

PRINCIPLE OF CUSTODY RESTRICTIVENESS AGAINST JUVENILES - INTERNATIONAL AND DOMESTIC LEGAL STANDARDS

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Abstract: *In the catalog of human rights, the right to liberty and security takes a particularly important place, so it is a prerequisite for the realization of other human rights, and as such was included on a number of international instruments (conventions, declarations, conventions, and covenants), constitution and the laws of democratic states. Custody, as the most serious measure that ensures the presence of the defendant, which limits the right to freedom, is always in the center of attention when it comes to protecting the rights and freedoms of the person against whom the criminal proceedings is conducting, which is especially strong, when it comes to juvenile against whom criminal proceedings on suspicion of committing the offense is ongoing, which the criminal code defines as a criminal offense. The authors analyze the most important provisions of international documents on human rights, regarding the restrictive detention of juveniles, as well as the provisions of the Juvenile Offender Law and Criminal law protection of minors of the Republic of Serbia, with emphasis on the relationship of law and analyzed international documents, regarding the detention restrictiveness toward the juveniles and their mutual alignment.*

Keywords: *custody, juvenile, international documents, law*

1. INTRODUCTION

Life and freedom are the main determinant for the existence of a man. However, the right to liberty, although it is the basic human right it is not absolute, but is subject to certain conditions.

Namely, precisely because it cannot be absolute, that is true and real object of protection of the state and its legal system. Although human rights are inalienable and cannot be taken away from anyone, it does not mean they can never be restricted or denied. This means that when the right is expressed in the form of legal norms, the boundaries of law must be determined. For example, legal provision that the person may be arrested or detained may limit the right to liberty of a person.

Custody, as a measure of the presence of the suspect or the accused in the proceedings and the successful conduct of criminal proceedings, is the most difficult measure of procedural coercion, which consists in taking away of a basic human right to freedom. It is a

coercive measure, with clearly defined process goal, rather than criminal sanctions (fines) against a minor, whose determination should be accessed only then, if other measures could not secure the presence of the defendant.¹ Due to the fact that the imposition of custody limits the right to freedom, to the authors analyzed the most important international human rights instruments, in order to identify provisions which encompass excellence in the application of custody of minors in criminal proceedings, the use of alternative measures of custody, determine the content and character of such excellence, and regulations governing the issue of custody restrictiveness of minors in the Republic of Serbia, as well as their compliance with international human rights documents.

2. THE BASIC INTERNATIONAL STANDARDS OF CUSTODY RESTRICTIVENESS PRINCIPLE

Custody as a measure to secure the presence of the defendant is envisaged by international documents.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)² defines custody as a last resort (awaiting trial), which should be reduced to the shortest possible duration (paragraph 13.1), in an effort to get the same, whenever possible, substitute alternative measures (paragraph 13.2).³ This is an option, as the last resort to ensure the presence of a juvenile during the process, which emphasizes that custody should be as short as possible, and that it can be replaced by other measures. The manner in which these provisions defining custody, indicates the need to carefully consider the justification of its pronouncement in each case, and highlights the possibility of replacement with alternative measures of custody, suggesting that to the danger of “criminal contamination” was appreciated that threatens minors during their stay in pretrial custody. In terms of custody, the provisions of paragraph 17.1 (b, c) of the Beijing Rules are significant which impose obligations to competent authorities to make a decision on limiting personal freedoms adopted after careful consideration of the case and that the deprivation of liberty shall not be imposed unless a juvenile is convicted of a serious offense involving violence against another person or exhibit persistence in committing other serious offenses and in cases where there is no other appropriate response. These provisions of the Beijing Rules emphasizes the assistance in relation to the pressure and punishment of juveniles, respond to the particular circumstances of the individual case versus reaction consistent with the protection of society in general. This does suggest that the approach of strict punishment is appropriate, that in the case of adults and in the case of serious offenses by juvenile, may be regarded that sanctions as a function of reprisal have some justification, but in juvenile cases, such arguments should always be overridden by the interest of ensuring well-being and future of young people. The rule contained in Section 17.1 (v) is intended to avoid the imprisonment of the minor, unless there is no other appropriate response that would protect public safety.

¹ Saša Knežević, *Maloletničko krivično pravo* (Niš: Centar za publikacije Pravnog fakulteta, 2012), 156.

² *Standardna minimalna pravila Ujedinjenih nacija za maloletničko pravosuđe* (Pekinska pravila), Rezolucija 40/33 Generalne skupštine Ujedinjenih nacija od 29. novembra 1985. godine

³ Such as: strict supervision, intensive care, putting in foster families, education or similar institutions

Custody restrictiveness⁴ is contained in Article 5 (right to liberty and security) of The European Court of Human Rights (European Convention)⁵ that guarantees the right to liberty and security of person, but provides for cases of deprivation of liberty, among others (...) in case of putting minor under the custody for the purpose of educational supervision or its lawful detention for the purpose of bringing the juvenile before the competent authority. Regarding the status of minors in criminal proceedings, Beijing Rules provide greater protection of minors with regard to the custody, life and replace it with the same or other measures, but it is defined by the European Convention - which emphasizes the legality of custody, and the Beijing Rules emphasizes justification (last resort) of custody imposition, its replacement with usually milder measures, to avoid the danger of pretrial confinement trial, and assistance as opposed to punishment.

Other international documents⁶ pay more attention to the legality of the custody, its denial with respect to its restrictiveness. The provisions of Article 7 (1) (2) (3) of the American Convention on Human Rights (Chapter: The right to personal liberty)⁷ provides that everyone has the right to liberty and security, that no one shall be deprived of its freedom except for reasons and conditions determined in advance by the constitution or by law, enacted pursuant to the constitution, and that no one shall be subjected to arbitrary arrest or imprisonment. Nearly identical words are contained in Article 25 (XXV - Chapter One - Rights) of the American Declaration of the Rights and Duties of Man,⁸ in the sense that no one can be deprived of its liberty except in the cases and in the procedure established by the existing law. Nothing substantial, in terms of restriction of custody, was not provided by the African Charter on Human and Peoples' Rights,⁹ which in Article 6 (Chapter I: Human and Peoples' Rights) contains a general formulation, in a way, that everyone has the right to liberty and security that no one shall be deprived of its freedom except for reasons and conditions previously laid down by law, and in particular that no one may be arbitrarily arrested or imprisoned. In the context of international documents of regional character, the International Covenant on Civil and Political Rights¹⁰ in Article 9 contains provisions guaranteeing individual liberty and security provisions stipulating that a person may be deprived of its life in accordance with the law and procedure prescribed by law, and other rights, similar to the above documents, which guarantees the right of the lawfulness of the detention, challenging the grounds for custody, and the need for the custody by an independent and impartial tribunal. On the other hand, the aforementioned documents does not touch the question of imposition of custody, when there are statutory reasons, nor there is an alternative to imposing custody, and there are no specific provisions regarding the imposition of custody for minors. In fact, it is not possible to identify the rules in these documents clearly under which the custody is only an exceptional meas-

⁴ The term used by the Amnesty International

⁵ The European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome November 1950, entered into force in 1953

⁶ American Convention (Article 7); American Declaration (Article XXV), the African Charter (Article 6), the International Covenant on Civil and Political Rights (9). American Convention on human rights was passed in 1969, and entered the force in July 1978.

⁷ American Convention on human-rights, was passed in 1969, and entered the force in July 1978

⁸ The American Declaration of the Rights and Duties of man, passed in 1948

⁹ African Charter on Human and Peoples' Rights, passed in 1981, entered into force 1986

¹⁰ International Covenant on Civil and Political Rights was passed by the General Assembly of the UN in 1966. and entered into force in 1976

ure in ensuring the presence of the defendant and that it should be determined only when it is only necessary, not for the application of alternative measures to ensure the presence of the defendant, that would contribute to the reduction of custody. For these reasons, the provisions of these documents are not in the spirit of the Beijing Rules and the Convention in terms of restriction of custody in general, or to minors.

3. THE PRINCIPLE OF CUSTODY RESTRICTIVENESS FOR JUVENILES IN THE LEGAL SYSTEM OF THE REPUBLIC OF SERBIA

The Law on Juvenile Offenders envisages putting minors under the custody and Criminal Protection of Minors (Article 67), as a subsidiary measure to secure the presence of a minor defendant in a criminal proceeding, if the process objectives cannot be achieved by a measure of temporary accommodation of minors. Custody is determined by the decision of the juvenile judge, and based on decisions taken by the juvenile chamber, the custody may be extended if there are justifiable reasons. Regarding the grounds for custody, the Law on Juvenile Offenders and Criminal Protection of Minors (Article 67, paragraph 1) provides for the application of the basis provided for in Article 142 of the Criminal Procedure Code.

In relation to the above mentioned international documents, the provisions of the Law on Juvenile Offenders and Criminal Protection of Minors, relating to custody, makes it to a certain extent more advanced with respect to these documents, as specifically provided excellence in the administration and instead of incarceration may specify a measure of temporary accommodation of minors, if the purpose of the detention can be achieved by this measure, which bringing it closer to the Beijing Rules (paragraph 13.2).

4. CONCLUSION

International documents on human rights, according to the opinion of the author, except the Beijing Rules and the European Convention does not contain provisions seen custody as a last resort, to be used only in exceptional cases where the presence of the defendant or a minor cannot otherwise be provided in criminal proceedings. In addition, most of these documents have no special provisions to ensure exceptional nature of putting juveniles under the custody and to highlight the need

In each case, the implementation of juvenile or other alternative measure is justified, rather than to opt for imprisonment, and thus provides a measure of restricting freedom. As far as the provisions of the Juvenile Offenders and Criminal Protection of Minors, on the issue of restrictive custody in relation to minors, they comply with major international standards (contained in the Beijing Rules and the provisions of the European Convention) which regulate the imposition of custody for minors in criminal proceedings.

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