

Legal Framework of Detention in Custody or Imprisonment of Minors or Juveniles Under the Legislation of Republic of Bulgaria (Some Possibilities for Applying Foster Care as an Alternative Measure)*

Ivan Georgiev**

Abstract:

The implementation of penalties involving deprivation of liberty applied to underage persons, should aim first of all their re-education and preparation for life in freedom. Some of the restraining measures could implement a foster care.

The review of the relevant national legislation shows that there is place for foster care, but unfortunately the Bulgarian legislation in the sphere of juvenile justice is too old and disorganised.

Rezumat:

Punerea în aplicare a pedepselor privative de libertate a minorilor trebuie să urmărească în primul rând lor de reeducarea și pregătirea pentru viața în libertate. Unele dintre măsurile de restricție ar putea pune în aplicare o asistență maternală. Revizuirea legislației naționale relevante indică faptul că există loc pentru asistență maternală, dar, din păcate, legislația bulgară în domeniul justiției pentru minori este prea veche și dezorganizată.

Keywords: minors and juveniles, penalty, detention, foster care, alternative measure, Law of child protection

* Scientific report to the project "Alternatives to Custody for Youth Offenders – Developing Intensive and Remand Fostering Programmes", provided by British Association for Adoption and Fostering, in cooperation with Family, Child, Youth Association (Hungary), Budapest Capital Child Protection Agency (Hungary), University of Salento

– Department of Legal Studies (Italy), Social Activities and Practice Institute (Bulgaria).

** Judge at Sofia Regional Court; PhD student in Civil and Family Law at the Institute of State and Law of the Bulgarian Academy of Sciences. Professional contact e-mail: georgiev22@gmail.com.

1. Introduction

Foster cares are provided under the conditions of *Law of child protection*⁷²⁴ (LCP). There is no any possibility under the Bulgarian legislation to remove the detention or imprisonment with foster care or some similar measures.

The biggest question is if the foster care could apply in some situations as an alternative of the restrictive measures. In the present report I will try to find the answer, giving a comprehensive panorama of the current criminal legislation.

2. Legal framework

There are few laws, providing special provisions for the criminal responsibility of minors and juveniles. *Penal Code*⁷²⁵ (PC) gives the definition for “criminal responsible person” and states some special rules for juveniles. *Criminal Procedure Code*⁷²⁶ (CPC) contains a chapter for the rules for hearing cases of crimes committed by juveniles. There are some provisions about the different conditions for juvenile criminals in places for deprivation of liberty under the *Law on Execution of Penalties and Detention*⁷²⁷ (LEPD). The most important act for the responsibility of children is the *Law on Measures of Delinquency of Minors and Juveniles*⁷²⁸ (LMDMJ).

3. The age as a condition for the criminal liability

Criminally responsible is the person of age – who has accomplished 18 years of age, who in a state of sanity commits a crime. A juvenile who has accomplished 14 years of age but who has not accomplished 18 years of age is criminally responsible if he could have realised the

quality and the importance of the act and handle his conduct. The necessity of sanity requires in each case the juvenile to be a subject of expert examination in the sphere of psychiatry. The juveniles whose acts cannot be imputed shall be accommodated by a court decision in a corrective boarding school or in other suitable establishment if so required by the circumstances of the case – Art. 31, para. 3 PC.

A juvenile who has not accomplished 14 years of age is not criminally responsible. Applied, with respect of the juveniles who have committed social dangerous acts, can be respective corrective measures – Art. 32, para. 2 PC.

There is different approach for the responsibility of minors and juveniles, committed delinquencies. Under Art. 12 LMDMJ some special correctional measures can be taken in relation to minors who are aged between 8 and 14 if they have committed anti-social acts and minors who are from 14 to 18 years of age have committed anti-social acts, as well as when underage have committed a crime.

4. Punishments

The punishment for the juveniles shall be imposed with the priority objective of their reformation and preparation for socially useful labour – Art. 60 PC.

Regarding a juvenile who commits a crime due to aberration or frivolity, which does not represent a great social danger, the prosecutor may decide not to constitute or discontinue the constituted pre-trial procedure, and the court may decide on no committal to trial or no conviction if corrective measures can be successfully applied according to the LMDMJ. In these cases the court itself

⁷²⁴ Promulgated, State Gazette (SG), No. 48/13.06.2000.

⁷²⁵ Promulgated, SG, No. 26/02.04.1968.

⁷²⁶ Promulgated, SG, No. 83/18.10.2005.

⁷²⁷ Promulgated, SG, No. 25/03.04.2009.

⁷²⁸ Promulgated, SG, No. 13/14.02.1958.

can impose a corrective measure informing about that the local commission for juvenile delinquency or send to it the file regarding the imposing of such a measure. If the prosecutor decides not to constitute pre-trial procedure or abandon the constituted one, he shall send the file to the commission for imposing corrective measure – Art. 61, para. 3 PC.

Only the following punishments can be imposed on the juveniles:

1. imprisonment;
2. probation;
3. public reprobation;
4. deprivation of right to practice a definite profession or activity.

The punishments stipulated for the juveniles under the PC shall be replaced as follows:

1. the life imprisonment without option and the life imprisonment – by imprisonment from three to ten years;
2. the imprisonment of more than ten years – by imprisonment of up to five years;
3. the imprisonment of more than five years – by imprisonment of up to three years;
4. the imprisonment of up to five years including – by imprisonment of up to two years, but no longer than the stipulated by the law;
5. the fine – by a public reprobation;
6. the probation for those under 16 years of age – by a public reprobation.

Punishments stipulated by the PC for the juveniles who have accomplished sixteen years of age shall be replaced as follows:

1. the life imprisonment without option and the life imprisonment and imprisonment of more than fifteen years – by imprisonment from five to twelve years;
2. the imprisonment of more than ten years – by imprisonment of two to eight years.

If the determined punishment is imprisonment of less than one year and

Unfortunately, the Bulgarian legislation in the sphere of juvenile justice is too old and disorganised. Some of the *de lege ferenda* suggestions are only palliative cure.

its fulfilment has not been postponed (under condition) the juvenile shall be released from its incurring and the court shall accommodate him in a corrective boarding school or shall impose another corrective measure stipulated by the LMDMJ. This rule cannot apply: a) when the juvenile has committed a crime during the time of serving imprisonment sentence and b) when he is convicted after coming of age.

Upon a proposal of the prosecutor or of the respective local commission for fighting juvenile delinquency the court can, after rendering the verdict, replace the accommodation in a corrective school by another corrective measure.

The juveniles, until coming of age, shall serve the time of imprisonment in a corrective home. After coming of age they shall be moved to a prison or to a prison hostel. For completion of their education or qualification, upon proposal of the pedagogical council, by a permit of the prosecutor, they can remain in the corrective house until the accomplishment of twenty years.

Regarding a person who has been awarded a probationary sentence for a crime he has committed as a juvenile the probation period shall be from one to three years – Art. 69, para. 1 PC.

5. Restraining measures

A restraining measure may be taken to the defendant in case of general nature,

where from the evidence on the case a reasoned assumption that he/she has committed the crime – Art. 56, para. 1 CPC. While determining the restraining measures, the degree of social danger of the crime, the evidence against the defendant, the health status, family status, the profession, the age and other data about the defendant shall be taken in consideration. The restraining measures shall be taken with the purpose to stop the defendant to abscond, to commit a crime or to foil the execution of the entered in force verdict.

The restraining measures are:

1. subscription;
2. guarantee;
3. home arrest.
4. detention in custody.

But there is a different rule for juveniles. As regards minor age persons, only the following restraining measures may be taken:

1. surveillance by parents or trustee;
2. surveillance by the administration of the education establishment where the minor age person is accommodated;
3. surveillance by the inspector with the children's educational unit or by a member of the local board for combating antisocial manifestations of underage or minor age persons;
4. detention in custody.

The restraining measure detention in custody could be taken in exceptional cases – Art. 386, para. 2 CPC.

In cases of detention, the minor age persons shall be accommodated in suitable premises separate from the adults, where their parents or trustees and the principal of the educational establishment, when the detained person is a student, shall immediately be notified.

6. Correctional measures

The following correctional measures can be taken in relation to minors having committed anti-social acts and underage,

having committed crime and having been released from criminal liability (Art. 13, para. 1 LMDMJ):

1. warning;
2. putting under the obligation to offer an apology to the victim;
3. obligation to participate in consultations, training and programmes for overcoming the deviations of behaviour;
4. placement under correctional supervision of the parents or the person substituting for them, under the obligation to take special care;
5. placement under the correctional control of a public tutor;
6. prohibition of the underage to visit definite places and establishments;
7. prohibition of the underage to visit and establish contacts with definite persons;
8. prohibition of the underage to leave his permanent address;
9. obligation of the underage to remove, by his work the caused damage if this is within his abilities;
10. obligation of the underage to perform a definite job in favour of the public;
11. placement in a social pedagogical boarding school;
12. warning for placement in a correctional boarding-school with a probation period of up to 6 months;
13. placement in a correctional boarding-school.

There is a possibility for releasing ahead of term for the measures of placement in boarding school.

7. Places for deprivation of liberty

The implementation of the penalty deprivation of liberty in relation to underage persons, shall aim first of all their re-education and preparation for life in freedom. At their placement in the reformatory home, the underage persons, deprived of liberty shall be placed in a

reception department, where they stay 14 days – to 1 month under supervision of a supervisor, doctor and psychologist – Art. 187, para. 1 LEPD. Persons, coming for the first time in a reformatory home shall be placed separately from the others. Within the term of 3 days after the underage persons are placed, the administration of the reformatory home shall notify their parents or the persons, exercising parental rights, the prosecution, the military command, the municipal council, the monitoring commission and the children pedagogical room in the places, where they live and the relevant local commission for fight against the anti-social acts of minors and underage persons.

The underage persons, who are taught in the schools and courses during the period of the school classes, may be included in work up to 3 hours daily aside of those, envisaged in the curricula. The training shall be done in day schools and courses. For the time of work and presence at school classes, the underage persons, deprived of liberty shall be recognized as working days for diminishing the term of the penalty – Art. 189 LEPD.

8. Is there place for foster care?

Foster placement is one of the main aims of the *United Nation Convention of the Rights of the Child*⁷²⁹ (UNCRC). States Parties shall in accordance with their national laws ensure alternative care for such a child. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic,

religious, cultural and linguistic background – Art. 20 UNCRC.

Under the provisions of LCP, it is clearly indicated that the family environment is the best option for living of children.

When the court imposes a punishment of imprisonment up to three years, it can postpone the imposed punishment for a period from three to five years if the person has not been convicted for imprisonment for a crime of general nature, and if the court finds that for the purpose of the punishment and, most of all for the reformation of the convicted, it is not necessary to serve the sentence – Art. 66, para. 1 PC. During the probation period the convicted shall be obliged to study or work, unless he/she is obliged to undergo treatment.

In case of postponement of the fulfilment of the punishment the court can assign to the respective public organisation or a work team, upon their consent, corrective care for the convicted during the probation period – Art. 67, para. 1 PC. For postponement of the punishment for a juvenile the court shall inform the respective local commission which shall organise the corrective care – Art. 67, para. 4 PC.

That is one of the possibilities for implementing foster care as a part of the execution of the penalty for juvenile offenders – they could be obliged to live with foster family during the postponed period. Of course, this is an option only for children without biological families.

The other good place for implementation of foster care is the case of releasing ahead the term of the punishment. The court can rule a probationary release ahead of term for the remaining part of the punishment of imprisonment regarding a convicted with

⁷²⁹ Adopted and opened for signature, ratification and accession by General Assembly

resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

exemplary conduct and honest attitude to the work, and who has proven his reformation and has served actually no less than half of the imposed punishment – Art. 70, para. 1 PC. The court can release ahead of term the convicted to imprisonment juvenile if he has corrected himself, after having served actually no less than one third of the imposed punishment – Art. 71, para. 1 PC. Regarding the persons released ahead of term the court shall assign the organising of the supervision and the corrective care for them during the probationary term to the respective commission, and for the juveniles - to the local commission for fighting juvenile crime – Art. 73, para. 1 PC. The total control and the management of the corrective care and of the conduct of the released ahead of term shall be carried out by the regional court at the place of their residence – Art. 73, para. 3 PC. As

to the previous example, the foster care in this case could be an intensive instrument for reintegration of the young offender.

Some of the restraining measures could implement a foster care. For example, the surveillance could be successfully completed in the foster family. It is a better solution for both – the offender and the inspector.

9. Conclusion

The brief review of the relevant national legislation shows that there is place for foster care. Unfortunately, the Bulgarian legislation in the sphere of juvenile justice is too old and disorganised. Some of the *de lege ferenda* suggestions are only palliative cure. Probably the only way for implementation of alternative measures of detention is a quite new reform of the system of correctional measures and places of detention.