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SYSTEM OF JUSTICE FOR JUVENILES IN THE REPUBLIC OF KOSOVO

Abstract

The system of juvenile justice is an integral part of the justice system in a country. International trends in law, are increasingly giving priority to juvenile justice in relation to other branches and they also recommend states in shaping of this system, drawing on specific legislation for children and establishing procedures and mechanisms independent from the justice system of one state.

The Republic of Kosovo has issued a special law for juveniles, such as the Code of Juvenile Justice¹⁰, then there are also special procedures established and developed separately from the proceedings where the subjects are adults, whereas from 1 January 2013, the new legislation has started to be applied such are the Criminal Procedure Code¹¹, Criminal Code of the Republic of Kosovo¹², Law on Courts¹³ and law on State Prosecution¹⁴. Furthermore, within the courts and prosecution offices, there are also departments for juveniles established, as well as there are judges and prosecutors foreseen for juveniles.

Key words: System of Juvenile Justice, the Code of Juvenile Justice, the juvenile department, the juvenile judge, the prosecutor for juveniles, measures of diversity, social survey.

1. General reviews related to the System of Juvenile Justice

System of Juvenile Justice in the Republic of Kosovo consists of the legislation that is harmonized with international standards and instruments in the field of human rights and the best international practices in the field of rule of law.

Because of its specifics, the system of juvenile justice, has a great number of participants (institutions) that take part in the juvenile justice, because, by being based on the international best practices in the treatment of juveniles, during the administration of juvenile justice system, the broad participation of institutions and other persons it allows us to understand that when we talk about children, then, everyone is obliged to answer the requests and needs that the children might have, especially when there is a procedure conducted towards them.

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¹⁰ Code of Juvenile Justice, no.03/L-193, 8 July 2010 (In further text CJJ).

¹¹ Code of Criminal Procedure, no.04/L-123, 13 December 2012, (In further text CCP).

¹² Criminal Code of the Republic of Kosovo, no.04/L-82, 20 April 2012, (In further text CCRK).

¹³ Law No.03/L-199 on Courts, 22 July 2010.

¹⁴ Law No.03/L-225 on State Prosecution 30 September 2010.

In the past years there have been a lot of changes in this course, because the system of juvenile justice is increasingly seen as an integral part of the justice system in our country and that the legislation, respectively CJJ, is more and more considered as a defense instrument over a child that is facing the law, not a punishing instrument.

About juveniles, or children in conflict with the law (that are facing the law, juvenile delinquent, juvenile crime), in the literature we see a lot of different expressions, but what we need to emphasize is that we need to avoid expressions that affect the dignity of a child, so, to avoid expressions such as: offender, accused, criminal, etc. Ever since the ancient history, like for e.g. in ancient Rome etc., children had had a different treatment from the society, from relevant state institutions or from different justice mechanisms. The diverse treatment of children had begun since the definition of the criminal responsibility (age), then the procedure and the possibility of imposing sanctions - punishments or measures against children etc.

International justice instruments¹⁵, recommend the countries to determine a minimum age, under which the children would be presumed irresponsible for their actions so as to initiate criminal procedures against them¹⁶. Based on the Rules of Beijing, rules that consist the mosaic of moral legislation or the so called “soft legislation” as far as the administering juvenile justice is concerned, in a way they recommend that the minimum age of criminal responsibility under the age of 12 should not be acceptable¹⁷. Whereas, regarding the lowest level of age, there are differences in countries legislations¹⁸, in some countries, the age limit is 8 years old, while, in some countries it is 10, 12 etc. The opposite of this, as far as the lowering the minimum age of criminal responsibility is concerned it can be justified with scientific achievements in terms of different multidimensional areas such as: health, social, psychological, etc. The time we are living in is very dynamic, where the modernization and electronics have played their part, their conscious or unconscious influence in our life is obvious and inevitable. Despite this, tendencies and all professional debates, are for the increase of the minimum age of criminal responsibility or to make a division like for example 12-14 years old, 14-16 years old in terms of the initiation of the procedure against a child or other kinds of measures and sanctions as well which can be imposed at this age.

The justice system in our country acknowledges as a special category the offenders who have not reached the age of 18 years old and hence all possible perpetrators (suspects) of criminal offenses under the age of 18 years old must be differently treated compared to the adult persons - persons who have already reached the age of 18 years old.

¹⁵ Convention of Children Rights, article 3 (a), Children rights in juvenile justice, 2010, Overall comment, no.10.

¹⁶ Article 41 of CJJ, and article17 paragraph 3 of CCRK.

¹⁷ Overall comment, no.10 (2007) CRC/C/GC, 10 February 2007.

¹⁸ Minimal age of criminal responsibility: 8 years old in Greece; 10 years old in England, France; 12 years old in Holand, Portugal, etc.

The age of criminal responsibility is the determining factor for a young person to be treated differently from an adult who has already become 18 years old. If we refer to the positive current legislation, respectively CJJ, a minor is considered a person from the age of 14 years old up to 18 years old, whereas a child is considered a person who has not reached the age of 18 years old. By this definition, even if the minor is called a child it is not a mistake – an error, but because of the specification of the position in the procedure he is called a minor.

Furthermore, the CJJ categorizes even the persons from the age of 14 to 18 years old and from 18 to 21 years old, by defining these meanings: that the “young juvenile” is a person between 14 and 16 years old, the “adult juvenile” is a person between 16 and 18 years old, while, the “young adult” is a person between 18 and 21 years old.¹⁹

A question may come forth of why persons under 18 years old are treated differently when they commit a criminal offence²⁰, and that the adult person committing the same offence can be punished with a much severe punishment for example imprisonment (up to 25 years or for life), while, to the minor (juvenile) can be imposed with some diversity measures, educational measures or maximum punishment of up to 5 years of juvenile imprisonment, and in extreme cases juvenile imprisonment of up to 10 years.

The achievements in the justice and science system for juveniles are based on multi-disciplinary approach, because, there are numerous factors (general factors) of the environment that can impact a minor such as family, school, the surrounding (society) in free time; and (individual factors) that are related to the personality of the minor (experience or perception of events); alcoholism, drug addiction, prostitution, unemployment, urbanization, the poor social conditions, wanderings, etc.

By accepting the concept of the age of criminal responsibility, one should bear in mind the facts of maturity – spiritual, emotional, mental and intellectual development. Modern methods take into account if a child fulfills the moral and psychological components of the criminal responsibility which means, if a child because of the perception and individual self-conception, can be called responsible for his/her delinquent behavior. The procedures that are carried out by the state public authorities over the child that has violated the law, are increasingly emerging and most of the countries have brought special laws and other law provisions including non-compulsory law documents (instructions, recommendations, protocols etc.), in relation to the children, or they have special chapters within other laws. However, the administering of juvenile justice system is not static as well, but it evolves and continuously is reformed by incorporating scientific achievements and best international practices because this method aims to have the child / juvenile treated in the best way possible.

¹⁹ Article 2 of CJJ.

²⁰ The Decision of the Basic Court in Gjilan PM. no. 104/2014 dated 05.11.2015, by which the previous Decision is revoked, the execution of the educational measure, sending to the Correctional – Educational Institute for the time of one year, after the juvenile has started his punishment by imprisonment for another crime carried out as an adult, because the execution of the above mentioned educational measure would not have had the aimed effect.

2. Legislation

The juvenile in the justice system of the Republic of Kosovo, is under the protection of the Constitution of the Republic of Kosovo, legal guarantee with local legislation of criminal justice, as well as by international standards for human rights, standards which are included in International legal acts and directly executable in the justice system of our country.

Base legislation of juvenile justice system (organic law) is the Juvenile Code of Justice, which was issued by the Assembly of Kosovo on 8th of July 2010 as: Code No.03/L-193 of Justice for Juveniles and the same was published in the Official Gazette of Republic of Kosovo, year V / no. 78 / 20 August 2010.

Another legislation that can be implemented in the System for Juvenile Justice if we refer to the Code of Justice for Juveniles, Criminal Code of the Republic of Kosovo (CCRK), Code for Criminal Procedure (CCP), Law on Execution of Criminal Sanctions²¹, Law on Mediation²², and any other relevant law²³.

Only superficially we are going to mention situations when the above mentioned laws can be implemented, the definition of the criminal offence when the possible offender is a juvenile, respectively at the qualification of the criminal offence the CCRK comes into terms; in situations when the procedure is not defined with CJJ, the CCP is implemented, e.g. the arrest, detention etc.; in cases when the Institutional Educational measures – the sending into educational correctional institution or imprisonment for juveniles, LECS is accordingly implemented, when a case is sent to mediation then the Law on Mediation is implemented. Apart from these, based on article 22 of the Constitution of the Republic of Kosovo, some international documents are also directly implemented, respectively international instruments. International instruments directly applicable in the justice system of our country are: Universal Declaration for Human Rights; European Convention for Protection of Fundamental Human Rights and its Protocols; International Convention for Civil and Political Rights and its Protocols; The Framework Convention of the Council of Europe for the Protection of National Minorities; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Punishments. In this regard, The Convention for Children Rights in articles 3, 37 and 40, foresees the rights and obligations of the country Institutions that they have in relation to the children rights that are in court proceedings – juvenile justice and in any case that there is a child as the subject the prevailing consideration determines the best interests of the child.

²¹ Law on Execution of Criminal Sanctions, no.04/L-149, 29 July 2013 (in further text LECS).

²² Law on Mediation, no.03/L-057, 18 September 2008.

²³ Article 5 of CJJ.

3. Actors of juvenile justice

Relevant institutions that take part in the juvenile justice system, but that are not limited only to those are: courts, prosecutors, probation services, police, correctional services, mediation institution, the body of custody etc. Whereas, the officials and persons that are presented are: the juvenile judge, the juvenile panel, juvenile prosecutor, defender-lawyer, probation officer, social worker, psychologist, pedagogue, doctor, mediator, police officer, custodian – official of the center for social affairs, interpreter etc.

Their activity is obliged in accordance with the legislation and that otherwise their inactivity can and should be sanctioned. As a result of their inactivity in a case where the subject is a juvenile the whole procedure may prove unacceptable or expressed in legal language "null".

Authorities or institutions that participate in judicial proceedings dealing with juveniles, as well as other persons and institutions who are asked for notifications, reports and opinions are obliged to act quickly and without unnecessary delay.

Nobody can be excluded from the duty to testify in relation to the circumstances necessary to evaluate the psychological development of the juvenile or for the recognition of his personality and the conditions which he lives in.²⁴

The juvenile shall undergo a general medical examination before the start of the submission of a proposal for the appointment of the detention measure to ensure that his health allows detention²⁵.

In proceedings against juveniles, the prosecutor notifies the appropriate authority of custody for initiating the procedure and the course of proceedings so that the same can make proposals and present facts relevant to the right decision²⁶.

Lay judges on the panel for juveniles shall be appointed among professors, teachers, educators, social workers, psychologists and others who have experience in the education of juveniles and that the lay judges participating in the juvenile panel are of different genders²⁷. If the juvenile panel does not consist of persons of opposite gender, then the whole procedure is proclaimed invalid and the case is returned to be proceeded from the beginning.

²⁴ Article 46 of CJJ.

²⁵ Article 45 of CJJ.

²⁶ Article 48 of CJJ.

²⁷ Article 51 paragraph 3 and 4 of CJJ.

Juvenile panel²⁸, also judges criminal cases when an adult is being tried for some special criminal offences carried out towards the child, as foreseen in the article 145 of CJJ.

4. Practice

When in a criminal case a child is presented as the offender, then, based on the article 21 paragraph 2 of CCP, that case must necessarily be divided and proceeded as an individual case because that is the reason the Juvenile Department was created, as within the judicial system, as well as in the prosecutorial one, where within this department there is a juvenile judge and a juvenile prosecutor.

So, the case since the beginning is treated by the juvenile judge and a prosecutor for juveniles. Otherwise there are reasons for having issues discussed by the law professionals and experts on case competencies and to have the same submitted for further judicial debates within the professional academic discourses, as well as Kosovo Judicial Institute /Academy.

When the juvenile is stopped / arrested by the prosecutor for juveniles, the decision that needs to be issued necessarily determines that within 24 hours procedural action should be undertaken by the prosecutor for juveniles or the juvenile judge, so only if it is decided to submit a request for the detention or any other alternative measure to ensure the presence of the minor in the proceedings to be held against him, a juvenile judge needs to decide within these 24 hours. Whereas, the criminal proceedings against adults differs because here it is decided within 48 hours whether to assign any alternative measure, detention or to release under a regular procedure the adult person suspected of a crime.

Before taking the decision to initiate the preparatory proceedings, although from the evidence that we possess conform the feasibility (opportunity) which is defined in Article 56 of CJJ, the case can be closed by a decision for the non-commencement of the preparatory proceedings, so not to start and not to proceed further by taking into account the criteria specified in CJJ.²⁹

Afterwards, as in criminal proceedings against adults, criminal charges against juveniles may be refused even in the absence of evidence or by taking into consideration the criteria specified in the law.

There are opinions from legal professionals and experts that even the diversity measures can be imposed before the preparatory proceeding begins based on the goal

²⁸ The Decision of the Supreme Court of Kosovo Ap.no. 329/2011 of the date 1.3.2012, according to the article 145 of CJJ, for criminal offences defined in this article when the perpetrator is an adult whereas the victim is juvenile, the juvenile panel is the one that judges.

²⁹ Decision of the Basic Prosecutor in Gjilan – Juvenile Department PPM no. 29/15 of the date 18.2.2015, with which the procedure was not started against the juvenile for criminal offence: Destruction or damage to property from article 333, paragraph 1 of the CCRK.

of the diversity measures itself, but it is considered that there are difficulties in the implementation at this stage, how will the parties be invited, then how will the social survey be provided which is necessary for every case, etc.

Preparatory procedure according to the CJJ is obligatory as soon as the criminal charge is presented, but we consider that this should be an opportunity that needs to be evaluated by the juvenile prosecutor but not to be forced because even according to the CCP, the beginning of the investigation/criminal procedure is defined as an opportunity not a obligation that is why we refer to article 101 paragraph 1 of CCP.

The Centre for Social Work (CSW) is notified with the decision to initiate the preparatory proceedings and a social survey is required by Kosovo Probation Service (KPS). Furthermore, all the other necessary investigation actions are undertaken for the clarification of the case, such as the questioning of the parties, different expertise are requested, like medical ability, communication, ballistic, etc.

It is of particular importance to question the juveniles whatever status they might have: as a suspect, damaged party, witness, because apart that the level of the ability to understand should be taken into account, also the criteria defined by the law must be fulfilled such as the hiring of the defense counsel, the parents, the social worker etc. A legal criteria that is worth mentioning is that the child against whom the criminal offence was carried out, cannot be interrogated more than twice as a witness. When an adult is presented as the perpetrator, then we refer to the article 147 paragraph 2 of CJJ.

At the imposition of diversity measures according to article 17 of CJJ, the consent of the damaged party is not defined. So, CJJ does not oblige that the consent of the damaged party is taken in case of imposing the measure of diversity. Another important matter is if the measure of diversity is not implemented, CJJ allows the possibility of discretion to the prosecutor to choose if he is going to restart the procedure or consider it concluded, so, it is not obligatory in case of non- implementation of the diversity measure, we refer to the article 17, paragraph 3 of CJJ for this matter.

Without going deep into the role of the defense counsel, we have to emphasize that his role is very useful and necessary, and at the same time he has to be very professional in his work, but taking into account the insufficient expertise that is as a consequence of non-profiling of the defense, we have certain difficulties and quite often the effective defense of the juvenile by the defense counsel can be doubted.

In the introductory part of CJJ's, at the guiding principles even though the same are mentioned almost circumstantially without any disintegration that would fulfill the principle further, it is defined that "the system of juvenile justice aims the wellbeing of the juvenile and ensures that any reaction towards the juvenile perpetrator shall always be proportionate to the circumstances of the perpetrator and the criminal offense".

What should be implied with the wellbeing of the juvenile?

The wellbeing of the juvenile must be assessed, if it comes to the separation from the family or to the additional supervision from the family, or the separation from the school or the additional supervision from the custody body with measures of additional supervision – to attend school regularly and that in every case when the educational measure is proposed, sending to the Correctional Educational Institution – that in the Republic of Kosovo there is only one such centre in Lipjan – we should reason if any other measure or imprisonment for juveniles was previously imposed to the juvenile.

Personal circumstances of the juvenile perpetrator are important for the proposal or the imposition of measure or punishment by imprisonment for juveniles, and the prosecutor or the judge for juveniles gets informed about this through social survey, that has to be present in every case and it needs to be taken as evidence without which it would be hard to bring a deserved decision, because, we should not consider the juvenile as the main source and that the guilty plea from the juvenile, under no circumstances, relieves the court from the obligation to be involved in the overall treatment of evidence and facts which refer to the concrete case³⁰.

It is a very interesting fact that the measures for ensuring the presence of the juvenile in the proceedings, such as detention or house arrest do not count if the juvenile is imposed with an educational measure of being send to the Correctional Educational Institution.

The juvenile panel is not related to the proposal of the prosecutor for juveniles and if the same imposes a measure as the perpetrator to the juvenile then he has to come to a decision and that the juvenile is not proclaimed guilty, whereas, if to the juvenile as the perpetrator is imposed a punishment with imprisonment for juveniles the same is imposed through a verdict.

The court may decide to execute the measure regardless of the appeal if it determines this is in the best interest of the juvenile after the hearing of the juvenile, his parent, the adopting parent or the custodian³¹.

Every six (6) months since the implementation of the correctional – educational measure, the director of the institution delivers a report to the court regarding the bringing of the juvenile with the proposal for the amendment or the replacement of measures and that the court reviews the implementation of the educational measure every six (6) months, as well as every six (6) months the judge for juveniles visits the juvenile put in the educational - correctional institution³².

³⁰ PAM no.53/14 dated 14.10.2014 Decision of the Kosovo Court of Appeal, even though the juvenile has pleaded guilty for perpetration, the Basic Court department for juveniles as evidence had to review the document that would prove the correct age; PAKR.no.275/15 dated 1.10.2015 Decision of the Kosovo Court for Appeal, that among others cancels the case and returns it to the retrial because in the factual description of the provision the birthday of the damaged party was not given even though that was important because the same according to the case materials was a person under the age of 16 years old.

³¹ Article 77 paragraph 4 of CJJ.

³² Article 127 paragraph 1 and 2 of CJJ.

5. Conclusion

1. Effective administering of the juvenile justice system, is complex because of the fact that in all actions that are undertaken by the institutions the best interest for the child must prevail³³, even though the juvenile is presented, the juvenile can be presented in different positions: as the possible perpetrator, victim, damaged party or witness.
2. Legislation, respectively Code of Juvenile Justice, has to be understood as a defense instrument of a child that has come to face the law, and not a punishing instrument. Furthermore, guaranteeing and respecting their (children) rights is foreseen in the Constitution of the Republic of Kosovo, Convention for Children Rights and in other international agreements in the justice system.
3. Throughout the court proceedings with the juveniles who violated the law, a friendly environment and approach should be created and legal terms such as criminal, defendant, charged, convicted should be avoided as much as possible etc.
4. Educational measures or punishments can be imposed only after exhausting legal possibilities, by starting from the implementation of the principle of opportunity, by not starting or developing the procedure against the juvenile, provided the legal conditions are met, then the imposition of measures of diversity in the prosecution, in which case we do not proceed with the proceedings against the juvenile in court, all these options affect the re-socialization of the juvenile or prevent that in the future the juvenile does not commit other criminal offenses. After exhausting the above mentioned possibilities: non-commencement of the procedure, measures of diversity then the non-institutional educational measures come to surface such as the additional supervision by the family, custodian and after that the educational institutional measures such as: being sent to an educational-correctional facility and at the end, when all these actions undertaken against a juvenile as the perpetrator do not result in a positive impact or a re-socialization of the juvenile then as the last actions and that is only if all legal requirements are met such as: the punishment for that criminal act, recidivism, non-impact of the measures imposed, punishments for the juvenile come into consideration such as: fines, orders for community service work and juvenile imprisonment. On the contrary, in the absence of professionals/their legal profiling, competent institutions and adequate legislation, above mentioned standard can hardly be achieved where child protection should be provided because of the sensitivity of the level of maturity, spiritual, emotional, mental and intellectual development.

³³ Article 3 of the Convention for Children Rights.

5. Basically, the treatment that is done to a juvenile from the system of juvenile justice is a reflection of the culture of society and acceptance of universal values of the democratic world, such as the respect for human rights and fundamental freedoms, respect for the child's best interest, encouraging and giving priority to the implementation of measures towards imprisonment for juveniles, promotion and respect of friendly approach as well as the manner of action towards juveniles giving priority to education and socialization.

Consulted Literature and legislation:

1. The Constitution of the Republic of Kosovo.
2. The Convention for Children Rights.
3. Code of Juvenile Justice.
4. Code of Criminal Procedure.
5. Law on Execution of Criminal Sanctions.
6. Criminal Code of the Republic of Kosovo.
7. Law on Courts.
8. Law on State Prosecutor.
9. Joint Referring Protocol for justice institutions for juveniles, JIK, Pristina, 2012.
10. Code of Juvenile Justice, training module, JIK, Pristina, 2012.
11. Juvenile Justice, juvenile crime and juvenile justice practice in Kosovo, UNICEF, 2008.
12. The opinion of the European Economic and Social Committee on the prevention of juvenile delinquency 2006 / C 110/13), Brussels, 15 March 2006.
13. General comments no.10 (2007) Committee on children rights 15 January -2 February 2007 Geneva.
14. The entirety of the Minimum Rules of the United Nations in connection with the Giving of Juvenile Justice (the Beijing Rules), Milano, 26th August to 6th September 1985.
15. Standard Minimum Rules of the United Nations for Measures towards prisoners (Tokyo Rules), 14 December 1990.
16. United Nations Principles "For the Prevention of Juvenile Delinquency" Rules Riyadh, December 14th, 1990.
17. The Council of Europe guidelines concerning child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on November 17th 2010.

Consulted Decisions of Courts and Prosecution:

1. Ap.no. 329/2011 dated 1.3.2012, the Decision of the Kosovo Supreme Court.
2. PAKR.no.275/15 dated 1.10.2015, the Decision of the Court of Appeal of Kosovo.
3. PAM no.53/14 dated 14.10.2014, the Decision of the Court of Appeal of Kosovo.

4. PM.no. 104/2014 dated 5.11.2015, Decision of the Basic Court in Gjilan-Juvenile Department.
5. PPM no. 29/15 dated 18.2.2015, Decision of the Basic Court in Gjilan-Juvenile Department.