



## CHILDREN BELOW THE AGE OF CRIMINAL RESPONSIBILITY IN AUSTRIA: MEASURES, RIGHTS, PROCEDURE, PARTICIPATION

### **National Report for AIMJF's Comparative and Collaborative Research.**

Niños por debajo de la edad de responsabilidad penal en Austria: medidas, derechos, procedimiento, participación

*Informe nacional para la investigación comparativa y colaborativa de la AIMJF*

Enfants n'ayant pas atteint l'âge de la responsabilité pénale en Autriche: mesures, droits, procédure, participation

*Rapport national pour la recherche comparative et collaborative de l'AIMJF*

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**Abstract:** The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on children below the age of criminal responsibility. The article explains the applicable measures and the procedure adopted, the child's rights and his or her participation in the Protective and Justice System in Austria.

**Resumen:** El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre niños por debajo de la edad de responsabilidad penal. El artículo explica las medidas aplicables, el procedimiento adoptado, los derechos del niño y su participación en el sistema de protección y de justicia en Austria.

**Résumé :** Le document fait partie d'une recherche collaborative organisée par l'Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur les enfants n'ayant pas atteint l'âge de la responsabilité pénale. L'article explique les mesures possibles d'application et la procédure adoptée, les droits des enfants et leur participation dans le système de protection et de justice en Autriche.

### **Introduction**

The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, in the French and Spanish acronym) represents worldwide efforts to establish links

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between judges from different countries, promoting transnational judicial dialogue, in order to provide better conditions for a qualified attention to children based in a human rights approach.

To do so, AIMJF organizes research on international problems facing the operation of the courts and various laws relating to youth and family and training programs.

The aims of this research are to identify similarities and discrepancies among countries and to develop a cartography of measures, procedure, rights and participation of children below the minimum age of criminal responsibility.

This national report is based on a questionnaire prepared by AIMJF.

## QUESTIONNAIRE:

### 1. general information

1.1. What is the minimum age of criminal responsibility in your country (the **age of criminal responsibility** is the age below which a child is deemed incapable of having committed a criminal offence, it can also be referred as age of accountability, age of responsibility, and age of liability for children and it is different of the age when a person becomes an adult)?

*In Austria, the age of criminal responsibility starts with the day after the 14<sup>th</sup> birthday since 1929 and was essentially based on the end of compulsory schooling at that time. The end of compulsory schooling has been raised to 15 in the meantime, but the age of criminal responsibility stayed the same.*

1.2. Is there more than one minimum age of criminal responsibility? Which one? Is it possible to apply the ‘doli incapax rule’ in your country (possibility of demonstration that the child is sufficiently mature and capable to understand that the behavior was an offense and therefore could be criminally responsible)?

*There is only one minimum age of criminal responsibility, and it is as mentioned 14. There is no “doli incapax rule” in Austria.*

*There is however a rule, that a juvenile (14-17 years) who commits a punishable act is not punishable, if*

*1) he is not yet mature enough, for specific reasons, to recognize the wrongfulness of the act or to act in accordance with this recognition or*

- 2) *he commits an offense before reaching the age of sixteen, he is not guilty of any particularly serious guilt, and there are no specific reasons why the application of juvenile criminal law is necessary to deter the juvenile from committing criminal acts.*

*To determine delayed maturity, as described under 1), a psychiatric expert is usually consulted if it seems necessary.*

## 2. age assessment

- 2.1. In case of application of the ‘doli incapax rule’, how is this assessment made? Is there a specific methodology for this evaluation? A protocol on how to evaluate? Who assesses the child? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

*As mentioned, there is no “doli incapax rule” in Austria. As to the above mentioned delayed maturity: The assessment is usually made by a psychiatric expert and is based on the current medical and psychological standards. The child has to be heard to do a proper evaluation. A juvenile is usually represented by a defense attorney at all stages of the proceedings, except in minor cases. The attorney can apply for an evaluation from a psychiatric expert, if there is evidence to suggest, that there is possibly a delayed maturity. If there is evidence that an assessment was wrongfully omitted or if it can be demonstrated that the assessment did not meet current standards, legal action may be successful.*

- 2.2. In case of necessity of age assessment (due to a lack of birth registration), how is this assessment made? Is there a procedure? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

*The question of the defendant's age is a question of evidence. The determination can therefore be made based on objectively ascertainable physical appearance. Case law also permits X-ray examinations to clarify the disputed age. It is controversial whether a defendant may be forced to undergo an X-ray examination to determine his or her age. Due to the principle of proportionality in Austrian law, in practice no examination will be carried out without the defendant's consent. However, refusal to undergo an examination can certainly be used as evidence of a certain age.*

*A juvenile is usually represented by a defense attorney at all stages of the proceedings, except in minor cases. The attorney can apply for X-ray examinations to clarify the disputed age, if there is evidence to suggest, that there is possibly a younger age. If there is evidence that an examination was wrongfully omitted or if it can be demonstrated that the examination did not meet current standards, legal action may be successful.*

### 3. police intervention

3.1. In case a child under the minimum age of criminal responsibility commits an act considered as a crime, is he/she brought to a police station? Is it mandatory to do so? If not, in which situations is it necessary to be brought to the police station?

3.2. In case the child is brought to the police station, what is expected from the police to do? What are the legal guarantees for the child in this context? Is it possible, in any circumstance, that the child be imprisoned, even for a very short time? In this case, how long is it possible for the child to be deprived of liberty?

*In such situations, the police is obligated to release the child to the legal guardian. For this purpose, a very short detention is possible, as the child is taken to the police station, where he is then picked up by the legal guardian. Another possibility is that the child is taken directly to the legal guardian by the police. Detention beyond the period necessary for these measures is not permitted. So a few hours would be permissible in extreme cases, but more than 24 hours are not permitted under any circumstances.*

### 4. measures

4.1. In case a child below the minimum age of criminal responsibility has committed an act considered as a crime, is it possible to impose any kind of measure? Which one?

*There are no measures in that sense, as a crime committed would directly lead to any measures. However, if a child repeatedly reoffends or commits a serious crime, it must be examined from a family law perspective whether the child's welfare is at risk. The youth welfare authority would then be obliged to examine the situation and take any necessary measures to secure the child's welfare.*

4.2. Is it possible to impose an out-of-home placement (such as alternative care, in institution or foster family; in health facilities, for instance)? in which circumstances? For how long?

*An out-of-home placement would be possible, if the child's welfare is at risk and any other measures, like support for the legal guardians would appear not sufficient to secure the child's welfare. As said, any measures are strictly from a family law point of view, criminal law is not applicable.*

### 5. procedure

5.1. Who imposes such measures?

5.2. Is there a legal procedure for the determination of these measures? What is the nature of these procedures? Can you describe it shortly?

5.3. Is it possible to adopt alternative resolution mechanisms in these situations, such as mediation or restorative justice?



*Any necessary measures would be imposed by the Youth Welfare Office. Serious interventions such as the removal of the child from his or her home would then be reviewed and approved by the Family Court. The legal guardians can also appeal to the court at any time, which has to decide over the matter. Those are the procedures basically. It is very informal, so that the specifics of each individual case can be taken into account and there is always the possibility to change the decision when the circumstances are changing.*

*As all these measures are strictly from the child protective point of view, there is no place for mediation or restorative justice, because these measures are in no way whatsoever a punishment. It is only about the welfare of the child who committed a crime and the measures have to be beneficial for him or her only.*

#### 6. assessment

6.1. Is there any kind of assessment of the child for the imposition of such measures (on vulnerabilities, risk, rights violations)? Who assesses the child? Is there a protocol or guideline on how to assess the child? Can you please share it?

*There is no specific assessment for children, who are committing a crime. I unfortunately have no knowledge, if there are protocols or guidelines used by the Youth Welfare Office in general.*

#### 7. legal and procedural guarantees

7.1. What are the rights of the child in this procedure (legal and procedural guarantees)?

7.2. Does the child have the right to refuse any of these measures? Or to challenge in court any of these measures?

7.3. What happens if the child does not fulfill the obligations inherent to these measures?

*The child has always the right to challenge any measures in court. The child may de facto refuse measures because there is no method to force the child to cooperate.*

#### 8. the role of the justice system

8.1. Is it possible in your country that the justice system gets involved in these situations? In which situation (vg. to impose the measure or to review it, in case of resistance by the child or his/her family, or to impose some child protection order)? For what purpose? Which branch of the justice system is involved (youth court, family court, child protection court, criminal court...)?

8.2.. In case of involvement of the justice system, can you briefly describe the procedure?

8.3.. What are the rights of the child in this procedure? Does the child have the right to legal assistance? The right to appeal against any kind of decision?

*As stated before, criminal law is not applicable with children under the age of 14. The family court has to approve certain decisions of the Youth Welfare Office and can be called on at*



*any time by the child or the legal guardians. The procedures are very informal, everybody who is involved will be heard and the court will make a decision that can be appealed.*

#### 9. assistance or support

9.1. Besides the measures imposed to children, are there other kind of assistance available on a voluntary basis (social, psychological, medical)?

*Of course assistance and support on a voluntary basis is provided by the Youth Welfare Office in various forms.*

#### 10. child participation

10.1. Is the child heard in this procedure? By whom? At which stage of the procedure?

10.2. Is the child heard more than once in this procedure? How many times?

10.3. Is there a protocol or guideline on how to hear the child in this situation? Can you please share it?

*The child is heard by the court or – if deemed necessary – by an appointed expert at least once before the first decision of the court. There is no protocol or guideline.*

#### 11. legal implications

11.1. Is there any record of legal infringement committed by children below the age of criminal responsibility? When the child reaches the age of criminal responsibility, are these records taken into consideration?

*Every reported crime committed by a child under 14 is recorded, and the case is immediately dropped by the public prosecutor's office on the grounds of the young age. Such dropped cases are visible to the public prosecutor's office and the court in the general internal register. However, since the actual circumstances of those case were never examined, such dropped cases may generally not be used in further cases if the child over the age of 14 commits a crime.*

11.2. In case of damages, what kind of rights and remedies does the victim have regarding the child and the family? Besides financial reparation, does the victim have the possibility to have a say on the measures applied to the child?

*Although the capacity to commit a tort under civil law also only begins at the age of 14, there are exceptions in civil law, meaning that children under 14 can under certain circumstances be sentenced to pay damages. At most, legal guardians can also be sentenced to pay damages for the criminal acts of their children if they violate their supervisory duties. Apart from paying damages, the victim has no say in the measures taken for the child who has committed a criminal act.*

#### 12. reforms in progress

12.1. Are there ongoing reforms on this subject?



*Austrian constitutional law generally permits measures restricting liberty for criminal offenses, for medical reasons and for educational reasons.*

*Measures restricting liberty for criminal offenses is not permitted for children under 14.*

*Measures restricting liberty for medical reasons are generally possible for children under 14 just as for adults, if restrictions are necessary to prevent acute danger to others or to oneself due to a psychiatric illness or a mental disability. For children under 14, this is the only legal basis for measures restricting liberty.*

*There has been no statutory basis for measures restricting liberty for educational reasons in Austria for over 40 years. This means that there are no children's homes that can be closed, because there is no legal framework for it anymore. Compared to countries that allow freedom-restricting measures for children for educational reasons, Austria has fared well even without such measures. Certain political positions have recently led to renewed consideration of whether freedom-restricting measures should not be reintroduced for educational reasons. How exactly this might be implemented is currently under discussion.*