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PUNISHMENT OF JUVENILE OFFENDERS IN CRIMINAL JUSTICE SYSTEM OF BOSNIA AND HERZEGOVINA

Substantial reform of Criminal Justice system of Bosnia and Herzegovina took place in November 1998. The main innovation was considered to be an introduction of a set of educational recommendations as an alternative ways of reaction to juveniles' crime. If we consider that juvenile imprisonment is mostly retributive in its nature, educational measures rehabilitative, than there is no doubt that educational recommendations should be understood as measures that are restorative. Introduction of these recommendations, although presented and accepted as a glorious innovation that is in compliance with various international legal instruments related to rights of a child and juvenile offender, unfortunately did not find its way to practice of our courts.

Due to the fact that there has been a lot of published literature on juvenile imprisonment and educational measures for juvenile offenders, we will focus our presentation on the purpose, preconditions for imposition and structure of educational recommendations as a new way of reaction to crime in Bosnia and Herzegovina. Afterwards, we will analyze the imposition of educational recommendations on juvenile offenders during 1999-2002 period, and try to point out some potential problems related to low rate of imposition of these recommendations and propose some solutions to overcome the problem.

INTRODUCTION

Bosnia and Herzegovina (BiH) has been the country in a process of transition since early 1990-ties. Transition in BiH, with all its various meanings, brought a huge number of positive changes in the country but, unfortunately, some negative¹ too. One of the most important positive changes that occurred in our country since 1990 was almost complete reform of laws that were regulating all aspects of our environment. The reform that we, due to our professional interest, were particularly interested in was Criminal Law reform in BiH. The reform itself was not just a result of dissolution of ex-Yugoslavia and introduction of a new socio-economic system, but also a result of a desperate need to achieve international standards currently existing in the field of criminal law, contained in various international legal instruments, primarily through a process of harmonization.

The reform of Criminal law legislation in BiH has not happened at once but it was conducted on a step by step basis. Therefore, it could be easily divided into five clearly visible stages, or phases. In *Phase I* that started with the beginning of the war when, without a possibility to create new laws, BiH ratified Criminal laws that were in place on its territory while it was a member of Federal Socialist Republic of Yugoslavia. As soon as it was possible, more precisely in 1993, BiH had made some changes to existing criminal laws, that were not such a substantial but rather changes in terminology. This could be seen as a *Phase II*. Next major step forward, or should we say *Phase III*, was ratification of completely new criminal legislation in one of the BiH entities, namely Federation of Bosnia and Herzegovina (FBiH).² This was the phase in which Criminal Justice system was shaped in order to get harmonized with international standards contained in various international legal instruments. Therefore, just to name

a few changes, some new offences were introduced, death penalty was excluded, new ways of reaction to juvenile crime were defined, etc. In the next phase, that took place in 2003, we witnessed one of the most important developments of Criminal law in BiH in its recent history. It was the year in which Criminal Law of BiH was created, as the law that is going to be implemented on a whole territory of BiH. This event we define as the *Phase IV*. *Phase V*, logically, followed and its main characteristic was the harmonization of Criminal Legislation of FBiH, Republika Srpska and Brcko District of BiH, with the legislation existing on the state level.

In this paper, we are not going to explore how laws were changed in each particular phase, nor we are going to talk about all sanctions for juvenile offenders. Rather, we decided to stay focused on a particular innovation defined within *Phase III* that is related to new, innovative, inspiring way of reacting to juvenile crime. Of course we are talking about educational recommendations as a newly created sanctions for juvenile offenders. The main aim of introduction of these sanctions was to enable judges and prosecutors to divert juvenile offenders in alternative, more out-of-court, procedures of solving a problem of crime and therefore avoid some negative consequences that institutional criminal proceeding can have on a juvenile offender.³

SANCTIONS FOR JUVENILE OFFENDERS IN BOSNIA AND HERZEGOVINA

Before we get into discussion on practical implementation of the educational recommendations on juvenile offenders, let us briefly⁴ introduce the variety of sanctions and measures defined by Criminal Code of Bosnia and Herzegovina (CCBH)⁵ that could be imposed on juvenile offender once s/he commits a crime.

Regarding sanctions that can be imposed on juveniles, the CCBH, as most of criminal laws in the world, makes a distinction between different categories of offenders. When it comes to juvenile offenders, CCBH makes a distinction between *younger minors* (14-16), *older minors* (16-18) and *young adult offenders* (18-23). Consequently, criminal proceedings in BiH can not be initiated against a person who, at the time of committing an offence, was not older than 14.

Having in mind the nature of juvenile delinquency and personality of juvenile offenders, it is understandable that CCBH provides different types of responses towards committed crimes. There are four different types of sanctions prescribed for juvenile offenders and those are:

- a) Educational recommendations;
- b) Educational measures;
- c) Juvenile imprisonment;
- d) Security measures.

Educational recommendations and educational measures can be imposed on all juvenile offenders, whereas juvenile imprisonment can be imposed only, and exceptionally, on older minors. Security measures can be imposed only in addition to juvenile imprisonment and to some educational measures. Due to the fact that a lot has already been written on juvenile imprisonment, educational measures and security measures, we will, in our further discussions, focus only on educational recommendations.

EDUCATIONAL RECOMMENDATIONS⁶

Educational recommendations, as we have already said, are recent novelty in criminal justice system of BH. Those were firstly introduced in FBH back in November 1998, as a result of a necessity to harmonize criminal law provisions in BH both with the European Convention for Human Rights and the UN Convention on the Rights of Child.

Apart from general purpose of all sanctions defined by the CCBH⁷, the specific purpose of educational recommendations is to avoid initiation of criminal procedures against juvenile offenders and to influence the juvenile offender not to commit a criminal offence again. These recommendations can be imposed on a juvenile offender only by a competent prosecutor or a judge for juveniles. As for any other sanction for any offender, there are certain number of preconditions that need to be fulfilled in order a judge or a prosecutor can be eligible to impose these sanctions. So, educational recommendations can be imposed on a juvenile offender only if:

- The offence s/he committed is punishable by imprisonment not exceeding 3 years or by fine;
- The offender admits s/he has committed the crime and expresses willingness to make amends with an injured party.

If these conditions are fulfilled, and competent prosecutor, bearing in mind nature of the crime, circumstances under which it was committed, previous life of the offender and his/her personal characteristics, feels that it would not be expedient to conduct criminal procedure, she has to consider possibility and justification of imposition of educational recommendations on that particular juvenile offender. If, regardless to the fact that all preconditions are met, a prosecutor does not think that any of educational recommendations can achieve the purpose of the punishment, s/he will initiate a criminal proceedings by bringing the indictment to a juvenile judge. Before accepting the indictment, a juvenile judge has to reconsider the possibility of imposition of educational recommendations on that particular offender for that particular offence.

All educational recommendations defined by CCBH can be divided into two groups regarding who (competent prosecutor or judge for juveniles) can pronounce those. Educational measures that can be pronounced by competent prosecutor are:

- Personal apology to the injured party;
- Compensation of the damage to the injured party;
- Regular school attendance;
- Attending instructive, educational, psychological and other forms of counseling.

Educational measures that can be pronounced by a judge for juveniles are:

- Working for a humanitarian organization or local community;
- Accepting appropriate job;
- Being placed in another family, home or institution;
- Treatment in an adequate health institution.

If a prosecutor or a judge thinks that imposition of educational recommendation will lead to achievement of the purpose of punishment, concrete one will be chosen in co-operation with juvenile offender's parents or guardians and institutions of social care. When deciding which educational recommendation to pronounce, a competent prosecutor or a judge for juveniles has to take into consideration all interests of a juvenile offender and an injured party. In this decision making process, special attention must be given to juvenile's regular school attendance or his/her work.

When it comes to the duration, it must be said that educational recommendations can be pronounced for the period not exceeding 1 year. During the concrete period, upon becoming effective, pronounced educational recommendation can be replaced with another recommendation or canceled.

PRACTICAL IMPLEMENTATION OF EDUCATIONAL RECOMMENDATIONS AND SOME IDENTIFIED PROBLEMS

As mere existence of contemporary sanctions for juvenile offenders does not mean that our criminal policy is contemporary too, there is the need to see how often juvenile judges and prosecutors decide to use this opportunity and impose an educational recommendation on a juvenile offender in practice.

But before we present some results of some researches conducted in past few years on this issue, let us give a few remarks on juvenile delinquency in Bosnia and Herzegovina.

Although it is hard to argue that juvenile crime rates are increasing in past few years⁸, some authors argue that problems of juvenile delinquency in Bosnia and Herzegovina are extremely expressed⁹, and we share this opinion too. The same authors state that there are some clearly visible trends related to juvenile offending in BiH. Those trends primarily include increased involvement of juveniles younger than 14 in committing criminal offences, association of juveniles in more or less organized groups not only with peer juveniles but with adults too, number of criminal acts where juveniles expressed cruelty increases (crime against life and limb, violent behaviour), recidivism is more than evident, etc. There are a lot of causes that could have influence on above mentioned trends, including all-encompassing socio-economic factors, individual characteristics of a juvenile offenders, quality and intensity of implemented criminal policy, just to name a few. As we do not intend to present the implementation of all sanctions for juveniles, as a part of our criminal policy, but only of an educational recommendations as newly introduced alternative, diversionary measures, we will not be talking about other, not less important sanctions for juvenile offenders such as educational measures or juvenile imprisonment. It is because the educational recommendations represent clear intent of our lawmaker to reduce stigmatisation of juvenile offenders, and to increase their possibility for faster and more substantial social integration, to empower their protection, improve their care, provide more substantial and intense assistance. Their involvement in criminal legislation of BiH, as we have already said, is a result of implementation of rights of child defined by Convention on the rights of the child and other international legal instruments, that seek for introduction of a new, alternative model of reaction on juvenile crime.¹⁰ In other words, every juvenile offender, under conditions prescribed by criminal law of BiH has, under conditions prescribed by law, a right to be sanctioned by an educational recommendation. Therefore, if criminal justice system, personified in an institution of a judge or a prosecutor, fails to impose an educational recommendation on a juvenile offender, although all conditions are met, than, obviously, the rights of a juvenile offenders, defined not only in national legislation but in international treaties¹¹ also, are infringed, and at the same time, principle of legality and the rule of law in BiH are infringed.

When it comes to practical implementation of educational recommendations in FBiH,¹² some previous research¹³ showed that judges and prosecutors have rarely been deciding to impose educational recommendations on juvenile offenders. More precisely, only 10% of judges and 33,33% of prosecutors have been imposing educational recommendations on a juvenile offenders in their practice.

This extremely low imposition rate is definitely warning sign that needs to be properly addressed. When asked to give reasons for not imposing alternative measures more often, 41,2% of surveyed prosecutors said they had never had a suitable case that they could apply these sanctions on. The same answer was given by 63,33% of all surveyed judges. Another, very important reason given by 26,5% of prosecutors and by 23,33% of judges was the lack of an adequate procedure for imposition of these sanctions.

Regarding the problem of not having a suitable case it is our opinion that the biggest problem is to be found in the provision defining that educational recommendations are limited to offences punishable by fine or imprisonment not exceeding three years. If we know that juvenile offenders are mostly committing property offences and, at the same time, being violent, therefore offences that are punishable by up to ten years of imprisonment, it is obvious that three years requirement is serious limitation and that it is very probable that a prosecutor or a judge will not be able to impose this sanction.

When it comes to lack of prescribed procedure for imposition of educational recommendations, it must be said that there are several problems. First of all, it is not known what are the institutions that a juvenile offender could be sent for any form of counseling. Furthermore, it is not known what humanitarian or local community an offender could work for or in. Second, it is not known how the supervision of the implementation could be organized as it is not defined who would be in charged of conducting supervision, and how "the supervisor" should proceed in case the implementation failed. It is, also, not known what is to be done if the imposed educational recommendation is not effective. Third, the problem might be the fact that there is no provision saying that more than one educational recommendation could be imposed on the same juvenile offender for the same offence. Fourth, it is our opinion that educational recommendations are short-listed. Those eight that are already numbered should serve as the guideline for more creative decision, by a judge or a prosecutor, that could adequately meet the needs of a victim, an offender, a community and serve the purpose of the punishment, therefore meeting the needs of the state.

CONCLUSION

At the end we can conclude that although our criminal legislation is changed and harmonized with various international legal standards related to alternative reactions to a juvenile crime, in its practical implementation it is still not fully implemented. There are several reasons for extremely low imposition rate of alternative measures for juvenile offenders in BiH, but the most important ones are to be found in the lack of prescribed procedure for their imposition and very strict preconditions (3 years limitation). Therefore, we are sure that very soon, and after some serious research on practical implementation of educational recommendations in BiH, the CCBH will have to be changed in a way that scope of offences eligible for imposition of educational recommendations is widened, the procedure for imposition and supervision of implementation is clearly defined and the cooperation with various organizations and counseling institutions is established. Then, it is reasonable to expect that imposition rate of these sanctions will significantly increase. Otherwise, our modern laws will remain dead letters.

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ENDNOTES

- 1 E.g. poverty, high unemployment rates, increased crime rates, etc.
- 2 Events that were taking place in the region of ex-Yugoslavia during early nineties of the 20th century are widely known and they are usually defined by following words – crisis, disintegration and wars. From this point of time it would not be mistake to say that culmination of all these events, especially bearing in mind its duration and severe consequences, took place in Bosnia and Herzegovina (BiH). When it comes to war in B&H, it should be mentioned that it ended by signing of Dayton Peace Agreement (DPA). Although the DPA brought war to an end, it also defined very complex, inefficient and complicated administrative and territorial state structure. From 1995 on BiH is consisted of two entities, namely Federation of Bosnia and Herzegovina (FBH) and Republika Srpska (RS) that are afforded very high level of autonomy in exercising their constitutionally defined powers. FBH, as a bigger entity, is even more decentralized by being divided into ten cantons as separate units having their own assemblies and therefore constitutions too. Another separate administrative and territorial unit is represented by Brcko District of BH (BDBH) with separate legal system including separate criminal justice system.
- 3 Alternative sanctions are widely used all around the World and in some countries (e.g. New Zeland) due to their effectiveness are being used not only for juvenile offenders but on adults too. For more see McCCOLD, P., & WACHTEL, T. (2002). Restorative justice theory validation. In E. Weitekamp and H-J. Kerner (Eds.), *Restorative Justice: Theoretical Foundations* (pp. 110-142). Devon, UK: Willan Publishing; DAY, T. and MALJEVIĆ, A., *Teaching and Implementing Restorative Justice and its relevance for Criminal Justice System in Bosnia and Herzegovina in the 21st Century*, Pravna misao, 2001., No.5-6, p. 5-13
- 4 More about formal reactions to juvenile crime in Bosnia and Herzegovina can be found in Maljevic, Almir, National report on juvenile delinquency and juvenile criminal justice in Bosnia and Herzegovina, at The European Society of Criminology web site http://www.esc-eurocrim.org/files/juvenile_justice_system_of_bosnia_and_herzegovina.doc
- 5 Criminal Code of Bosnia and Herzegovina, "Službeni glasnik BiH" br. 3/03
- 6 Legal definitions of educational recommendations, their purpose and conditions for imposition are defined in art.76. – 79. CCBH
- 7 Article 6 of CCBH: The purpose of criminal sanctions is:
 - a) A preventive influence on others to honour the legal system and not to perpetrate a criminal offence;
 - b) Preventing perpetrators from perpetrating criminal offences and encouraging their rehabilitation.
- 8 Official statistics on both the state and the entity level do not provide us with a data that would allow us to take firm attitude on this issue
- 9 Čolić-Sijerčić, Hajrija, *Young People in Conflict with the Law in the Light of Topical Problems Related to Juvenile Criminal Justice in BiH*, COMESGRAFIKA, Banja Luka, 2002., p. 42, also, Kosović, Jasmina, *ibid.*, p. 11
- 10 Simović, N., Miodrag, *Krivični postupci u Bosni i Hercegovini*, Privredna štampa d.d., Sarajevo, 2003., p. 111
- 11 Other international legal instruments related to juvenile offenders include, amongst others, Standard Minimum Rules For administration of Juvenile Justice (Beijing Rules) of 1985, United Nations Guidelines for the prevention of Juvenile Delinquency (Riyadh guidelines) of 1990, United Nations Rules for the Protection of Juvenile Detainees of 1990, etc.
- 12 Educational recommendations exist in Criminal Law of FBiH since November 1998!
- 13 Research was conducted in 2000-june 2001 by two expert teams in both BiH entities. It was financed by Open Society Found BiH and UNICEF and resulted with publication "Young People in Conflict with the Law in the Light of Topical Problems Related to Juvenile Criminal Justice in BiH"