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Minors, Justice, and Procedural Safeguards: Impact of Directive (EU) 2016/800 on Portuguese Criminal Proceedings

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Introduction

The Convention on the Rights of the Child and Directive (EU) 2016/800 of the European Parliament and of the Council, of 11 May, outline a coinciding concept of child and minor suspect or defendant in criminal proceedings, respectively, in Articles 1 and 3, referring to a person under the age of 18, with the sole exception of the possibility that national law establishes a lower age of majority. According to our civil law, a minor is anyone who has not yet reached the age of eighteen (Article 122 of the Civil Code) and does not have the full capacity to exercise rights or the capacity to act (Article 123 of the Civil Code). Criminal law, in turn, considers anyone who, at the time of the offence, has not yet reached the age of 16 to be incapable on grounds of age (Article 19 of the Penal Code).

There is a time gap between the ages of 16 and 18, when a person is responsible for the criminal acts they commit and are considered minors. It is no coincidence that Article 40 of the Convention on the Rights of the Child strongly emphasises the position of minors in contact with the justice system, taking into account their age and, consequently, their vulnerability, specifying a set of special rights and guarantees, with a particular focus on children suspected or accused of having broken the criminal law. Very briefly, minors can only be deprived of their liberty as a last resort, for the period of time strictly necessary and under adequate material and procedural guarantees, placement in institutions should be avoided whenever possible and, in the event of legal detention, minors have the right to be treated in a manner appropriate to their age with respect for their dignity and personal worth, they should not be detained together with adults, preference should be given to alternative measures to detention to protect the best interests of the child and to promote their reintegration, which may include 'care orders, guidance and supervision, counselling, probation, orphanage, education and vocational training programmes'. Directive (EU) 2016/800, of 11 May, declared the need for guarantees due to the maturity and vulnerability of the agents concerned, applicable in the context of criminal proceedings and no other types of proceedings, namely proceedings specifically aimed at minors and which may give rise to protection, corrective or re-education measures. The Directive will not apply to some minor offences except when the minor suspect or defendant is deprived of their liberty.

As far as methodology is concerned, we mainly analysed documents, especially international instruments and national legal sources, as well as some of the doctrine on the subject, in order to understand the meaning and scope of the particular protection needs of minors when they come into contact with justice, particularly criminal justice.

The results obtained indicate that the duty to care for minors who are suspects or defendants underpins the proper administration of justice, particularly when minors are deprived of their liberty and therefore in a particularly vulnerable situation. This Directive was transposed into Portuguese law by Law no. 33/2019 of 22 May, which introduced changes to eight provisions of the Code of Criminal Procedure (articles 58, 61, 87, 90, 103, 194, 283 and 370).

The conclusions clearly point towards the procedural law reserving a greater role for parental responsibility holders, the legal representative or the person who actually has custody of the minor defendant. In addition, they must be informed of the order imposing coercive measures. There is also an intensification of information on the rights of minors, the inclusion of the exclusion of publicity as a rule in cases involving minors, the indication of the social report or information from the social reintegration services in the indictment, under penalty of nullity, and its inclusion in the case file, for the purposes of sentencing, if it is not already part of it, unless there is justifiable justification for dispensing with it in view of the circumstances of the case and as long as it is compatible with the best interests of the minor.

Keywords: Children's rights; Directive (EU) 2016/800; Juvenile suspects or defendants; Defence guarantees; Criminal proceedings.

Preliminary point

Our investigation centres on minors, a group of people who are particularly vulnerable because of their age and who therefore need special protection from the vigour of the justice system, especially in criminal matters. It has been recognised that

‘the immaturity inherent in children of a certain age entails, as a natural consequence, a particular vulnerability, which justifies specific and additional protection, complementary to that given to adults who are in full enjoyment of their capacities.’ (Dias, 2023, p. 84).

Let's start by discussing the concepts of minor/child.

Concept of child/children

In the Convention on the Rights of the Child and Directive (EU) 2016/800

Article 1 of the Convention on the Rights of the Child (CRC) defines a child as ‘every human being below the age of 18 years unless, under the law applicable to him or her, he or she attains majority earlier’. About this issue, it is interesting the analysis of CRC implementation, including the definition of a child and its problems in the work of Borská, Vacková & Small (2016). Article 3 of Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May on procedural safeguards for minors suspected or accused in criminal proceedings defines a ‘minor’ as a person under the age of 18. This is a universal concept of the child, as it is currently used in international law and also in European law, although in European Union law there is no single definition that is valid for all instruments, neither in the treaties nor in secondary legislation or case law. The terms “minor” and “child” are equated and, in principle, the criterion of under 18 years of age is followed; with the exception of the possibility of national law establishing a lower age of majority, under the terms and for the purposes enshrined in the CRC and also in other international and national normative instruments specifically dedicated to the defence and protection of minors/children.

The Committee of Ministers of the Council of Europe has also stated the same. In various European and international normative instruments on the protection of children's rights, there is a consensus around the equation of "minors" with "children", the common element being the age of less than 18 years. It should be noted that the European Convention on Human Rights does not contain a definition of "child", but according to Article 1, states are obliged to guarantee the rights enshrined therein to 'everyone'. Article 14 also guarantees 'without distinction of any kind', including 'on grounds of age', the enjoyment of the rights recognised in the Convention. For its part, the case law of the European Court of Human Rights, following the meaning of the Convention on the Rights of the Child, also adopts the concept of children under 18. Moreover, this Court has accepted applications from children, or submitted on their behalf, without distinction as to age (in this regard, the case of *Marckx v. Belgium*, no. 6833/74, 13 June 1979, in which the minor applicant was six years old when the Court handed down its decision). Likewise, the European Social Charter and its interpretation by the European Committee of Social Rights (CEDS), in the case of *Defence for Children International (DCI) v. Netherlands*, § 25, no. 47/2008, 20 October 2009, adopts the concept of minor as synonymous with a child under the age of 18.

In civil law

According to our civil law, a 'minor' is anyone who has not yet reached the age of eighteen (Article 122 of the Civil Code) and does not have the full capacity to exercise rights or the capacity to act, under the terms of Article 123 of the Civil Code: 'Unless otherwise provided, minors lack the capacity to exercise rights'. (Gonçalves, 2016, p. 5 and p. 10). However, article 124 states that the incapacity of minors is compensated for by parental responsibilities and, in the alternative, by guardianship, as is clear from the legal regimes established in articles 1877 and 1927 and seq, respectively. Incapacity to exercise rights or incapacity to act is understood to mean

'the lack of suitability to act legally, exercising rights or fulfilling duties, acquiring rights or assuming obligations, by one's own and exclusive act or through a voluntary representative or proxy' (Pinto, Monteiro & Pinto, 2020, p. 231).

In criminal law

According to Article 19 of the Penal Code, minors under the age of 16 are not punishable. This means that until the age of 16, when a minor commits a typical unlawful act, they are not susceptible to a judgement of legal and criminal guilt and therefore cannot be punished. In this regard, please note the summary of the Judgement of the Porto Court of Appeal, in case no. 892/24.8Y6PRT.P1, of 02/26/2025 (Rapporteur: Maria Ângela Reguengo da Luz): 'while it is true that being under 16 does not necessarily deprive a minor of the capacity to 'assess the unlawfulness of their conduct 'or 'to determine themselves in accordance with that assessment', the possession of this capacity does not legally imply the capacity for guilt. Legal-penal guilt consists of a judgement of ethical-social censure of the agent's personality. But it is legitimate and plausible to consider that the individual's personality, in a legal-penal sense, is not formed before the age of 16".

For criminal law purposes, we cannot fail to mention that the concept of imputability by virtue of age - over 16 years of age - does not coincide with the concept of minority - up to 18 years of age. Therefore, between the ages of 16 and 18 you are a minor, but you are criminally

imputable. You are criminally imputable from the age of 16, presuming that you have the maturity and intellectual and emotional capacity, at the time of committing the offence, to assess its unlawfulness or to determine yourself according to that assessment. On the other hand, somewhat paradoxically, from the age of 16 anyone can validly consent to the injury of a freely available legal asset that does not go against good customs (provided the other formal requirements laid down in Article 38 of the Penal Code).

Reference assumptions

The issue of criminal non-responsibility on account of age tends to be grounded in neurological and psychological studies. These disciplines indicate that full cognitive and emotional maturity is acquired relatively late, around the age of 25, due to the maturation of the prefrontal region. A specific area of the brain – the cortex – is identified as responsible for thought, reasoning, action planning, self-control, cognitive functions, and sensory perception, and is thus considered pivotal in the development and maturation of cognitive capacity and the regulation of human emotions. Naturally, this neurological element has repercussions for human behaviour, as it shapes both the capacity to resist impulses and the ability to make decisions. As noted by Inês Ferreira Leite, "Colloquially, we refer to these capacities as the ability to exercise discernment (the exercise of discretionary power) and the ability to exercise self-control (the exercise of veto power)" (2023, p. 37).

It must not be overlooked that, in criminal law, subjective culpability is based on the intellectual, volitional, and emotional components of intent (*dolus*). Furthermore, the ethical-legal judgment of blame presupposes that the agent, at the time of committing the act, possesses both the intellectual element/discernment to be capable of evaluating the unlawfulness of their conduct, and the capacity for self-determination/freedom, to be capable of acting in accordance with that evaluation.

What's more, the judgement of ethical and legal censure presupposes that the agent, at the time of the perpetration of the act, is endowed with the intellectual element/discernment to be able to assess the unlawfulness of the act he or she is practising and endowed with the capacity for self-determination/freedom to be able to determine himself or herself according to the assessment he or she makes. That is why it is essential to establish a connection between criminal law and the contributions of these sciences. In any case, it should be noted that, in addition to brain activity, the experience acquired throughout life also strengthens emotional intelligence. Hence, it is essential to establish a connection between criminal law provisions and the contributions of these sciences, as there is not yet a full articulation between the two fields of knowledge.

Minors and the commission of a typical unlawful act

From a legal point of view, if a minor between the ages of 12 and 16 commits a crime under criminal law, they will be subject to an educational guardianship regime (Law no. 166/99, of 14 September), which is aimed exclusively at 'educating the minor in the law and integrating them into community life in a dignified and responsible manner' (art. 2 of the law). Measures that are appropriate and sufficient are applicable, representing the minimum intervention in the minor's autonomy to make decisions and lead his or her life, which is likely to obtain his or her greatest support and the support of his or her parents, legal representative or person who has *de facto* custody of him or her - only in this way will the educational purpose of this law be achieved. Of

course, the guardianship measure must be proportionate to the seriousness of the offence committed and the minor's lack of education in the law, in line with the needs felt at the time the decision was made. At this age stage, we have children and adolescents who, although not yet capable of a full decision-making process, are able to distinguish between what is lawful and what is unlawful, at least for certain unlawful offences, perhaps the most impactful in society. In this regard, see Hugo Cunha Lança's text (pp. 86 and 92). It is understood that, due to age, you don't go from being an incompetent person to an imputable person overnight. This is why Ana Rita Alfaiate (2014, p. 125) has argued that

'a transition model from the mobilisation of protection law to criminal law that accompanies the development of the offender's capacity to be judged guilty'

as a result of the progression of skills over time and according to the social context. On the occasion of the proposal for a Directive, in a commentary, the same author (2015, p. 54) pointed out that it is

'the verification of imputability by the mere attainment of the age of sixteen is insufficient, disregarding absolutely the maturity of the minor and their ability to understand the meaning and scope of their decisions in relation to criminal legal duty'.

The United Nations Regional Information Centre for Western Europe offers us an operative perspective on adolescence and youth: young people are between the ages of 15 and 24, limiting the concept of children to the age of 14.

Procedural guarantees for minors suspected or accused in criminal proceedings as a result of Directive (EU) 2016/800

General Overview

Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May contains provisions applicable to minors who are suspects or defendants in criminal proceedings. Minority is measured at the time the proceedings are initiated (even if they have reached the age of 18 in the meantime). It is an instrument that considers the maturity, or lack thereof, and vulnerability of the person concerned.

One of the vital parts of this instrument consists of treating minors in a way that is appropriate to their age, maturity and level of understanding, considering any special needs they may have, including any communication difficulties. Member States are encouraged to apply the procedural guarantees provided for in the directive until the person concerned reaches the age of 21. However, the applicability of these guarantees extends only to criminal proceedings, with the exception of other types of proceedings, such as those specifically aimed at minors, but with a protective, corrective or re-educational purpose. On the other hand, the directive does not apply to some minor offences, except when the minor suspect or defendant is deprived of their liberty. There are means by which member states must determine the age of the minor: on the basis of their declarations, through verification at the civil registry office, through documentary research and other appropriate evidence. If this evidence is unavailable or inconclusive, a medical examination will be carried out, always respecting the child's rights, physical integrity and human dignity. If there is any doubt about age, the person must be considered a minor. The aforementioned medical examination should also take place when the minor is deprived of their liberty, guaranteeing their personal integrity as a condition for

preserving their future integrity.

Minors are in a particularly vulnerable situation when they are deprived of their liberty. This measure can entail risks for their physical, mental and social development and for their reintegration into society, with the exception of imprisonment in flagrante delicto. Efforts should therefore be made to prevent the deprivation of liberty or detention of a minor at any stage of the proceedings before a final judgement has been handed down. When deprived of their liberty, minors should benefit from protective measures, in particular separation from adults. The deprivation of liberty will be subject to a periodic review by the court at the request of the minor or their defence - a condition for assessing the necessity, appropriateness and proportionality of the deprivation of liberty. Whenever possible and appropriate, alternative measures to detention should be prioritised. These measures will include a ban on the minor going to certain places, an obligation for the minor to reside in a specific place, restrictions on contact with certain people, an obligation to inform the competent authorities, participation in re-education programmes or, subject to the minor's consent, participation in therapeutic programmes or detoxification cures. Maintaining regular contact with parents, family and friends through visits and correspondence is encouraged, unless exceptional restrictions are necessary in the best interests of the child, as well as in the interests of justice itself.

Echoes of the Directive in Portuguese Criminal Procedure

The previously acknowledged

The impact of the Directive on the Code of Criminal Procedure was not notable because the Code already had significant rules protecting minors in this area. Let's remember that its scope refers only to minors between the ages of 16 and 18. In fact, the qualitative shift of a minor from the status of witness to that of suspect (*arguido*) was already safeguarded in our Code of Criminal Procedure, which, in Article 61(1)(d), provides the right to silence, granting the individual the right "not to answer questions posed by any authority regarding the facts imputed to them or the content of any statements made in relation thereto." The right not to self-incriminate, in this context, is also provided for under Articles 132(2) and 59 of the Code of Criminal Procedure (CPP). Minors under the age of 16 are not required to take an oath, pursuant to Article 91(6) of the CPP. Furthermore, minors must be assisted by legal counsel when appearing before a court or a judge, as well as during detention. Article 64 of the CPP already established the mandatory presence of a defence lawyer, either chosen or court-appointed, for any procedural act involving a minor under the age of 21, a point that was highlighted positively in the Report of the Fundamental Rights Agency of the European Union. The confidentiality of communications between the minor and their legal counsel is essential for ensuring the effective exercise of defence rights and constitutes a core component of the right to a fair trial. Article 61(1)(f) of the CPP likewise already guaranteed the accused the right "to be assisted by a defence lawyer in all procedural acts in which they participate and, when detained, to communicate with them, including in private." This is a fundamental right of the accused. The European Court of Human Rights, in the case of *Dayanan v. Turkey*, judgment of 13 October 2009, held that this right applies to the accused "as soon as they are detained," and "not only during questioning." The Court reaffirmed this position in *Beuze v. Belgium*, judgment of 9 November 2018.

What was eventually acknowledged

Law 33/2019 of 22 May introduced the thirty-third amendment to the Code of Criminal Procedure, transposing the aforementioned Directive on procedural guarantees for minors suspected or accused in criminal proceedings. It was essential to promote the commitment of the parents or legal representative of the child accused, taking into account their specific needs and vulnerabilities. The constitution of a minor defendant is immediately communicated to those with parental responsibility, their legal representative or the person who has de facto custody of them (58.7).

The minor defendant now has the right to be accompanied during the procedural steps he or she attends by the holders of parental responsibility, their legal representative or a person who has de facto custody of them or, if they are unable to contact these people, or when special circumstances based on their interests or the needs of the case so require, and only for as long as these circumstances persist, by another suitable person indicated by them and accepted by the competent judicial authority (subparagraph i, paragraph 1, 68). These people must be informed by the judicial authority or the criminal police of the rights of the minor defendant (paragraph 3). If the minor has not nominated another person to accompany them, or if the person they have nominated is not accepted by the competent judicial authority, the latter will appoint a specialised technician to accompany them (paragraph 4). For these purposes, a minor is presumed if, after all the steps have been taken to identify the accused, his or her age remains uncertain and there is reason to believe that he or she is a minor (paragraph 5). With regard to public attendance at procedural acts, Article 87(3) establishes as a rule the exclusion of publicity in proceedings involving minors. As a result, it has also been decreed that it is impossible for anyone to consult the record and obtain a certificate from the record of interrogations or other procedural steps in which a minor defendant takes part (Article 90(2)). Acts relating to proceedings in which minors are involved, even if there are no defendants in custody, take place even during judicial holidays (Article 103(2)(b)) - the same rule as for urgent proceedings, ensuring greater speed in these cases. The court order imposing a measure of restraint and/or guaranteeing assets is immediately communicated to the holders of parental responsibility, their legal representative or the person who has custody of them (Article 194(11)). The indictment must contain, under penalty of nullity, an indication of the social report or information from the social reintegration services, when the defendant is a minor, except when it has not yet been submitted and is not necessarily due to the best interests of the minor (Article 283(3)(g)). With regard to sentencing, and more specifically the need for a social report, Article 370(2) states that in the case of a minor defendant, if the social report or information from the social reintegration services has not yet been attached to the case file, it must be attached within 30 days, unless there are grounds to justify dispensing with it in view of the circumstances of the case and provided that it is compatible with the best interests of the minor. These were the changes to the Code of Criminal Procedure that resulted from the transposition of the Directive.

Main Findings of the European Report on the Implementation of the Directive

The European Union Agency for Fundamental Rights published a report on 21 June 2022, analysing the implementation of the Directive on criminal proceedings in Austria, Belgium, Bulgaria, Germany, Estonia, Italy, Malta, Poland, and Portugal. A discrepancy is noted regarding the age of criminal responsibility across Member States: it is set at 14 in Austria,

Bulgaria, Estonia, Germany, Italy, and Malta. In Belgium, it is 18 (or 16 for serious offences); in Poland, 17 (or 15 for serious offences); and in Portugal, 16. Authorities verified the age of children in Germany, Poland, and Portugal. Procedural safeguards in Austria, Germany, Italy, and Portugal ensure children's participation in support programmes, enhancing their sense of security. The right to inform parents or legal representatives is a fundamental and innovative element of the Directive, leading to amendments in criminal procedure codes. This right is enshrined in Austria, Estonia, Germany, Italy, Malta, and Portugal. In the Member States concerned, legislation provides for mandatory legal assistance for children from the moment they become suspects. In Austria and Portugal, legal aid is free if the defendant lacks sufficient means. Minors deprived of their liberty undergo mandatory medical examinations upon arrival at detention centres to assess their health status in Bulgaria, Poland, and Portugal. Ensuring that children are held separately from adults remains challenging. In Portugal, the Leiria Educational Prison Facility houses children separately in individual detention cells across seven pavilions. They are segregated by age and according to whether they are serving a sentence or in pre-trial detention.

Conclusions

Minors are particularly vulnerable due to their age and inherent incapacity to exercise their rights and are in a disadvantaged situation compared to adults who are more capable in terms of cognitive development and exercising their self-determination, requiring the concept of criminal irresponsibility due to minority to be aligned with current scientific knowledge in the fields of neurology and psychology.

The results show that there are legal instruments that aim to provide the public authorities with the necessary means to safeguard the rights of children in conflict with the law and protect their best interests, with Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May playing a key role.

This was transposed into the Portuguese legal system by Law no. 33/2019, of 22 May, which introduced changes to eight provisions of the Code of Criminal Procedure, given that it was a guarantor code that already enshrined fundamental rights (such as the obligation to be assisted by a defender, the prerogative of non-self-incrimination, the recording of interrogations, among others, mentioned in the Directive).

The pattern of legislative changes called for the presence and accompaniment of minors by their parents, legal representatives or those with de facto custody, their right to information and the obligation to communicate decisions to them, such as the application of a coercive measure, the restriction on the publicity of procedural acts involving minors and the need to indicate and attach the social report or information from the probation services in the indictment and final decision.

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