

## The Imprisonment Punishment as the Last Means Against the Minor Convicts in Compliance with the Exemption from Judicial Procedures



### Law

**Keywords:** imprisonment sentence, minor offense, crime, criminal offense, juvenile justice, rehabilitation, etc.

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### Abstract

The justice system in our country, as in many other countries, is trying to change and reform, moving from a punitive approach to a system that values restorative justice embraces the principles of rehabilitation and reintegration into society and the implementation of alternative measures against imprisonment, seeing the limitation of juvenile delinquency only as a last resort. Progress in this direction was also marked by the adoption of the Juvenile Justice Code. This Code considers detention of juveniles only as a last resort and sanctions alternative measures for children in conflict with the law. The Code brings the juvenile justice system in compliance with the Constitution, the United Nations Convention on the Rights of the Child and international standards, and other international norms aimed at protecting the juvenile and the effective protection of the highest interests of the juvenile. One of the international standards of juvenile justice is the use of imprisonment as a last resort and reintegration as a goal of the justice system. Justice should be gentle with children and be on their side. Freedom of liberty as a last resort and for a short period of time is clearly expressed and dealt with in international acts, which I have previously dealt with in some other scientific works. What is important and what I would like to present in this article in terms of applying the "punishment of imprisonment" measure is to know about the implementation of legal provisions in favor of juvenile justice and the relevant gaps. This is done by focusing primarily on national legislation.

### 1. The existence of legal and practical problems related to the punishment of minors

The administration of the Juvenile Justice System and its compliance with international standards aims to put the use of imprisonment at the center, as a last resort and reintegration as the primary goal of the justice system. The principle recognized today in the international jurisprudence for juvenile delinquency is: "... justice should be gentle with children and be on their side ..."<sup>46</sup>. In our country, the creation of a special legislation on juvenile justice, the adoption of a new law on protection and the rights of children, or the ratification of some applicable protocols of the UN Convention on the Children's Rights, testify about the progress made in administering juvenile justice. Its main purpose is the consolidation of the juvenile justice system, bringing it closer to international contemporary standards and norms, and affirming human values, thus providing legal and procedural guarantees for this category of our society.

The transition from a punitive system to a system with a new approach to justice that educates and reintegrates is the spirit that pervades today all the reforms of the legal framework of the juvenile justice system. Exactly, the legal amendments adopted in this important area of vital activity, such as the promotion and protection of children's rights, testify about the increase of the level of services that state authorities and law enforcement bodies will make for the most vulnerable category of the society, bringing about more comprehensive safeguards to ensure the protection of the best interests of children, especially those in conflict with the law, in street situations, victimized, abandoned, etc.

<sup>46</sup>Report by UNICEF on the level of justice for minors in Albania (source: [www.unicef.al](http://www.unicef.al))

These changes do not affect the essence of the current system and key institutes, but only regulate some issues that are particularly problematic and have been ascertained in court practice.<sup>47</sup> These changes do not touch the core of the current system and the key institutes, but only address some issues that are particularly problematic and have been ascertained as such in court practice. Another problem encountered is the various measures such as reconciliation between the victim and offenders, the indemnity practices, and alternative sentences for juveniles that have been implemented recently, which have contributed to alternative measures against the imprisonment for minors who have violated the law.<sup>48</sup>

Another problem encountered is the situation in the police districts. There are still cases when juveniles in detention are held in the same cell with adults.<sup>49</sup> Keeping a minor in the same cell with an adult can seriously damage the minor's mental and physical health. The separation of the juvenile is a standard set out by a set of legal documents and aims to rehabilitate the juvenile through methods that are different from those for adults.

The imprisonment has negative consequences for the future of juveniles, as it is a repressive measure that interrupts their normal education and development. In addition, being a severe punishment measure, it does not prevent, but drives many juveniles to commit crimes again, thus becoming recidivists.<sup>50</sup>

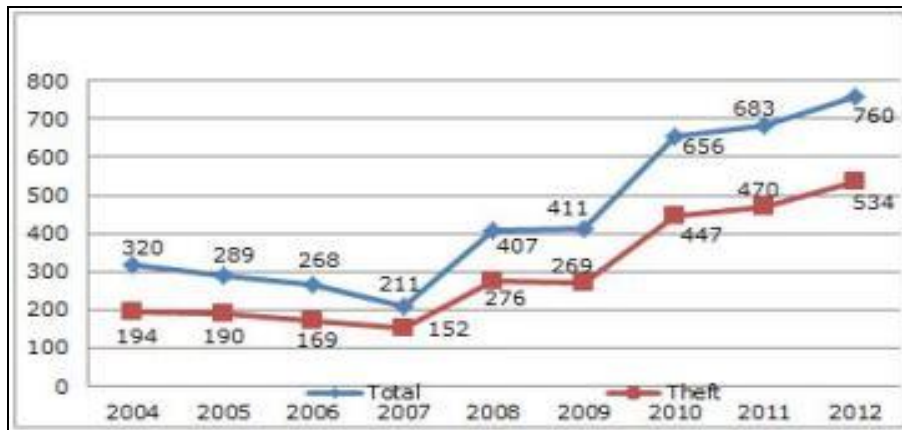
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<sup>47</sup>Specifically, the recently adopted amendments to Law No. 9062, dated 8.5.2003, "Family Code", published in O.G.489, p.1907, only concern the institute of abandonment declaration (article 250) and the deadlines for inter alia adoption (Article 257). These changes are intended to facilitate the immediate adoption of certain categories of children, namely abandoned children from birth and abandoned children with the purpose to be granted for adoption. During the judicial declaration of abandonment, the court attempts to locate the biological parents of the child and return the child to the biological family. Notification of biological parents is done at their official address, the address given at the time of abandonment of the child at the hospital or through the State Police. Attempts to find parents, mostly the biological mother, not only prolong the abandonment declaration procedure, but in certain cases may endanger the mother's life and cause other problems that are associated with abandoning the child. Meanwhile, a significant number of mothers abandoning children at birth explicitly demand that they no longer be contacted for various reasons, usually related to the fact that the birth of the child is kept secret by the family and the community where she lives. These changes do not touch upon the essence of the current system and key institutes, such as declaring abandonment and adoption, but only address issues that are particularly problematic in judicial practice.

<sup>48</sup>In the UNICEF report, concerns are expressed that the probation service is not the same for minors across the country and is poorly funded and is heavily dependent on donor support.

<sup>49</sup>In the recent European Commission report on the prevention of torture and punishment and degrading and inhuman treatment, it is noted that the treatment of juveniles in our country does not comply with international standards. Thus, in imprisonment, children do not receive the appropriate services and there are only two detention centers for juveniles, namely: Vlora and Lezha, as well as an institution for juvenile integration in Kavaja, where juvenile convicts are found. This institute, built by the EU and supported by UNICEF, Save the Children and some local NGOs, provides a model for dealing with juvenile convicts. The convicts are offered education, training, mediation, free legal assistance, and reintegration activities. Most convicts are 16-17 years of age. Most of them abandoned school and belong to Roma and Egyptian communities. ([www.coe.gov.al](http://www.coe.gov.al))

<sup>50</sup>In my analysis of the UNICEF report, there is a clear concern that this body raises, regarding the growing number of crimes committed by delinquent juveniles in years. In 2011, 683 juveniles received criminal sentences in Albania. 470 cases of crime were crimes against property, something classified as ordinary crime. (See the chart for further details.)



The graph refers to the period between 2004 and 2012 and presents the level of juvenile crime - on average, 67% of convicted minors resulted from the perpetration of ordinary crimes (*Source: UNICEF*)

What is worth noting is that punitive justice is not a solution. A more comprehensive approach to prevention and care is required. Preventing juvenile delinquency is a duty that belongs to the entire society, not just to the family and to the community. The primary task is to draft special programs for the prevention of criminal phenomena in order to prevent juvenile delinquency<sup>51</sup>.

Today, the justice system suffers from long unresolved processes, corruption, and low law enforcement<sup>52</sup>. It is estimated that almost 65% of juveniles spend their time of detention on remand, due to lengthy court proceedings. The excessive use of imprisonment in response to guilt has not prevented the phenomenon of juvenile delinquency, but on the contrary, the most noticeable is the fact that the number of juveniles in conflict with the law has constantly increased reaching alarming levels. Therefore, a priority is to find ways and undertake the necessary measures, through the adoption of state strategies and policies, to offer young people and teenagers better chances in life, education and employment opportunities when they reach adulthood.

<sup>51</sup>This implies that community groups need to be empowered to play an active role in preventing juvenile delinquency, in close partnership with state agencies, civil society organizations, the business community, the media, the schools, etc. In the context of this key area, community methods of providing public services should be oriented towards this age group, which is the most endangered due to their age and psycho-motor development, to become victims of organized crime. Such a practice is also undertaking of the initiative "School as a community center, a friendly school for all", which is already included in the Albanian education system, as part of the Pre-University Education Development Strategy (2014-2020) and aimed at expanding to support the efforts of all actors and factors. This initiative encourages partnerships between schools, families and the entire community. In this sense, schools are not simply educational providers, but also catalysts of cohesion and community development. The "School as a Community Center" project can be transformed into a powerful tool, providing counseling services and acting as a central link in the design of preventive programs. Teachers are important first-line employees who serve as liaison within communities. Consequently, their ability to distinguish and respond to criminal phenomena and to prevent them should be strengthened and sustained.

<sup>52</sup>It would be sufficient to bring to our attention the law on access to free legal aid, adopted in 2009 which is still in its early stages of implementation. This was also one of the examples highlighted by the High Commissioner for Human Rights of the Council of Europe.

The lack of access to justice is an attribute of several factors related to the economic situation, poverty, for several social categories such as women, minorities, people with disabilities (PWDs), etc.

However, those who suffer most as a result of the lack of access to justice are the children just because of their status. They have the right of access to justice, but the access of juveniles to justice in Albania is still insufficient.<sup>53</sup>

Recently, one of the problems encountered is the lack of institutions or care facilities, through which childcare and rehabilitation programs are provided for minors. Child victims or witnesses in a criminal offense risk being victimized again, as there are not enough institutions or capacities to provide care and rehabilitation programs. Social services are poor, suffering from the lack of qualified and trained staff, and have no role in the treatment and support of minors under the age of criminal responsibility in conflict with the law.

### *1.1. Punishment – Alternatives to punishment*

Criminal offenses committed by minors are no different from those committed by adults and are no less socially dangerous. Therefore, for offenses committed by juveniles, it is necessary to assign a certain kind and punishment measure. As is well known, the purpose of punishment is not just the punishment for an immoral and unlawful act, but re-education, re-socialization and re-integration of convicted persons in the society. With regard to minors, based on their mental and psychosocial development, the educational and socializing role of the penalty is very important, so that the minors understand the antisocial and immoral value of the offense so that they no longer do it, disconnecting themselves from the factors that led to its execution and integrating into the normal social life. Therefore, it is necessary to have alternative penalties for juveniles and avoid imprisonment as much as possible, which would be the only way of solving the problem. In this regard, the law itself provides for milder punishments for juvenile defendants (Article 51 of the Criminal Code), which stipulates that a minor cannot be punished by a higher sentence than the half of the penalty provided by the consumed provision. The second paragraph of Article 31 of the Criminal Code provided for the prohibition of the application of the punishment of life imprisonment for juveniles, but this provision was repealed by Law No. 9668, dated 26.02.2007, "On several amendments to the Criminal Code of the Republic of Albania".

These are the legal determinations with regard to the imprisonment penalty for juveniles, which should be applied only when there is no other suitable punishment alternative. As regards

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<sup>53</sup>Juvenile justice deals with children in conflict with the law, be it criminal, civil, administrative, etc., or for whatever reason. If their rights are violated, they need a proper response at the right time. Thus, international organizations such as UNICEF, etc., have offered to support state authorities and law enforcement agencies in the country through the provision of financial assistance to projects to ensure full access to justice for vulnerable groups, one of the main proposals being the review of fees of the judicial treatment of citizens' requests, reducing the differences that condition the obtaining of free legal aid.

other punishment alternatives, there is not sufficient space within the Albanian legislation devoted to it. In this respect, Article 52 of the Criminal Code (“Excluding minors from punishment”) states, “The court, considering the low dangerousness of the criminal offence, the specific circumstances under which it was committed, and the previous behavior of the minor, may exclude him from punishment. In these cases, the court may decide to place the minor to an educational institution.

Article 53 of the same code, states that ‘In specific cases, when the court deems that both the offence and the perpetrator are of low dangerousness and there are several mitigating circumstances and no aggravating circumstances exist, the court may impose a sentence under the minimum or a more lenient punishment than the one provided for in the respective provision.’ In addition, Article 59 dealing with the suspension of the execution of an imprisonment sentence and placing the convict on probation. None of these articles deals only with juvenile convicts. With the latest changes made to the Criminal Code by Law nr. 10023, dated on 27.11.2008, “On several amendments and annexes to the Law nr. 7895, dated on 27.01.2995, “The Criminal Code of the Republic of Albania”, several punishment alternatives have been envisaged, referring to juvenile convicts as well.

Therefore, Article 58 of this code says, “For sentences up to one year of imprisonment, the court may, due to the obligations of the convict in relation to work, education, qualification or professional training, essential family responsibilities or the need for medical treatment or rehabilitation, decide the execution of the sentence in open prisons. The convict serving the sentence in open prison is obliged to return to prison, after carrying out responsibilities outside of prison, within the deadline set out by the court. The juvenile convict is also included in the changes made to Article 59 of the Criminal Code, though not in an explicit manner. Article 59a, added to this code deals with home confinement and it states as follows, “For up to two years imprisonment sentences or when this timing is the remainder of the sentence, according to a decision pertaining to a longer time of imprisonment, the court may decide for the convict to serve the punishment at home, in another private house or a center of public health care...” Circumstance d) of this Article says, “for young adults, under the age of twenty one, with established medical, study, work or family responsibilities needs.” The court may allow the persons convicted to home confinement to leave their residing place, to fulfill their indispensable family needs, to get involved at work activities, education or rehabilitation programs, which the probation service has agreed upon.

Article 60 of the Criminal Code deals with the obligations of the convict on probation that can also be applied for juvenile convicts, in the function of their rehabilitation and are supervised by the probation service. Article 63 of the Criminal Code refers to the suspension of enforcement of imprisonment sentence and compulsion to perform community work. This is also an alternative to the imprisonment sentence which can be applied when it comes to juvenile convicts, and if such working conditions are created, it would have a positive impact in the re-education and integration of these youngsters.

## 2. The execution of the punishment

This paragraph deals with the execution of the imprisonment sentence. It is of special importance as such and it has been envisaged in Article 33 which says, “Life imprisonment and imprisonment are served at special institutions set up specifically for this purpose. The rules concerning the way of serving the sentences and the prisoner’s rights and duties are defined by law. Juveniles shall serve imprisonment sentences in locations separated from adults. Women serve imprisonment sentences in locations separated from men.” The rules on the suffering of the punishment, the rights and duties of those sentenced with imprisonment have been regulated with a special law. In this context, the way of the execution of the imprisonment punishment is regulated with Law nr. 8331, dated on 21.04.1998, “On the execution of criminal decisions”<sup>54</sup> and Law nr. 8328, dated on 16.04.1998, “On the rights and treatment of the imprisoned”<sup>55</sup>

Both these laws envisage special rules with regard to the execution of the punishment for minors. They suffer their punishment in separate institutions, regardless of the severity of the crime or the penitentiary institution where the suffering of the punishment will take place.

Juveniles are treated in a separate manner not only with regard to the facilities, where they have no contact with adults at all, but also with regard to their educational, relaxing, cultural, and professional programs they attend during this period.<sup>56</sup> Juveniles enjoy special treatment even with regard to the assistance they receive by the psychologist and social workers, contacts with their family members or their lawyers as well as disciplinary measures that can be undertaken against them and their duration.

In these penitentiary institutions priority is increasingly given to educational programs with the aim of socialization and social integration of the youngsters suffering their punishment. The abovementioned laws provide for the rules of execution of educational measures, which must be executed voluntarily by the parent; otherwise, they are enforced in a mandatory way, by the respective institutions, which are missing in Albania, unfortunately. The execution and enforcement of alternative sentences, such as being subjected to probation, semi-liberty or home confinement, is done by the probation service, which is a new institution and has not yet established a consolidated working practice in our country.

<sup>54</sup>Law nr.8331, dated 21.4.1998 “On the execution of criminal decisions”, changed by Law nr.10024, dated 27.11.2008.

<sup>55</sup>Law nr.8328, dated 16.4.1998, “On the rights and treatment of the imprisoned and pre-detainees”.

– Changed by Law nr.8758, dated 26.3.2001 published in OG nr.15

– Changed by Law nr.9071, dated 22.5.2003 published in OG nr.53

– Changed by Law nr.9888, dated 10.3.2008 published in OG nr.44

– Changed by Law nr.10 087, dated 26.2.2009 published in OG nr.32

– Changed by Law nr.40/2014, dated 17.4.2014, published in OG nr. 67

<sup>56</sup> Penalogjia, Prof.as.dr.Vasilika Hysi, pp. 178-179, 2006

### 3. Conclusions

The Albanian constitution mentions the notion of the ‘minor’ as follows: “... *A person’s freedom cannot be restricted, apart from the following cases: ... ç) for supervising a minor for educational purposes or escorting him/her to the competent body...*”<sup>57</sup> The Criminal Procedure Code does not envisage any specific treatment with regard to this principle, but is based on the criterion of not arresting the minor when s/he is accused of criminal conviction.<sup>58</sup> In cases of determining personal security, the court cannot terminate concrete educational processes<sup>59</sup>.

Even though it has not been reflected expressively in the criminal legislation, the opposite is happening in practice. Treating a minor who has committed a criminal offense cannot be compared to treating an adult who has committed one offense. This is because a child does not only have the ability to physically handle the dwelling in these institutions, but his stay there will spur the curiosity of "specializing" in the criminal segment. Meanwhile, that is not the goal that a child who has wronged in committing a criminal offense is needed. The use of the verb "wrong" in this case is related to the fact that the very age of a minor makes you think that there are various factors that push him toward this path. It is the adults who, despite the circumstances, have failed to bring up their own children, often making the use of violence against minors the most preferred form of education, serving as a demonstrative example in the criminal activity of the juvenile defendant. The spirit of identifying the "superman" presented to their family impels minors to demonstrate this in other social, school and other environments, thus becoming the cause of a criminal activity<sup>60</sup>. Among the necessary mechanisms for preventing juveniles from being engaged in criminal activities is the creation of opportunities for attending vocational education and training schools for different professions such as carpenters, plumbers, construction technicians, etc. Of course, inter-institutional co-operation and interaction between all law enforcement agencies, state agencies, NGOs, the community, and the family makes it possible to orient the juveniles towards integration in the society.

<sup>57</sup>Article 27/c The Constitution of the Republic of Albania, adopted by Law nr.8417, dated 21.10.1998, “The Constitution of the Republic of Albania”, amended.

<sup>58</sup>Article 230/4 The Criminal Procedure Code, adopted by Law nr.7905, dated 21.3.1995, “The Criminal Procedure Code of the Republic of Albania”, amended.

<sup>59</sup>Ibid. Article 229/3.

<sup>60</sup>Regarding this issue, an important step has been taken by the former Ministry of Social Welfare and Youth, the State Agency for the Protection of Children’s Rights in cooperation with the Council of Europe, towards the presentation of the political document "The Future of the System of Integrated Protection of Children in Albania". One of the main objectives of this document was the creation of a child-friendly justice system.

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