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PERSPECTIVES OF THE APPLICATION OF THE JUVENILE JUSTICE OF IRELAND AS A SAMPLE FOR THE DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM IN UKRAINE

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SUMMARY

This paper seeks to address the issue of the establishment of the institution of juvenile justice in Ukraine. This paper is an overview and evaluation of legislation on children's rights in Juvenile Justice System in Ireland, its correlation with the international law and standards of best practice. The aim of our research is to highlight some problematic issues of practice of dealing with children who offend, trying to show the extent to which law and practice match in Ireland and to estimate whether Irish juvenile justice system model can be used as an example for Ukrainian legislator.

Key words: juvenile justice, juvenile crime, children's rights, young offenders, preventative measures, rehabilitative justice, child-centered approach.

ПЕРСПЕКТИВЫ ИСПОЛЬЗОВАНИЯ СИСТЕМЫ ЮВЕНАЛЬНОЙ ЮСТИЦИИ ИРЛАНДИИ КАК ОБРАЗЦА ДЛЯ ПОСТРОЕНИЯ ЮВЕНАЛЬНОЙ ЮСТИЦИИ В УКРАИНЕ

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АННОТАЦИЯ

Данное исследование посвящается проблеме установления и развития института ювенальной юстиции в Украине. Статья представляет собой обзор и оценку законодательства о правах детей в системе ювенальной юстиции в Ирландии, его взаимосвязи с международным правом и стандартами наилучшей практики. Цель нашего исследования состоит в том, чтобы осветить некоторые проблемные вопросы практики обращения с детьми-правонарушителями, показать степень соответствия законодательства и практики Ирландии и оценить, можно ли использовать модель ирландской системы ювенальной юстиции в качестве примера для Украины.

Ключевые слова: ювенальная юстиция, ювенальная преступность, права детей, несовершеннолетние правонарушители, превентивные меры, реабилитационное правосудие, ориентированный на детей подход.

Statement of the problem. Establishment and functioning of juvenile justice system have always been a difficult issue for international community. High rates of juvenile offences demonstrate the necessity to address questions of why juveniles commit crimes and how to fight this phenomenon. Such situation forces government agencies and academics to develop countermeasures to adolescent crime while taking into account standards of best practice, international state's experiences and peculiarities of legislation of particular country.

The relevance of the research topic is confirmed by effective regulation

of juvenile crime situation in Ireland and the poor organization of juvenile justice system in Ukraine.

Status of research. Scientific analysis of the problems of juvenile justice is carried out by many bright scientists around the globe. Geoffrey Shannon, Ursula Kilkelly, Dermot Walsh, Sarah Jane Judge represent the scientific community that performs researches in juvenile justice field in Ireland. Natalia Krestovsky, Volodymyr Pecarchuk, Stanislav Krasovsky, Alexandr Tereshchuk, Natalia Maksimova in Ukraine.

The object of this research deals with international and national regulation



of legal relations in the field of juvenile justice system in Ireland and Ukraine.

The purpose of the article is to give a critical analysis to juvenile justice system of Ireland as one of the best systems in Europe worth of following by Ukraine.

Presentation of the main material. In legal literature the most discussible matters of functioning of juvenile justice system concern the age of criminal responsibility; sources of information regarding the youth crime; diversion from criminal justice system.

Irish Law

The stone legal act governing treatment of children in conflict with law in Ireland is the Children Act 2001¹ signed on 8 July 2001. The Act 2001 contemplates the most comprehensive reform of the Irish youth justice system in one hundred years². Prior for almost a century statutory framework for juvenile justice system in Ireland provided the Children Act 1908, that was progressive and liberal for its time. Preparations to passing a new act began with the Kennedy Report in 1930, then extended by Henchy Committee in 1974, the Task Force on Child Care Services in 1980 and the Dail Select Committee on Crime and Justice in 1992. As a result of continuous work the Children Bill 1996 was published, then introduced to the government in 1999 finally became a law as the Children Act 2001³.

The Thirty-first Amendment of the Constitution (Children) Act 2012 signed into law in 2015 added a new Article 42A which comprises that the best interests of the child shall be regarded as the first and paramount consideration and that the views of a child who is capable of forming his/her own views must be determined and given due weight in accordance with the age and maturity of the child. These provisions place the child at the centre of all proceedings addressing his/her welfare and create general "child-centered approach"⁴.

International Law

UN Convention on the Rights of a Child

One of the most effective, directly and solely dedicated to children's rights international treaties is the UN Convention on the Rights of a Child. It was adopted in 1989 and ratified by Ireland in 1992. Being not incorporated into domestic law, the CRC is binding international law, which imposes legal obligations on the State⁵. UNCRC by its three articles (2, 3, 12) established the main principles of juvenile justice system: non-discrimination, child's best interest be a primary consideration in all matters concerning a child and its rights to be heard. Articles 37 and 40 establishing custody to be used as a measure of last resort and treatment of children in the manner consistent with the promotion of the child's dignity and worth are key achievements of the CRC⁶.

European Convention on Human's Rights

Another not child-centered but effective instrument in the ensuring of children's right in Ireland is the ECHR. Being signed in 1953 and given further effect in Irish law (ECHR Act 2003) the Convention (Art.6) requires a fair trial of individuals (means every human being) in both civil and criminal cases⁷. The case law of the European Court of Human Rights is of particular relevance to youth justice and detention⁸. Cases of *Nortier v. the Netherlands*, *T v UK* and *V v. UK* and *SC v. UK* establish an obligation of children to be tried with the specific procedural rules, ensuring their effective participation. So ECtHR requires the child's age, level of maturity, intellectual and emotional capacities be taken into account when a child faces criminal charges.

International Rules and Guidelines

GA of UN adopted three significant documents that form global standards of best practice on youth justice: 1) the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules); 2) the UN Rules for the Protection of Juveniles deprived

of their Liberty, 1990 (the Havana Rules); 3) the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Rules). Together with the Council's of Europe Guidelines on Child Friendly Justice from 2010 these four documents as Kilkelly says "formulate and specify the rights, to which children and young people in conflict with the law are entitled"⁹. Despite non-binding character these Guidelines are of great importance and respect having practical impact on policy, law and practice.

Evaluation of legislation

Irish law on children's rights in comparison with international law and standards of best practice should be highly estimated. However, particular provisions of the Act 2001 and its practical implementation must be critically examined as so the lowered in 2006 age of criminal responsibility, absence of effective complaint mechanism for children, delays in court proceedings, absence of post-detention treatment of juveniles, introduction of Anti-Social Behavioral Orders, lack of staffing of the social work and child care services, lack of cooperation between child-focused agencies, absence of specialized trainings for workers with juveniles, no comprehensive official statistic data about youth crime, limited budgeting etc. Warning issue as Kilkelly notes is the absence from the Act the purpose of juvenile justice system and commitments to the its principles or recognition of duty of statutory agencies to exercise their functions in line with these principles¹⁰.

Age of criminal responsibility

One of the most debatable issues in contemporary juvenile justice system is the age of criminal responsibility. According to the UNCRC and Children Act 2001 a child is a person under 18 years. The general age of criminal responsibility (the legal capacity to commit a crime) is fixed to be 12 years. However, the Criminal Justice Act 2006 lowered this age by 10 years for some serious crimes as manslaughter, rape, murder and aggravated sexual assault. Moreover, such crimes are dealt with by the Circuit Criminal Court or the Central Criminal Court. Here arises a question does Ireland comply with its

¹ Children Act 2001. URL: <http://www.irishstatutebook.ie/eli/2001/act/24/enacted/en/html>.

² Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 24.

³ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 25-29.

⁴ Shannon Geoffrey. Children and Family Relationships Law in Ireland: Practice and Procedure. Clarus Press, 2016. P. 17.

⁵ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 17.

⁶ Kilkelly. Children's Rights in Ireland: Law, Policy and Practice. Tottel Publishing Ltd, 2008. P. 529.

⁷ European Convention on Human Rights 1950. URL: www.echr.coe.int/Documents/Convention_ENG.pdf.

⁸ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 20.

⁹ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 20.

¹⁰ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 45.



international obligations by trying children as young as 10 in adult's courts?

Useful supplementary advice on the application of the CRC gives the General Comment № 10¹¹. Together with the Beijing Rules point that the age of criminal responsibility shall not be fixed as too low, bearing in mind the facts of emotional, mental and intellectual maturity¹² which are defying with neurological abilities the child's legal capacity. Leading scientist such as Grisso&Scott, Bechham, Teicher, Golberg and others assert that physiologically adolescents are unable to respond effectively to situations that require careful or reasonable decisions, to control impulses, facing lack of future orientation and differ from adults in their cognitive functioning¹³. So age of 12 years and less should not be a sufficient to try a child with the offence. More reasonable sounds the general conception of *doliincapax* in common law that children under 14 are incapable of committing an offence.

Sources of information regarding the youth crime

According to the UNCRC¹⁴ Ireland is obligated to report to the Committee on the situation of the protection of children's rights in the country. Ireland still has no central agency with responsibility for collecting and analyzing data on young people in conflict with law and there is no government sponsored program for the researching youth justice and related areas¹⁵.

Criminal justice statistics have been rightly described by Professor Walsh as a "mess"¹⁶. A number of agencies have their own specific databases concerning juveniles and present reports. A comprehensive research of IASD in 2015 particularly names such sources of information as CCTS and NJO databases, SRSB, detention schools and ST. Patrick's Institution for Young Offenders provided information in relation to young

people committed to detention, Probation and Welfare Services reports, National Assessment and Remand Unit (NARU), HSE's reports¹⁷. Together with three primary official sources as the Garda Commissioner's Annual Reports, the Annual Prisons Reports and the Annual Reports of the Department of Education and other unofficial crime surveys, research projects commissioned by public agencies and private bodies, and studies by academics¹⁸ create extremely complicated and inconsistent system (rather "scope") of information about the juvenile crime and young offenders. The lack of centralized source of youth crime data is accompanied by insufficient quality of it.

Professor Walsh's analysis of data available demonstrates white spots in each of official sources on youth crime. He says that the indictable offences are broken down into age, gender and geographical region categories only. It's not possible to deduce trends among juveniles in respect of non-indictable offences as a distinct category. Juvenile Diversion Programme demonstrates only information about indictable offences, leaving behind cases of non-indictable ones, so those who are cautioned or have no action taken against them are not included. The Commissioner's Report do not include data on the exercise of police powers of stop, question, search, arrest, detention or entry, search and seizure, data on bail applications, data on guilty pleas and acquittal rates¹⁹.

Absence of specialized body with responsibility for collecting and analyzing data on young people in conflict with law makes it impossible to track a young offender within juvenile justice system. It seems impossible at the moment to present anything close to a complete picture of young people, their background and family circumstances or their offending behavior²⁰. Sarah Jane Judge points that the lack of official, centralized data causes difficulties in identifying factors contributing to the involvement of children in criminal behavior²¹.

It is important to mention the centralized source data on youth crime should be able to provide information on effectiveness of the responses of the criminal justice system to the child's criminal behavior²². Currently, none of available sources can be called "suitable".

Diversion from Criminal Justice System

UNCRC promotes where appropriate and desirable, measures for dealing with children who infringed the penal law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected²³. Beijing Rules²⁴ repeats that as well as establishment of the provision that practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence).

Diversion refers to efforts to keep young people away from the formal criminal justice system due to the harm, including labeling, that it may cause²⁵. Diversion can be described as a package of measures for dealing with children under the age of 18 who commit an offence or offences²⁶. In Ireland Diversion Programme (currently GDP) was introduced in 1963, launched nationwide in 1981 and in 1991 the Garda National Juvenile Office was established and given a coordinating and monitoring role²⁷. Despite undoubted success of its implementation and functioning there are several significant issues in need to be improved.

Problematic issues:

The extension of the Diversion Programme in 2006 included 10 and 11 years old children. Neither the 2006 Act nor the 2001 Act specifies whether the inclusion of 10 or 11 years old is for serious crimes only or all types of crimes²⁸. Here

²² Sarah Jane Judge. Juvenile Justice Course 2016–2017. Children in Conflict with the Law. P. 7.

²³ United Nation Convention on the Rights of a Child. URL: www.ohchr.org.

²⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). URL: <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.

²⁵ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 66.

²⁶ Garda Office for Children and Youth Affairs (2004) Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme, Dublin: Irish Youth Justice Service, P. 8.

²⁷ Sarah Jane Judge. Juvenile Justice course 2016–2017. Children & the Police: Interaction, Impact and the Importance of Diversion. P. 7.

²⁸ Sarah Jane Judge. Juvenile Justice course 2016–2017. Children & the Police: Interaction, Impact and the Importance of Diversion. P. 8.

¹¹ Committee on the Rights of the Child General Comment № 10: Children's Rights in Juvenile Justice. URL: www.ohchr.org.

¹² United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). URL: <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.

¹³ Sarah Jane Judge. Juvenile Justice course 2016–2017, Binding International Law, International Standards of Best Practice & the Fair Trial Rights of the Child. P. 6–10.

¹⁴ United Nation Convention on the Rights of a Child. URL: www.ohchr.org.

¹⁵ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 3.

¹⁶ Walsh. 2005. P. 9.

¹⁷ McPhillips S. Dublin Children Court: A Pilot Research Project. Dublin: Association for Criminal Justice Research and Development, 2005. P. 8.

¹⁸ Walsh. Juvenile Justice. Thomson Round Hall, 2005. P. 13.

¹⁹ Walsh. Juvenile Justice. Thomson Round Hall, 2005. P. 31.

²⁰ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 3.

²¹ Sarah Jane Judge. Juvenile Justice Course 2016–2017. Children in Conflict with the Law. P. 2.



arises a question whether this provision intends to divert children who committed serious crime from adult-oriented court proceeding in Circuit or Central Courts or to bring more children under the age of criminal responsibility (12 years) into Criminal Justice System.

Attention should be paid to Good Behaviour Warnings that presume a meeting of Garda superintendent with a child and his/her parents/guardians to discuss anti-social behavior that results a signing by them the Good Behavior Contract. In case of a breach of Contract the child will be referred to the Garda Diversion Program or an application can be made to the Children Court for anti-social behavioral order²⁹. So again we see possibility to involve a bigger number of children into Criminal Justice System.

The decision to include a child into GDP is taken by a Garda Superintendent at Garda Youth Diversion Office who is known as the Director of the Programme³⁰. Warring is that this decision cannot be appealed. As far as GDP is extremely important tool to keep a child away from all bad impact the Juvenile Justice system can impose on him/ her that seem to be essential right a child to appeal the decision and be granted a chance to be out of any criminal labeling.

The matter of respect to children's rights in GDP and cooperation with police in general deserves attention. Kilkelly points that it will help to safeguard the interests of children in the diversionary scheme and enhance their faith in the fairness of its procedures³¹. The right of a child to seek legal advice before giving his/her consent to participate in the GDP must be granted.

According to Commentary to Rule 11 of the Beijing Rules diversion may be used at any point of decision-making³². In Ireland diversion in practice is basically used only before child comes into

the court system. This limitation contradicts with the best interest of a child principle and violates directly provisions of UNCRC, Constitution and 2001 Act.

Council of Europe Guidelines on Child Friendly Justice Guidelines³³ requires usage of child friendly language. That is very important in the lights of understanding by the child all pros and cons of the participation in GDP especially when securing the consent of the young offender which is one of three criteria of acceptance into GDP (taking responsibility for the offending behavior; where appropriate, agreement to terms of supervision; and agreement to be cautioned).

Conclusions (Irish juvenile justice system). In general Irish law on children's rights in comparison with international law and standards of best practice can be highly estimated. However, particular provisions of the Act 2001 must be critically examined. Particular attention was given to such issues as the age of criminal responsibility, sources of information regarding the youth crime and diversion from Criminal Justice System. The established age of criminal responsibility of 10 years for serious crimes makes it not possible to affirm that the constitutional guarantees of the child-centered approach to all matter concerning a child are fully in force. Also the lack of centralized source of youth crime data results gaps in policy making and further in practice. Centralized source of information is needed to direct and the full realization of all 2001 Act's provisions and standards of best practice. Despite of significant success of Juvenile Diversion Programme there is still a need to critically examine the compatibility of the intervention with the rights of due process and children's rights.

We have obtained comprehensive results providing that juvenile justice system in Ireland might serve as an example for Ukraine in designing its own model of child friendly justice by taking into account Irish experience and standards of best practice.

Ukrainian Law

Ukraine admits that the *prevention of juvenile delinquency* is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orienta-

tion towards society and outlook on life, young persons can develop non-criminogenic attitudes. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood³⁴.

Besides, with adoption of The Beijing Rules by Ukraine, Rule 5 that refers to two of the most important *objectives of juvenile justice* is recognized as well. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. The second objective is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances³⁵.

In Ukraine today there is no integral system of legislation on the protection of children's rights, which could create a working state institute of juvenile justice. Instead, certain steps from time to time still occur. The scope of *current legislation* looks like:

1. Chapter 38 of the Criminal Procedural Code of Ukraine, 2012 "Criminal proceedings against minors".
2. The Law of Ukraine "On the Judiciary and Status of Judges" (establishes a specialization for a juvenile judge).
3. National strategy on human rights for the period up to 2020 (a special body of the Interagency Coordinating Council on Juvenile Justice has been formed, which main task is to improve the system of penalties applicable to minors, by extending the possibilities of using punishments not related to to isolate

²⁹ Sarah Jane Judge. Juvenile Justice course 2016–2017. Children & the Police: Interaction, Impact and the Importance of Diversion. P. 8.

³⁰ Department of Children and Youth Affairs (2014) Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme. P. 6. URL: www.lyjs.ie/en/IYJS/Annual_Report2014-English.pdf/Files/AnnualReport2014-English.pdf.

³¹ Kilkelly. Youth Justice in Ireland: Tough Lives Rough Justice. Irish Academic Press, 2006. P. 119.

³² United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). URL: <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.

³³ Council of Europe Guidelines on Child Friendly Justice Guideline. URL: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9>.

³⁴ United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines). URL: <https://www.un.org/documents/ga/res/45/a45r112.htm>.

³⁵ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). URL: <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.



a person; to draft the Law of Ukraine “On juvenile justice”; to approve the Strategy for the prevention of juvenile delinquency; to draft a billon amending the Law of Ukraine “On Free Legal Aid” regarding the provision of free primary and secondary legal aid to a child and informing her about their rights and freedoms.

4. Decree of the President of Ukraine “On the Concept of the Development of Criminal Justice for Minors”.

5. Order of the Cabinet of Ministers of Ukraine “On Approval of the Action Plan for Implementation of the Concept for the Development of Criminal Justice in Minors in Ukraine”.

It is very interesting that Ukraine recognizes most of the international child-friendly justice regulations, also has particular national instruments to deal with young offenders but no further steps are taken to integrate a wide scope of state institutions that deal with juvenile crime into one whole and effective system (model) of juvenile justice.

Conclusions (Ukrainian juvenile justice system). The Ukrainian child ombudsman M. Kuleba accurately described the system of juvenile justice in Ukraine, comparing it with a disassembled car: “Everyone holds in hands some of the parts – some one has a wheel, somebody’s a door, somebody’s a helm. Everyone is standing and telling every one that this is a car and he or she has to move. Yeah, move. So, each of these spareparts goes ahead – in this way we get a moving car. But it’s unreasonable to move the car in parts, if you can build it who le and go”³⁶. Our work has led us to conclude that Irish model of juvenile justice isn’t perfect but at this stage can serve as a good example of effective and integrated system for Ukraine to take into account.

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³⁶ Administration of the President of Ukraine. Commissioner of the President of Ukraine on the rights of the child Mykola Kuleba. URL: <https://www.facebook.com/nikolai.kuleba.5>.

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