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57498, accessed 22.08.2014

[77] *Engel and others v. The Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57479, accessed 22.08.2014. Here the court explicitly took into consideration all the specific circumstances of the case: who were the applicants, how many days and in what conditions were they deprived of their liberty etc. Although all of them were part of the military (which always creates a special situation), the court made a distinction between the light arrest, the aggravated arrest and the strict arrest, and only the latter constituted a deprivation of liberty. Without further elaboration on the case details, I just wanted to draw the attention to the importance of the analysis of the notion of deprivation of liberty as it many times might not be that obvious.

[78] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 459

[79] For example in the Mancini v. Italy case the pre-trial measure was replaced by the measure of the house arrest, and since there was a delay between the two, that delay constituted a violation. So even the place and manner of detention plays an important role.

One important question would be whether there is a deprivation of liberty if the person who deprives someone from his liberty is a private person and not the state. When could the Contracting States be responsible in this case? In the already mentioned Riera Blume case the court explicitly stated that the authorities were responsible for the situation, although it mainly happened between private individuals. In the Nielsen case (which will be described later in more detail), the court ruled that the mother has only exercised her parental rights, when she 'put' her 12 year old son in a psychiatric ward against his will.[80] In another case (Storck v. Germany) the court held that: „ Article 5 § 1, first sentence, of the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens"[81]. So Article 5 definitely requires the state to take positive measure, and even if the deprivation occurs between private citizens, the state has the responsibility to intervene.[82] In addition it is also a very important that Article 5 is not limited within the borders of a state.[83] In the Öcalan case[84] the court took the view that if one state arrests a person on the territory of another state, and the latter one didn't gave its consent, then that might amount to an Article 5 violation.[85]

Another 'inquiry' could come up in relation to the first sentence of Article 5 "in accordance with a procedure prescribed by law". The question predictably arises: what is understood under law? Evidently, it has to refer to the law of the country involved in the case. But it is important to note

[80] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 460
[81] *Storck v. Germany*, Application no. 61603/00, par. 102, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69374, accessed 22.08.2014
[82] Naturally if a person is under the control of the state authorities this responsibility becomes unquestionably bigger.
[83] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 462
[84] *Öcalan v. Turkey*, Application no. 46221/99, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022, accessed 22.08.2014
[85] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 462

that this does not has to be a written law[86], and not all cases must involve a purely judicial procedure[87].

"The question of whether a detention complies with the requirement "a procedure prescribed by law; is closely related to the question of whether the detention was lawful"[88]. Therefore for a lawful detention, the deprivation of liberty must have a legal basis in the substantive as well as in the procedural national law. And the court can only assess whether the concrete acts were in conformity with the law. Generally they are not addressing the law itself.[89] And of course, as in the case of other articles as well, the quality of law also plays an important role in this line of thought. As described in several cases the law has to be "sufficiently accessible and precise" [90]. The book of Donna Gomien, David Harries and Leo Zwaak stressed the following idea:

> Relatively few cases have challenged the substantive character of the law under which an individual has been deprived of liberty. The situation is different with respect to the procedural law that applies to deprivation of liberty. Although in many instances, discrepancies between the domestic law and practice may be the sole factor leading to the finding of a violation of article 5, in some circumstances the Commission and the court will delve further into the matter to determine whether the actions taken by the governmental authorities were in good faith or whether they were manifestly arbitrary." [91]

This proves the fact, that although this problematic might sound a little theoretical it could easily come up. Especially in today's environment where the 'extreme' governments are gaining power in more and more European countries.

[86] *Drozd and Janousek v. France and Spain*, Application no. 12747/87, par. 110-111 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57774, accessed 22.08.2014
[87] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 463
[88] Ibidem
[89] From the subsidiarity principle it follows that states are left to interpret and adapt their own laws. However since the case of Dudgeon v. The United Kingdom a law might be asked to be quashed by the ECtHR if that could violate in the future the applicant (typical case for a possible future victim).
[90] Baranowski v. Poland, par. 51-52, Amuur v. France, par. 50, Steel and others v. The United Kingdom, par. 54-65
[91] Donna Gomien, David Harries and Leo Zwaak, *Law and practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing, 1996), p. 130

And as a last idea before I proceed on the analysis of the individual subparagraphs is that, although it is not explicitly included in the text of the Convention, the measure of deprivation of liberty should be a measure of last resort. As described in the case of Witold Litwa v. Poland: "[…] the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances."[92] This idea should be always bared in mind during the whole examination of the non-arbitrariness of any kind of deprivation of liberty (especially in the case of minors).

2.2.2. Cases of lawful deprivations of liberty

In this subchapter, I will proceed to the analysis of the already mentioned cases of allowed deprivations of liberty. I will look at the text itself as well into the case law of the court. By the end of this section I will prove the correctness of this text (naturally pointing to eventual flaws) as well the fact that all imaginable situations are covered by these six categories. A special weight will be put on article 5(1)(d) which deals explicitly with minors, not just because this is the topic of my work, but also because this is the most 'interesting' and controversial text.

The first exception included in article 5(1)(a) concerns "the lawful detention of a person after conviction by a competent court". This is a classical situation, where a person before a court (has to be a judicial organ[93]) is convicted, and therefore the deprivation of liberty becomes lawful. I will not go into the details what is a court, what should be its composition, competence etc., but I

[92] *Witold Litwa v. Poland*, Application no. 26629/95, par. 78, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58537, accessed 22.08.2014

[93] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 465

will include an 'official' statement of what lawfulness means: "[…] the facts to which the sentence relates constituted under municipal law at the time of the offence was committed a punishable act for which the imposition of imprisonment was possible. In addition, the sentence on which the deprivation of liberty is based, must satisfy the provisions of the Convention"[94]. Moreover due to the Van Droogenbroeck case, "after conviction" means that first there has to be established (based on the law) that an offence was committed, after which the guilt is proven. The last step is the imposition of a punishment.[95]

The second exception in article 5(1)(b) makes reference to the noncompliance of a court order "in order to secure the fulfillment of any obligation prescribed by law". Examples would be like the order of a court to pay a fine, to comply with a civil sentence or to submit a blood test for example.[96] There are many theories and cases concerning this, but I think that at this point the most important point would be that: "A balance must be drawn between the importance in a democratic society of securing the immediate fulfillment of the obligation in question and the importance of the right to liberty"[97]. Here once again the specific circumstances have to be taken into account like the duration of the detention, nature of the obligation, the person itself, circumstances leading to the detention etc.[98]

The third exception included in Article 5(1) (c) is one of the first articles which assures and balances at the same time the need to fight against crime and the right to freedom.[99] This same idea is supported in the travaux preparatoires of the Council of Europe: "it may be necessary in

[94] Ibid, p. 466
[95] *Van Droogenbroeck v. Belgium*, Application no. 7906/77, par. 35, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57471, accessed 22.08.2014
[96] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 469
[97] Ibid, p. 470
[98] Ibidem
[99] Donna Gomien, David Harries and Leo Zwaak, *Law and practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing, 1996), p. 136

certain circumstances to arrest an individual in order to prevent his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a criminal offence"[100]. It does so because it allows a deprivation of liberty based solely on suspicion. At first this might go against the principle that the right to liberty is one of the most important 'mark' of a democratic society. But in this case, this was balanced against the need of a society to effectively fight a crime and if this is supported by sufficient safeguards it is indeed justifiable. But couldn't this be still easily abused?!

The first step towards answering this question is to analyze its structure as it contains several conditions. It starts with the case of a detention when reasonable suspicion of having committed an offence exists then it proceeds to the case when detention is allowed because either the person might commit another offence or might flee. Well then: are these cumulative conditions or is it enough if one of them is present?

If one proceeds to a deeper examination of the text it is quite obvious that it is not a cumulative condition, although in concrete cases it might occur so. Moreover, that is also quite obvious that there is a close connection between them. If someone is arrested because of a suspicion for having committed an offence then the aim must be to bring him/her before a competent judicial authority.[101] Very interestingly, for example, the court considered in the Brogan case that only the purpose has to exist, the achievements have to be considered independently[102]. From this also

[100] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p.471
[101] Ibid, p. 472
[102] *Brogan and Others v. The United Kingdom*, Application no. 11209/84; 11234/84; 11266/84; 11386/85, par. 53, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57450, accessed 22.08.2014

follows that if: "someone released under a judicial decision does not render the arrest unlawful with retroactive effect, hence only a reasonable suspicion is needed"[103].

But what is reasonable suspicion? The Peter Van Dijk commentary uses the following definition: "Reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed or is about to commit the offence and it depends on all the circumstances of the case"[104]. As an example, in the Lukanov case the court expressly stated that the conduct of the detained person can reasonably imply an offence, with the condition that that conduct constituted a criminal offence in the given country[105].

Frankly, I am of the opinion that the text of the article is good if and only if that is used together with the case law of the convention. I think this because the terms like "reasonable suspicion" or "reasonably considered necessary" are not defined in the convention texts. It is indeed quite unusual in the case of international conventions to give exact definitions within the treaty texts (that would make the consensus between countries even harder), but in the same time this could serve as a 'root' for abuse. That is why I consider that the presence of a definition, to which one could refer to, is crucial.

The fourth exception included in paragraph 5(1) (d) is, from our point of view, the most important provision understandably as it refers specifically to minors. It does so because through

[103] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 473
[104] Ibidem
[105] *Lukanov v. Bulgaria*, Application no. 21915/93, par. 42-45, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58022, accessed 22.08.2014

this, the convention manages to create a special situation where detention of the minors becomes lawful even if they are not involved in criminal cases.[106]

The text contains the notion of "lawful order" which means that that order does not necessarily has to originate from a judicial organ[107]. This is central since in most jurisdictions if someone is detained for educational purposes then the order mostly will emanate from an administrative organ. The case law of the court as well as the theoretical professionals claim that this lawful order is only justified if it is: "reasonably assumed that the development or the health of the minor is seriously endangered- for instance in the case of drug addiction and/or prostitution- or that he is being ill-treated"[108]. But reading this, questions are arising.

Namely, the Convention text speaks only about educational supervision. In a stricter interpretation for me this would mean that if the educational future of the child is in danger, then and only then, is the detention allowed. I think it needs a much broader intention of interpretation to arrive at the conclusion made in the previous paragraph (which the court did and with which of course I totally agree with). But I still think that the text itself is not clear enough. They should have expressly included notions like danger to development, health, ill-treatment etc. to create a firmer basis for the protection of children.

This unclearness of the convention text is especially problematic because the deprivation of liberty of minors should be a 'last-last' resort (as it will be described in more details in future paragraphs). Either a regime will be too permissive and most of the cases will end up with a deprivation of liberty, or they will be too restrictive and those cases which should be treated with

[106] Jacobs and White, *The European Convention on Human Rights* (Fourth Edition, Oxford University Press, 2006), p. 142
[107] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 475
[108] Ibidem

this most serious measures (like child abuse) will not be included with the reasoning that they do not belong in this group. Then again it is also true that the case-law of the court compensates until a certain level the mistakes of the text.

The second part of this subparagraph speaks about bringing a minor before a competent legal authority. This should cover all the case which do not fall under 5(1)(c), and therefore it "seem(s) to be a measure by which the minor is protected against himself in order to prevent his sliding into criminality"[109]. The scholars are not entirely sure either what cases could be covered by this; the only case which is mentioned is the case of X. v. Switzerland concerning an "enforced stay of eight months in an observation center, while the authorities examined whether theft and traffic offences has been committed"[110].

One more important step is to address the age limit hence it is necessary to determine who is considered a minor, therefore who could become a subject to this provision? It is naturally mainly left to the state parties to determine the concrete age limits, but the Committee of Ministers in their Resolution 72(29) recommended to fix this at eighteen[111]. So it does not really matter whether someone is at a school-obliged age or not, if they are below eighteen, and below the countries official maturity age, this article generally applies to them[112]. With this in mind, in the following I will list some of the most important cases arisen under this provision.

In the case of Bouamar v. Belgium, the court has found an article 5(4) violation. The minor in the case was detained nine times and although the confinements were always lesser then 15 days

[109] Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 476
[110] Ibidem
[111] Ibidem
[112] Ibidem

(statutory limit) the 'total amount' did lead to a violation of this article[113]. Moreover the court stated that: "The detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim"[114].

In another case (D.G. v. Ireland) the court has also found a violation of article 5(1)(d) because the minor was placed in a "typical penal institution, and all the educational and other recreation services were entirely voluntary"[115]. Moreover it was also stated that "educational supervision" does not necessarily has to mean a classical "classroom teaching": "in the context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned"[116].

In the Mubilanzila, Mayeka and Kaniki Mitunga v. Belgium case the court has also found a violation of this article, and one of the reasons for this being that:

> … the second applicant was detained in a closed center intended for illegal immigrants in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied foreign minor. In these circumstances, the Court considers that the Belgian legal system at the time and as it functioned in this instance did not sufficiently protect the second applicant's right to liberty.[117]

Although these cases seem to prove the fact that the ECtHR has a high standard in protecting children, this is not entirely true. There is one more interesting case which is, in this context,

[113] Ibidem
[114] *Bouamar v. Belgium*, Application no. 9106/80, par. 52, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57445, accessed 25.08.2014
[115] *D.G. v. Ireland*, Application no. 39474/98, par. 81, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60457, accessed 25.08.2014
[116] Ibid, par. 80
[117] *Mubilanzila, Mayeka and Kaniki Mitunga v. Belgium*, Application no. 13178/03, par. 103-104, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77447, accessed 25.08.2014

especially relevant namely the case of Nielsen v. Denmark[118]. While it is not necessarily related to this article, it still serves as a typical example in the: "difficulty in protecting children's rights under the Convention, where the European Court of Human Rights maintains the view that a minor may not have independent rights under Article 5"[119]. As mentioned earlier, the case concerned a minor who was confined in a hospital based solely on the consent of the mother. The question was whether this could fall under article 5(1), and whether there was a detention at all or not. The court said the following in one of its conclusion:

> Regarding the weight which should be given to the applicant's views as to his hospitalization, the Court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. There is no evidence of bad faith on the part of the mother. Hospitalization was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which clearly is not covered by paragraph 1 of Article 5.[120]

Here it is very clear that the court gives preference to the right of the parents. The judgment stems from 1988 (when there was no Children's Rights Convention yet). Would have there been a different judgment if the Convention would have already existed? Of course no one could ever have a certain answer but I certainly would say yes.[121] This will be discussed in more detail in the last chapters, but I uphold this opinion because of the CRC's basic 'guideline' that preference should be always given to the children's rights.

It is very interesting that the court could have reached the same conclusion (as in their final judgment) without provoking criticism. They could have put more emphasis on the child's rights and his best interest, and less accent on the parental rights and they could have come up with a

[118] *Nielsen v. Denmark*, Application no. 10929/84 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57545, accessed 25.08.2014
[119] Donna Gomien, David Harries and Leo Zwaak, *Law and practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing, 1996), p. 138
[120] *Nielsen v. Denmark*, Application no. 10929/84, par. 72, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57545, accessed 25.08.2014
[121] The ECtHR is not bound by any other treaty then the ECHR itself. But it belongs to the practice of the court that they tend to look and review all the relevant international standards if the case requires so. That is why I would claim from an optimistic point of view that the CRC could have influenced this judgment.

decision perfectly in line with today's CRC.[122] Inspiringly, the judges participating in the process were not one-sided either. The final voting regarding the judgment came out very close, there has been nine judges who voted in favor and seven who voted against. And most of the dissenting opinions put emphasis on the fact that the court didn't put enough weight on the specific circumstances of the case (it was against the child's will, the length of the hospitalization, disagreement regarding the boy's custody etc.).

After looking at all these cases it seems that this article brings a lot of confusion. While it is a remarkable step that there is a separate provision covering minors (by which they accept their especially vulnerable position) in the same time it is not consistent with today's children's rights standards. And the biggest problem, as also noted above, that it only refers to "educational supervision" therefore it might possibly limit the thousands of possibilities that come up in relation with child protection. Moreover, the case law is not the best either[123] especially the judgments like the one in the Nielsen case. Therefore I think that in this case the article should be amended.

The fourth exception included in article 5(1)(e) deals with the prevention of infectious diseases, with persons of unsound mind, alcoholics, with drug addicts and with vagrants. It would be too long to extensively analyze all the composing parts of this article, but two things should be explicitly mentioned.

The first is that there are no exact definitions of these concepts. There is case law which deals with the term of vagrant for example, but 'officially' there are not included in the text of the

[122] Of course I know that in the '80s the whole discussion has just in fact started about these issues that is why I would like to hope that today, due to the CRC and the "living instrument theory" a different judgment would come out.

[123] Although the references made to the fact that if there is no special educational care one cannot really speak about educational supervision is very useful.

convention. This means that once again the state parties have the liberty to define who is considered who in their own legislation. The case law of the ECtHR unquestionably serves as an important source. And second of all, all these cases which involve these certain persons, should pose a danger to the public, and only if there are no less sever measures can the deprivation of liberty become justified.[124]

Finally the last exception included paragraph 5(1)(f) is concerned with persons being subject of a deportation or extradition procedure. It is an important article because as it was outstandingly put: "[…] the Convention does not grant to aliens a right of admission to or residence in any of the Contracting States, article 5 nevertheless contains certain guarantees in the case of authorities proceed to arrest or to detain an alien pending the decision on his admission, deportation or extradition"[125]. And it has a lower level of protection then in par. 5(1) (c) as the only requirement is that one of the mentioned procedures is being taken against the person in question.[126] But once again it's analyzes could be a whole new subject of a different thesis.

2.2.3. Subparagraphs 5(2)-5(5)

These remaining four paragraphs are concerned with the concrete rights of a person who is detained based on one of the above mentioned conditions. These conditions are also included in the ICCPR, and they are considered the most important, without which the right to liberty couldn't be efficiently assured. That is why I will shortly address each of them, and I will include the most important remarks and comments.

[124] Ibid, p. 477
[125] Ibid, p. 481
[126] Ibid, p. 484

The first, and one of the most vital right is the right to information (Article 5(2)). It relates to everybody and not only to those who are subject to a criminal law arrest.[127] Every person has the right to know why and on what grounds is he or she kept in confinement. But how much someone is entitled to know and in what specific circumstances that varies from case to case.[128]

Article 5(3) applies only to those persons who are detained under 5(1)(c). This ensures that in this case they detainees have a special guarantee: "a procedure of a judicial nature designed to ensure that no one should be arbitrarily deprived of his liberty and, furthermore, to ensure that any arrest or detention will be kept as short as possible"[129]. This has to be embedded in the system (has to be automatic) otherwise the purpose of the safeguard might be changed[130].

Promptness is another important requirement in the case of this article. Van Dijk gives a very funny yet in the same time very accurate definition: "must not be interpreted so literally that the investigating judge must be virtually dragged out of bed to arraign the detainee or must interrupt urgent activities for this. However, adequate provisions will indeed have to be made in order that the prisoner can be heard as soon as may be reasonably be required in view of his interests"[131]. That is why several elements have to be taken into account (based on the case law): "the actual length of detention, the length of detention on remand in relation to the nature of the offence, the penalty prescribed and to be expected in the case of conviction; material, moral or other effects

[127] Ibid, p. 484-486
[128] This right is also related to the right to a fair trial, so due to its complexity I cannot really go into deeper details
[129] Pieter Van Dijk et al.,*Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p. 487
[130] Ibidem
[131] Ibidem

on the detained person; the conduct of the accused; the manner in which the investigation was conducted; the conduct of the judicial authorities concerned"[132].

Paragraph 5(4) includes the classical habeas corpus requirement: everyone who is subject to a deprivation of liberty is entitled to take proceedings by which the lawfulness of it will be established[133]. This is another key article because even if the detention is not violating article 5(1) an inquiry whether article 5(4) has been violated could be made. If a detention falls under 5(1) an assessment is still needed whether the detained person had the chance to go to a court which would review the lawfulness.[134] And naturally it covers all the cases mentioned in 5(1). Interestingly this article contains the word speedily and not promptly like in 5(3). This "indicates a lesser urgency"[135], but everything has to be examined on a case by case basis.

And the last article 5(5) contains the right to compensation which is an independent right unlike art. 41, and "grants an independent right vis-à-vis the national authorities, the violation of which right may constitute the object of a separate complaint and may subsequently lead to the Court's application of Article 41"[136]. In other words, the applicant can always invoke this and get a compensation even if article 41 wasn't included in the application. And as in any other cases this compensation could be material as well as non-material.[137]

It is a challenging task to draw a final conclusion in relation to article 5. From legalistic point of view article 5 does not belong to the most important rights as it is not included in the list of non-derogable rights in article 15(2). But on the other hand if some parts of this are not observed (for

[132] Donna Gomien, David Harries and Leo Zwaak, *Law and practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing, 1996), p. 149
[133] Pieter Van Dijk et al.,*Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006), p.498
[134] Ibidem
[135] Ibid, p. 507
[136] Ibid, p. 508
[137] Ibid, p. 509

example 5(3) or 5(4)) then it is questionable whether other non-derogable rights, like the right to life, could be efficiently protected.

It is clear that it is a very complex right. The convention text tries to covers all the possible lawful cases and protection mechanisms. And this aim was indeed fulfilled. It is not the task of an international convention to give an exhaustive and detailed list of concrete measures. The task here is to from a firm basis with the most important basic principles which a state should observe. That is why I claim that if a country would adhere not only to the text but also to the case law, as in fact required, we should be able to claim that the countries of the Council of Europe have the most effective protection to the right to liberty. But since this did not happen (and probably never will as it should be) the need remains out there to speak and debate about it. Naturally, for a proper debate the analysis of the ICCPR cannot be skipped therefore the next subchapter will address this subject-matter.

2.3. International Covenant on Civil and Political Rights - Articles 9, 10

The ICCPR was the second biggest step in the 'legal life' of the United Nations. As we saw in chapter 2.1, a number of ideas were dropped in the text of the UDHR, with the justification that it will be included in the text of this Covenant. So let us first examine what is exactly the difference (or the similarity) between these two international instruments.

The first and very important difference is that while the Universal Declaration is a "solemn declaration", the Covenant is a binding legal instrument, under which states have to comply with their obligations included in the treaty (submission of periodic reports for example to the Human Rights Committee).[138] It is very interesting though, that although the UDHR does not have an

[138] Philip Alston, Ryan Goodman, *International Human Rights, The Successor to International Human Rights in Context: Law, Politics and Morals, Text and Materials* (Oxford University Press, 2013), p.158

enforcement mechanism a lots of scholars tend to view that there are legally binding: either as a matter of customary international law or as an authoritative interpretation of the UN Charter"[139].

Secondly both of these instruments contain individual rights.[140] The ICCPR is in a way the 'successor' of the UDHR that is why they "closely resemble" [141] each other as it was wisely stated by Philip Alston and Ryan Goodman. So let us see how exactly does the Covenant deal with the right to liberty and what the most important cases and commentaries are that should be mentioned in the context of this paper.

First of all the right to liberty and security is included in article 9 as follows:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[142]

It is obvious from the first view that it is much shorter than article 5 of the ECHR. It is so because the ICCPR does not list the allowed cases of deprivation of liberty, the text only prohibits arbitrary arrest or detention. Otherwise the remaining article's structure and content is

[139] Ibidem
[140] Ibid, p. 159
[141] Ibidem
[142] http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, accessed 28.08.2014

almost the same[143]. As there are a number of similarities between the approaches of the two treaties, I will try as much as possible to avoid repetitive ideas. Therefore during the analysis made in this chapter I will put more accent on the existing comments realized by the human rights scholars with some case-law examples. One of the most important commentaries about ICCPR is written by Manfred Nowak[144]. His work is indeed remarkable and exhaustive, that is why I choose it as a basis for my paper.[145]

The importance of the right to liberty is not questionable. This has been stated not only by academics, but by the United Nations itself through the travaux preparatoire and the case law. But in contrast to other important rights (like article 6, 7, 8) this is not an absolute right: "[…] does not strive toward the ideal of a complete abolition of State measures that deprive liberty; rather, it merely represents a procedural guarantee"[146]. Nowak expressly states that deprivation of liberty is not prohibited in its totality, only those which are either arbitrary or unlawful or both.[147]

Whether a deprivation of liberty is considered lawful or not, that is left to the state parties to establish it in their own legislation. As already mentioned, this is the biggest difference between the ECHR and the ICCPR. If this is a better solution? This is a difficult question. Both could be efficient if used in the proper manner and both could be abused. But personally, as this was also stated before, I prefer if a convention (especially those with a legally binding power and

[143] It describes the right to information, then the right of those who are detained on criminal charge, then the habeas corpus, and lastly the right to compensation.
[144] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2nd revised edition, N.P. Engel, Publisher, 2005)
[145] I would like to establish, that as in the case of the ECHR, I will leave out the part of the right to security, despite the fact that the case-law of the ICCPR shows us, that unlike in the case of the ECtHR, this is treated as a separate right. But since I left it out from the previous chapter, I find it more adequate to do the same here too.
[146] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2nd revised edition, N.P. Engel, Publisher, 2005) p. 211
[147] Ibidem

enforcing mechanism) is as concrete as possible. That still leaves less place for erroneous interpretation.

Of course, there is another 'side of the story' which should be mentioned at this point. If someone looks at the travaux prepratoire of the Covenant, it becomes clear that the states initially intended to include all the permissible cases of deprivation of liberty.[148] They wanted to include the situation of minors, alcoholics, drug addicts and so one, but since the UN has even more member states than the Council of Europe, it became quite obvious at a point that there is no real chance that these countries could agree on an exhaustive list. This is how an Australian proposal was adopted, which used these words for the first time: arbitrary arrest and detention.[149].

ICCPR also refers and uses to the term liberty as the "freedom of bodily movement in the narrowest sense"[150]. Nowak specifies this even more and states that: "An interference with personal liberty results only from the forceful detention of a person at a certain, narrowly bounded location, such as prison or some other detention facility, a psychiatric facility a re-education concentration or work camp, or a detoxification facility for alcoholics or drug addicts, as well as an order for house arrest"[151]. Therefore in any other case, where no deprivation of liberty in its strictest sense occurs, the guarantees of article 9 will not become applicable. The General Comment no. 35 regarding the right to liberty has made a similar statement:

> Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12. Examples of deprivations of liberty include police custody, "arraigo", remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional

[148] Ibid, p. 216
[149] Ibidem
[150] Ibid, p. 212
[151] Ibidem

> custody of children, and confinement to a restricted area of an airport, and also include being involuntarily transported.[152]

As a next step it is important to analyze the theoretically permissible cases of deprivation of liberty. As some of the text speaks only about "arrest" and "detention", it is essential to see how these two situation could occur and what is beyond them.[153] This question has come up during the preparation of the convention as well as after it. The participating countries have realized that if they would use a restricted interpretation that would lead to "absurd results"[154], so the General Assembly finally supported "a broad interpretation of the terms arrest and detention"[155]. This means, that not only the strict arrest and detention falls into this category but also deprivations of liberty which occurs between private persons, persons with alcoholic, drug problems, detention of minors for education purposes etc. Otherwise this would go against the "object and purpose of the Covenant in the sense of Art. 31(1) of the VCLT"[156].

This same idea is also expressed in the Human Rights Committee's General Comment no. 8 about Article 9. Here they point out that:

> … paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.[157]

[152] *General Comment no. 35, Article 9: Liberty and security of person*, p. 1-2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F35&Lang=en, accessed 25.11.2014
[153] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2nd revised edition, N.P. Engel, Publisher, 2005), p. 219
[154] Ibid, p. 220
[155] Ibidem
[156] Ibidem
[157] *Human Rights Committee, General Comment 8, Article 9*, par. 1, http://www1.umn.edu/humanrts/gencomm/hrcom8.htm, accessed 01.09.2014

For example in the case of A v. New Zealand[158] the question has been whether a detention based on mental illness could be justified or not.[159] The HRC has found no violation, and in a separate opinion of two members of the committee the following justification was further included: "In an individual case there might be well a legitimate ground for such detention, and domestic law should prescribe both the criteria and procedure for assigning the person for compulsory psychiatric treatment. As a consequence, such treatment can be seen as a legitimate deprivation of liberty"[160]. So let us note that based on these ideas it is true that all the deprivations of liberty which are considered lawful in the ECHR system, will be considered lawful also in the ICCPR.

The second part of par. 1 refers to the lawfulness of the deprivation of liberty. Just as in the case of the ECHR law and this principle of legality refers here to the law of the specific country. It has to be understood in a strict sense: "administrative provisions are not sufficient"[161]. Moreover the law itself has to comply with the non-arbitrariness requirement as well as its enforcement.[162]

It is essential, to mention the fact that during the preparation of this document the majority of the delegates were on the opinion that arbitrariness "went beyond this (unlawfulness) and contained elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality, as well as the Anglo-American principle of due process of law"[163]. This was considered in the following case: Van Alphen v. The Netherlands[164], where a Dutch lawyer was forced by detention, to give out information which could be used either against him or against his

[158] *A (name withheld) v. New Zealand*, Communication No. 754/1997, http://www1.umn.edu/humanrts/undocs/session66/view754.htm, accessed 02.09.2014
[159] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary* (Second Edition, Oxford University Press, 2005), p. 319-321
[160] Ibid, p. 320
[161] Ibid, p. 224
[162] Ibidem
[163] Ibid, p. 225
[164] *Van Alphen v. The Netherlands*, Communication No. 305/1988 http://www1.umn.edu/humanrts/undocs/session39/305-1988.html, accessed 01.09.2014

clients.[165] The Committee has made consequently in this case the following important comment: "[…] 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances"[166].

The following articles, like in the case of the ECHR, contain the specific rights of those persons who are detained and therefore are deprived from their liberty in one way or another.[167] Paragraph 9(2) starts right away with the right to information. It is interesting that scholars make a clear distinction and say that this right only applies to the "state of arrest, i.e., not to the state of detention"[168]. Moreover this right applies to everyone, not only to those who are subject to a criminal charge, hence this serves the legal certainty and the interest of the person in arrest.[169]

Paragraph 9(3) refers exactly to those persons who are detained on a criminal charge. This right is formulated in a very different way than that one in the ECHR. While the latter one speaks about persons who are suspicious of committing an offence (and about persons about whom it is reasonable to consider that they either might commit on offence or might flee after done so) the ICCPR mentions only those who are "arrested or detained on criminal charges". Now which one has a more limited scope of applicability?

[165] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary* (Second Edition, Oxford University Press, 2005), p. 309-310
[166] Ibid, p. 310
[167] For more information see Ilias Banketas and Lutz Oette, *International Human Rights Law and Practice*, (Cambridge University Press, 2013), p. 340-345
[168] Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary 2nd revised edition, N.P. Engel, Publisher, 2005,, p. 228
[169] Ibidem

Due to Manfred Nowak, it is clear that the ICCPR intended to have the same type of "scope of applicability analogous to that under the ECHR"[170]. As a justification he also notes the fact that the earlier formulation contained a referral solely to "criminal acts already committed"[171]. From the shortness of these arguments one might get the impression, that this is not a truly crucial question and I personally agree. What can be seen in these two provisions is basically the same, even more because it is hardly imaginable to arrest someone based on a suspicion, which suspicion is not regularized in the criminal law, hence it does not constitute a criminal charge. Therefore I will not elaborate on this issue more, because in my opinion both of them cover all the necessary situations in question.[172]

It is more important to see what the consequences of a detention are. The first is, as in the case of the ECHR, that he or she must be brought promptly before a judge, or other "other officer authorized by law" which can rule and deal with the legal issues in question. Both treaties mention the right to a trial within a reasonable time or release. What is different though is the second part of these provisions.

The ECHR speaks about the fact that this release may be conditioned (for the purposes that someone will appear during the trial), whereas the ICCPR points out the same idea but in the same time accentuating the fact that awaiting trial in custody shouldn't be the rule. As in the case of many other paragraphs, they speak about the same idea although in this case the ICCPR introduces a very important basic principle. This does not mean that in the ECHR system, custody or pre-trial detention is the rule, but stating this expressly in the convention itself serves the idea of legal certainty, which is and was especially important in a new area of law such as

[170] Ibid, p. 230
[171] Ibidem
[172] For a similar analysis see Louise Doswald-Beck, *Human Rights in Times of Conflict* (Oxford University Press, 2012), p. 269-279

human rights. Especially because the number of pre-trial detainees is still very high, and this number shows profoundly the situation of the legal system in a given country (cc. 10 mil. people are currently in pre-trial detention)[173]. Moreover if this is a rule for everyone, than it should be even more important to become a rule and a basic principle for juveniles (as we will see it in the following chapters).

Paragraph 9(4) containing, the Anglo-American legal principle of habeas corpus, exists regardless of whether deprivation of liberty is unlawful"[174]. As this seems similar to the previous paragraphs, it is important to agree with the statement made by Manfred Nowak, who claims that: "the true significance of the right to remand thus come to light in the case of custody or other security measures or in preventive cases of deprivation of liberty beyond that required for criminal justice, such as detention of vagrants, drug addicts, the mentally ill and aliens"[175].

And finally paragraph 9(5) contains the right to compensation to persons who suffered from an unlawful arrest or detention. The same paragraph in article 5 of the ECHR provides this right, but if only if article 5 of the Convention has been violated. ICCPR does this a little bit differently. The text speaks about "anyone", which means that it is "available to every victim of unlawful arrest or detention"[176]. It makes a difference because with this type of formulation not only those have a right a compensation who have suffered an article 9 violation but also those whose detention contradicts a provision of the state law.[177] This might result in a broader application of

[173] Manfred Nowak, Karolina M. Januszewski and Tina Hofstatter (edited by), *All Human Rights for All* (Vienna Manual on Human Rights, Neuer Wissenschaftlicher Verlag, Vienna, Graz, 2012), p . 364
[174] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2nd revised edition, N.P. Engel, Publisher, 2005), p. 235
[175] Ibidem
[176] Ibid, p. 238
[177] Ibidem

this right.[178] The only alleviation is, that in the case of the ICCPR the procedure becomes simpler: par. 9(5) can be immediately applied without an establishment of a violation of the first four paragraphs. Whether this is a better solution or not, is not an 'open and shut' question. Since the ECHR has a limited cases of lawful deprivation of liberty, it becomes logical that only if those are violated can a compensation question come in use. The ICCPR speaks only generally about unlawful and arbitrary detention, so a broader applicability possibility of the right to compensation also fits this structure at its best. So it is not necessary to condemn either of them, as they fit the two different systems quite well.

The other big difference between the ECHR and the ICCPR is that the general description of the right to liberty is followed by an article which describes the right of detainees to be treated with humanity and dignity (here juveniles are already expressly mentioned). This is a step forward (manages to carry the right one step forward[179]) as it contains express provisions regarding their status in article 10 of the ICCPR:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
>
> (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
>
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

As it is quite long and detailed unfortunately there is no space to focus on all the subparagraphs and provisions, but only on few important general ideas. It is a cornerstone article because this

[178] But as I have already mentioned in the case of the ECHR, these provisions basically cover all the imaginable cases of deprivation of liberty, therefore if there has been a violation of domestic law there probably was a violation of article 9.

[179] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2nd revised edition, N.P. Engel, Publisher, 2005), p. 213

right of the prisoners has never been part of an international human rights treaty or covenant.[180] For a long time the prohibition of torture and inhuman, degrading treatment has been considered enough even for the protection of the prisoners.[181] But as I have argued in my first chapter, vulnerable groups (and prisoners are a vulnerable group) always need an additional protection layer.

This has been not that obvious for many countries. As Manfred Nowak describes, some scholars have claimed that this article cannot belong in a bill of rights, or they generally questioned the legal value of such a provision.[182] But in the same time he gives a tremendous counter reaction to it: "to the extent that this criticism is directed at Art 10(1), it is in our opinion not justified in that it is based on a restrictive understanding of human rights (as mere obligations to refrain from interference) that can today be viewed as outdated"[183]. And this new way of thinking about human rights is exactly the point. If such a provision is not considered to be part of the human rights system why should for example children's rights be?

Within the paragraph it is emphasized not only once, but twice that children should be separated from adults and should have a special treatment which takes into consideration their age and circumstances. One refers to the stage of pre-trial detention (10(2)(b)) and the other generally to the time that has to be spent in a closed facility during the punishment. The former has one more additional scope: it tries to limit the time spent by juveniles in pre-trial detention as much as possible.[184] And this is a very important! But this will be further elaborated on in the next subchapter.

[180] Ibid, p.242
[181] Ibidem
[182] Ibidem
[183] Ibid, p. 243
[184] Ibid, p. 252

This idea of humane treatment of the prisoners is further featured in the General Comment no. 21. Here in paragraph 4 very inspiringly the following idea is echoed:

> Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[185]

This citation deeply describes the fact that this right cannot be dependent on funds, this is an inherent right of the person even if they are deprived from their liberty. It is a good sign that there are several other documents which target the same idea[186], because even within democratic societies the situation of prisons and prisoners is not 'properly human rights friendly'.

As a conclusion, it could be said that the right to liberty is a very complex right. It entails so many parts and viewpoints that for a proper understanding one needs to go through it all. But in the same time this is also a very exciting pattern of study. Especially because of its importance and its complexity it becomes a true challenge to be able to understand at least the essence. Sometimes it might have been felt out of scope (as there was a limited reference to children) but I think otherwise it will be harder to grasp the core of children's deprivation of liberty.

Therefore after this general analysis of the right to liberty now in the next chapter the focus will be turned toward the children's rights of liberty. We have already seen that both in the ICCPR and the ECHR juveniles are treated, in some way or another, as a different group, and by this, implicitly their special status is emphasized. Further on it will be expanded why this is so, and what the concrete measures are that the international community has done to protect them even better.

[185] UN Human Rights Committee (HRC), *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, par. 4, http://www.refworld.org/docid/453883fb11.html accessed 02.092014

[186] For example the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations, or the European Prison Rules Recommendation no. R(87)3 adopted by the Committee of Ministers of the Council of Europe

CHAPTER 3. CHILDREN'S RIGHTS INSTRUMENTS AND DEPRIVATION OF LIBERTY

In this chapter I will analyze the main topic of my thesis: children's rights and their deprivation of liberty. In this process first I will study why the Convention on Children's Rights has such a big importance, and what the main issues are and which critics appeared. And secondly I will address Article 37, the right to liberty and everything that should be mentioned in this regard. In this part I will speak not only about the CRC but also about two additional instruments the Beijing rules, respectively the Havana rules. This time I will not analyze them in the order they appeared, rather first I will address the convention, after which I will mention the most important parts of the rules. But let us first see, how the CRC actually came into existence.

3.1. The Convention on the Rights of the Child and its drafting history

The first relevant, international children's rights instrument was the Declaration of the Rights of the Child (Geneva Declaration) 1924, adopted by the League of Nations. It focused more on the material need of children after the First World War, and they "were not formulated in terms of rights, but rather as duties declared and accepted by "men and women of all nations""[187]. This was still treating the children as objects rather than subjects. After the experience of the Second World War in 1959 the Declaration of the Rights of the Child was adopted. It was more detailed than its previous version in 1924; it had 10 principles, and it was already formulated in terms of rights (housing, education, recreation, nutrition rights etc.). It also did not have a binding effect but due to Andrew Bainham its true value was that: "it established a many of the generally

[187] Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Kluwer Law International, 1999), p. 13

accepted international norms of treatment for children which could then be translated into binding legal obligations on States in the 1989 Convention"[188].

In 1978, during the 34th session of the UN Commission on Human Rights, Poland initiated a draft resolution to be adopted by the ECOSOC (UN Economic and Social Council), which recommended that the UN General Assembly should adopt on international convention on the rights of the child.[189] Therefore in March 1978, the UN Commission on Human Rights adopted the draft CRC with some amendments, and also "Member States of the UN, respectively specialized agencies, regional governmental organizations and non-governmental organizations were invited to submit their views, observations and suggestions relating to the Polish proposal"[190].

The established Working Group needed 10 years to adopt its final text, mainly because they were operating on a consensus base. The first draft of this final text was submitted to a technical review to the United Nations Secretariat, then that reviewed text was submitted for a second reading to the working group, after which the final text was submitted to the Commission on 23 February 1989. Consequently it was adopted by the General Assembly on 20th November 1989, intentionally on the thirty years anniversary of the 1959's Declaration. It is also presumed that the coincidence of two major historic events (the adoption of the CRC and the reunification process of Europe) was not by chance, it served "as a reminder of the interrelationship between the contemporary understanding of child rights (profoundly different from the 1959 Convention)

[188] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 576
[189] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Kluwer Law International, 1999), p. 14
[190] Ibid, p. 15

and democracy, the value that defines modern Europe"[191]. And on July 1, 1997 it has been ratified by 191 states.[192]

The CRC has received a number of critiques, but it is still far the best formulated or conceived human rights treaty, and its importance and new vision's implementation cannot be denied. The Lord Chancellor of the UK Parliament stated that: it is the "most comprehensive and far reaching reform of child law, which has become before Parliament in living memory"[193]. Similarly John Eekellar stated about the CRC that:

> … to recognize people as having rights from the moment of their birth continuously into adulthood could turn out, politically to be the most radical step of all. If all young people are secured all the physical, social and economic rights proclaimed in the Convention, the lives of millions of adults of the next generation would be transformed. It would be a grievous mistake to see the Convention applying to childhood only. Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all people. It could influence their entire lives. If its aims can be realized, the Convention can truly be said to be laying the foundations for a better world[194].

It is very interesting how the situation changed after the adoption. Alston and Tobin refer to a "two-post adoption stage: the first at the end of the 20th century, is identified as one of enthusiasm and optimism", and the post 21st century stage which is characterized by: "consolidation and reaction, which would end the honeymoon with children's rights".[195] Jebb Hammarberg in 1990 was also emphasizing that:

> The time has come to work out a comprehensive strategy for the realization of the Convention. It is a question of allocating priority. The rest of this century should be made a decade for children and their rights. The adoption of the Convention should be seen as the start of radically renewed effort to put right the wrongs we do to children with our short-sighted economic policies, political blunders and wars[196].

[191] Carol Bellamy et al., *Realizing the Rights of the Child* (rüffer & rub, 2007), p. 35
[192] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*,\ (Kluwer Law International, 1999), p. 18
[193] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 27
[194] John Eekellar, *The importance of Thinking that Children have Rights* (International Journal of Law and Family 221, 1992), p. 234
[195] Antonella Invernizzi and Jane Williams, *The Human Rights of Children, From Visions to Implementation* (Ashgate Publishing Limited, 2011), p. 2
[196] Ibid, p. 4

But the path of the Convention, unfortunately, was not that 'glossy', as it was attacked (and is attacked) on many aspects. For example one of the criticizers of this convention brought up the issue of the notion 'child' and its definition under the convention. They claim that there is a discrepancy between article 1 (which extends its rights to minors also until 18) and the other articles where they keep referring to children.[197] But this reasoning is not sophisticated.

As mentioned before, for the sake of legal certainty concreteness in general is always the better solution. And as the age of criminal liability for example varies from country to country, it is much better that a concrete age was set in order that every child until eighteen can benefit from the rights of the CRC. There are certainly some odd situations, for example: how come a 17 year old is already criminally liable, but is not able to sign a contract of have a driver license?[198] But the CRC in his present form is not really capable to solve this issue. Therefore, this dispute has more importance on a theoretical level (maybe the drafters should have made a distinction throughout the whole convention between children and minors) but on a practical level this type of formulation does not create a problem.

What on the other hand is indeed a valid comment: that by formulating all the rights in a universal and indivisible manner, they posed, sometimes too big, challenges for law reforms in the state parties national system:[199]

> What were perceived prior to the CRC as supportive social policies and measures on matters such as health and education now become an indivisible dimensions of children's rights that must be incorporated into law. Socio-economic rights in regard to basic needs such as health, food, security, education and shelter continue to be perceived as discretionary and distinct administrative initiatives that fall into the realm of social policy rather than enforceable law. Studies show that continued perception in this regard prevents legislative reform that is

[197] Ibid, p. 44
[198] Harry D. Krause , *Child Law, Parent, Child and State* (Dartmouth Publishing Company Limited, 1992), Martha Minow, *Rights for the next Generation: a Feminist Approach to Children's Rights,* p. 62
[199] UNICEF, *Protecting the World's Children, Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (Cambridge University Press, 2007), p. 5

> holistic, and ultimately result in the contravention of the core human rights norms of the CRC.[200]

Although I am generally a 'universalist'[201], I agree that a universal implementation of the convention cannot be achieved from a practical point of view. But this is the situation with all the international human rights treaties. Therefore it would be much better if practicality would be forgotten, and member states would try to implement the CRC as it is. Difficulties will always be there (even if a lower standard is set) but with time and effort a constant advance can be reached.

After the CRC several other children's concerning international human rights instruments has been adopted. Among others the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, in 1996 (this was the modified version of the Hague Convention on the Protection of Minors from 1961). It is not concerned with substantive rights, rather with how to avoid clashes between this and its sister convention The Hague Child Abduction Convention and the Hague Convention on Inter-Country Adoption.[202] Then also in 1996 the European Convention on the Exercise of Children's Rights was adopted, which is more concerned with the practical implementation of these rights.[203] And very importantly, the issue was raised in regard with the European Convention of Human Rights, as to what "extent fundamental rights and freedoms guaranteed by the Convention have application to children and can be enforced on their behalf"[204], especially under article 8.

In this regard there is one very interesting case, which illustrates not just the importance of the issue of children's rights but also the problem of the balance of children's and parents' rights,

[200] Ibid, p. 5
[201] Namely, that I believe in the universal nature of human rights.
[202] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 593
[203] Ibid, p. 596
[204] Ibid, p. 596

namely X, Y and Z v. The United Kingdom. Here the dispute was related to a child's situation in a family where one of the parents was transsexual. And the question was whether it was a violation of article 8 that X could not be registered as the father of the kid, because he had originally been a women. It was very interesting how the court tried to balance between X's rights on the one hand and the child's right on the other.[205] And this is in fact what constantly has to be done when a juvenile is involved in a (none) legal system.

In conclusion it can be said that with all these conventions changed the role of children's rights from a non-existing status, to the child as an object, and then to the point where the child is finally recognized as complete person, and an "individual equal to other individuals with rights, guarantees and protection that can be asserted".[206] So in a very cliché way of saying it can be established that "The only certainty is that the development of the modern law affecting children in the 21st century is not going to be a boring process"[207]. So let us see how the evolution of children's rights to liberty has taken place, and what are the major differences and similarities between their rights and generally the right to liberty.

3.2. Children's deprivation of liberty – Article 37 of the CRC

Article 37 of the CRC has a little bit different structure than the right to liberty enshrined in the ICCPR and the ECHR. It reads as it follows:

> States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. 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;

[205] *X, Y and Z v. The United Kingdom*, Application no. 21830/93, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58032, accessed 01.09.2014
[206] Carol Bellamy et al., *Realizing the Rights of the Child* (rüffer & rub, 2007), p. 37
[207] Andrew Bainham, *Children: The Modern Law* (Jordan Publishing Limited, 1998, Second Edition), p. 602

> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.[208]

It could be said that this article combines in a complex way on the one hand the approach of the ECHR and on the other hand the text of the ICCPR. The CRC is the first convention who actually puts several ideas, general principles, rights together, and rightly so. But before analyzing the text of the convention, let us first see some important moments of the preparation procedure, and how international scholars view the place of this right within the children's rights framework.

According to Geraldine van Bueren: "International law has not yet reached the stage where states are prepared to accept an absolute prohibition on the imprisonment of children. There is, however, a perception trend moving in this direction"[209], and this article certainly proves this idea. In the same time the reality is that: "There is very little treaty law setting out the objectives of institutions in which children are deprived of their liberty"[210], and although this was written down in 1995 this problem is still real and even today there is a high number of children who are institutionalized in one way or another.[211] In relation to this, Van Buerren very rightfully also observes that: "It is this lack of binding international law which adds to the difficulties in protecting the rights of children in institutions, as a binding framework of objectives would serve

[208] Convention on the Rights of the Child, http://www.ohchr.org/en/professionalinterest/pages/crc.aspx, accessed 20.10.2014
[209] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995), p. 206
[210] Ibid, p. 217
[211] Worldwide, around 1 million children are deprived of their liberty. (Ton Liefaard, Deprivation of Liberty of Children in Light of International Human Rights Law and Standards, Intersentia, 2008, p.1)

to measure the effectiveness and legitimacy of institutions and could also be used as a more effective tool to prevent abuses arising"[212]. Fortunately, the CRC is one of the documents that counterweights a little bit this difficulty, so let us see what approach is used.

As it was mentioned in the first chapter, one of the basic principle of the CRC is included in article 3(1), namely that: " In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[213]. This means that even in the case of punishment this "best interest" cannot be overlooked. As we are speaking about children punishment could never be the ultimate goal, hence their rehabilitation into the society should be the primary concern. Forming this in a more precise way with the words of the Working Group of the CRC: "Accordingly, children in conflict with the penal law shall be assisted to develop a sense of responsibility to assume a constructive role in society"[214]. Therefore if we put all these together, it becomes logical that the prohibition of certain methods of punishments will be included in the same article as the prohibition of arbitrary detention, arrest etc., moreover the CRC in article 39 has expressly included this (to promote their physical and social reintegration). On a very similar matter, the Canadian representative (during a meeting of the Working Group) has further stated:

> The States Parties to the present Convention recognize the right of the child accused or found guilty of infringing the penal law to be treated in a manner consistent with the aims of child development acknowledged in article 17 of this Convention, and in particular in such a manner as to promote the full development of his or her personality, sense of dignity and worth, and respect for human rights and fundamental freedoms.[215]

[212] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995), p. 206
[213] Convention on the Rights of the Child , http://www.ohchr.org/en/professionalinterest/pages/crc.aspx, accessed 20.10.2014
[214] Sharon Detrick, Jaap Doek and Nigel Cantwell, *The United Nations Convention on the Rights of the Child, A guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers, 1992), p. 470
[215] Ibid, p. 459

It became already clear during the analysis of both of the conventions (ICCPR and ECHR), that the prohibition of torture, cruel and inhuman treatment is closely related to the prohibition of arbitrary arrest. But they were always mentioned in a separate article. The CRC is the first treaty, which puts these two together further emphasizing the enhanced vulnerability of the children. Additionally, the HRC has stipulated that not only the 'typical' types of torture and inhuman, degrading treatment are prohibited, but also corporal punishments: "The prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions"[216].

In addition, some general principles (which are present either in the text of the ICCPR and the ECHR, or either in their case law) were expressly included in order to underline their importance in relation to children. One additional novelty appears right in the first subparagraph namely that capital punishment is prohibited, and also life imprisonment if there is no possibility for release[217]. Both of these principles are now generally applicable also within the ECHR and the ICCPR system, but neither of them mentions this explicitly (death penalty abolitions are included in the optional protocols, but not in the original text of the conventions). It is an interesting fact though that not every country agreed with this solution. For example, because of Japan's inflexible objection, the term "without the possibility of release" had to be introduced (this being a Canadian suggestion).[218]

[216] Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Kluwer Law International, 1999), p. 623
[217] Also see, Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995), p. 209
[218] Sharon Detrick, Jaap Doek and Nigel Cantwell, *The United Nations Convention on the Rights of the Child, A guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers, 1992), p. 465

Article 37(b) contains the general prohibition of arbitrary detention, the condition of lawfulness and very importantly, the requirement of last resort and shortest appropriate period of time is also included. Exactly as in the previous case, although both of these principles are now applicable both within the context of the ECHR and the ICCPR, the CRC is the first which expressly included it[219], therefore the standard set here is clearly higher[220]. Interestingly, the working group responsible for this issue has proposed a higher standard: that all "all deprivations of liberty should only be for the shortest possible period of time"[221], but then due to the objections of some states (among them the Soviet Union and Italy) opposed it claiming that their jurisdiction does not have this principle.[222]

Article 37(c) is very similar to article 10 of the ICCPR, as it refers to the humanity and the dignity of the persons deprived of their liberty. The fact that children should be separated from adults is repeated, plus it is stated that children should be able to keep the contact with their families (a proposal by the Netherlands[223]) and that one should always take into account the child's age[224] (normally, it should make a difference whether we are speaking about a 12 year old or a 17 year old).[225] This last part means that states have the positive obligation to build up a juvenile justice system where all stages of the process are shaped in a way which satisfies the needs of children (until the age of eighteen).[226]

[219] The second sentence of this article is based on Beijing Rules: 13, 17,19 and Havana Rules 1, 2, 17, but the CRC is the first as a Convention which mentions it expressly.
[220] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995), p. 210
[221] Ibid, .p 214
[222] Ibidem
[223] Ibid, p. 219
[224] Ibidem
[225] This is also applies in the case of adults, but once again it is not included in either of the ECHR nor the ICCPR.
[226] Prof. Dr. Stefanie Schmahl, LL.M., *Kinderrechtskonvention mit Zusatsprotokollen, Handkommentar* (Nomos, 2013), p. 275

The idea that juveniles should be separated from adults was proposed by Sri Lanka during the preparation of the ICCPR "in an attempt to protect the physical and moral integrity of the child"[227] and this puts an "unconditional duty on the State Parties"[228]. It will become important in our next chapter, that the United Kingdom put a reservation not only in the ICCPR in relation to this right (article 10(2)(b) and 10(3)) but also in the case of the CRC[229]. Therefore they permit non-separation in two cases: when both of the parties can "mutually benefit from it"[230] and when there is a "lack of adequate facilities"[231]. This might be considered as a negative step, but Van Bueren puts this in another light: "Are the best interests of the child being equally upheld by governments who declare that they enforce strict separation, those that adhere to the principal but cannot always apply it and those that deny the very desirability of that principle?"[232] From this perspective the act of the United Kingdom can be considered more honest, and more clear-cut, although for the sake of the level of protection in the field of children's rights protection one would prefer that States adhere to the text without any reservation.

Finally, article 37(d) lists all the general, and already well known rights of the detained person, and all the jurisdictional procedures. Dr. Schmahl in his book states that this "control organ" does not have to be a judicial one, the only requirement is that it should have the power to rule about the legality of the detention and to actually have the power all the unlawful, arbitrary detentions. From this article's perspective the biggest difference between the CRC and the ICCPR (and the ECHR) is, that the CRC does not speak about compensation but since it is not

[227] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995), p. 221
[228] Ibidem
[229] United Nations Treaty Collections, Ratifications and Reservations, https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en, accessed 21.10.2014
[230] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995), p. 221
[231] Ibidem
[232] Ibidem

actually empowered with an enforcing mechanism, it is understandable. As a last thought: although it is true that the right to information, or the right to being brought promptly before a judge are not expressly mentioned they are included in paragraph 40 (which is applicable only to children who are subject to a criminal procedure).

As a final remark I will to say that the text of the CRC is a good starting point but it is not exhaustive enough. If this would be the only instrument, then I think the level of protection could not be considered too high. If this would not be a problem enough, as already stated, the CRC does not have en enforcing mechanism which weakens the pressure of the United Nations Committee (on the Rights of the Child) on the signatory states. That is why additional instruments like the Beijing or Havana Rules have such a high importance. Still, in my opinion, this is not enough, as states can easily use all the existing bolt-holes (like Romania with its new regulation concerning the juvenile's pre-trial detention or England's non-separation of children from adults[233]).

3.3. The Beijing Rules and the Havana Rules

The Beijing Rules and the Havana Rules are not just complementary tools to the CRC but they served also as a very good source for it, as the Beijing Rules for example was adopted by the General Assembly in 1985, 4 years earlier than the CRC. I included these two resolutions because they refer explicitly to the juvenile justice cases, to the situations of how and in which conditions can a child be deprived of his liberty.[234]

[233] For more details see Chapter 4.

[234] There are of course other type of documents also (for example the Recommendation no. (87)(20) of the Council of Europe, Guidelines for Action on Children in the Criminal Justice System Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997) but I found these two set of rules as the most important and most exhaustive ones. Therefore I opted to include them in my work.

The Beijing Rules consists of six parts: general principles, investigation and prosecution, adjudication and disposition, non-institutional treatment, institutional treatment and research, planning, policy formulation and evaluation.[235] It can be seen that each of them is related to article 37 of the CRC but it goes one step further and regularizes in a detailed manner all the requirements of a children rights friendly system. Speaks about the importance of having a separate set of laws concerning the juvenile offenders and their justice system; about the age of criminal responsibility; the aims of this kind of systems; diversion and different types of non-institutionalized solutions and punishments; rights of the juveniles during a criminal trial etc.

The Havana Rules[236] are very similar to this. They have five parts addressing the following topics: fundamental perspectives; scope and application of the rules; juvenile under arrest or awaiting trial; the management of juvenile facilities and the personnel. It can be already seen from the topics, that this set of rules goes deeper and speaks in a more detailed way for example about the concrete everyday life of an institution in which children are 'locked in' (education, facilities, illnesses etc.); qualifications of the personnel of these type of institutions etc.

All these requirements will become very important in the next chapter when the institutions of the two countries will be analyzed, as both of them are United Nations' Member States, therefore these resolutions are binding upon them. Therefore let us now proceed (probably) to the most important part of this thesis, and see, how all these articles, provisions, principles and rules are applied in the concrete situations of England and Wales on the one hand and in Romania on the other hand.

[235] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf, accessed 21.10.2014
[236] United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) http://www.ohchr.org/Documents/ProfessionalInterest/res45_113.pdf, accessed 21.10.2014

CHAPTER 4. CHILDREN'S DEPRIVATION OF LIBERTY IN THE EUROPEAN CONTEXT

In the last chapter the focus will be turned over to the analysis of two European countries or better said regions: England-Wales and Romania. Since the United Kingdom is divided from a legal perspective I was forced to narrow down my examination to this region. Since Scotland has a very different juvenile justice (even than England) structure and Northern Ireland fits more into the Irish system, therefore for the purpose of having a more 'general' view of a common law country I opted for England and Wales as one of the basics of my comparison. And as Romania is concerned: I chose it because it is one of the newest members of the European Union and it will be interesting to compare it to one of its oldest and most powerful member.

I also chose these two because I wanted to present two extreme situations. I found it important to include two countries which are both party to the European Union, but in the same time, as mentioned before, are located at the two opposite sides of the 'scale'. On the one hand they differ because one is embedded in the traditional common law system and the other is based on Roman law, and has many similarities with the French judicial system.[237] And on the other hand they differ a lot because while the United Kingdom has constantly been a democracy (speaking about the last century), Romania had a long period during which communism was its dominant political system.

Having noted this, now I will proceed to the concrete exploration of these legal systems. I will do them separately and not in a parallel way as the difference is too big. Hence for a more proper understanding it is better to address each of these systems independently. First I will start with

[237] Although recently with the introduction of the new codes (civil and penal) this has started to change. But its basic principles are still embedded in the Roman law structure.

England and Wales not just because it is the first in the alphabetical order but also because it has a more complex juvenile justice system. In the first part a general observation will be included (the situation of the juveniles in the given country), this being followed by a short history of the system (laws), after which the next phase is a description of the juvenile justice system's current structure (procedure, pre-trial solutions, custody requirements and possibilities etc.). As a final step I will formulate, or better said summarize, the positive and the negative sides of the two system from one perspective: how does the national system fit into the requirements of the international instruments analyzed in the previous chapters.

4.1. England- Wales

4.1.1. General observations

This subchapter will be started instantly with a criticism formulated by Raymond Arthur in his book entitled "Young Offenders and the Law": "England and Wales locks up more young people than any other country in Western Europe. Large numbers of these young people sentenced to custody do not pose a serious risk to the community and, indeed, by leading to broken links with family, friends, education, work and leisure they may become a significantly greater danger upon their release"[238]. This is the premise from which I will 'launch' this part of my thesis: it is not a solution to lock up children under 18 because in most of the cases more damage is caused then excised.

As I mentioned in the introduction part of this chapter, I chose England because it has a common law system which is inherently different from any other continental country's judicial structure. But there is an additional reason why England became my choice, and that is that it has one of

[238] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 103

the highest number of juvenile inmates in his prison system (although in the last few years this number is in decline) and therefore it immediately faces us with a paradigm: England one of the oldest democracy with an adversarial penal system has one of the highest inmates in Europe. And that is why the analysis of this situation becomes challenging.

So let us now see what concrete numbers 'are in play' in relation to juveniles being placed in custody shown in the following chart:

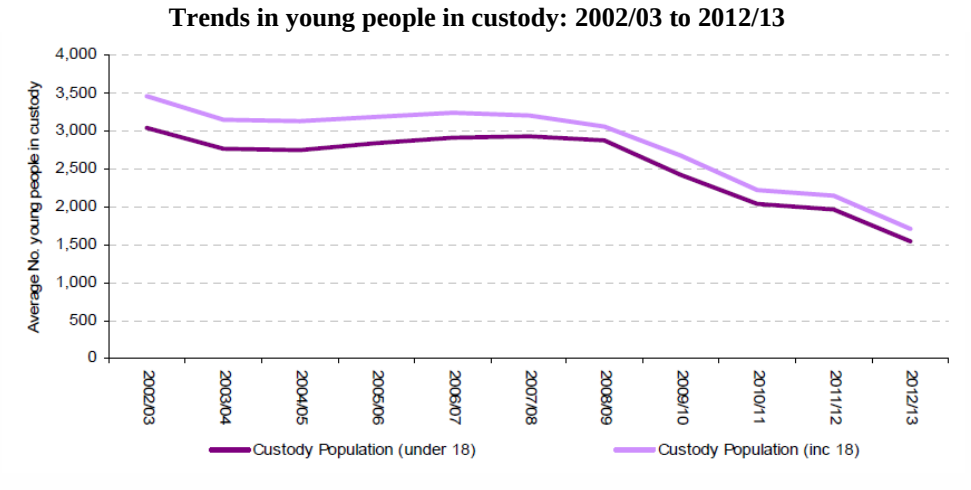

Figure 1: Trends in young people in custody: 2002/03 to 2012/13
Source: *Youth Justice Statistics 2012/2013, England and Wales*, Youth Justice Board, Ministry of Justice, Statistics Bulletin, Published on 30th January 2014, https://www.gov.uk/government/statistics/youth-justice-statistics, accessed 18.11.2014

It is clear from this graphic representation that there has been a considerable decline in the past ten years (2002-2012). There has been a 36% reduction which is impressive. While this is undoubtedly a positive sign, this is not the only fact what one should analyze in relation to the young offender's custody situation. It is also very important to see how many days a juvenile spends in a closed institution. This number will already represent the negative aspect of the English system, as it has been in constant rise.

Due to the United Kingdom's government's statistics: "the average length of time spent in custody increased by eight days to 85 days in 2012/13. For Detention and Training Orders (DTOs), it increased by eight days (from 107 to 115), for remands it increased by three days

(from 42 to 45) and for longer sentences it decreased by 51 days (from 353 to 302)"[239]. This looks in the following way on a chart:

Average time in days spent in the secure for children and young people: 2009/10 to 2012/13

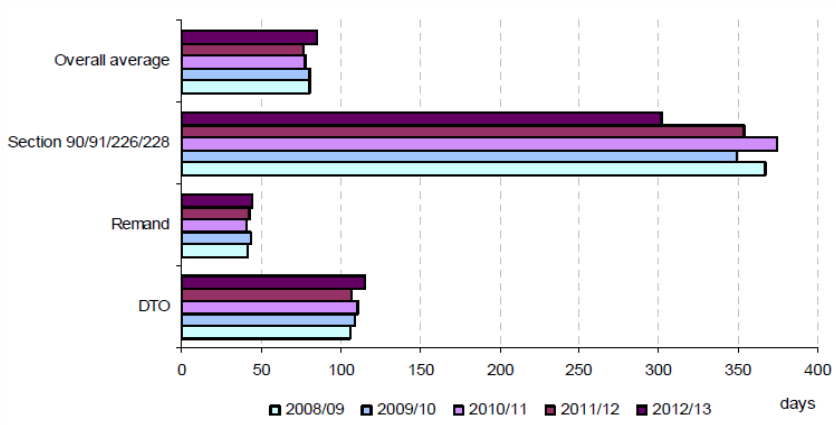

Figure 2: Average time in days spent in the secure for juveniles: 2009/10 to 2012/13
Source: *Youth Justice Statistics 2012/2013, England and Wales*, Youth Justice Board, Ministry of Justice, Statistics Bulletin, Published on 30th January 2014, https://www.gov.uk/government/statistics/youth-justice-statistics, accessed 18.11.2014

These numbers do give rise to concern. While on the one hand there are less children who are involved in a custodial type of punishment on the other hand those who are confined to a liberty chastisement spend more time in there. But this is not or should not be normal, as it goes deeply against the principle of every type of liberty punishment: it should be for the shortest possible time.[240] Moreover, besides the total number of children kept in confinement and the number of average days spent in there, the analysis of the reoffending rate of those who have been subjected to custodial type of punishment should also be included.

[239] *Youth Justice Statistics 2012/2013, England and Wales*, Youth Justice Board, Ministry of Justice, Statistics Bulletin, Published on 30th January 2014, https://www.gov.uk/government/statistics/youth-justice-statistics, accessed 18.11.2014
[240] CRC: Article 37(b).

Binary rate (proportion who re-offend) for young people: 2000, 2005/06 to 2011/12

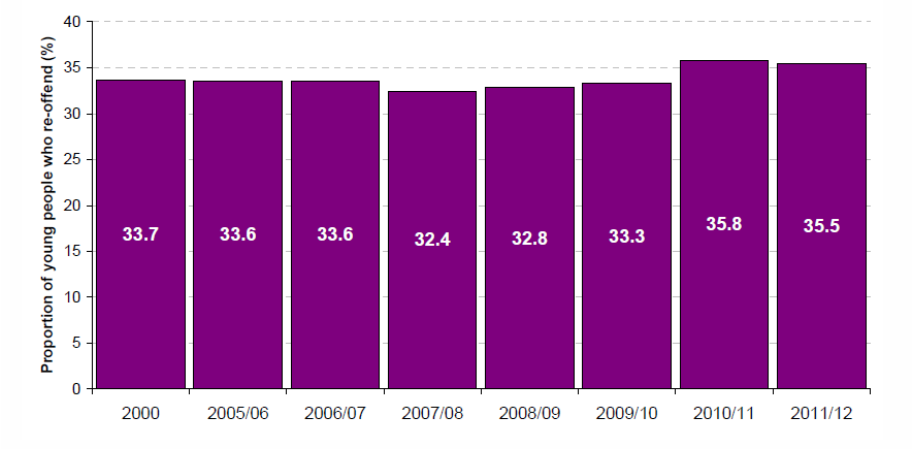

Figure 3: Binary rate for young people: 2000, 2005/06 to 2011/12
Source: *Youth Justice Statistics 2012/2013, England and Wales*, Youth Justice Board, Ministry of Justice, Statistics Bulletin, Published on 30th January 2014, https://www.gov.uk/government/statistics/youth-justice-statistics, accessed 18.11.2014

This chart clearly shows that reoffending is not decreasing, moreover there has been a slight increase since 2000. This could be of course one of the reasons why the average number of prison days is also getting higher. But this is also not acceptable. The ultimate goal of the youth justice system, as also formulated in the Crime and Disorder Act of 1998 (this will be further mentioned in the next subchapter), is to "prevent offending by children and young persons"[241]. So if the reoffending rate is getting higher, that means not only that the number of juveniles crimes is not decreasing, but also that the type of crimes committed are getting heavier for which harder punishments are prescribed (as this is a general tendency for every type of reoffending). Therefore the final conclusion in relation to England's general situation[242] is, that there is a considerable number of children who are stuck within the custodial punishment system. It is a

[241] Section 37(1) of the Crime and Disorder Act of 1998

[242] I would like to mention here that these data which I presented here and which I will also do in the upcoming parts of this work, might not be complete and sometimes might be even misleading. As also explained by scholars like Frieder Dünkel/Joanna Grzywa, Philip Horsfield, Ineke Pruin in their book entitled Juvenile Justice Systems in Europe, these data fail: "[…] to capture those crimes that are not reported to or recorded by the police or which do not result in a conviction. Nor do they provide a reliable indication of general trends in the volume of juvenile delinquency since they may also reflect changes in the practice on the part of criminal justice agencies and, in particular, the police" (p. 363). The so called self-report surveys are proved to be a better solutions, but as I had access only to the ones which do not cover the recent years, I decided not to include them here.

positive point that, generally the number of children in custody is in constant decrease, but the system still has flaws since reoffending cannot be prevented. Let us now see how this legal system looks like and how could this situation be explained.

4.1.2. Legal framework

Due to the fact that England and Wales are regions of a common law country, there is no separate criminal code from which one could easily take out all the necessary legislative acts.[243] Consequently one is forced to use the Acts of Parliament, as they regulate all the criminal proceedings to which juveniles are subject to. One of the first acts goes back until the beginning of the 20th century, where The Children Act of 1908 was adopted under which the first juvenile court was established.[244] Due to this long history the current system is a result of: "the emergence of two quite distinct 'jurisdictional regimes', both of which can result in the imposition of formal measures- including the use of detention- on young people"[245].

First there is the 'traditional' system (as in the case of adults) where juveniles (above the age of criminal responsibility which is currently 10) will be subject to special proceedings after which the court can impose the sanctions.[246] Then there is another form the so called "civil jurisdiction" where a range of different interventions can be imposed on the children in question, even if they are under the age of criminal responsibility.[247] In addition to these two possibilities, new hybrid types of measures have been introduced, which combine elements of criminal and civil law measures (ex. of anti-social behavioral order).[248] In this thesis I will focus more on the special

[243] James Dignan, *England and Wales* in "*Juvenile Justice Systems in Europe, Current Situation and Reform Developments"* Frieder Dünkel et al., (Vol. 1, Forum Verlag Godesberg, 2010), p. 358
[244] Ibidem
[245] Ibid, p. 361
[246] Ibidem
[247] Ibidem
[248] Ibidem

juvenile proceedings which end up with a custodial type of punishment, as only these could be regarded as deprivations of liberty. But since also the latter types are an inherent part of a juvenile justice system, I will briefly mention them later in the proper places. But for now the most important legislative acts will be presented which unsurprisingly shapes the current juvenile justice system.[249]

The first important act is the Criminal Justice Act from 1982. This has recognized that juvenile courts should also be adversarial, that the sentence should be proportionate to the offence and it has also established the youth custody centers.[250] The Criminal Justice Act of 1988 made it "more difficult to impose custodial sentences on young offenders"[251] and replaced the youth custody centers with young offender's institutions (YOI). And the Children Act of 1989 abolished the power of the juvenile court to put a young person under the supervision of a local authority.[252]

The Criminal Justice Act of 1991 set up a new youth court and extended its jurisdiction until children up to the age of 18.[253] The Criminal Justice Act of 1993 reintroduced the obligation of the courts to take into account of the offender's previous criminal records, and the Criminal Justice and Public Order Act of 1994 lowered the age at which children could be detained if they committed grave crimes (manslaughter or other violence) from 14 to the age of 10.[254] The Crime and Disorder Act of 1998: "introduced youth offending teams (YOT), the Youth Justice Board, parenting orders, child safety orders, local child curfew schemes and detention and training

[249] I will use notions which might seem unfamiliar, and which will be explained later, when I will concretely speak about them.
[250] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 28
[251] Ibidem
[252] Ibidem
[253] Ibidem
[254] Ibidem

orders (DTO). It abolished the presumption of doli incapax[255] and allowed courts to draw inferences from the failure of an accused child to give evidence or answer questions at trial"[256]. The Youth Justice and Criminal Evidence Act from 1999 made the referral order as a new primary sentencing method to children aged between 10-17 who were willing to plead guilty and were find guilty for the first time.[257]

In 2000 the Powers of Criminal Courts (Sentencing Act) was adopted, which underlined the previous act's idea, namely that the referral order should become the usual sentence until the age of 18, unless the offence is so serious that a custody would better fit into the picture.[258] The Criminal Justice and Police Act from 2001 raised the age limit to 15 in the case of introducing child curfew schemes (unsupervised children). And the Criminal Justice and Immigration Act: "introduced the youth rehabilitation order as the new generic community sentence for young offenders"[259].

Besides all these national legislation there is a number of case law and international instruments which influence the English juvenile justice system. The most important of the latter ones is naturally the CRC which was ratified by the UK in 1991. However this has not been incorporated into domestic law, therefore it is not legally enforceable in the UK.[260] But since they ratified it, they are under the obligation to comply with its principles consequently they must report periodically to the United Nations Committee on the Rights of the Child.[261] And there adequately a number of other instruments which were adopted or ratified by the UK in one

[255] Is not considered capable of committing an offence with an intent (due to his or her age).
[256] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 28
[257] Ibidem
[258] Ibidem
[259] Ibidem
[260] Ibid, p. 34
[261] Ibidem

way or another: Council of Europe's Recommendation about the European Rules for Juvenile Offenders Subject to Sanctions or Measures[262], Beijing Rules, United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), Tokyo Rules and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[263]

Subsequently, now I the type of institutions will be identified which are dealing with the juveniles while there are subject to these proceedings. After this the focus will be turned to the presentation of the judicial arrangements before a trial (pre-trial detention etc.) and lastly the type of punishments which include a deprivation of liberty will be introduced.

Juveniles are subject in most of the cases to the institution named Youth Court. It is part of the "lower tier of the English criminal court system"[264], section of the magistrate's court and tries all the cases with the exception of the most serious ones.[265] It is constituted of special magistrates, the procedure is adversarial but is simpler and less formal as in the adult courts.[266] The number of magistrates is three (one of them has to be a women and one must be a man), and they are chosen from a special panel.[267] These persons are lay, and they "rely on justice clerks (legal advisors) for advice on matter of law"[268]. It can also occur that district judges are sitting in these panels (usually in bigger cities) and in these cases they "adjudicate alone"[269]. During the trials the public is usually not allowed into the court rooms, but the press might be invited to report (of

[262] Recommendation CM/Rec (2008) 11
[263] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 34-41
[264] Frieder Dünkel, et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 1, Forum Verlag Godesberg, 2010), p. 370
[265] Ibidem
[266] Josine Junger-Tas and Scott H. Decker (edited by), *International Handbook of Juvenile Justice* (Springer Publisher, 2006), p. 70
[267] Ibid, p. 71
[268] Ibidem
[269] Ibidem

course this cannot include the identification features of the juvenile).[270] After the trial, if the interest of justice requires so, the "protection from publicity can be lifted [...] the idea behind: encourage young offenders to face up to the consequences and this deter further offending"[271]. But this "naming and shaming" and giving out data is controversial hence article 40(2b) of the CRC and also the Beijing Rules prohibit this (Rule number 8, 21).[272]

In some cases the Youth Court can or is obliged to pass over its jurisdiction to the Crown Court. The Crown Court has jurisdiction without discretion in the following cases: homicide other grave circumstances like grave crimes (Section 90-92 Powers of Criminal Court Sentencing- a person over 21 could be charged with minimum 14 years of imprisonment), those charged with the offence of indecent assault, and those charged together with an adult offender who has been sent to the Crown court.[273] In all of these cases, the punishment is always set out by the Youth Court and will be longer than 24 months or 16 months in case of firearm sentences.[274]

At this point I will highlight that in the case of R. v. Nottingham Magistrate's Court [2001] EWHC Admin 802 one of the judges (Lord Brooke) had explicitly stated that when a juvenile is placed in a Young Offender's Institution, article 3(1) of the CRC -the best interest of the child principle- has to be taken into consideration.[275] This is an important step towards the acknowledgment of the CRC as an influential legal instrument. But going back to the jurisdiction of the Crown Court. In case of the violent or sexual offences the case will also go to the Crown Court if: "if the Youth Court considers that the young person might reasonably be considered

[270] Ibidem
[271] Ibidem
[272] Ibidem
[273] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 121
[274] Ibid, p. 123
[275] Ibid, p. 106

dangerous. This will exist where the court determines that there is a significant risk of serious harm caused by the young person committing another of the offences specified in the 2003 Act"[276].

Whether the Youth Court passes its jurisdiction over to the Crown Court or not (in non-mandatory situations) depends on their judgment about which of these institutions will be in a better position to "pass the appropriate sentence"[277]. In the cases of R v. Thetford Youth Court and R v. Waltham Forest Youth Court [2002] EWHC 1252 (admin)[278] the court held that this referral should always be: "very much a long stop, reserved for very serious offences"[279]. While in other cases like the R v. Southampton Youth Court and R v Wirral Youth Court [2002] EWHC 1640 (Admin)[280] the court also said that: "case should only be referred to the Crown Court if there is a real possibility that a penalty of 2 years or more would be appropriate"[281].

In relation to this idea there has been an important ECtHR case: T v. The United Kingdom[282]. Here the Court has found the UK to be in breach article 6 (right to a fair trial) because these two ten year old boys were tried in a Crown Court. This court cannot be suitable because an institutions dealing with juveniles should: "adequately respect their right to privacy, promote their welfare and enable them to understand and fully participate in the proceedings"[283]. I fully agree with this. I think if a system already has a separate system built up for juveniles, then it makes no sense that in some occasions they are still sent back to the adult courts. If the case is

[276] Ibid, p. 123
[277] Ibidem
[278] Ibidem
[279] Ibidem
[280] Ibidem
[281] Ibidem
[282] *T v. The United Kingdom*, Application no. 24724/94, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58593, accessed 18.11.2014
[283] Martin Stephenson, Henri Giller and Sally Brown, *Effective Practice in Youth Justice* (Second Edition, Routledge, 2010), p. 72

truly complicated and difficult then eventually one could use instead of lay magistrates, specialized judges who are qualified in juvenile matters. This negative impact of a formal proceeding has been emphasized a lot by scholars and general principles[284], consequently this becomes a flaw of the English system.

Now we will began to look at the judicial arrangements that can be imposed on a child. First of all there are the so called "pre-court disposals" through which the system tries to keep away those juveniles who commit minor crimes.[285] Among these arrangements is the Child Safety Order for example. This can be used when a child younger than 10 years old commits an offence or even he or she might be at the risk to commit something. Then a special institution called Family Proceedings Court may pose a curfew order, the requirement to attend school or not to meet with certain people etc.[286] For kids above 10 years old the Youth Court can impose an informal warning, a reprimand or a final warning.[287]

Then unfortunately the child can be prosecuted. This decision is made by the police but "sometimes they seek advice from the Crown prosecution service, especially if there is some doubt about the sufficiency of evidence"[288]. Once the prosecution is in 'charge': "they must satisfy themselves that there is sufficient evidence to secure conviction and that it is in the public interest to prosecute, such as the seriousness of the offence or whether the defendant has put right the loss or harm caused"[289].

[284] For example this certainly goes against Article 4 of the CRC (best interest of the child), or Article 40 which is emphasizing dignity.
[285] Josine Junger-Tas and Scott H. Decker (edited by), *International Handbook of Juvenile Justice* (Springer Publisher, 2006), p. 74
[286] Ibid, p. 73
[287] Ibid, p. 74
[288] Ibid, p. 75
[289] Ibidem

Being subject to an investigation means that some kind of pre-trial arrangement has to be settled. Generally the magistrates can remand the juveniles in custody or on bail "with or without conditions"[290]. In most of the cases, as shown in the graphic below, bail is granted.

Type of remand decisions for young people: 2012/13

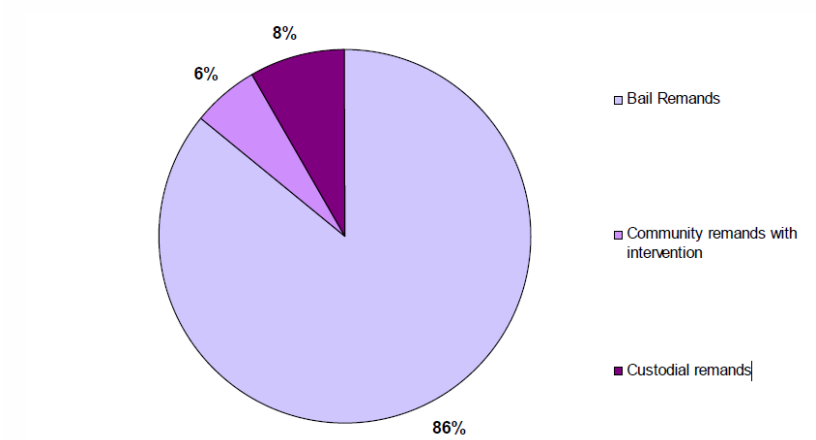

Figure 4: Type **of remand decisions for young people: 2012/13**
Source: *Youth Justice Statistics 2012/2013, England and Wales*, Youth Justice Board, Ministry of Justice, Statistics Bulletin, Published on 30th January 2014, https://www.gov.uk/government/statistics/youth-justice-statistics, accessed 18.11.2014

Before the decision in relation to remand is made, the courts will receive the so called: "bail information scheme" (what type of support and supervision can a child get) and together with a risk assessment they will make their final decision.[291] The bail can be refused for very strong reasons like when the accused has a history of: "breaching bail conditions, is thought unlikely to appear in court or likely to commit further offences or interfere with witnesses while on bail or custody; or it is thought to be required for their own welfare or protection"[292]. If this is the case then the child can be remanded either to the local authority or to prison.[293]

[290] Ibidem
[291] Ibidem
[292] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 1, Forum Verlag Godesberg, 2010), p. 385
[293] Ibidem

Juveniles aged under seventeen are usually placed under the supervision of the local authorities regularly in the area where he/she lives or where the act was committed.[294] Due to Section 25 of the Children's Act from 1989, the local authorities can only place a child under such a secure accommodation only if it is proved that one of the following criteria is present: he or she has a high chance of absconding, the child can suffer a significant harm if released and that he/she might injure himself or others.[295] In such a case there are three different types of institutions where a juvenile can be placed: supported lodgings, placement with relatives, placement in community home and remand fostering.[296]

If the remand in prison is to be found the best solution then next to the above mentioned criteria it must be also proved that the public has to be protected from the juvenile in question.[297] In this case, the local authorities, the social workers or a probation officer has to be contacted[298], and the juveniles must have the opportunity to apply for legal aid. Initially this pre-trial detention may last for 8 days and extended to 28 days if the special circumstances require so.[299] If the police holds someone in custody that can last for 24 hours, and if the child is already 17 than that can last up to three days.[300] Both in the case of a remand to local authorities or in prison the maximum number for which a juvenile can be kept in detention is 70 days, although an extension is legally possible (important to mention that all of these cases also 10-11 year olds can be subjected to such a procedure).[301]

[294] Ibid, p. 76
[295] Ibidem
[296] Ibidem
[297] Ibid, p. 77
[298] Ibidem
[299] Ibidem
[300] Ibidem
[301] Ibidem

During the trial and the sentencing procedure, the court has to take into account a five key principles[302]. Most importantly, the sentences have to relate to the seriousness of the offence (the Criminal Justice Act from 1991, emphasizes this as the most important element)[303]. The second principle is that the court has to take into account the welfare of the child as stated in 44th sentence of part III of the Children and Young Persons Act from 1993: "Every court in dealing with a child or young person who is brought before it, either as […] an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training"[304]. But as formulated in the International Handbook of Juvenile Justice, England and Wales has a totally separate welfare system (family proceedings court) therefore it is impossible for the magistrates to fully fulfill this requirement.[305]

The third principle entails the role of the parents, the fourth is that juveniles aged 16 and 17 have to have a special status: due to the fact that they are in a transitional age the court can impose (taking into account their maturity and status of development) the "full range of community sentences both those previously available for juveniles and those currently available for adults"[306]. Lastly, the fifth principle is that the so called presentence report (PSR) made by the social worker or the probation officer has to be taken into account. Due to the English juvenile justice system after going through all these five principles the proper punishment and sentence can be drawn upon the child.

[302] Ibid, p. 78
[303] Ibidem
[304] Children and Young Persons Act, 1993, http://www.legislation.gov.uk/ukpga/Geo5/23-24/12, accessed 17.11.2014
[305] Josine Junger-Tas and Scott H. Decker (edited by), *International Handbook of Juvenile Justice* (Springer Publisher, 2006), p. 78
[306] Ibid, p. 79

Hence the focus of this thesis is the right to liberty now the 'display' of the sentences will follow where the juvenile is being placed in a custodial type of institutions and is deprived of his or her liberty. Evidently, it is true that it is essential to mention before this, that England and Wales has a number of community type of sentences for children (referral order, anti-social behavior order, curfew order etc.). As we have seen in the general observation subparagraph, these methods are proved to be efficient as there are less and less children who are subjected to a confinement. Unfortunately, there is no space to speak about them in a detailed manner, but due to their high number and number of areas that they cover, they should definitely be considered as a positive aspect of England's and Wales' juvenile justice system. But turning back to confinements.

One of the most common, and therefore the most important type of detention order is the Detention and Training order (DTO) which was created by the Crime and Disorder Act from 1998.[307] This can be given generally to children aged between 15 and 17 if the court is purely on the opinion that they are persistent offenders, and to 12-14 years olds if they are[308] persistent and dangerous offenders[309]. It can be set up for a period of 4-24 months[310] and normally, half of the sentence is served in custody and the other half in the community under the supervision of a social worker, probation officer or of a member of the YOT.[311] As to whether what these YOTs are: "multi-agency teams made up of representatives from police, probation, education, health and social services, and specialist workers, such as accommodation officers and substance misuse workers. YOTs were set up following the 1998 Crime and Disorder Act with the

[307] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 104
[308] Ibidem
[309] Section 100(2)(a-b), Powers of Criminal Courts (Sentencing) Act 2000
[310] Frieder Dünkel at al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 1, Forum Verlag Godesberg, 2010), p. 368
[311] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher), 2010, p. 104

intention of reducing the risk of young people offending and re-offending"[312]. They have an important role in several stages of the youth justice.

In order that a custody can be installed the court has to establish the fact that the crime was so serious that no other type of measure would be an adequate punishment.[313] It is interesting, that it is stated in the Sentencing Act from 2000[314], that in the case of a sexual offence, custody is the only adequate type of punishment. As to whether someone is a persistent offender or not that is defined on a case by case basis.[315] It has to be remarked that there has been a statutory definition of the Home Office (1997a) namely that persistent is someone if he or she was sentenced on three or more times and arrested again within three years of the last sentence[316], but it was overruled in the case of R v. C[317], where the court has stated that this is irrelevant in determining persistency.

The court during the establishment of the persistency is also entitled to take into consideration any type of reprimand or final warning (CR v. AD [2000] Crim LR 867[318]) moreover persistency can be proven even in the absence of such measures (R v. Smith [2000] Crim LR 613[319]- "a 14 year old boy who has participated in 3 robberies, 2 offensive weapon offenses and a false imprisonment within 24 hours was found to be a persistent offender"[320]).[321] Another important fact is that in a DTO, detention without the training component can only be imposed if someone

[312] Youth Justice Annual Statistics: 2012 to 2013, Youth Justice Board, Ministry of Justice, Statistics Bulletin, Published on 30th January 2014, https://www.gov.uk/government/statistics/youth-justice-statistics, accessed 18.11.2014
[313] Section 152 Criminal Justice Act 2003.
[314] Section 79(2) Powers of Criminal Courts (Sentencing) Act 2000
[315] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 105
[316] Ibidem
[317] Ibidem
[318] Ibidem
[319] Ibidem
[320] Ibidem
[321] Ibidem

is aged between 18 and 20[322]. And upon release, the offender is supervised by a member of the YOT, and if the order is not respected, the punishment is to return to detention center and to serve the remainder of the time originally established.[323]

Another type of punishment which influences the liberty of the child is the Intensive Supervision and Surveillance Program. This is a very peculiar legal solution because this order targets only those individuals (3% of the delinquents) who are responsible for 25% of all juveniles offending.[324] It is true that children are not 'locked up' as in the case of a DTO, but I included this here because children are subject to a constant, "24 hour supervision, electronic tagging, voice verification, intelligence led-policing and advocate schemes are used to monitor, track and supervise offenders"[325]. And I think this could amount to a deprivation of liberty[326] also in the case of an adult not to mention juveniles. Near this, the young offenders have: "[…] 25 hours of purposeful activity a week during the first three months. They should also include elements of reparation, education and training, intensive offending behavior courses, training in interpersonal skills and family support and, where applicable, provision for mental health problems or drug rehabilitation"[327]. But a big number of them breach all these requirements and eventually end up in custody, so effectiveness is not an adjective which could be attributed to this situation.[328]

Lastly, next to these two there is the 'classical' solution of the long-term detention. In all the case enumerated in relation to the mandatory jurisdiction Crown Court, the court can impose the same

[322] Ibidem
[323] Josine Junger-Tas and Scott H. Decker (edited by), *International Handbook of Juvenile Justice* (Springer Publisher, 2006), p. 86
[324] Ibidem
[325] Ibid, p. 87
[326] Very similar case of Guzzardi v. Italy.
[327] Josine Junger-Tas and Scott H. Decker (edited by), *International Handbook of Juvenile Justice* (Springer Publisher, 2006), p. 87
[328] Ibidem

number of years of imprisonment as in the case of adults.[329] And this is concerning because statistics (in 7 years from 1990 to 1997 the number of offenders sentenced for grave crimes raised from 100 to 700[330]) show that this type of crimes raised, and even today violent crimes form a big part (21%) of the type of offences committed by children:

Proven offences by young people: 2012/13

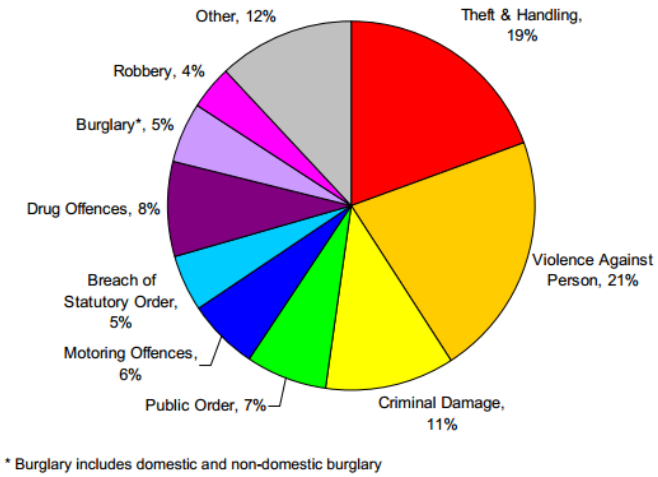

Figure 5: Proven offences by young people: 2012/13
Source: Youth Justice Statistics 2012/2013, England and Wales, Youth Justice Board, Ministry of Justice, Statistics Bulletin, Published on 30th January 2014, https://www.gov.uk/government/statistics/youth-justice-statistics, accessed 18.11.2014

This leads to the conclusion already made in the first part of this subchapter: even if the number of children locked up in closed institutions is not increasing the number of years spent in there is definitely bigger, as the types of crime committed are graver. And this is explicitly a destructive situation.

When someone is sentenced with a DTO then there are three type of custodial institutions which are implemented in the English system and in which consequently a juvenile can be placed into[331]. One of them is the so called Secure Children's Home (SCH). They are run by the social services and not the prison estate, and offenders until the age of 16 can be placed here, but

[329] Ibid, p. 88
[330] Ibidem
[331] Ibid, p. 86

usually they are used for children aged 12-14.[332] These institutions are special because they focus not only on offenders but also on vulnerable children with intensive "one-on-one work to address their behavioral problems [...] focusing on attending their physical, emotional needs of the young people"[333]. And they have also the liberty not to take anyone from the youth court.[334]

The next custodial type of institution is the Secure Training Center (STC). These are already part of the prison estate, and there are four of these type of centers holding around 50 juvenile offenders: Milton Keynes, Durham, Northamptonshire and Kent.[335] As it is quite obvious from the number of 'detainees' these institutions work with individually tailored program, have a "high staff/inmate ratio"[336] allowing this way the individuals to "develop and stop reoffending"[337]. Moreover they ensure: "a stronger tie with families; more contact with the external community and a wider range and higher volume of education"[338]. And lastly, next to the STCs there is the more 'classical' institution named the Young Offenders Institutions (YOI). They are capable of having a large number of inmates (the majority of the offenders are placed here[339]), therefore more incapable to address individually their needs and special circumstances.[340]

Although, even from these short descriptions it is quite obvious which institutions could fit best into the principles and requirements of a child friendly custody, it is still necessary to look at some numbers and data. One of these studies had compared the reconviction rate of those young

[332] Martin Stephenson, Henri Giller and Sally Brown, *Effective Practice in Youth Justice* (Second Edition, Routledge, 2011), p.106
[333] Ibidem
[334] Ibidem
[335] Ibidem
[336] Ibidem
[337] Ibidem
[338] Martin Stephenson, Henri Giller and Sally Brown, *Effective Practice in Youth Justice* (Second Edition, Routledge, 2011), p.222
[339] Ibidem
[340] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 107

offenders who have committed grave crime and who spent their detention in Young Offenders Institutions compared to those who were placed into Secure Children's Home.[341] Reconviction rates were considerably higher after a 2 year period of those living in YOIs (53%) then of those living in SCHs (40%); also the reoccurrence of violent crimes in the previous situations happened more often than in the latter ones.[342] Even in the case of STCs "one in three children were rearrested within one month of their release and 2 out of 3 had reoffended before the order has expired"[343].

If we look at it from a material point of view the distinction between these institutions is even bigger. While an average bed in a Young Offender's Institutions costs 53,112 pounds, in a Secure Training Center it is 172,260 and in a Secure Children's Home it is 185,532.[344] And if we take into account also the fact that the outcomes are not very successful plus this amount accounts for around 2/3 of the youth justice budget[345], one can rightfully put the question: couldn't this amount be spent in a more effective way, like making the budget for diversion measures bigger?

Young Offender Institutions as they are very similar to normal prison conditions, are not suitable to effectively rehabilitate and reintegrate the young offenders. These institution's environment is characterized by: "daily bullying, intimidation and routine self-harm"[346]. John Muncie has formulated in the following way the very adequate idea that: "An approach which concentrates on incarcerating the most delinquent and damaged adolescents, in large soulless institutions

[341] Martin Stephenson, Henri Giller and Sally Brown, *Effective Practice in Youth Justice* (Second Edition, Routledge, 2011), p.222
[342] Ibidem
[343] Josine Junger-Tas and Scott H. Decker (edited by), *International Handbook of Juvenile Justice* (Springer Publisher, 2006), p. 86
[344] Martin Stephenson, Henri Giller and Sally Brown, *Effective Practice in Youth Justice* (Second Edition, Routledge, 2011), p. 220
[345] Ibidem
[346] John Muncie, *Youth and Crime, A critical introduction* (SAGE Publications, 1999), p. 293

under the supervision of staff with no specialist training in dealing with difficult teenage behavior, is nonsensical and inhumane"[347]. Moreover the very basic idea of child (and not only) imprisonment is not serving the aim to prevent reoffending[348]:

> The vast majority of young people in custody do not pose no danger or risk to the community. Indeed they may be a significantly greater danger on their return. When a young person is in custody they are making no reparation to the victim or society. Child imprisonment makes little if any positive effect in preventing offending: patterns of reconviction with regard to children, following release from all forms of custodial institution are exceptionally high.[349]

Even the Government itself in the early 90's stated that this way is an: "expensive way of making bad people worse"[350]. This is especially true as due to a statistic from 2010 shows that 46% of all the young people placed in a YOI had been attacked, mugged or threatened with violence.[351] Then how can we expect that they transform and become 'normal' citizens? Moreover closed institutions bear further risks in relation to juveniles: limits their decision making and planning skills in people who have just started to develop them, learning has to be performed in an unhealthy environment and if we remove these children from the environment which they just started to understand we cause further harm which will be much harder to repair.[352]

Raymond Arthur had furthermore also stated that in general all these penal institutions are not really influencing the crime rate, and if: "most prisons were closed tomorrow, the rise in crime

[347] Ibidem
[348] Raymond Arthur, *Young Offenders and the Law, How the Law responds to young offending* (Routledge Publisher, 2010), p. 108
[349] Ibidem
[350] Ibidem
[351] Ibid, p. 109
[352]Martin Stephenson, Henri Giller and Sally Brown, *Effective Practice in Youth Justice* (Second Edition, Routledge, 2011), p. 222

would be negligible"[353]. Unfortunately it is true that at this moment it is not a possibility to erase all type of custodial punishments, but as David Faulkner put it:

> …its relationship with, and its potential for solving problems of crime and social disorder and of dysfunctional communities and families is much more uncertain. These problems are part of a wider and usually complex situation of relationships, opportunities, temptation and motivation where the punishment of individuals can have only limited impact[354].

The solution unquestionably would be to put accent on non-custodial type of punishments, but more importantly, on early interventions not only because savings in amount of 100 million pounds cold be made annually[355], or because it was also recommended by the European Commission already in 2005[356], but also becomes these types of programs could form the most positive outcome for a child[357]. And as the CRC's basic principles states: everything should happen in the best interest of the child.

As a conclusion I will shortly formulate once again the critics and the 'compliments' of the English and Welsh system. Generally, it is good that children spend little time in these closed institutions then adults. The solutions of the DTO is especially positive, as only one part of the sentence has to be spent in a closed institutions, during the other part the child has already regained its freedom. This Supervision and Surveillance Program seems also a positive steps, as it tries to deal with the most problematic juveniles, but the measures seems a little bit too farfetched. And the number of non-custodial type of punishments is also quite impressive.

There are of course a number of problems also. First of all it is problematic that the age of criminal responsibility is so low (10 years old). In Europe the general tendency is to put this

[353] Raymond Arthur, Young Offenders and the Law, *How the Law responds to young offending* (Routledge Publisher, 2010), p. 109
[354] David Faulkner and Ros Burnett, *Where next for Criminal Justice?* (The Policy Press, 2012), p.96-97
[355] Raymond Arthur, Young Offenders and the Law, How the Law responds to young offending, Routledge Publisher, 2010, p. 109
[356] Ibidem
[357] Josine Junger-Tas and Scott H. Decker (edited by), *International Handbook of Juvenile Justice* (Springer Publisher, 2006), p. 69

number around 14 and I totally agree with it.[358] A 10 year old is still too young to be conscious about what can in a penal system happen. And if a 10 year old or even a 13 year old ends up in a prison estate the harms caused will be hardly impossible to repair.

Secondly, as I also mentioned this earlier, it is not good that there are two totally different institutions which deal on the one hand with juvenile delinquents, and on the other with those in need of care and protection.[359] In the case of children those who are in need or care, usually end up committing an offence either because they do not know that it is not allowed, or because they do not have anyone to take care of them, so they have to do that by themselves (for example feeding themselves). So these institutions should be definitely combined, otherwise the rule number 6.1 of the Beijing Rules as an example (the special needs of the child has to be taken into account at all stages of the proceedings) would be hard to achieve.

It has been formulated as a criticism that the stuff who deals with the juveniles in several of the institutions are not trained well enough[360]. The YOI for example has an inferior staffing level (1:10)[361] and that the needs of victims are: "subordinated to other pressing priorities such as speed of processing, or the preference for correctional interventions"[362]. All these requirements are included in one or the other of the children's rights instruments (it is interesting that the staff qualification is not mentioned expressly in the Beijing Rules, only in its commentaries as they were quite aware that in a high number of regions this cannot become a reality).

[358] The Beijing Rules for example (Rule 4.1.) states that this age shouldn't be placed at a low level. And 10 is low, although it is higher than 8 which is the age of criminal responsibility in Scotland.
[359] Frieder Dünkel, et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 1, Forum Verlag Godesberg, 2010), p. 395
[360] John Muncie, Youth and Crime, *A critical introduction* (SAGE Publications, 1999), p. 293, Josine Junger-Tas and Scott H. Decker (edited by), *International Handbook of Juvenile Justice* (Springer Publisher, 2006), p. 86
[361] Frieder Dünkel, et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 1, Forum Verlag Godesberg, 2010), p. 390
[362] Ibid, p. 396

A series of other criticism could be enumerated but due to lack of space I chose to list the most important ones. It is still essential to mention that there have been a number of positive changes in the English system, but one should be never satisfied with the given situation, as positive changes can always be implemented.[363] The United Kingdom has always been a very self-conscious country, so we shall see how the present or the upcoming international bodies and instruments like the CRC Committee or the EU can change this.

4.2. Romania

4.2.1. General observations

Just like in the case of England and Wales I will start this subchapter with a critic formulated by UNICEF in a study entitled: "Practices and Standards in the System of Juvenile Justice in Romania":

> The problem of juvenile justice is an open problem in Romania. At the present time, we have to deal with a system focusing more on sanctioning and less on reeducation, ignoring the reality that, in fact, minor perpetrators are more victims than offenders. The sanctioning system of minors who commit offenses is very harsh, the alternatives available to judicial bodies being extremely few. There are no educational or medical treatment options to be applied to juvenile delinquents in an individualized manner, as there are no sufficient human and logistic resources to impose the few alternative sentences to imprisonment which exist in the current or future Penal Code.[364]

As we will see in the following subchapter a lot has changed since the introduction of the new Penal Code and Code of Criminal Procedure, but unfortunately this change cannot be regarded as a positive one. And it is quite hard to predict at this point what type of changes this will bring: but most probably the current system will raise the number of juvenile detainees (detailed explications in the next subparagraph) and this is not the goal which a democratic country should comply with.

[363] In my opinion the most urgent one should be the change of the age of criminal responsibility.
[364] *Practices and Standards in the System of Juvenile Justice in Romania, UNICEF*, http://www.unicef.org/romania/justitie_juvenila_engleza.pdf, p. 1, accessed 19.11.2014

Unlike in the case of England, in the case of Romania it is much harder to present accurate statistics. First of all during Communism statistics were not published, and the real facts of the juvenile criminality were undisclosed.[365] For example a study in 1964: "to analyze the bio-psychosocial components of the personality of the minor offender, was interrupted by representatives of the former General Prosecutor's Office because the content of the study was considered an attempt to introduce principles of "bourgeois sciences" in Romania, such as criminology or criminal sociology"[366]. Later on with the abolishment of the prison sentence the number of criminality has increased and then after the regime change suddenly decreased: "from 194.6 per 100,000 inhabitants in 1988 to 699 in 1992"[367]. This was probably due to the slow decrease of the poverty rate and due to the fact that those 'famous' children orphanages, which in fact were producing criminals, started to close up.

Similarly to the situation in England most of the crimes committed, fall under the so called property crimes, although this percentage is much higher in the case of Romania then in the case of England (in fact the violent crimes were on the 'leading' position, and in Romania the property crimes have the highest percentage):

[365] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 3, Forum Verlag Godesberg, 2010), p. 1085
[366] Ibidem
[367] Ibidem

Proven Offences by Juveniles in Romania

Year	Total	Population by age group (14-17 years)	Per 100,000	Offences Against the Person	Thereof: Murder	Thereof: Rape	Property Offences	Thereof: Theft	Thereof: Robbery
1989	3,810	1,506,027	253	369	72	119	2,950	2,652	191
1990	4,554	1,518,616	300	405	53	234	4,011	3,586	367
1991	8,520	1,559,721	546	617	80	303	7,619	6,628	802
1992	9,210	1,608,135	573	569	75	220	8,286	7,131	909
1993	10,141	1,584,947	640	501	77	167	9,035	7,614	906
1994	11,658	1,565,534	745	524	79	172	10,531	9,289	822
1995	12,611	1,528,609	825	556	73	163	11,251	9,912	781
1996	12,439	1,478,156	842	554	58	140	11,074	9,906	728
1997	13,674	1,396,132	979	620	73	98	12,100	11,010	814
1998	10,918	1,322,006	826	508	63	78	9,590	8,744	619
1999	8,231	1,294,004	636	460	40	78	7,097	6,327	646
2000	7,322	1,282,661	571	495	52	105	6,316	5,600	584
2001	8,576	1,346,673	637	499	64	101	7,336	6,518	704
2002	7,811	1,391,137	561	590	89	139	6,527	5,736	713
2003	7,267	1,388,797	524	510	59	91	6,129	5,369	668
2004	7,915	1,399,028	566	513	70	110	6,760	5,892	786
2005	7,868	1,286,569	612	540	75	115	6,711	5,528	1,092
2006	6,709	1,139,544	589	500	64	107	5,722	4,542	1,102
2007	4,613	1,034,006	446	614	75	108	3,634	3,046	558

Figure 6: Proven offences by juveniles
Source: Frieder Dünkel et al., Juvenile Justice Systems in Europe, Current Situation and Reform Developments (Vol. 3, Forum Verlag Godesberg, 2010) p. 1084

This means that theft and similar offences represent the biggest threat and they are the main reason why juveniles end up in the circles of the criminal justice system. This difference between England and Romania is also explicable by the fact that Romania is a much poorer state, children sometimes commit all these actions to survive. So one solution towards change would be more investments in decreasing child poverty.

Another interesting fact is that most of the offences are committed in a partnership and not alone (64% to 36%)[368] and mostly together with adults (57%)[369]. More importantly most of them come from a difficult background having problems not only with their parents but also with their schoolmates:

[368] Practices and Standards in the System of Juvenile Justice in Romania, UNICEF, http://www.unicef.org/romania/justitie_juvenila_engleza.pdf, p. 30, accessed 20.11.2014
[369] Ibid, p. 31

Relationship with Parents

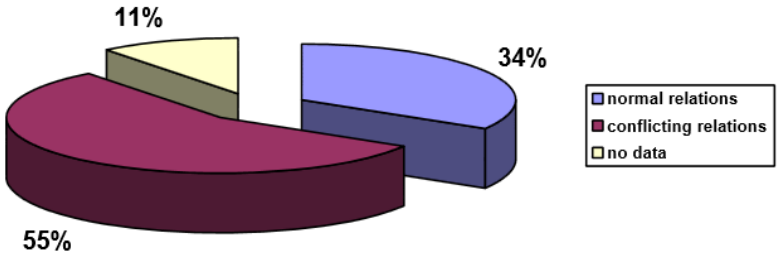

Figure 7: Relationship with parents
Source: *Practices and Standards in the System of Juvenile Justice in Romania, UNICEF*, http://www.unicef.org/romania/justitie_juvenila_engleza.pdf, p. 40,(accessed 20.11.2014

Relationship with colleagues

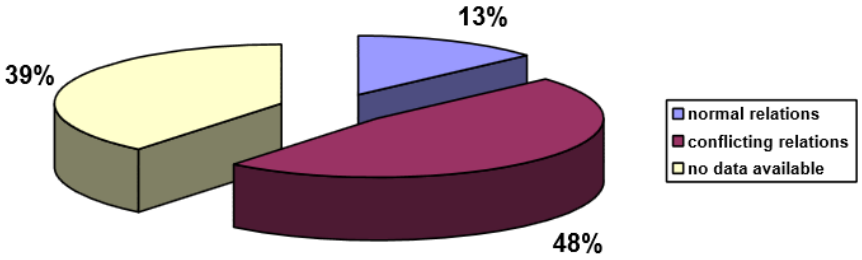

Figure 8: Relationship with colleagues
Source: *Practices and Standards in the System of Juvenile Justice in Romania, UNICEF*, http://www.unicef.org/romania/justitie_juvenila_engleza.pdf, p. 41, accessed 20.11.2014

All these data prove that the real problem lies in the economic and social construction of the country. It would be much more efficient if these could be addressed after which probably the whole juvenile justice system will be much easier to change, as there would be less young people who should 'be dealt with'. So let us now proceed to the examination of the Romanian judicial system.

4.2.2. Legal framework

Surprisingly, even Romania has a long history of a penal system which addresses specifically the juveniles: already the Criminal Code from 1865 stipulated that children between the ages of 15-20 are fully criminally responsible, and those between 8 and 15 only then if it can be proven that

they were aware what the consequences of their action entail.[370] Then during the 20th century and even during the communism laws have constantly been enacted which were forming the juvenile justice system.

In 1936 the new Criminal Code has raised the age of criminal responsibility to 14[371], and then in 1938 this was lowered back to 12.[372] In 1969 this age limit was once again raised to 14 and they made the differentiation between the age group of 14 and 15 and respectively 16 and 18 (in the case of the former judgment/discernment has to be proven).[373] There was no maximum penalty determined, and sentences were only 1/3 of the adult sentences.[374] In 1977 through the Decree No. 218/1977 a substantial change has been made: imprisonment was totally abolished for youngsters between 14 and 18, plus they introduced a wider range of educational measures.[375]

After the regime change, the new democracy has addressed this question of non-imprisonment and consequently they abrogated this 1977 Decree, and returned to the 1969 solution through the Law no. 104/1992, so 14-18 year olds could be newly sent to prison. In the same time Romania, just as England, started to adopt all the international conventions into their system, but unlike England all these became enforceable as they were adopted through national legislation: Riyadh Guidelines: Resolution No. 45/112, 1990; Beijing Rules: Resolution No. 40/33, 1985; Tokyo Rules: Resolution No. 45/110, 1990[376], Conventions on the Rights of the Child: Law no. 18/1990[377]. Furthermore to comply with the requirements of these international instruments

[370] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 3, Forum Verlag Godesberg, 2010), p. 1077
[371] Ibidem
[372] Ibid, p. 1078
[373] Ibidem
[374] Ibidem
[375] Ibidem
[376] Ibid, p. 1079
[377] *Practices and Standards in the System of Juvenile Justice in Romania, UNICEF*, http://www.unicef.org/romania/justitie_juvenila_engleza.pdf, p. 15, accessed 19.11.2014

further laws have been enacted: "the Law no. 301/2004, Law no. 272/204 (on the protection and promotion of the rights of the child), and Law no. 294/2004 on the execution of sentences and of measures imposed by judicial bodies in the course of the penal trial"[378].

Despite all these laws currently there is no separate juvenile justice system (in the sense that the regulations are included in the same penal code as the regulations for adults, and most of the rules are applicable for juveniles with some special rules), it has only one part in the current Criminal Code, Title V, where all the distinct regulations are laid down. So currently in Romania the age of criminal liability is 14, under that no one can be held responsible[379] (although there are some special measures which address this group- Law 271/2004[380]- but as they do not entail liberty deprivation, I will not include them). Those aged between 14 and 16 are only responsible if it can be proven that in the time of their action they were aware of their deeds (acted with discernment), but those above 16 are fully criminally responsible.[381]

At this point I will mention that due this common penal system Romania does not have this English system of the Youth Courts either. The "Law on the Organization of the Judicial System"[382] only stipulates that: "Courts of Appeal, Tribunals and Local Courts establish special sections or panels (secţii/ complete specializate) for criminal and civil matters with competencies in family cases involving minors"[383]. At present there is one Tribunal which is specialized only on cases involving minors placed in Brasov, and otherwise one more court has a separate section

[378] Ibidem
[379] Romanian Penal Code, Title V (Juveniles), Art. 113
[380] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 3, Forum Verlag Godesberg, 2010), p. 1080
[381] Romanian Penal Code, Title V (Juveniles), Art. 113
[382] Interestingly in the preamble of this law (No. 304/2004) it is expressly stated that it is formulated in a way that it respects a number of international conventions among other the CRC and the UDHR).
[383] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 3, Forum Verlag Godesberg, 2010), p. 1094

focusing only on minors involved in penal matters.[384] And this is not conform to the international requirements: even according to the Guidelines for Action on Children in the Criminal Justice, in paragraph 13(d), it is stated that States should set up juvenile courts.

Before addressing the concrete prescriptions of the Romanian custodial system, I will briefly mention that there is a special Law no. 281/2003 which gives entitlement to some special rights concerning the minors. In Article 160 it is stated: that minors arrested or in pre-trial detention have a right to a mandatory legal representation; in 24 hours the parents or legal guardian has to be notified and that they have to be kept in a separate facility, and separated from adults. As concerns the problem of pre-trial detention: in art 243 of the Code of Criminal Procedure, it is stipulated that minors can be subjected to it, but only in exceptional cases if this measure does not become disproportionate in regards to the aim followed.[385] When the court establishes its duration the age of the juvenile has to be considered plus instantly the parent or legal guardian has to be notified.[386] But this is all.

The former code of the criminal procedure had a much more detailed regulation about how, when and which age group for how long can be arrested and kept in pre-trial detention, while the new code is silent about these issues. This means that the same conditions apply (pre-trial detention can take place for maximum 30 days with the possibility of prolongation[387]) with those few regulations mentioned in the former paragraph. And this is a big step backwards. These so called exceptional regulations included are clearly not enough. It was much better when concrete borders were established. It is also obvious that this goes against all the international regulations

[384] Ibidem
[385] Romanian Code of Criminal Procedure, Art. 243(2)
[386] Ibid, Article 243(3) and 243 (4)
[387] Romanian Code of Criminal Procedure, Art. 222

where the accent is put on detention as "measure of last resort"[388], and this type of regulation will certainly encourage the use of pre-trial detention.

Now let proceed to the type of custodial punishment that can be applied to minors. If someone is above 14 and commits an offence the general rule is that they are subject to an educational measure ("măsură educativă")[389]. Theoretically, it is a good thing that the law itself emphasizes that educational measures should prevail over penalties especially that in the new code there is a larger amount of possibilities that can be applied. While in the former one there has been the possibility for reprimand, supervised freedom; in the current code there are 4 possibilities: civic training course, supervision, confinement to weekends and daily assistance.[390] Due to lack of space I will not elaborate separately on them, I just mentioned this as a positive change in the system. But still more emphasis and accent could be put on these non-custodial methods.

In relation to the delivering of punishment, it is important to stress that the court is obliged before choosing the sanction to take into consideration "the degree of social danger of the committed act, the minor's physical condition and degree of moral and intellectual development, his/her behavior, the conditions in which he/she lived and was raise, and further aspects likely to characterize the minor"[391].

While the general rule is the use of these educational measures, the exception is the use of those educational measures which entail a deprivation of liberty. This can happen in the following cases: if he or she has already committed an offence for which an educational measure was imposed (either it has been fulfilled or the juvenile is still under this obligation and he committed

[388] CRC, Article 37(b) and Rule 13 of the Beijing Rules
[389] Romanian Penal Code, Title V (Juveniles), Art. 114
[390] Ibid, Art. 115
[391] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 3, Forum Verlag Godesberg, 2010), p. 1089

the new act during this time) or when he or she has committed an act for which the penalty is minimum 7 years of imprisonment or life imprisonment.[392] These educational measures with a deprivation of liberty part can be spent either in an education center or in a prison.[393] Juveniles spend their whole time in these facilities, having the chance to leave for home visits, holidays, excursions and other activities.[394] This measure can be imposed at least for one, and maximum for three years (before it could be installed for an indeterminate period).[395]

If during the period spent in an educational center the juvenile commits a new offence or is tried for an offence committed earlier than his detention, the court can prolong this measure without overrunning the maximum of three years, or in the worst situation he or she can be replaced to a prison facility.[396] In the other situation, if the juvenile has shown a constant interest in his studies and is making progress towards the social reintegration the court can replace this punishment with an educational measure if the person is under 18 (with the same period of time as the original punishment was but not longer than 6 months) or can be liberated if he/she is already 18.[397] In both of the cases if the new conditions are not respected, or a new crime is committed the remainder of the punishment must be served in the educational center (which can also be prolonged) or it can be replaced with imprisonment.[398] At present there are three re-education centers in Romania: Buziaş, Găeşti and Tîrgu-Ocna.[399]

[392] Romanian Penal Code, Title V (Juveniles), Art. 114
[393] Ibid, Art. 115
[394] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 3, Forum Verlag Godesberg, 2010), p. 1090
[395] Romanian Penal Code, Title V (Juveniles), Art. 124(2)
[396] Ibid, Art. 124(3)
[397] Ibid, Art. 124(4)
[398] Ibid, Art. 124 (6-7)
[399] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 3, Forum Verlag Godesberg, 2010), p. 1106

Before the introduction of the new code this measure could be imposed for an indeterminate period until the child reached 18, and even then in certain circumstances it could be prolonged with additional two years. All the other requirements related to the release were similar. So now I think it is better that it is expressly stated that it can only last maximum 3 years, otherwise in the older system a child could be stuck there for 6 years (from 14 until 20) which probably wasn't beneficial neither for him/her and neither for the system (costly) or the society (no effective social reintegration).[400] But both of these situations are quite ambiguous. Children are left to the discretion of the judges, who are in most of the cases not specially qualified to deal with children.[401]

If the measure of confining a young offender to a reeducation center does not prove to be sufficient he or she can be imprisoned. The law itself states that this institution should be specialized in dealing with children.[402] In these institutions the juvenile must have the possibility to continue his studies best fitted to his aptitudes and abilities.[403] The period of time for which someone can be imprisoned is between 2-5 years, with the exception when for the offence committed the punishment is 20 years or more. In this case the years which can be imposed is between 5 and 15 years.[404] If the young offender commits another offence during his detention or is tried for an offence committed before his detention, the time of imprisonment can be prolonged not exceeding the maximum period (5 and respectively 15 years).[405]

Naturally, like in the case of the educational measures, if the child proves interest in his studies and made some progress towards social reintegration, imprisonment can be replaced with an

[400] Ibid, p. 1090
[401] Ibid, p. 1110
[402] There are currently four prisons especially designed for children: Bacău, Craiova, Târgu Mureş and Tichileşti.
[403] Romanian Penal Code, Title V (Juveniles), Art. 125(1)
[404] Ibid, Art. 125 (2)
[405] Ibid, Art. 125(3)

educational measure but nor more than six months if the person is under 18. Or release can occur if he or she is above 18.[406] If the child does not respect the new conditions set out when his/her type of detention was changed he or she will be forced to serve the remainder of his detention in the prison.[407] Before the introduction of the new code there was a possibility that a child could be locked up even only for days, as the rule was to reduce by half the adult sentences (15 days to 30years), so it meant that an 8 day imprisonment could easily occur.[408] The current solution is in a way also better because it is much harder to imprison someone as it has to be at least for two years which means that the gravity of the act has to meet this requirement. But it is in the same time also a negativity, as children are locked up for at least two years, and an imprisonment for 15 years can also occur. And this is not what all the international instruments are promoting, hence it becomes unacceptable. What is in line with the requirement of the children rights instruments is the regulation concerning the procedure of the trial. For example it is established that the trial is not open for the public, if such an evidence is presented which could influence him/her a negative way he/she has to be removed from the room, and he or she should be listened only once (only in solidly required cases can this happen twice).[409]

The regulation concerning the type of institution in which a minor can be placed, has its legal roots in the Law no. 254/2013: Law on the Execution of the Deprivation of Liberty Measures during the Criminal Procedure. There is a distinction made between two type of institutions detention centers (prisons) and educational centers. In the following I will mention some of the special rights what juveniles have in these facilities: minors and adults have to be separated[410]; a

[406] Ibid, Art. 125(4)
[407] Ibid, Art. 125 (6)
[408] Frieder Dünkel et al., *Juvenile Justice Systems in Europe, Current Situation and Reform Developments* (Vol. 3, Forum Verlag Godesberg, 2010), p. 1091
[409] Romanian Code of Criminal Procedure, Art. 509
[410] Law no. 254/2013, Art. 43(1)

range of educational and psychological assistance has to be present[411] and the minor must be able to keep in touch with his family if this does not hinder the course of the criminal procedure[412]. It is only mentioned as a comment that the personnel has to have the special qualifications which will best serve the needs of the child[413] and it is also stated that the lack of financial resources shouldn't influence the respect to the rights of the child.[414] The child has to be informed in a language which he understands[415], all the measures imposed have to be individualized (social status, psychological state etc.)[416], they have the right to work[417] and so on. This is indeed a very detailed regulation, it even establishes juveniles have the right to a minimum of 7 hours of sleep each night[418]. Therefore I would conclude that as a document it really respects all the international requirements. That would be the subject of a different thesis whether the reality is consistent with the letters of the law. For the purpose of proving that the reality is much worse I will invoke once again the study of the UNICEF where they have concluded the following facts after interviews with young people:

> -the first statement at the police station is taken outside the presence of the lawyer and of the parents or other legal representatives;
>
> -investigation bodies obtain statements using threats and intimidation;
>
> -statements obtained under coercion of physical abuse;
>
> -minors are forced to admit to other criminal offenses than the ones they were under investigation for;
>
> -parents' notification conditional upon admission of guilt.[419]

[411] Ibid, Art. 89
[412] Ibid, Art. 117
[413] Ibid, Comment to Art. 138
[414] Ibid, Comment to Article 143
[415] Ibid, Comment to Article 156
[416] Ibid, Art. 155
[417] Ibid, Art. 164
[418] Ibid, Art. 77
[419] *Practices and Standards in the System of Juvenile Justice in Romania, UNICEF*, http://www.unicef.org/romania/justitie_juvenila_engleza.pdf, p. 15, accessed 20.11.2014

As a conclusion I would say the Romanian system of juvenile justice is very unbalanced. On the one hand positive changes occurs like the raise of the number of possibilities for non-custodial measures or that the maximum years spent in a reeducation center has been set up for three years. It is also a constructive thing that there is such a detailed regulation about the conditions of a child in a detention facility. And as mentioned before the requirement included in this law are very much in line with the CRC, Beijing Rules and other international rules.

Unfortunately, on the other hand a number of negative decision have been made, among them the most serious being the effacement of the regulations related to pre-trial detention. It is not permissible that juveniles can spend the same amount of time in arrest or pre-trial detention as adults. This is certainly a very destructive solution. Also the number of years which can be spent in prison is too high. A country which has signed and ratified all the international instruments concerning the right to liberty, and which includes even in its own Code of Penal Procedure[420] the right to liberty (that the right to liberty can be deprived only in exceptional cases) shouldn't allow, not even theoretically, that someone (that someone being a child) can be locked up for 15 years. That will certainly destroy every chance of that young person to return to the society as a 'normal' citizen. It is also an undesirable fact that there is lack of specialized tribunals and personnel in them. For a proper and effective youth justice system it would be very much required to have at least one specialized court in each county center, or at least in each bigger region. The presence of the two listed courts is certainly not enough.

As a result, the conclusion is that at the present there are less positive elements in the system then negative ones, for that reason it would be advisable to revise the whole system and change it according to the requirements of all the international instruments.

[420] Romanian Code of Criminal Procedure, Art. 9

CONCLUSION

As sometimes the topic itself, the conclusion of my thesis is quite bilateral and controversial. It is quite impossible to formulate a final sentence in which all the concluding aspects of this paper could be included. On the one hand there have been many positive aspects which came up during the research (especially those related to the theoretical part). But on the other hand the practice, and the concrete realization of the rights and duties are considerably neglected or are stagnating at a certain point. That is one of the main reasons why the number of detained children is so high[421]. So the need for a clear change is still present.

During the whole time of the research I was facing a big amount of scholarly work and a really small amount of case law (especially in the given countries context). That also gives rise to concern, because it means that even if a legislation is flawed, or children's rights are not accurately respected, that is not brought before a competent judicial body. And as the biggest powers of change are exactly these cases, this means that there is little chance of alteration in the near future. So let us now see what were the biggest problems found and what are those main findings and impressions that necessarily have to be brought up.

I have started this paper (and also my whole approach to this work) with the cognition of children's rights: what does this notion entail, how was it formed and what the biggest challenges are. It is amazing that although it is a relatively new field of law, the number of books and articles that appeared in relation to it is more than numerous. After the presentation of all these theories and principles I ended up agreeing with the 'attitude' of the CRC, which claims that everything should happen in the best interest of the child. It is obvious that if one uses this type of argumentation, it becomes irrelevant whether someone adheres to the will or interest theory,

[421] See the Introduction Chapter.

or whether someone finds the parent's rights more important than children's rights. The common area should be that everyone, regardless of his or her personal legal or philosophical views wants to improve the situation of children. And for that Article 3 of the CRC could and should become the common ground.

After the presentation of this theoretical part I entered into the analysis of the right to liberty. The challenging fragment here was the quest and the dissection of all the relevant international 'laws' and its related commentaries. During the framing of my thesis, I mentioned it several times why I consider this chapter as an important step. It is true that the basic topic is children's deprivation of liberty, but without the understanding of the general right to liberty it will be hard to fully understand the positive, negative sides and the specifications of how the children's rights to liberty is regulated.

For this purpose of proper understanding I was using three important international instruments: the UDHR, the ICCPR and the ECHR. I included the UDHR because it was the starting point of this whole right to liberty. Although there has been few referrals to it after its own subchapter, its influencing capacity had to be stated. My final conclusion in relation to this was that despite the fact that it has a very short description, it serves the aims of the UDHR very well, and therefore formed as an excellent preliminary point for future declarations.

The expectations from the ECHR and the ICCPR were adequately already higher. These treaties are not just already legally binding but influence the national jurisdictions a lot more than the UDHR. While the dissection of the commentaries and case laws, I realized that its regulations are more complex than the one included in the ICCPR. This serves the idea of legal certainty very well, because especially in the area of human rights, there is a need for concrete, down-written regulations. In the light of the whole thesis, it became clear that the European convention

has the most detailed and exhaustive text, with one exception: that being the subparagraph referring to children. As it was explained in the second chapter, this text is the only one which is not clear enough, and could lead to erroneous interpretations. Maybe this is one of the reasons why the case law in this regard is also sometimes not reflecting the current expectations of children's rights, and could not be considered that they cover the principle of the best interest of the child.[422]

The ICCPR regulates the right to liberty in a very similar way as the ECHR. At this point I will point to one positive thing which is not present in the ECHR and that is Article 10. It is very constructive that the dignity of those deprived of their liberty is expressly included in a different article. This accentuates the importance of the right to liberty, and if used properly all the other detailed requirements of the general comments and rules could be deleted. But due to the countries' very different perception of the notion of dignity this cannot happen. Nevertheless this should be included in all the international and national legislations covering those persons who are eventually deprived of their liberty. Otherwise, after this chapter the conclusion was that the ICCPR offers a good protection of the right to liberty (proof of the cases included).

The third chapter enclosed the main topic of this thesis: children's deprivation of liberty. The process of the CRC formation was included, after which I proceeded to the analysis of Article 37. The CRC suffers from the same difficulties as almost all United Nations' instruments. First of all during the procedure of the formation of the final text, there was a need for a big consensus coming from very different (political systems, cultures, legal structures etc.) type of countries. This has led to the fact that sometimes a smaller protection level was granted. And this is normal,

[422] Obviously, I know that these international instruments are not binding vis-à-vis each other, but I still consider that they should reflect and form the same level of protection.

but from a purely human rights point of view is still problematical. And secondly the biggest problem is that the United Nations' enforcing mechanism is very weak, almost non-existing, therefore the leverage of the different kinds of committees is very low. As a result it becomes very hard to achieve a positive change (coming from the UN) in a given country's situation.

Article 37 of the CRC plays an important role as it justifies the fact that children should be subject to a special regime in regards to criminal procedures and deprivations of liberty. But surprisingly, the text of the convention is not exhaustive enough and gives too much space for incorrect interpretation. For example it as a deficiency that the period of pre-trial detention or arrest is not mentioned at all in the sense that there is no clear time limit set up. Certainly, this would have collision into the will of some countries but as we have seen in the case of Romania, it also gives rise to erroneous laws and implementations. Paradoxically, this also depends on the will of the given country: if someone has the right intention then the CRC does serve as a good basis for that, if not then additional Rules like the Beijing or Havana Rules are also not enough. Still, these latter two rules were included into the structure of this thesis, exactly because they complement the CRC. If the CRC would be taken together with all these additional instruments, then the exquisite juvenile system could be reached. But since this never happened, this idea remains only a prediction.

The last chapter includes the already foreseen analysis of the two countries: England-Wales and Romania. This chapter formed the biggest challenge and also disappointment in relation to the final findings.. It was not only difficult to find the appropriate regulations, but it was also hard to see how in practice this whole nicely built-up children protection system is not working (especially in Romania). In the case of England the final conclusion was that at least it is visible that positive changes do occur. The biggest problem there is the low age of criminal

responsibility and that children are not always separated from adults (especially in the case when they are tried by Crown Courts and when they get an imprisonment sentence). But otherwise the number of custodial sentences, and the fact that even in a DTO only half of the detention is spent in a close facility is really good.

Romania, as expected, is a much more complicated case. After the communism (and even during it) they have adopted all the international children rights instruments as binding, but despite this, lately negative changes started to appear. The new criminal code has put children almost in the same situation as adults concerning their arrest and pre-trial detention. Moreover there are no truly specialized courts whose personnel are specifically trained to deal with children in an effective way. As an end result juveniles can be imprisoned for 15 years and can spend their pre-trial detention in a prison for more than 30 days. Children are stuck in the system for too long and although the requirements of these institutions (prisons, education centers) seems very exhausted and child friendly (Law no. 254/2013), the reality (as shown in the UNICEF study) is much worse. Consequently, the legislation definitely should be revised.

The enumeration of these final remarks could continue for an endless time. This topic is indeed so complex that the framing of several thesis' in the same subject matter wouldn't be enough either to cover completely everything. But this only proves (unfortunately) that the situation of children deprived of their liberty is not settled. There are many difficulties and shortcomings that on a long road could turn the universal situation towards a bad direction. But the purposes of all these type of studies is exactly prevention. As history had already shown it several times, positive changes can occur but for this could never happen without the collection of all the proper knowledge.

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