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2009 Janusz Korczak Lecture

“Children and prisons: what can we do better?”

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and given by

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¹ The lecture was given during the 29th Conference of the Council of Europe Ministers of Justice “Breaking the silence – United against domestic violence” organised jointly by the Council of Europe and the Norwegian Government.

I accepted with a feeling of honour and humility the invitation to give a Korczak lecture on children and their relation with prisons in Europe. With a feeling of honour, because the life and work of Janusz Korczak, a man who has done so much “for and with” children, call for deep respect. With humility, because I cannot compare my, our, innovative work with that of a man who, through the ultimate sacrifice, that of his life, proved that his words for and with children were true.

In this presentation I should like to discuss how the best interests of the child – or to put it in Korczak’s terms, the child’s right to respect – can be upheld in a prison environment. In reflecting on this lecture I was inspired by a true story, which I believe is symptomatic of the issues we need to address. Obviously, I will not mention real names, nor a specific prison, but I believe this story could serve as inspiration for our action in relation to children who enter into contact with a prison environment, in one way or another.

I don’t know what your vision of a prison – any prison – is. For my part, a prison is not a place where we detain people rejected by society for the purpose of retribution or retaliation. For me it should be a place where people who have broken the law are assisted in a process of re-socialisation and of prevention of reoffending. If this is true for adults, it is even more so for children. If children are our future, they are first and foremost entitled to have a future.

During a visit I met Benjamin, a minor, an adolescent, who was imprisoned at the age of 14 after a series of convictions for petty criminal offences. Because of his turbulent behaviour, he was transferred as a disciplinary measure from one place of detention to another, back and forth. When Benjamin arrived at the detention facility, he was clearly stigmatised, by prison staff and fellow detainees alike, as being a “hot potato”. He was detained in a cell with another young offender; the difference between them was that his cellmate was in contact with his family, which was not the case for Benjamin. He was wearing a bandage around his arm and I was told that he had tried to slit his wrists the day before. I asked him whether he received visits. His answer was “no” and he looked down. It was clear that he felt desperately alone and abandoned, even by his family. I left him after some encouraging words: I talked about the need to get training, to continue his education and to prepare for an active role in society. But I was uneasy and uncomfortable, faced with a young man who was deeply depressed. A few months later, I read in the media about the death of a young man in the same prison establishment. I enquired: it was Benjamin.

- **Juvenile offenders**

Young men like Benjamin are called in legal terms “juvenile offenders”.

Despite the obligation to ensure that detention of children is used only as a measure of last resort and for the shortest appropriate period of time laid down in Article 37 of the UN Convention on the Rights of the Child, the UN Study on Violence against Children estimates that over 1 million children are deprived of their liberty around the world. Most of these children are charged with minor or petty crimes (truancy, vagrancy or homelessness), and are first-time offenders. Many children in detention have not been convicted, but are awaiting trial. Children in detention are frequently subjected to violence by staff, including as a form of control or punishment, often for minor disciplinary offences. In at least 77 countries around the world corporal and other violent punishments are accepted as lawful disciplinary measures in penal institutions.

The protracted duration of detention on remand should be a serious cause for concern. To quote a little boy cited in the UN Study, "Sometimes one day in prison felt like a year. But after 10 days you get used to it and you don't cry as much".

The European Court of Human Rights has repeatedly found breaches of the Convention in cases concerning the detention of children.

In the case of *D. G. v Ireland* of 16 May 2002 the detention of the applicant, for over a month, in a prison without having been charged or convicted was found to be in violation of Article 5(1) of the European Convention on Human Rights (ECHR).

In the case of *Selçuk v Turkey* of 10 January 2006, the duration of the detention on remand for almost four months of a 16-year-old child in Turkey was found to have exceeded the "reasonable time" requirement, in breach of Article 5(3) of the ECHR.

More recently, the detention of a minor was the subject of another judgment (*Güveç v Turkey*, judgment of 20 January 2009). Only 15 years old when he was arrested, the applicant had spent the next five years of his life together with adult prisoners. For the first six-and-a-half months of that period he had had no access to legal advice; nor had he had adequate legal representation until some five months after he had first been detained. Those circumstances, coupled with the fact that for a period of 18 months he had been tried for an offence carrying the death penalty, could not but create a situation of total uncertainty for him.

The Court considered that those aspects of the applicant's detention had undoubtedly caused his psychological problems which, in turn, had tragically led to his repeated attempts to take his own life. What was more, the national authorities had not only been directly responsible for the applicant's problems, but had also manifestly failed to provide adequate medical care for him.

Consequently, given the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and finally, the failure to take steps to prevent his repeated suicide attempts, the Court was in no doubt that the applicant had been subjected to inhuman and degrading treatment, in breach of Article 3.

To sum up, the Court's position, reiterated in these and other cases, is that pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is inevitable, minors should be kept apart from adults.

Standards were also adopted by the Committee of Ministers of the Council of Europe. The European Rules for juvenile offenders subject to sanctions or measures² extensively deals with this question.

One should never forget that a child's perception of the world is different from that of an adult and that a child's personality is a book which is still being written. Therefore concerns regarding how best to teach a young offender to develop educational, emotional and social skills which save him or her from a path of crime should be of primary concern, rather than punishment and retribution. I wonder whether Benjamin had this opportunity.

² Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008.

Deprivation of liberty is very destructive for a child of any age and should be a rare exception provided only for older juveniles who are persistent and serious offenders and who cannot be dealt with by other measures. Even so, they should be detained separately from adults in institutions which are specifically designed for them and should be taken care of only by staff specifically selected, recruited and trained to work with them. Interventions should be exclusively of an educational nature and treatment should come before everything else. Benjamin was detained in a prison for adults.

Staff should have personal and professional qualities which enable them to be a positive role model for the juveniles for whom they are responsible. They should remain the same throughout the whole period in order to entertain stable and secure relations with the juvenile, thereby enabling self-confidence to be built and reaching long-lasting positive change in a juvenile's life. I wonder whether Benjamin received such care. Unfortunately, nowadays, despite the agreed standards of the Council of Europe, many children in Europe are still imprisoned.

It is my strong conviction that children have no place in prison. Children do not have the necessary maturity to face the harshness of detention and to grasp the sense of it. Their adolescence and fragility prevent them from understanding why they are in prison and what they are supposed to learn from it.

When they break the law, they should be helped, not punished; we should show them forgiveness, not revenge; we should educate them, not park them; we should help them to think about what they have done, to avoid it happening again; we should not stigmatise, but take time to explain what they have done wrong; links with the child's family should not be severed, and we should help both the child and his or her family to grow up. In short, we should provide a life project for and with them.

I strongly believe, like Janusz Korczak, that children must be able to know and learn about their rights and obligations, they must be corrected when they err, but in an atmosphere of understanding and forgiveness, based on the individual child's right to respect.

Such respect will lead to self-respect and that is what many of these children totally lack. I would have liked Benjamin to have read this extract from a well-known poem, which reads: "You are a child of the universe no less than the trees and the stars, you have a right to be here."

- **Children whose parents are in prison**

We also need to consider the impact of a prison-like environment on young, innocent children whose parents are detained.

It is a fact that most women in prison are mothers and usually in sole charge of their children. Inevitably, the prison sentence which the mother serves affects the children and other members of the family disproportionately, especially where the mother is the sole care-giver.

The first question which arises is whether women should give birth to a child in prison at all and, if so, for how long should the mother and her child be allowed to stay together?

The Council of Europe's European Prison Rules offer useful guidelines in this respect.³ They provide that women shall be allowed to give birth outside prison, but where a child is born in prison the authorities shall provide all necessary support and facilities. Infants may stay in prison with a parent only when it is in the best interests of the infants concerned, and they shall not be treated as prisoners.

Where such infants are allowed to stay in prison with a parent, special provisions shall be made for a nursery, staffed by qualified persons, where the infants shall be placed when the parent is involved in activities during which the infant cannot be present. Special accommodation shall be set aside to protect the welfare of such infants.

The second question which arises is what arrangements need to be made for children to visit their parents in prison to maintain family ties?

If a father is incarcerated, the child in many cases visits him together with his or her mother or another family member, or writes letters, and some, albeit limited, contact is preserved. Very often, though, if a mother is incarcerated, the reality is that her husband or partner abandons her, she receives virtually no visits and her child is taken away. This is very destructive for a child's life, as it is for the mother.

Like the Parliamentary Assembly in its resolution on women in prison,⁴ I believe that mothers need to be able to maintain their role as parents; this must include full parental control and full access to information about the welfare of their children.

I would like to refer here to Article 17 of the European Social Charter of 1961, which regulates the right of mothers and children to social and economic protection, and a number of conclusions of the European Committee on Social Rights concerning the length of pre-trial detention, prison conditions, and the detention of adults and children in the same place.

The impact of parental imprisonment on children can stretch far beyond the time of imprisonment and the immediate post-imprisonment period. Research has repeatedly highlighted the fact that many young prisoners have parents who have committed a criminal offence: a UK study⁵ following boys for a period of 40 years found that those who were affected by parental imprisonment as children were more likely than other boys to display anti-social behaviour in later life. The imprisonment of a parent was found to be an accurate predictor of future criminal behaviour in the children, regardless of the length of sentence imposed.

The case of Benjamin was no different – Benjamin too visited his parents in prison before becoming an offender himself.

It is my view that prisons are not designed for pregnant women or women with infant children. We must always remember that children of prisoners are innocent in the true sense of the word, and they need and are entitled to our care and our attention, as well as that of their mother.

³ Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, 11 January 2006.

⁴ Resolution 1663 (2009) on women in prison, 28 April 2009.

⁵ Joseph Murray and David P. Farrington, "Parental imprisonment: effects on boys' antisocial behaviour and delinquency through the life-course", *Journal of Child Psychology and Psychiatry*, Vol. 46, No. 12 (2005), pp. 6-7.

Responses to offending behaviours should integrate children's rights and include training for prison staff who are in contact with children of prisoners, an approach to sentencing that takes account of their impact on children, the promotion of community alternatives for mothers, the strengthening of the legal entitlement to visits, and measures to encourage contact between parents in prison and children.

On the issue of contact, we still have member states which do not allow children to hug their parent in prison!

- **Child-friendly justice**

Whether children are juvenile offenders or enter into contact with the prison system "through" their contacts with their parents, it is essential that justice systems are child-friendly, starting of course with access to justice.

Access to justice is a fundamental right that every human being should enjoy. However, in practice, access to justice for vulnerable groups is often impeded. This is particularly true in the case of children. Either because justice does not provide for their information, representation and participation in justice at all, or because it does not allow for it in an appropriate manner, designed to meet the specific needs of children. Yet, an inappropriate access to justice is an access denied.

Children still face a number of specific disadvantages in their contact with the justice system, be it as victims, witnesses or perpetrators of crime. Although better understanding of children has led to improvements in laws and courts, prevention, treatment and services, there is a clear need to develop justice systems in our member states which better reflect children's needs, but above all their rights. The issue of the age of criminal responsibility of children is still an open and difficult question for member states, with figures which vary considerably from one country to another.

In my view, the starting point for any reflection on child-friendly justice is certainly the Bulger case. The story of this case is indeed extremely sad. On 12 February 1993, when they were 10 years old, T. and V. had played truant from school and abducted a 2-year-old boy, James Bulger, from a shopping precinct, taken him on a journey of over two miles and then battered him to death and left him on a railway line to be run over. The proceedings which followed against the two offenders gave rise to a judgment of the European Court of Human Rights which was publicly much debated.

In respect of the right to a fair trial enshrined in Article 6 of the ECHR, the Court clearly stated that "in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition". The Court also noted that:

although the applicant's legal representatives were seated ... "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of co-operating with his lawyers and giving them information for the purposes of his defence.

The Court found accordingly a violation of Article 6.⁶

At the 28th Conference of the European Ministers of Justice, which took place in Lanzarote in October 2007, ministers adopted a resolution on child-friendly justice which stated that there was “a need to provide and facilitate children’s access to effective remedies, to mediation and to court proceedings, in order for their rights to be fully respected and promoted”.⁷

First and foremost, it is essential to examine the role children have before, during and after judicial proceedings including in the context of a mediation process.

Moreover, any guidelines should ensure that the judicial proceedings themselves do not contribute either to the re-victimisation of children who were victims or witnesses of crime, or to the stigmatisation and labelling of children who have committed criminal offences. The European Guidelines on child-friendly justice, which our ministers asked us to draft, are ranked as a core pillar of the Council of Europe’s strategy “Building a Europe for and with children” for 2009-2011.

If we have truly child-friendly justice systems, we may be able to prevent children like Benjamin from taking their own lives.

I would like justice to be administered for children, and not only on them. I have witnessed too often in my career adults talking about children’s rights, but really meaning their own rights over children. This is the wrong approach. Children have their own rights; these are the rights of children, not of adults over them.

I would like to conclude by quoting Janusz Korczak: “Know yourself before you attempt to get to know children. Become aware of what you yourself are capable of before you attempt to outline the rights and responsibilities of children. First and foremost you must realise that you, too, are a child, whom you must first get to know.”

Again, it all boils down to a matter of respect for children’s rights and to their right to respect.

I urge all of you to recognise the fact that children, as vulnerable human beings, deserve more, not less, protection. Any contact of children with prisons, or with the justice system as a whole, must therefore be undertaken with this fundamental principle in mind.

Our children’s future is in our hands and without them there is no future.

⁶ Cases of *V. v United Kingdom* and *T. v United Kingdom* of 16 December 1999.

⁷ 28th Conference of the European Ministers of Justice, Resolution No. 2 on child-friendly justice, 26 October 2007, MJU-28 (2007) Resolution 2E.