TOWARDS IMPROVING THE LEGISLATION AND CASE LAW ON THE APPLICATION OF A MEASURE OF RESTRAINT ON A MINOR

Irine Bokhashvili

Associate Professor, Doctor of Law

East European University

Abstract

The juvenile defendant as a juvenile in conflict with the law and criminal justice as the most "severe" form of justice has always been both the subject of active observation in society and a topical part of the country's criminal policy.

On June 12, 2015, the Law of Georgia "Juvenile Justice Code" (hereinafter - JJC) was adopted, thus joining the number of countries where juvenile justice (at the domestic level) is regulated by independent special legal acts.

Recently, on September 1, 2020, the Law of Georgia "Code of the Rights of the Child" entered into force (adopted on September 20, 2019), which further strengthens the unshakable, constructive policy of the State in terms of forming a solid support system ensuring the rights and freedoms of minors.

The issue of preventive measures against minors is discussed in the paper, taking into account the domestic legislation of Georgia and the regulations provided by international legal norms, case law and statistics in the country.

The rights of the juvenile defendant, as a specific direction concerning the rights of the child in law, become an even more specific subject of interest when a measure of restraint is imposed on the juvenile defendant.

The JJC provides for a number of features that are directly connected to the application of a measure of restraint to a minor. However, it is advisable to make several legislative changes in this direction, for example: to establish an electronic monitoring measure as the main form of prevention and develop a sample list of additional restrictions. As well as this, it is important to take into account the following issues: consideration of the judge's discretion in the case of detention on bail; the practice of imposing supervision on both parents; and an indication of the circumstances of best interest of the juvenile among the circumstances to be taken into account by the judge, etc.

Case law and statistics reveal that the issue of non-custodial treatment of a juvenile and the predominant use of extradition of a juvenile under the supervision of a parent are still active among these non-custodial measures.

One of the important issues concerning imposing a measure of restraint on a juvenile defendant is the specialization of the persons involved in the process and the effective implementation of this legislative reservation, which implies the correct approach of the prosecutor, lawyer and judge. Undoubtedly, the focus of the whole process should be the best interests of the child.

The current legislation and system of juvenile justice in Georgia requires a timely, dynamic development and continuous improvement in line with the growing demands and needs of juveniles in the modern world, which should be one of the priority directions of the state for each child.

Keywords: *Juvenile justice, Prevention measure, Best interests*

TOWARDS IMPROVING THE LEGISLATION AND CASE LAW ON THE APPLICATION OF A MEASURE OF RESTRAINT ON A MINOR

Irine Bokhashvili

Associate Professor, Doctor of Law

East European University

Introduction

The juvenile defendant as a minor in conflict with the law and criminal justice as the most "severe" form of justice has always been the subject of active observation in society and a topical part of the country's criminal policy.

On June 12, 2015, the Law of Georgia on Juvenile Justice was adopted, thus Georgia joined the countries where juvenile justice (at the domestic level) is regulated by independent special legal acts.

Quite recently, on September 1, 2020, the Law of Georgia "Code of Rights of the Child" entered into force (adopted on September 20, 2019), which further strengthens the unshakable, constructive policy of the State in terms of forming a solid support system ensuring the rights and freedoms of minors.

The proposed paper deals with the peculiarities of the application of a measure of restraints to a juvenile, during which the issue is discussed taking into account the domestic legislation of Georgia and the regulations provided by international legal norms, case law and statistics in the country.

The rights of the juvenile defendant, as a specific direction of the rights of the minor in law, become an even more significant subject of interest when a measure of restraint is imposed on the juvenile defendant. The Juvenile Justice Code takes into account a number of features that are set directly when imposing a measure of restraint on a juvenile. However, it is advisable to make some legislative changes in this direction.

Case law and statistics show that the issue of imposing to a minor non-custodial measures and the predominant use of extradition under the supervision of a juvenile to his/her parent, as a specific non-custodial measure are still active.[1]

One of the most important issues in imposing a measure of restraint on a juvenile defendant is the specialization of the persons involved in the process and the effective implementation of this legislative reservation. It implies the right approach of the prosecutor, lawyer and judge, while filing a motion by the prosecutor, when presenting the position on the motion, by the lawyer, and while substantiating the decision to impose a restraining order/refusal respectively, by the judge. Undoubtedly, the focus of this whole process should be focused on the best interests of the minor.

This paper shares some important recommendations to assist in improving the law and court practice in imposing a measure of restraint on a juvenile defendant in criminal proceedings.

1. An accused juvenile, as a child who is in conflict with the law.

According to the first part of Article 3 of the Juvenile Justice Code (hereinafter – the JJC), a person under the age of 18 is considered a juvenile. In this article, for the purposes of criminal liability, a juvenile is a person from 14 to 18 years of age. As for being in conflict with the law, according to Article 3-22 (a) of the JJC, this situation also applies to the case where there is a probable cause that a juvenile has committed a crime. Pursuant to Article 3-11 of the Criminal Procedure Code of Georgia (hereinafter – CPCG), a probable cause means

[1] The "Criminal Case Analysis of Accused Juveniles, 2019" published by the General Prosecutor's Office of Georgia in 2020, is available electronically: public information (pog.gov.ge) The final section offers an authorial review and evaluation of the statistic.

the possible commission of a crime. Pursuant to Article 3 (a) of the Code of the Rights of the Child (hereinafter referred to CRC), all minors under the age of 18 are children, and according to Article 3 (b) of the same Paragraph, all minors under the age of 18 are adolescents.

The age and terminological definitions provided by the JJC and the CRC are fully in line with international standards and approaches to the definition of a minor on the one hand and of a child on the other. For example: Article 1 of the Convention on the Rights of the Child (November 20, 1989); and Rule 11 (a) of the United Nations Rules for The Protection of Juveniles Deprived of Their Liberty (December 14, 1990).

From the analysis of the above norms it is possible to conclude that behind the status of a juvenile defendant, as a formal legal status, in there is in fact an adolescent child, who, as it known at present that he may have violated the law. It should be a firm position that when applying a measure of restraint against a juvenile defendant, all persons involved in the process, and in particular the judge, should be guided by this definition and attitude as a person with discretionary power to decide on the application of a measure of restraint.

2. A system of preventive measures according to the Juvenile Justice Code

Chapter IX of the JJC refers to the preventive measures and defines the types of preventive measures while briefly describing the peculiarities of their use against minors.

Under Article 60 of the JJC, the following may be used as a measure of restraint against a minor: transfer of the minor for supervision, an agreement on not leaving the place of supervision, and on good behaviour therein, a personal guarantee, and bail and detention.

It is advisable to use the electronic monitoring of juveniles under Article 192, Part 2 of the Criminal Code, in a number of cases, as a basic measure of restraint, which is also positively assessed by practicing judges (GYLA, 2020).

The system of preventive measures proposed by the JJC consists of custodial and non-custodial measures of which only one is considered to be a custodial measure whereas all other measures are non-custodial.

2.1. Transfer of the minor for supervision/a personal guarantee

Transfer for supervision is a form of alternative deterrent to a juvenile as a special subject. Where there is no question of any measure of restraint being applied to the juvenile and / or where an agreement on absenteeism and appropriate conduct is not sufficient to achieve the purpose of the measure of restraint, the possibility of transfer under the supervision should always be considered preferably and only when it is strict exclused, another preventive measure can be used.

Transfer to supervision has its own specific features, one of the most interesting of which is its dual voluntariness, which implies the consent of both the juvenile and the person to whom the subject is transferred for the supervision (Article 61 -2 2 of the IJJ). However, a person who supervises a minor always has the right to refuse supervision if he or she considers that he or she is unable to ensure his or her proper conduct.

This reservation, as a means of retreat, creates the most encouraging environment for the person to be in the disposition in all possible cases, not to refrain from giving consent. However, in addition to confirming the consent, the court has to carefully examine the real possibility of exercising supervision or custody, for example, free time, health, and in some other cases, this will often be the basis for the court's refusal to use the transfer of custody or supervision.

The personal guarantee, in essence and severity, is commensurate with the transfer for supervision, except that the personal guarantee does not constitute a direct measure on a minor as a special subject. The JJC does not contain any characteristics of peculiarities concerning personal bail and implies that when applying personal bail to a minor, we should be guided directly by the relevant Article 203 of the CPCG. In this regard, it may even be disputed to consider personal bail as a measure of restraint applied to a minor. It has a somewhat substitute purpose and is used in cases where transfer for supervision cannot be used even though the basis for the use of this type of supervision is obvious.

The uniqueness of the transfer in parental supervision lies in its content, where the connection between a parent and child is characterized by specific features. The reason for this replacement can be various circum-

stances: the lack of will on the part of the parent(s) or the minor him / herself; health problems; lack of free time, etc. The literature also suggests that the use of a direct personal guarantee may be justified in terms of avoiding additional court process. For example, when a minor is soon geting 18 years of age and to avoid the need to change parental supervision (Meishvili & Jorbenadze, 2007), especially since the law does not provide for any restrictions on the parent to be a personal guarantor (the decision of the Investigative Panel of the Tbilisi Court of Appeals of October 8, 2015).

In view of the above reasoning, where parental supervision is considered to be a specific type of personal bail, the entry in Article 61 of the JJC, which presupposes the sipervision of only one parent, is ineffective and it unjustifiably limits the use of this type of restraint. The marker of personal guarantee is the large number of trusted persons (Article 203, first and second parts of the CPCG), which is understood by the party in the case law and the list of personal guarantors frequently exceeds several scores of people.

Therefore, in the first part of Article 61 of the JJC it is advisable to replace the words "one of the above-mentioned persons" with the following words: "one or more of the above-mentioned persons", which will allow the court to consider not only the possibility of supervision by one person, but also, for example, about that of both parents or several close relatives together to provide the supervision of the minor.

2.2. An agreement on not leaving the place of supervision, and on good behaviour therein

According to the JJC and the CPCG, an agreement on absenteeism and appropriate conduct is an independent form of restraint and is characterized by its less stringent content: there is no third party involvement (e.g., such as supervision or bail), no financial security of any kind, (for example, as in the case of bail) and there is no deprivation of liberty to a person (which is typical only for imprisonment). Article 62 of the JJC expands significantly the scope of application of this measure to a juvenile and considers it possible to apply it if a less serious or negligent crime has been committed. For comparison, under Article 202 of the CPCG, an agreement on absenteeism and proper conduct applies only if the crime committed does not consider a sentence of more than 1 year of imprisonment. Such an approach of the JJC, in addition to the specificity inherent in juvenile justice, must be justified in terms of creating as wide a choice as possible of non-custodial measures, which is inevitably important, especially with regard to juveniles. It goes without saying that such a provision of the law does not imply the unconditional application of only this measure of restraint in the case of a less serious or negligent crime It also requires that the factual and formal grounds for the application of the measure be given.[2]

2.3. Bail

The content of Article 63 of the JJC presents, in fact, the last sentence of the Article 2 part of the paragraph 200 -2 of the CPCG with the change that the bail can be set at any amount of money. That is, all other bail proceedings against a minor are completed in accordance with Article 200 of the CPCG. In the presented paper, only one topical issue related to bail is discussed and the opinion is expressed about the so-called "detention bail" (Article 200, Part 6 of the CPCG). In addition to the principle generally recognized in the application of a measure of restraint, that detention should be used only as a measure of extreme restraint when it is the only means to achieve the goal, it is critical for a juvenile to use all means possible to avoid imprisonement against the juvenile defendant (Beijing Rules, Rule 10; Hamilton, 2011).

As a result of a synthetic analysis of international legal standards with the law of Georgia, it is possible to develop the opinion that Article 63 of the JJC should present the discretionary power of a judge to freely decide on the issue of bail in case of detention of a juvenile unlike the 6th part of the Article 200, different definitions of which can be found both in the scientific literature and in court practice (Bokhashvili, 2017; Niparishvili, 2016). The judge should be given the opportunity to release the detained juvenile from the courtroom on bail if he or she deems that there is no unavoidable need for replacing bail by imprisonment.

[2] The Supreme Court of Georgia, 2019, 87-90.

2.4. Detantion

Detantion, as the most severe measure of restraint, is used with even greater caution towards the juvenile cases and is truly an extreme means of achieving the goals of the measure of restraint.[3] Such an approach and standard are recognized by international legal norms (Bokhashvili & Benidze, 2009; Gabisonia, 2003, pp.:124-128; Shalikashvili & Mikanadze, 2016). and are also agreed by the intrastate legislation. Article 9 of the JJC recognizes the unwavering provision of juvenile justice – the use of detention only as a measure of extreme urgency. Article 64 of the CPCG provides for the peculiarities of the application of detention to a juvenile, which sets out formal grounds different from the first part of Article 205 of the CPCG. Of particular note are sub articles (a) and (c). (a) Article 64 of the JJC, which restricts the use of detention to a juvenile, provided that the offense committed must be punishable by imprisonment and that the purpose of the detention must exceed the interest of the juvenile's freedom.

Article 64 of the JJC prescribes a "preferential, concessionary scheme" for the period of detention of a juvenile, which differs substantially from the reservations of the CPCG. The maximum term of detention in the case of a juvenile before his / her pre-trial proceedings is 40 days, after which he / she must be released from detention (section 2, Article 64, JJC) and the total term of detention should not exceed 6 months (section 4, Article 64 of the JCC). Section 3 of Article 64 of the JJC deals with the issue of considering the grounds of keeping detention in force as part of a judicial control over detention. This norm contains a fault and therefore needs to be changed. According to section 3 of the JJC, the court examines the release of a detainee at least once every 20 days from the first pre-trial hearing. It is clear that the legislator determines 20 days as the maximum interval between inspections and counts it only from the first pre-trial hearing. There are cases when the term of detention in the investigation exceeds 20 days which has not been attaended to yet. It is advisable to add a record to section 3 of Article 64 of the JJC, according to which (as in section 3, Article 208 of the CPCG) if the period of detention of a juvenile exceeds 20 days from the time of detention to the pre-trial hearing, the court is obliged to examine the issue of detention in arrest.

2.5. Other measures

Pursuant to Section 2, Article 60 of the JJC, other measures may also be applied when imposing a measure of restraint on a minor, as mentioned in Section 2, Article 199 of the CPCG. In general, the measures in Section 2, Article 199 of the CPCG take the form of additional restrictions and create a flexible system in terms of encouraging non-custodial measures (Giorgadze (Ed.), 2015). From this point of view, in Section 2, Article 60 of the JJC it would be desirable for the legislature to produce a direct list of other restrictions to be applied in addition to the restraining order (e.g. for instance, to determine the night hours when juveniles are not allowed to leave home, constraint on using internet, prohibition of mobile phone use and / or conversely, obligation to communicate with a parent or other family member while away from home, etc.). At the same time, this does not exclude, the application of Section 2 of Article 199 of the CPCG and would give some direction to the court, taking into account the specific circumstances and individual approach to the juvenile (Article 14 of the JJC) to determine any other measure.

3. Rules and grounds for applying a measure of restraint against a juvenile accused

The JJC does not set either independent rules or grounds for imposing restraint measures on a minor and therefore, under Section 2, Article 2 of the JJC, the relevant norms of the CPCG apply in this case. However, since the JJC establishes the general principles of juvenile justice, the norms of the CPCG are applied in accordance with these principles.

Article 198 of the CPCG defines the purposes and grounds for the application of a measure of restraint, while Article 206 of the same Code serves to establish the rules for the application, modification and revocation of a measure of restraint. It is under these articles that the court is guided when imposing a measure of restraint on a minor.

[3] See for example, the ruling of the Investigative Panel of the Tbilisi Court of Appeals of 25 February 2015 on the abolition of detention and the use of bail on a juvenile, where the judge reasonably discusses the exception of detention, the special consideration of the juvenile, /http://library.court.ge/judgements/74072015-03-09.pdf/

If the JJC does not take into account the independent rules and grounds for imposing a measure of restraint on a juvenile in the chapter dedicated to preventive measures, it is advisable to add, if only in the form of a record, the features that are to be taken into consideration concerning juvenile cases. For example, Section 5, Article 198 sets out the circumstances to be considered by the court when imposing a measure of restraint. Although the law allows the court to take into account other circumstances as well as the ones listed in the norm, even the best interests of the juvenile as one of the main circumstances and the essential principle of juvenile justice (Article 4 of the JJC, Article 13 of the CRP) should be mentioned independently in Chapter IX of the JJC. No less important is the fact that the court is guided by the provisions of Articles 9 and 14 of the JJC when applying a measure of restraint to a minor. Also, noteworthy is the right of the child secured under Article 13 of the CRC to a fair trial, which must be tailored to the rights and needs of the child. The JJC also provides for the existence of an individual juvenile assessment report (Article 27). Although the imposition of a restraining order is not a move that requires the preparation and use of an individual report, it is desirable that Chapter IX of the JJC recommends that an individual assessment report be used when imposing a restraining order on a juvenile if such a report exists (especially when Section 8 of the Article 27 of the JJC will only encourage this approach).

According to the current case law, the parties and the court, in substantiating their position or decision, focus on the exception of detention, the best interests of the child and other individual characteristics in the measure of restraint against the juvenile (the judgment of the Chamber of Criminal Cases of the Tbilisi Court of Appeals of February 23, 2017), and this process would be much more effective if the above mentioned suggestion was taken into account.

4. Statistical Analyses published by General Prosecutor's Office of Georgia on Criminal Cases of Juvenile Defendants

According to official statistics released by the prosecution, a total of 330 juveniles were charged in 2019 and 130 of them were remanded in custody, which is quite high and is equal to 39% (for comparison, in 2018 the same figure was only 24%). This was against the fact that the majority of detainees were charged with committing a serious (79%) and less serious (14%) crime and only 9 (7%) cases were initiated when prosecuting a juvenile for a particularly serious crime. Juveniles are mostly detained in emergency situations (118 out of 130 cases) and are determined in the Subparagraph "e" , Section 2, Article 171, CPCG, as the juvenile may "skip bale". It is noteworthy that 40 out of 130 detainees were released, and in 32 cases – by court decision.

The use of detention against a juvenile significantly determines and influences the subsequent imposition and selection of a specific type of measure of restraint on him or her.

According to survey in 2019, the prosecutor's office petitioned 295 juveniles (out of 330 cases) to apply a measure of restraint to the court, and in 126 cases (38%) the prosecutor petitioned for the use of detention, which in most cases was upheld by the court – 87 (69%). Bail was more often used by the court against the other persons – 37 (of which 1 – prison bail) and only 2 persons were transferred to supervision. Added to this are 8 cases of the so-called "detention on bail" (out of 100 bail petitions). However, the court granted only 3 motions and selected various less harsh forms against the other persons (in 1 of these cases the plea agreement was approved and the measure of restraint was no longer applied).

Statistics on the resolution of bail petitions is also interesting. Out of 92 motions of the prosecution, the court granted the request in only 56 cases. Most of the cases of non-use of bail (21) cases are from concluding a plea agreement with a minor. It is also noteworthy that in 9 cases the court did not apply the measure of restraint at all and in only three cases requested the transfer of custody or an agreement on absenteeism and appropriate conduct.

Transfer to custody was requested for 60 juveniles, which was almost fully upheld by the court (56 cases). 3 of the other 4 persons were not detained (in 2 cases a plea agreement was signed) and 1 person was sentenced to bail.

Finally, in only 9 cases did the prosecutor petition the court to apply an agreement on absenteeism and appropriate conduct. The court granted the motion in 8 of these cases, and a plea agreement was signed with 1 person.

Based on the analysis of statistics, it is clear that the court frequently (57%) fully or partially (22%) shares the position of the prosecutor's office or imposes another type of preventive measure (14%). Nevertheless, the existing statistics and practices of cases of refusal to apply the measure of restraint to minors should be positively noted. In 35 out of 330 cases, the prosecution considered that there was no reason to apply the measure of restraint to the person and did not apply to the court, and in 10 more cases the court decided not to apply the measure of restraint to the juvenile.

Conclusion

In conclusion, the current legislation and system of juvenile justice in Georgia requires simultaneous, dynamic development and continuous improvement of the growing demands and needs of juveniles in the modern world. It should be one of the priorities of the state to care for every child.[4] In this regard, the initiatives proposed in the paper will make some contribution to the improvement of the legislative or practical regulation of the application of the measure of restraint to minors.

References

Bokhashvili, I. (2017). *A preliminary hearing in criminal proceedings. Journal of Law*, (1), pp.:289-316.

Bokhashvili, I., Benidze, M. (2009). *Issues of Juvenile Justice. Law* (2), pp.:35-62.

Criminal Procedure Code of Georgia (October 9, 2009).

Convention on the Rights of the Child (November 20, 1989).

Decision of the Investigative Panel of the Tbilisi Court of Appeals of February 25, 2015

/http://library.court.ge/judgements/74072015-03-09.pdf/

Gabisonia, I. (2003). *Preventive Measures in Criminal Procedure*. Tbilisi. Meridian.

Giorgadze, G., (Ed.) (2015). *Commentary on the Criminal Procedure Code of Georgia.* Tbilisi, Meridian.

General Prosecutor's Office of Georgia (2020). Analysis of Criminal Cases of Accused Juveniles, 2019. Public information (pog.gov.ge)

GYLA (2020). *Standards for the use of preventive measures.Tbilisi.*

Hamilton, C. (2011). Guidelines for Juvenile Justice Legislative Reform. Georgian translation: UNICEF, 2013.

Judgment/Decision of the Chamber of Criminal Cases of the Tbilisi Court of Appeal of February 23, 2017/ http://library.court.ge/judgements/63432017-10-17.pdf/

Law of Georgia "Juvenile Justice Code" (June 12, 2015).

Law of Georgia "Code of the Rights of the Child" (September 20, 2019).

Meishvili, Z., Jorbenadze, O. (2007). Comments on the Criminal Procedure Code of Georgia. Tbilisi.

Niparishvili, B. (2016). Imprisonment as a measure of securing the bail. Justice and Law, (2(50)), pp.:37-64.

Shalikashvili, M., Mikanadze, G. (2016). Juvenile Justice. IRZ, Tbilisi, Freiburg, Strasbourg. UNICEF (2017). *Adapted Justice for Children, Legislative Research.*

https://www.unicef.org/georgia/media/1481/file/Legislative%20Analysis%20GEO.pdf/

United Nations Rules for the Protection of Juveniles Imprisoned (December 14, 1990).

United Nations Standard Minimum Rules on the Juvenile Justice Administration (Beijing Rules, November 29, 1985).

The Supreme Court of Georgia, 2019. Application of Measures of Restraint against Minors: Application of International Standards in National Legal Practice. Tbilisi.

[4] UNICEF Georgia is constantly monitoring and analyzing this issue. See, for example: UNICEF (2017).