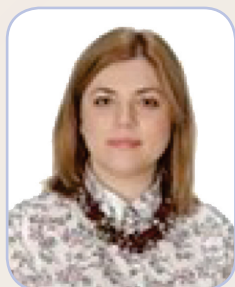


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CRIMINAL PROCEEDINGS INVOLVING CHILDREN
IN CONFLICT WITH THE LAW

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SUMMARY

At each stage of criminal procedure involving children (juveniles) in conflict with the law, it is important to be ensured the fundamental rights provided by international standards, as well by national criminal legislation. Starting with the first contact of the child with criminal justice system until the pronouncement of the decision by the Court, including the enforcement of the punishment, the juvenile must be supervised by qualified professionals from criminal justice system, who could intervene in each moment with a purpose of providing pertinent information to criminal investigative body and to the Court, in order to establish a proportionate and equitable punishment.

Key-words: *juvenile, criminal proceedings, proportionate punishment, conditional release, probation, national criminal legislation, hearings, deprivation of liberty, pre-sentencing report, imprisonment.*

Any contact by the police with a child should respect his or her rights and avoid any harm, in a such way that the child should feel the confidence of the specialists and of persons who are in contact with him/her during the criminal proceedings. The fundamental rights must be ensured in a prompt and adequate manner. As such, the Beijing Rules outline all the basic safeguards that should exist for children at all stages of proceedings:

- The presumption of innocence;
- The right to be notified of the charges;
- The right to remain silent;
- The right to counsel;
- The right to the presence of a parent or guardian;
- The right to confront and cross-examine witnesses;
- The right to appeal to a higher authority.

A child who is questioned by the police has the same rights as an adult not to answer questions put to them. The police must, as soon as possible after arrest, explain the nature of the allegations against them and inform the child of his or her rights to legal representation [4, p.37].

SUMAR

PROCEDURI PENALE CU IMPLICAREA COPIILOR (MINORILOR) ÎN CONFLICT CU LEGEA

În cadrul etapelor procesului penal cu implicarea minorilor în calitate de subiecți ai infracțiunilor, este foarte important să se asigure respectarea drepturilor fundamentale prevăzute de standardele internaționale și legislația penală națională. Începând cu primul contact al copilului cu sistemul de justiție penală și până la pronunțarea hotărârii de către instanța de judecată, cât și pe parcursul executării pedepsei penale, minorul trebuie să fie înconjurat de specialiști calificați din sistemul de justiție penală, care pot interveni în orice moment pentru a furniza organului de urmărire penală și instanței de judecată informațiile pertinente cazului, în vederea stabilirii unei pedepse proporționale și echitabile.

Cuvinte-cheie: *minor, proceduri penale, pedeapsă proporțională, liberarea condiționată, legislație penală națională, audiere, privațiune de libertate, raport prezentințial, pedeapsa cu închisoare.*

According to Moldova criminal procedure legislation, in the course of a criminal investigation and hearing of a case involving juveniles, the following shall be established:

- 1) the age of the juvenile (date, month and year of birth);
- 2) the conditions in which the juvenile lives and is educated, his/her level of intellectual, volitional and psychological development, peculiarities of his/her character and temper, his/her interests and needs;
- 3) the influence of adults or other juveniles on the juvenile;
- 4) the reasons and conditions that contributed to the commission of crime.

It shall also be established if he/she was fully aware of the commission of the act. In order to establish these circumstances, the parents, teachers, educators of the juvenile and other persons who can provide the necessary information shall be heard, and a social enquiry, the necessary documents shall be requested and other criminal investigative and judicial acts shall be performed. For the purpose of establishing these circumstances, the criminal investigative body should order the elaboration of pre-sentencing report with a purpose of evaluating psychological profile of the child [3, art. 475].



The Beijing Rules state that the speedy conduct of formal procedures in children's cases is a paramount concern. As time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically.

Criminal investigations and hearings of cases shall be performed within reasonable timeframes. Criminal investigations and hearings of criminal cases involving juveniles as suspects/accused/defendants under preventive arrest, shall be performed in an urgent and preferential manner. A reasonable timeframe should not be interpreted in an extensive manner for children in conflict with the law, but should be respected the national regulations that stipulate the maximum duration of 4 months for children (juveniles) under preventive arrest [3, art. 479].

Having determined the seriousness of the offence and the degree of responsibility of the child, the court must determine which of the possible sanctions or combination of sanctions would be a proportionate sentence. It is quite possible that more than one sentence would meet the requirement of proportionality in a particular case. For example, a short community sentence with minimal conditions would be proportionate to some less serious offences. A longer community sanction with restrictive conditions would be proportionate to more serious offences. A child's sentence must never exceed that of an adult sentence, and in a majority of States it is legislated that a child should not receive more than half of the sentence an adult would receive in the same circumstances [4, p.78].

Thus, the national criminal legislation provides the term of imprisonment for a person who at the date of the commission of the crime was aged under 18, which shall be determined from the maximum punishment established by criminal law for the crime committed, being reduced by half. National criminal code defines imprisonment as the deprivation of the liberty of a person guilty of the commission of a crime by the forced isolation of the person from his/her normal living environment and placed in a penitentiary institution for a certain term based on a court decision [2, art.70].

International standards stipulate that in all cases, the final disposition of a case must be proportionate both to the circumstances and the gravity of the offence and to the circumstances and needs of the juvenile, as well as to the needs of society. The principle of proportionality within national criminal justice system is the most relevant in the process of applying the criminal punishment. In the cases involving children, the court must be very cautious and must assess the possible proportionate sentences, which must:

- Be the least restrictive sentence that can achieve the purpose of rehabilitation;
- Be the sentence that is most likely to promote the rehabilitation and reintegration of the child;
- Promote a sense of responsibility in the child and an acknowledgement of the harm done to the victim and the community [4, p.79].

Analysing all legal aspects and all circumstances which could influence the establishment of the proportionate

sentence demonstrate the fact that the judge according to his/her intimate conviction can assess what are the best interests of the child and must adopt the most suitable decision for every case in particular.

In determining the appropriate sentence, the competent authority must take into account:

- The extent to which the child participated in committing the offence;
- The harm done to victims and whether the child intended to cause it or could reasonably have foreseen that it might occur;
- Any previous findings of guilt relating to the child;
- Any reparation made by the child to the victim or the community;
- The amount of time that the child may have spent in pre-trial detention as a result of the offence;
- Any other aggravating and mitigating circumstances related to the child or the offence such as the nature and circumstances of the offence;
- The personal history, social circumstances and personal characteristics of the child based on pre-sentencing report [4, p.79].

In addition, when adjudicating and disposing of cases, the Beijing Rules state:

- Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
- Deprivation of personal liberty shall not be imposed unless the child is convicted of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
- Capital punishment shall never be imposed for any crime committed by children;
- Children shall not be subject to corporal punishment [4, p.79].

The competent authority should ensure that within the sentence, the fundamental rights of children are protected, especially the fundamental rights of personal development and education [4, p.79].

Regarding the conditional release, children should be released from detention as early as possible to serve the remainder of their sentence in the community. Children released on such conditions from an institution must be assisted and supervised by an appropriate authority. The Havana Rules state 'circumstances permitting, conditional release shall be preferred to serving a full sentence' [6]. In the case of offenders conditionally released from an institution, assistance and supervision by a probation or other officer should be provided and community support should be encouraged. It is also possible to gradually reintegrate children into the community using short term releases from custody. Such short visits help the child to feel more connected to the outside world and get a gradual taste of what it is like to be in the community [4, p.125].

In the Republic of Moldova, the conditional release is linked to the probation activity, which is regulated in com-



pliance with the Law on probation of 2008. Thus, according to the law, the types of probation are:

Probation - psychosocial assessment, control of persons in conflict with the criminal law and their re-socialization, adaptation of persons released from detention, in order to prevent the commission of new crimes;

Pre-sentencing - psychosocial assessment of personality of the suspect, accused, defendant;

Community sentencing probation - fully oriented activities to re-socialization of persons exempted from criminal punishment of imprisonment, to control their behavior and respect the obligations;

Sentencing probation - socio-educational activities conducted in prisons and training activities for the release of persons from detention;

Post-sentencing probation - assistance to persons released from detention in their reintegration into society [1, art.2].

Main directions of probation activity are:

- reflection of psychosocial profile of the person in conflict with the criminal law;
- formulation of proposals for the court, on the main activities to be undertaken by the person in conflict with the criminal law in order to facilitate the settlement of psychosocial problems;
- providing information on the person in conflict with the criminal law, to her family and social environment of origin;
- ensuring the cooperation of the person in conflict with the criminal law and his/her compliance with the conditions which have been established by the court;
- advising the subject of probation in solving personal difficulties that led to the commission of the offence;
- conducting individual and group programs, concentrating on community resources to solve psychosocial problems of probation subjects;
- control of person in conflict with the criminal law;
- coordination of social programs and the treatment of minors [1, art.5].

For ensuring a good functionality of juvenile justice system, it is important to exist a good collaboration and involvement of relevant professionals, who could assist the child offender, starting the initial point until the rehabilitation.

Beside the role of probation counsellor during probation activity, the social worker has an important role not only within child protection system, but also in justice system. In this regard, the 'key' actions to be carried out by social workers in the justice system could be highlighted:

- Assisting the child from the moment of arrest.

In some countries, a social worker has to be present with the child during police questioning if the parents cannot be, providing emotional and possibly paralegal and other support to the child. A social worker may also be able to propose pre-trial solutions other than remand in custody that will be acceptable to all parties, and can in any case maintain contact with the child throughout the pre-trial period in order to provide assistance and advice as required.

- Supervising young offenders in the community.

Social workers (often specialized, such as probation officers) can clearly be made responsible, by the court, for overseeing supervision orders. This involves not only working with the child concerned but also with his/her family and, where appropriate, with the school and community associations [5, p.7].

- Support during custodial sentences.

The availability of a social worker for children deprived of their liberty can be an important factor for their well-being, and thus for the prognosis on completion of sentence. In such circumstances, a social worker can also suggest and mobilize other services - education, NGOs, etc. - to make the detention measure more constructive. In most cases, if the social worker concerned is also in contact with the family, this will be an added benefit (although it should never replace, of course, family visits or other communications between family and child) [5, p.7].

- Post-release support (aftercare).

Whether or not there are formal conditions attached to a child's release from a custodial sentence, which a social worker may be tasked with overseeing, the availability of support and advice from a social worker at this stage can be invaluable in enabling the child to avoid reoffending.

In many cases, the child's overall environment (family, friendships, community, material conditions, opportunities) will have changed little during his/her time in custody, and to the extent that these were causal factors in the original offending behaviour, the child may well need ad hoc or ongoing support to resist recidivism [5, p.7].

In conclusion, The Convention on the Rights of the Child has a progressive approach to the 'best interests' of the child. In any assessment of what is best for the child, it is essential that the child herself or himself be allowed to express an opinion and that opinion is taken seriously. When interests clash, it is of course also necessary to consider other interests than those of the individual child or children as a group, as may be relevant. Such assessments and the balancing between the various interests will be facilitated by impact analyses and the consequences of proposed actions should be analysed and evaluated. The intention of this process is to encourage decision makers to consider the child dimension seriously before decisions are taken.

Bibliographic references:

1. Law on probation, No.8 of 14.02.2008. Republished in *Monitorul Oficial*, 2015, No. 361-369.
2. Moldova Criminal Code, No. 985 of 18.04.2002. In: *Monitorul Oficial*, 2002, No.128-129, into force 12.06.2003.
3. Moldova Criminal Procedure Code, No. 122 of 14.03.2003. In: *Monitorul Oficial*, 2003, No. 104-110, into force 12.06.2003.
4. Protecting children's rights in criminal justice systems (a training manual and reference point for professionals and policy makers). Penal Reform International, 2013. 190 p.
5. The role of social work in juvenile justice, UNICEF, 2013. 9 p.
6. United Nations Rules for the protection of juveniles deprived of their liberty (Havana Rules), Resolution 45/113 of 14 December 1990.

