

CONSIDERATIONS ON CHILD PROTECTION AGAINST EXPLOITATION IN SPAIN

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***Abstract:** The protection of vulnerable persons, such as children, women, or the elderly, against exploitation is sought by the European Union's, as well as by each of its member states. In this respect, as some forms of exploitation prejudice fundamental human rights, but also considering the categories of persons affected, the European Union has stepped up to protect these persons, prevent and tackle this phenomenon, especially by strengthening cooperation and coordination between police and judicial authorities of the Member States.*

One of the states that have adopted strong measures to tackle and prevent the exploitation of disadvantaged groups is Spain. With regard to children, the forms in which exploitation manifests itself in Spain are different; notable among them are: physical, emotional, and sexual abuse, physical neglect, child labor, being forced into begging, prenatal maltreatment. In the following, we shall analyze these measures in the light of incidental normative acts in this matter.

Keywords: *protection, child exploitation, preventive measures, Spanish legislation on tackling child exploitation*

Introduction

The idea of exploitation of man against man is not a recent one; it has existed since ancient times, when each individual sought to assert themselves by force against other individuals. Gradually, from one era to another, it took on specific forms determined by the socio-

economic context in which it manifested itself¹. In recent years, however, the extent of this phenomenon relative to children led the United Nations to declare the 2001-2010 period as the “International Decade for a Culture of Peace and Non-Violence for the Children of the World”.

The concerns of international bodies with preventing and tackling this phenomenon can be observed since the early twentieth century, through the adoption of internationally applicable documents, such as the 1924 Geneva Declaration on the Rights of the Child, which established the idea of child protection against exploitation, and then continued with: the Universal Declaration of Human Rights (1948) which, at art. 5, bans subjection to torture and to cruel, inhuman or degrading treatment; the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which reiterates these prohibitions, and stipulates, at art. 4, the prohibition of slavery and servitude [para. (1)], and that of forced or compulsory labor [para. (2)]; the Declaration of the Rights of the Child, adopted by the General Assembly on 20 November 1959 which, at art. 9, expressly provides child protection against all forms of neglect, cruelty or exploitation²; the International Covenant on Economic, Social and Cultural Rights of 1966, which enshrines the protection of children and adolescents against economic and social exploitation; the International Covenant on Civil and Political Rights of 1966, which reiterates the provisions of the Universal Declaration of Human Rights regarding the prohibition of torture and cruel, inhuman or degrading treatment or punishment, and adds the prohibition of subjecting a person to certain medical or scientific experimentation without his consent (art. 7), the prohibition of slavery, slave trade, servitude and forced labor (art. 8) and, with regard

¹ See D. Berlingher, *Instituții de drept internațional privat*, Editura Limes, Cluj-Napoca, 2014, pp. 47-48.

² Also, the same legal text also governs other forms of child protection against exploitation: prohibition of child trafficking, under any form it may take; with regard to economic exploitation it states the ban on employment of children before reaching minimum age for this purpose, as well as the ban on forcing them to receive a job or to engage in any type of work that might prejudice his health or education, or compromise his physical, mental or moral development.

to children, in art. 24 it provides that: “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”; The International Labor Organization (ILO) Convention no. 138/1973 concerning Minimum Age for Admission to Employment aimed at the adoption of a national policy by the signatory states to ensure the effective abolition of child labor and to progressively raise the minimum age for admission to employment³; the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, which confirms the obligation of States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of violence, injury or abuse, whether physical or mental, from neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of both parents or one of them, legal representative(s), or any other person to whom the child has been entrusted [art. 19 para. (1)]⁴, and specifically upholds the right of the child to be protected from economic exploitation and not be bound to any work that is “likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development” (art. 32), as well as the protection of children from the illicit use of narcotic drugs and psychotropic substances (art. 33) and against sexual exploitation and sexual abuse (art. 34); International Labor Organization (ILO) Convention no. 182/1999 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, which enshrines a set of effective measures which can be taken, according to art. 7 para. (2), by any member of the Convention, such as:

³ See S. Murgu, N. M. Stoicu, *Cadrul juridic de protecție a drepturilor omului în dreptul intern și internațional*, Cordial Lex Publishing House, Cluj-Napoca, 2012, pp. 62.

⁴ The same international document provides, at art. 19 para. (2), that these protection measures should include, where appropriate, effective procedures for the establishment of social programs to provide necessary support for the child and for those to whom s/he has been entrusted, as well as for other forms of prevention and for the identification, reporting, referral, investigation, treatment and monitoring of child maltreatment cases, specified in para. (1), and, if necessary, the procedures for judicial involvement.

a) preventing the employment of children in the worst forms of child labor;

b) providing necessary and appropriate direct assistance for the removal of children from the worst forms of child labor and ensuring their rehabilitation and social integration;

c) ensuring access to free basic education and, where possible and appropriate, vocational training for all children removed from the worst forms of child labor;

d) identifying children at special risk and entering into direct contact with them;

e) considering the particular situation of girls⁵.

An important European country facing problems with child exploitation is Spain⁶. Thus, according to the Organization for Security and Cooperation in Europe (O.S.C.E.), in 2008 about 20,000 minors were identified by police as victims of exploitation⁷. Some of them are exploited by being forced into prostitution, begging or committing crimes, others are victims of international criminal networks, labor exploitation, illegal adoptions or organ trafficking. To combat child exploitation – considered the third largest criminal business worldwide – the Spanish NGO Save the Children believes that the priority is to identify victims, implement plans to help minors and provide training and support to judicial and police authorities⁸.

Issues relating to preventing and tackling child exploitation in Spanish legislation

Complex implications arising from the exploitation of children at a personal, social, moral, psychological, medical, legal level, etc. led Spain to adopt measures to prevent and tackle it.

⁵ See N. M. Stoicu, *Drept constituțional și instituții politice*, I, Casa Cărții de Știință Publishing House, Cluj-Napoca, 2014, pp. 253.

⁶ See also S. Cirilo, P. di Blasio, *Niños maltratados: Diagnóstico y terapia familiar*, Paidós Iberica Publishing House.

⁷ <http://www.elmundo.es/elmundo/2008/01/28/solidaridad/1201537697.html>

⁸ According to the Spanish NGO Save the Children, child exploitation is a business involving 23,500,000 euros annually (*idem*).

Among the Spanish institutions exercising responsibilities for child protection against exploitation are: the Ministry of Labor and Social Affairs (Ministerio de Trabajo y Asuntos Sociales), the Childhood Observatory (Observatorio de Infancia), FAPMI (Federacion de Asociaciones para la Prevencion del Maltrato Infantil).

In Spain, as in Romania, the different forms that the exploitation of minors may take are⁹: physical, emotional and sexual abuse, physical neglect, emotional neglect, child labor, being forced into begging, corruption. It is noted that, in addition to these forms of maltreatment that are also debated in specialized Romanian doctrine¹⁰, Spanish literature also analyzes forms such as prenatal maltreatment (consisting of negligence, by action or failure to act, of the body of the future mother or self-administration of drugs or substances which, consciously or unconsciously, cause harms to the fetus), shaken baby syndrome (produced by violent shaking of the baby's body to cause it to stop crying, resulting in retinal and brain hemorrhage) and the Münchhausen syndrome (situations where the father or, especially, the mother, subjects the child to medical examinations pathological citing physical symptoms which are fictitious or generated by the action of the father or mother).

An important Spanish document in matters of child protection against exploitation is the National Strategic Plan for Children and Adolescents 2006-2009¹¹, prepared by the Childhood Observatory, under the aegis of the Ministry of Labor and Social Affairs. It provides 11 strategic objectives, a noteworthy one being objective 6, focusing on social intervention for children and adolescents in risk, vulnerability and disability situations and/or social exclusion situations. The explicit setting of competences is noted for each institution. In this respect, promoting research directions with regard to domestic violence against children, maltreatment and sexual abuse, but also to other forms of violence existing in parent-child relationships, and analyzing child

⁹ <http://www.monografias.com/trabajos16/prevencion-maltrato/prevencion-maltrato.html>

¹⁰ D. Lupașcu, C. M. Crăciunescu, *Dreptul familiei*, ediția a 2-a emendată și actualizată, Universul Juridic Publishing House, București, 2012, pp. 426 et seq.; E. Florian, *Protecția drepturilor copilului*, ediția a 2-a, C. H. Beck Publishing House, București, 2008, pp. 27.

¹¹ <http://www.observatoriodelainfancia.msps.es/documentos/PlanEstra2006Espa.pdf>

exploitation data are in the competence of the Ministry of Labor and Social Affairs, the General Directorate for Family and Children, the General Directorate for Social Inclusion and Autonomous Communities; promoting actions for prevention, detection, care and treatment of abused children is also assigned to the Ministry of Labor and Social Affairs and Autonomous Communities; and implementing measures envisaged in the second Plan of Action against sexual abuse and exploitation of children and adolescents, as well as evaluating them, is the task of the Ministry of Labor and Social Affairs and Childhood Observatory, etc.

At the legislative level, preventing and tackling child exploitation in Spain is governed by certain normative documents, most notably: Organic Law 1/1996 on the legal protection of minors, partly amending the Spanish Civil Code and the Spanish Code of Civil Procedure, the Civil Code¹², the Statute of workers¹³, the Spanish Penal Code¹⁴.

The analysis of the Spanish legal system reveals the idea that Spain does not currently have a single system for the protection of minors, and each autonomous region has developed its own system that meets all requirements established by Spanish and international legislation in this matter¹⁵. In what follows we shall only consider state-level provisions.

One of the significant normative acts, incidental in this matter, is Organic Law 1/1996 on the legal protection of minors, partly amending the Spanish Civil Code and the Spanish Code of Civil Procedure. It provides, at art. 11 para. (2), the basic principles governing the work of public institutions with regard to minors. Among these are: the primacy of the interests of the minor; keeping

¹² <http://www.boe.es/buscar/act.php?id=BOE-A-1889-4763>

¹³ <http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730>

¹⁴ <http://www.aranzadi.es/index.php/informacion-juridica/legislacion/penal/codigo-penal>

¹⁵ J. M. Suarez Santodomingo, *Psicología jurídica al servicio del menor. La incorporación de menores institucionalizados al mundo laboral*, Cedecs Publishing House, Barcelona, 2000, pp. 190, apud F. J. Duran Ruiz, *La protección de los menores en situación de riesgo y desamparo en España y en Italia. Con especial atención a los menores inmigrantes*, Granada University Publishing House, 2008, pp. 222.

the minor in its biological family, except when it is contrary to its interests; the family and social integration of the minor and preventing all situations which may hinder the child's personal development. Title II of Law 1/1996 describes actions taken by Spanish authorities in situations of social vulnerability of the child. In this regard, according to art. 12, the protection of minors by public authorities is brought about by preventing and remedying the factors that have led to risk situations, by implementing appropriate services for this purpose, exercising protection, and, in cases of distress, transferring custody to the Ministry of Justice. The provisions of art. 16 establish the obligation of public authorities competent in matters of protection of minors to check the situation notified to them and to take the necessary steps to resolve it.

As regards the provisions of the *Spanish Civil Code* on child protection, a special attention is paid to "minors in need". The term "state of need" means, according to art. 172 para. (1), second thesis of the Spanish Civil Code, that situation which occurs due to failure, impossibility or inappropriateness in performing the obligations of provided by the legal stipulations for the protection of minors, when they are deprived of necessary care from both a moral and material point of view. Under the provisions of art. 172 para. (1) of the Spanish Civil Code, the public institution (*Entidad Pública*) to whom the protection of minors is assigned in that territory receives their custody from the Ministry of Justice and must adopt protective measures necessary for their protection, notifying the Public Ministry (*Ministerio Fiscal*) and the parents, tutors and other caregivers (*guardadores*) within 48 hours, as provided under by the law. Assigning guardianship to the public institution involves suspending parental rights or regular guardianship. It is noted, however, that proprietary documents signed by a parent or guardian to represent the minor, which are advantageous to the latter, shall remain valid [art. 172 para. (1) third thesis].

If parents or guardians, due to serious circumstances, cannot take care of minor, they may request the competent public institution to assume its protection for as long as necessary. In the terms of the Spanish Civil Code art. 172 para. (3) first thesis, protection assumed

at the request of parents or guardians or as a prerogative of guardianship (*como función de la tutela*) by the Ministry of Justice is achieved through family or residential placement with the person(s) determined by the public institution [art. 172 para. (3) first thesis]. According to international documents, the interest of the minor will always be taken into account and, when not contrary to his interest, reintegration into his own family is also considered.

The protection of minors against their exploitation through labor is regulated in Spain by the *Statute of workers*. In this sense, art. 6 para. (1) of this normative act prohibits the employment of minors under the age of 16 years. The document also prohibits night shifts for minor workers aged 18, as well as activities or work that the Government, at the proposal of the Ministry of Labor and Social Security, having previously consulted the representative trade union organizations, has declared unhealthy, harmful, noxious or dangerous, both for their health and for their professional or human development [para. (2)]. Also, in order to protect minors aged 18, performance of overtime work by them is prohibited. However, it is established that exposure of 16 year-old minors in public events is permitted only in exceptional cases by the Labor Inspectorate, when such exposure does not pose a health hazard to them and their professional and human development.

As regards the working time, the normative act being analyzed provided, under article 34 pt. 3 para. (3), that the actual working hours for minors aged 18 cannot exceed 8 hours/day, including time spent training and, if they work for different employers, the hours worked for each of them. Also notable is the obligation to establish a rest period which, in the case of minors aged 18, working 4 hours and a half per day, shall be a minimum of 30 minutes [section. 4 para. (2)]. Another measure to protect working minors aged 18 is to establish a minimum weekly rest of two continuous days [art. 37 pt. 1 para. (1) last thesis].

Provisions to protect minors against their exploitation by violence, kidnapping, sexual abuse or indecent exposure can also be found in the *Spanish Penal Code*¹⁶. Thus, regarding violence, art. 153 of

¹⁶ <http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>

the Spanish Penal Code stipulates punishment by imprisonment from 6 months to one year, or community service from 31 days to 80 days and, in any event, deprivation of the right to own and carry weapons from one year and a day to three years, for a person who causes another to suffer a mental disorder or injury not defined as a crime under this Code, or who assaults or abuses another without causing injury, when the injured party is or was his/her husband/wife, a woman who is or was connected to him by a similar relationship of affection, even without living with him, or a particularly vulnerable person living with the perpetrator. Also, these penalties are added, when the judge or the court considers it to be in the interest of the minor or incapable person, the prohibition on the perpetrator to exercise parental care, guardianship, trusteeship, protection or foster care for a period of up to 5 years.

It is noted that the Spanish legislator has also sought to enhance the protection afforded to the child by increasing penalties for committing crimes with minors as victims or in their presence. In this sense, art. 163 of the Spanish Penal Code criminalizes unlawful seizure or detention of a person by another person, by depriving them of freedom, and punishes such acts with imprisonment from 4 to 6 years; but if the victim is a minor, an incapable person or a civil servant in the exercise of his duties, the penalty imposed will start from the upper limit (art. 165 of the Spanish Penal Code).

Also, the Spanish Penal Code criminalizes degrading treatment and physical and psychological violence. Thus, according to art. 173 para. (1) of the Spanish Penal Code, subjecting a person who subject another person to degrading treatment, seriously undermining their moral integrity, shall be punished with imprisonment from 6 months to 2 years. Para. (2) of art. 173 Spanish Penal Code provides that repeatedly inflicting physical or psychological violence on certain people such as one's husband/wife or former husband/ spouses, or on a person who is or was connected to them by a similar relationship of affection, even without living with them, or on the descendants, ascendants or brothers, whether biological, adoptive or affine, of one's husband/wife or cohabiting partner, or against minors or persons lacking full capacity who live with them, or who are in the custody, guardianship, de facto

protection or foster care of the husband/wife or cohabiting partner, or on other persons protected by other relationships due to which they are in the same family, but also on people who, due to their vulnerability, are cared for or protected in public or private institutions, shall be punished with imprisonment from 6 months to 3 years, deprivation of the right to keep and carry arms for 2 to 5 years, and when the judge or the court considers it to be in the interest of the minor or incapable person, the prohibition to exercise parental care, guardianship, trusteeship, protection or foster care for a period of 1-5 years, these penalties being independent of punishments for offenses or misdemeanors in which the acts of physical or mental violence are materialized¹⁷. It can be noted that the second thesis of para. (2) provides that the applied punishments will start at the upper limit when there are aggravating circumstances, such as acts of violence occurring in the presence of minors or the use of weapons.

Noteworthy in this context is the criminalization of human trafficking in the normative act under review. According to art. art. 177 bis para. (2) Spanish Penal Code trafficking constitutes capturing, transporting, transferring, placing, receiving and accommodating a person, if exercised with respect to minors, for the purpose of exploitation, by using or even without using such means as violence, intimidation, or deception.

With regard to sexual assault, it is noted that an aggravating circumstance of the offense of sexual assault is the detriment to the sexual freedom of a person by violence or intimidation, if the victim is particularly vulnerable due to their age, illness, disability or condition, and in any case, when they are under the age of 13 years old [art. 180 (para. 3) Spanish Penal Code]. Another crime that can be committed against a minor is sexual abuse¹⁸. This, in Spanish law consists in committing, without violence or intimidation and without

¹⁷ Para. (2) thesis 1 of art. 273 was amended by Organic Law no. 11/2003 on specific measures regarding public security, domestic violence and social integration of foreigners.

¹⁸ See, in this regard, the work carried out by E.C.P.A.T. in Spain. This is a global network grouping institutions and individuals who militate to end child prostitution, child pornography and child trafficking for sexual purposes (<http://ecpat.net/Ei/index.asp>).

consent, acts affecting the sexual freedom or intimacy of a person. The protection of individuals against this crime is achieved by punishing the offender to imprisonment from 1 to 3 years or a fine of 18 to 24 months [art. 181 (para. 1) Spanish Penal Code]. The fact remains that child sexual abuse is characterized by the fact that the assailant pursues an economic advantage, the exploitation including child prostitution and pornography¹⁹.

Likewise, the Spanish Penal Code criminalizes the exposure of minors or persons lacking full capacity. In this respect, in accordance with art. 189 para. (1), imprisonment from 1 to 5 years is the penalty for such acts as use of minors or persons lacking full capacity acts as entertainment or in (sexually) exhibitionistic or pornographic shows, whether public or private, or to make pornographic materials or finance such activities. Aggravating circumstances of this crime, punishable by imprisonment from 5 to 9 years, are acts mentioned in para. (1) of art. 189, where, according to art. 189 para. (3) of the Spanish Penal Code, they occurs in certain circumstances, such as: they refer to 13 year-old minors; the acts are particularly degrading or humiliating; the incriminated material shows children or incapable persons who are victims of physical or sexual violence.

Conclusions

Currently, in order to counter the negative effects of child exploitation, the European Union monitors compliance with children's rights and proposes concrete measures in this regard. The document *Towards an EU Strategy on the Rights of the Child* [COM (2006) 367 - not published in the Official Journal] was adopted in this regard, aiming to promote and protect children's rights in the internal and external policies of the EU, and to support efforts by Member States in this matter. It ascertains that children's rights are generally still far from being respected and that many children are subjected to forced labor, are victims of human trafficking, or are involved in armed conflicts as child soldiers. Specific issues relating to child exploitation, identified in the European Union, concern: social

¹⁹ <http://www.tuabogadodefensor.com/>

exclusion of Roma children, child trafficking, child pornography on the Internet.

Since the twentieth century, laws governing EU countries expressly stipulate, by internal and international laws²⁰, the right to special protection of children and other persons who are in a state of vulnerability. These assertions are also applicable in Spain, which faces specific forms of exploitation: prenatal maltreatment (*maltrato prenatal*), shaken baby syndrome (*síndrome del bebé zarandeado*) and Münchhausen syndrome (*síndrome de Münchhausen por poderes*). Concerted actions of Spanish authorities to prevent and combat child exploitation are considering two levers: assignment of clear and precise powers to bodies with prerogatives in the matter, and express regulation of forms of juvenile exploitation in the legislation.

The analysis of provisions in Spanish legislation on the protection of children from exploitation, under the various forms it can take, reveals the possibility of adopting some of them in internal law. In this respect, in the matter of family law, a provision similar to that in Spanish legislation may be established, by which, if the parents or guardians, due to serious circumstances, cannot take care of the minor, they may request that the competent public institution be transferred care for as long as necessary. Also, in labor law, a measure to protect working minors aged 18 could be adopted, setting mandatory weekly rest, regardless of their work, for a minimum of 2 uninterrupted days.

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²⁰ For instance, the European Convention on the Exercise of Children's Rights, adopted at Strasbourg on 25 January 1996, entered into force on 10 July 2000 (<http://www.humanrights.ch/fr/droits-humains-internationaux/conseil-europe/droits-enfants/>).

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