

Alternative Approaches to Juvenile Delinquency: Aligning National Legislation with International Standards on Minimum Intervention and Restorative Justice

ABSTRACT: *The subject of this paper is diversion procedures and programmes, and the elements and instruments of restorative justice (such as family group conferences) in juvenile justice proceedings. The author explores their fundamental theoretical foundations and objectives, as well as legal standards based on the principle of minimal intervention and restorative justice. This paper aims to achieve a comprehensive understanding of international standards and identify forms of diversion that are noticeable in comparative law and basic types of diversion in certain national legislations. The central part of the paper focuses on analyzing international legal principles, specifically emphasizing alternative approaches, the balance between informal proceedings and the protection of fundamental rights, and upholding the core elements of the right to a fair procedure. The author addresses alternative and diversion measures applied in proceedings involving juveniles in the Republic of Serbia – diversion orders.*

KEYWORDS: *diversion procedure, diversion programmes, restorative justice, family conferences, right to a fair procedure*

1.

Introductory Considerations on Diversion Options

The diversionary approach in proceedings involving juveniles includes redirecting juvenile offenders away from the formal classic/traditional criminal proceedings through ‘discretionary diversion options’ – ‘diversion process’ and ‘diversion

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programmes'.¹ In theory, it is emphasized that the roots of diversion stem from the late 19th century when juvenile courts were instituted to redirect juvenile delinquents from adult courts, prioritizing 'reform' rather than punishment, even though there was no proven methods available to change juvenile offenders.²

A diversionary approach has been developed under the influence of labelling theory³ as an alternative response to crime, diverting juveniles from the criminal court to other entities (e.g. special youth services) and milder/less severe forms of intervention based on the criminal court's decision. However, it has been observed that such diversion programmes have functioned as additions to the system, as they were applied to juvenile offenders who would otherwise have been released, issued a fine, or given a suspended sentence.⁴ Diversion programs are primarily aimed at reducing stigma and recidivism, providing juveniles with prevention services, connecting them to "community service programs"⁵, and holding youth responsible for their behavior by requiring them to face their victims.⁶

According to the procedural stage at which diversion measures and programmes are applied, or the timing of their implementation, we distinguish diversion measures/programmes implemented before the procedural moment marking the formal initiation of criminal proceedings, diversion measures/programmes applied during the conduct of criminal proceedings, and those applied after the court judgment. Redirecting from formal judicial procedures is commonly applied during the early stages of the proceedings, before the court phase is initiated (*police diversion, prosecutorial diversion*). Diversionary forms can be applied before the court, in which cases the court makes certain decisions (e.g. discontinuing proceedings, guilty verdict without punishment, imposing measures of special care instead of a criminal sentence). In some countries, diversion is combined with educational measures. In Serbian juvenile criminal law theory, a distinction is made between *real* forms of diversion and *improper* forms of diversion. A real form of diversion involves the application of the principle of opportunity, whereby the juvenile's public prosecutor refrains from prosecution – either through the use of unconditional or conditional opportunity.⁷

1 For notions 'diversion process' and 'diversion programmes', see Rutherford and McDermott, 1976, pp. 4–5.

2 Albrecht and Ludwig-Mayerhofer, 1995, p. 4

3 It is pointed out in the literature that there are three main policy implications of labelling theory: 1. *ignoring the actions of the delinquent*; 2. *informal response, diverting the child from juvenile justice*; 3. *bringing together the offender, the victim, and the community to "right the wrong" or restore justice*: Regoli, Hewitt and Delisi, 2010, p. 233. About labelling theory: Braithwaite, 1989, pp. 16–21.

4 Jilly, Cullen and Ball, 2007, p. 137.

5 Harris et al., 2011, p. 6.

6 Bayer, 2003, p. 4.

7 Škulić, 2022, pp. 157–159.

By contrast, an improper form of diversion refers to cases where criminal proceedings have already been initiated but subsequently discontinued for reasons of purposefulness (unconditional or conditional discontinuing of proceedings).⁸ The principle of opportunity was applied to 660 juveniles in 2023 and 572 juveniles in 2022.⁹ Also, proceedings against 412 juveniles were discontinued by the court due to the application of opportunity.¹⁰

2. Restorative Justice

Restorative justice has its origin in Anglo-Saxon systems where the position of the victim in the criminal procedure is very weak.¹¹ The essence of the restorative justice model is to create conditions within the framework of criminal proceedings for the maximal satisfaction of the interests of the injured party/victim of the criminal offence.¹² The term used for this concept is “victim-centred justice”.

The theory of reintegrative shaming forms the basis of the restorative justice model.¹³ It is constructed on the assumption that wrongdoing can be disapproved of while maintaining a respectful relationship, disapproving the “evil of deed” without labelling the person as evil, ensuring that deviance does not become “a master status trait”.¹⁴ Restorative justice is closely linked to the theory of procedural justice, which suggests, among other things, that there is a connection between obeying the law without the threat of sanctions, and perceiving that the criminal justice system and its authorities are acting justly and the “legal system based more heavily upon voluntary cooperation”.¹⁵ Some researchers have shown that restorative justice programmes are perceived to be more legitimate, compared with traditional criminal justice processes.¹⁶

The juvenile criminal law doctrine states that the restorative justice model aims to achieve social reintegration of the offender through the application of measures

8 Ibid.

9 Vrhovno javno tužilaštvo, 2024, p. 96.

10 Ibid., p. 100.

11 In an adversarial criminal procedure, the injured party generally cannot have the status of an authorised prosecutor; as a rule, they lack the ability to initiate evidence or realise a restitution claim. Furthermore, the examination of the injured party/victim as a witness (especially during cross-examination) often takes on a notably “aggressive” character. Škulić, 2020, p. 19.

12 Škulić and Miljuš, 2024, p. 16.

13 About theory of reintegrative shaming see: Braithwaite, 1989, p. 55.

14 Braithwaite, 1995, p. 146

15 See: Tyler, 2006, pp. 309–313.

16 Office of Juvenile Justice and Delinquency Prevention, 2021, p. 1.

that ensure adequate participation of the victim, the offender, and the broader social community in the procedure.¹⁷ The model of restorative justice is considered as a “community-based alternative to state justice system”, and “the way of doing criminal justice” is characterized by “voluntariness”.¹⁸ Restorative justice programmes focus on *repairing the harm* (compensating for the damage) caused by a criminal offence, *holding the juvenile accountable* for his/her actions, and *a dialogue* between the juvenile and the victim. Restorative justice programmes and elements of the restorative justice system in proceedings involving juveniles aim to ensure that juveniles understand the significance of the harmful consequences of their actions, acknowledge their responsibility, and agree to compensate for the damage or rectify the detrimental consequences caused by the commission of the criminal offence.

Diversion procedures enable juveniles to engage in a restorative process, involving both the victim and the community. Restorative justice elements are applied through diversionary mechanisms, such as, “diversion orders”¹⁹ in Serbia's juvenile criminal law. The juvenile public prosecutor can impose diversion orders on a juvenile during the pre-trial procedure, and may condition non-prosecution on the fulfilment of one or more diversion orders. In court procedure, diversion orders can be imposed by the juvenile judge or juvenile court bench. The juvenile judge shall issue a decision on discontinuing proceedings if a juvenile complies with the ordered diversion orders (conditional discontinuing of proceeding).

2.1. Youth Conferences – The Example of Northern Ireland

Youth Conferences are a form of diversion procedure and an instrument of restorative justice, characteristic of New Zealand (family conferences) and Nordic countries. They contain elements of mediation. The co-ordinator is impartial, respects the dignity of the parties, and has a disciplinary approach. The co-ordinator is a trained professional. He/she explains the procedure to the participants and leads the procedure.

¹⁷ Škulić, 2022, p. 110.

¹⁸ Zernova, 2016, pp. 59–102.

¹⁹ “Diversion orders” in juvenile criminal law in Serbia are: 1. *settlement with the injured party* (by compensating the damages, rendering an apology, work, or otherwise), so that the detrimental consequences would be alleviated either in full or partly; 2. *regular attendance of classes or work*; 3. *engagement, without remuneration, in the work of humanitarian organisations/community work* (welfare, local or environmental); 4. *undergoing relevant check-ups and drug and alcohol treatment programmes*; 5. *participation in individual/group therapy* at a suitable health institution or counselling centre. See more: Škulić, 2015, pp. 811–813. During 2023, the public prosecutor issued diversion orders for 288 individuals, while the court issued diversion orders for 82 individuals. See: Vrhovno javno tužilaštvo, 2024, p. 96.

Northern Ireland is considered a pioneer in Europe for restorative responses to youth delinquency. In Northern Ireland “diversionary referrals” accounted for the largest proportion of all referrals in 2022/23 (47.6%; 648), followed by court ordered (27.0%; 367) and earlier stage diversions (16.9%; 230).²⁰

Northern Ireland’s youth conference system is based on law, and the procedure for conducting conferences is partially prescribed by law. A high percentage of victims participate in such conferences and experience satisfaction. These conferences are based on the voluntary acceptance of their participation. The victim has the option to attend a conference and either accept or decline participation. The victim may be physically present at the conference, participate via audio-video link, through another close person representing their interests, or provide written statements regarding the consequences of the criminal offence. A juvenile offender must confess his/her offence (admit the offence) and accept that his/her case will be resolved in this manner.

There are two forms of youth conference and methods for initiating the youth conference procedure: 1. youth conference referral by the Public Prosecutor Service, available when the youth offender consents to the process and admits to have committed the offence (“*diversionary conferencing*”, “*pre-court mechanism*”); 2. “*court-ordered youth conferencing*” – requires the admission of guilt or establishment of guilt and consent of the young person involved.²¹ The public prosecutor may refer the case to some specific form of diversion, including a youth conference (“*diversionary youth conference*”). If court proceedings have been initiated and the juvenile admits the offence, the court may issue a decision ordering the youth conference to be held. In Northern Ireland, the system is characterized by “mandatory court-ordered referrals to youth conferencing” with some exceptions.²²

Youth conference can be defined as a formal meeting attended by the juvenile, a police officer, members of the juvenile’s family, and the victim or their representatives, led by a conference coordinator, where a discussion about the criminal offense committed is conducted for the purpose of formulating an “action plan”. The procedure concludes with the adoption of an “action plan”, which is confirmed by the Public Prosecutor’s Office or the court. Both the offender and the victim agree to the “conference plan”, which is the outcome of the conference. The “action plan” is the result of prior sharing of stories and expressing emotions by the parties, as well as the dialogue between them.²³ A “Conference plan” could include an apology, compensation, undertaking reparation/community service, adhering to restrictions

20 Brown, 2023, p. 1.

21 O` Mahony and Campbell, 2006, pp. 101–102.

22 Ibid., p. 102.

23 Nulund, Evrasti and Adrian, 2018, p. 151.

on conduct/whereabouts (through the use of curfews or electronic monitoring), or involvement in programmes or treatments.²⁴

2.2. Konfliktråd – The Example of Norway

In Norway, administrative bodies conduct proceedings for minors under the age of 15; jurisdiction is concurrent – either an administrative body or a court may proceed for minors aged between 15 and 18 years.²⁵ In cases involving minors aged 15 to 18, the prosecutor may initiate proceedings before a social welfare board.²⁶ Elements of restorative justice are evident in the mediation process. The mediation procedure in Norway is an integral part of the criminal justice system, which includes the juvenile justice system. The formally structured mediation procedure has its roots in Nils Christie's lecture and his article "Conflicts as Property", wherein he has advocated for establishing an alternative to the professional punishment system, allowing parties in conflict to take an active role in the process of finding solutions to their problems.²⁷ The basic principles of mediation include, among others, "simple and rapid case resolution"; "the parties themselves participate in problem-solving"; "finding individual solutions"; "contributing to a real resolution of the conflict", and "paying attention to the victim, including the possibility of rapid compensation".²⁸

The Law of Conflict Processing (Conflict Thread Act) was enacted on 15 March 1991. Mediation proceedings are conducted between the minor and the injured party before the Konfliktråd (Norwegian National Mediation Service), organized under the Ministry of Justice. At the municipal level, special committees handle both criminal and civil cases based on voluntary conflict resolution. The fundamental principle is "participation in a collective process" to determine how the consequences of violations of rights will be resolved (The Mediation Service Act – Section 1).²⁹

Practically, the decision to prosecute can be conditioned on the successful completion of the mediation process (a form of conditional opportunity) if the case is suitable for mediation. The decision to refer a case to mediation can be made by the prosecuting authority integrated within the local police. The basis for mediation can also be a court decision (mediation as a special condition within a suspended sentence, or as part of a

24 Seumour Mairéad, 2013, p. 62, Youth justice, no date, p. 1. See more details on the obligations/measures covered by the "Youth conference plan": The Criminal Justice (Children) (Northern Ireland) Order 1998, Section 3C.

25 Škulić, 2022, p. 175.

26 Ibid., p. 176.

27 Kemény, 2005, p. 101.

28 Ibid., p. 111.

29 The Mediation Service Act (Lov om konfliktrådsbehandling (konfliktrådsloven)), LOV-2014-06-20-49, Last consolidated LOV-2021-06-18-127 from 01.07.2021.

community sanction). Mediation proceedings in criminal cases are urgent and must begin as soon as possible after the case is received. One of the basic principles is that an attorney (proxy) cannot represent the parties in the mediation process. Before conducting the mediation process in a formal sense, the mediator/mediators hold meetings and conduct discussions with the parties to prepare for the mediation process. Mediators are professional, trained laypersons, volunteers, who meet certain legal criteria. They are appointed for each municipality. In most cases, mediation concludes with an agreement, which is not recorded in the criminal register. The agreement between the parties must be approved in writing by the mediator. When the agreement is fulfilled, the prosecuting authority is notified (Section 20). The public prosecutor may initiate criminal proceedings if the minor did not participate in the mediation process or if the minor significantly violated the agreed terms.

3.

Certain International and European Standards as Alternative Approaches to Juvenile Delinquency

The United Nations Convention on the Rights of the Child (UNCRC) of 20 November 1989³⁰ is a leading international human rights document. In Serbian legal theory, it is described as “the most comprehensive source of international law” in the field of children’s rights, which imposes obligations on States Parties to harmonise their normative and institutional systems with the provisions of the Convention.³¹ It includes guarantees for the realization of human rights and the legal protection of children and encompasses the rights of “children” who are charged with a procedurally relevant degree of suspicion of having committed a criminal offense (suspects, accused), and the position and rights of children in criminal proceedings.

The UNCRC establishes the principle of *prioritizing alternative approaches over judicial processes*, which involves applying alternative measures instead of conducting criminal proceedings and using alternatives to “institutional care” after adjudication. Its implementation involves the prescription by states of alternative procedures that respect human rights and ensure the legal protection of the child.³²

30 Convention on the Rights of the Child, 20 November 1989, General Assembly Resolution 44/25

31 Novaković, 2023, p. 621.

32 According to European legal standards, the principle of priority is practically defined as the promotion of alternative approaches (such as mediation and forms of diversion that involve judicial redirection mechanisms) whenever they best serve the “child’s best interests”. It is also emphasised that the “preliminary use of alternatives” must not be used in a way that hinders the child’s access to justice. See: Committee of Ministers of the Council of Europe – Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 November 2010, Rule 24.

Practically, the UNCRC obliges States Parties to maintain a balance “between the informality of proceedings and the protection of the fundamental rights of the child”.³³ Following the ratification of the Convention by the States Parties, formal progress has been achieved in two directions: 1. the establishment of specialized juvenile courts in countries where they did not previously exist; 2. the expansion of diversion measures in some states.³⁴

Earlier, on 29 November 1985, the General Assembly adopted the “*Beijing Rules*” (*Standard Minimum Rules for the Administration of Juvenile Justice*)³⁵, which prescribed diversion and considering the possibility of resolving cases involving juvenile offenders without resorting to formal trial by the competent authority “whenever appropriate” (Rule 11.1). Commentators have noted state practices of applying diversion in the form of diverting away from criminal proceedings (formal criminal justice system) and redirecting juveniles to alternatives – community services (community-based diversion) or other services – to avoid stigmatization (“the stigma of conviction and sentence”) and a criminal record. It is observed that, in some cases, diversion in the form of deciding not to intervene at the outset is the best solution, such as when the juvenile offense is minor, and when informal social control institutions (such as family and school) have already reacted/are likely to react responsibly and constructively.

Police/prosecutor’s offices are authorized to *act at their discretion*, without formal hearings, according to criteria prescribed in their national legal systems, and the principles of the Rules. Also, courts/tribunals could use diversion. States are faced with an important requirement that the application of a diversion measure must be conditioned upon the *free and voluntary consent* of the juvenile, parents, or guardians. It is also advocated that they ensure an “objective assessment of the appropriateness” of the decision to apply diversion, upon request.³⁶ “Juveniles should not feel pressured (e.g. to avoid court appearance) or be pressured into consenting to diversion programmes”.³⁷

General Comment No.24 (2019) on children’s rights in the child justice system,³⁸ issued by the UN Committee on the Rights of the Child, interprets that diversion usually involves “*programmes or activities*” (para. 15). It suggests that states *continuously expand* “the range of offences for which diversion is possible, including serious

33 Van Bueren, 2006, p. 25.

34 Ibid., p. 1.

35 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), General Assembly A/RES/40/33

36 “The Beijing Rules” – Commentary of Rule 11.3

37 Ibid.

38 General Comment No. 24 (2019) on children’s rights in the child justice system, CRC/C/GC/24, 18 September 2019.

offences where appropriate” (para. 16).³⁹ Diversion programmes include community service, supervision, and guidance by designated officials, family conferencing, and other restorative justice options, including reparation to victims. Diversion measures and programmes are a part of the child justice system and their application requires the fulfilment of the following procedural conditions: 1. *compelling evidence* exists that the “child” committed the alleged offence; 2. the “child” *freely and voluntarily admits responsibility*; 3. *free and voluntary consent from the child to participate in the diversion process* and to diversionary measures is obtained.

In the application of diversionary measures or programmes, it is essential to uphold elements of the right to a fair procedure, ensuring adequate procedural safeguards.⁴⁰ These include: 1. *Right to Information* – information provided must be adequate and specific, detailing the nature, content, and duration of the diversionary measure, as well as the consequences of failure to cooperate or complete the programme; 2. *Access to a Lawyer* – the “child” must have the opportunity to seek legal/other appropriate assistance concerning the proposed diversionary measure; 3. *Preservation of the Presumption of Innocence* – records of diversion should not be treated as criminal convictions or included in criminal records; 4. *Prohibition of Repetitive Prosecution* – fulfilment of the diversionary measure or completion of the diversionary programmes should result in the “definite and final closure of the case”, with no further prosecution allowed.

The United Nations “Tokyo Rules”⁴¹ distinguish measures alternative to institutional treatment that are applied, in accordance with the principle of minimal intervention, before trial and after adjudication. The criteria for selecting measures should relate to the offense (nature, severity/gravity), the offender (character/personality, background), the purpose of punishment, and the rights of the victim (Rule 3.2). At the pre-trial stage, the police or the public prosecution service should be empowered (police and prosecution diversions) to decide not to prosecute the offender or to terminate the early stage of the proceedings, provided it is assessed that criminal prosecution/further criminal prosecution is not necessary to achieve the purpose of punishment (such as “the protection of society, crime prevention, or the promotion

39 This tendency was evident in the Draft Law on Amendments to the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles of the Republic of Serbia, which proposed expanding the possibility of applying diversion orders to the category of criminal offenses punishable by five to eight years of imprisonment. See: Škulić, 2022, p. 388.

40 See also Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Rule 25, which emphasised the child’s right to detailed and adequate information (both legal and otherwise), the child’s right to be consulted, and in this regard, the right to legal advice and other assistance in choosing between court proceedings and alternatives.

41 United Nations Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”), General Assembly resolution 45/110 of 14 December 1990.

of respect for the law”)⁴², while considering the rights of the victims. In this regard, the prosecution may also decide to impose measures that do not involve deprivation of liberty when the situation entails minor offences.

Regarding the formulation of European standards for alternative proceedings, the practical significance lies in the recommendations of the Council of Europe – Committee of Ministers. The following basic principles are prominent as the foundation for alternatives to formal prosecution: 1. alternatives should be *part of the regular procedure*; 2. the *principle of proportionality* should be respected; 3. the application of alternatives should reflect “*the best interest of the child*”; and 4. in principle, alternatives to criminal prosecution should be applied in cases where *juveniles freely accept responsibility*.⁴³ It is recommended that states expand the range of suitable alternatives to formal prosecution. It is suggested that community sanctions and measures be developed even in cases involving serious offenses, with elements of violence, and when dealing with repeat juvenile offenders. Likewise, unless it is deemed counterproductive, the application of these sanctions/measures should also involve the juvenile’s parents/other legal guardians to contend deal with the offending behavior, the needs of the offender, and to ensure that they “become aware of and accept their responsibilities regarding the offending behavior of young children”.⁴⁴ When determining the potential alternatives to criminal prosecution, the rights and needs of victims should be considered. The development of diversion and mediation procedures at the public prosecutor or police level is encouraged, along with the involvement of Child Protection Boards and relevant services in these procedures.⁴⁵

*European Rules for juvenile offenders subject to sanctions or measures*⁴⁶ define the principles of minimum intervention and a restorative approach and the notion of “community sanctions or measures”. “Community sanctions” refer to “any sanction imposed by a judicial/administrative authority”, while a “community measure” refers to “any measure taken before” or as an alternative “to a decision on a sanction”.⁴⁷ These also include special methods of enforcing a sentence of imprisonment outside a prison facility. Diverse measures are *not criminal sanction*, in the formal – legal sense/

42 United Nations Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”) – Pre-trial stage, Rule 5.1.

43 Council of Europe, Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, 24 September 2003.

44 Recommendation Rec (2003) 20, Rule 8, 10.

45 Council of Europe, Recommendation CM No. R (87) 20 of the Committee of Ministers to member states on social reactions to juvenile delinquency, 17 September 1987.

46 Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008, Appendix to Recommendation CM/Rec(2008)11 – European Rules for juvenile offenders subject to sanctions or measures

47 European Rules for juvenile offenders subject to sanctions or measures, Rule 21.4.

sense of criminal law. The principle of minimal intervention implies that sanctions or measures should be applied to the extent and for the duration strictly necessary. This principle, on the one hand, ensures better protection of human rights and preserves social bonds, while on the other hand, it does not increase the risk to society.⁴⁸ The principle of a restorative approach in proceedings against juveniles emphasizes prioritizing restorative measures, such as mediation and others, at all stages of the procedure. This approach is favored owing to its greater preventive benefits for the offender, the victim, and the community.⁴⁹

Regarding the intentions for the development of restorative justice, it is also necessary to highlight certain standards from the Council of Europe's Recommendation on restorative justice in criminal matters⁵⁰: 1. *"General availability"* – access to all types of offences and at all stages of the criminal procedure. 2. *Application of restorative principles to certain interventions* that transcend the offender-victim dialogue. 3. *Individualization in practice*, which involves considering the status and needs of children and adapting the application of restorative justice to the child.⁵¹

4.

Basic Types of Diversion in National Legislations

According to their substance, three types of diversion are distinguished in national legislation. They are: 1. *Diversion involving non-intervention*, which involves the legal decriminalization of an offense for which there is minimal culpability and non-action/non-intervention by prosecuting authorities (the application of unconditional opportunity). 2. *Diversion with intervention* – complex diversion that involves the application of diversion measures, such as diversion orders in Serbia (the application of conditional dismissal of criminal prosecution) and the application of instruments in the implementation of diversion programmes. 3. *Diversion, in combination with referring the case to a) social services, and b) special administrative body.*

According to the formulated European standards in the "Yerevan Declaration"⁵², regarding "procedural decriminalization", prosecutors, as prosecuting authorities, are required to seek advice from social services or specialized child protection services before deciding to prosecute a juvenile (para. 23). When it comes to alternatives

48 Council of Europe, 2009, p. 38.

49 Ibid., p. 39.

50 Council of Europe, Committee of Ministers, The Recommendation CM/Rec (2018)8 concerning restorative justice in criminal matters, 3 October 2018.

51 See Marder and Forde, 2023, p. 203.

52 Consultative Council of European Prosecutors (CCPE) – Opinion No. 5 "Public prosecution and juvenile justice" – Yerevan Declaration, 19–21 October 2010.

to prosecution, alternatives to prosecution should represent an appropriate judicial response to the offense, assessed by considering the interests of victims, the public, and adherence to the goals of juvenile justice (para. 26).

More importantly, in general, and with respect to juveniles, the application of conditional opportunity represents a “consensual method of concluding proceedings”, a form of negotiation aimed at avoiding the initiation of criminal procedure or adjudication, and one of the forms of simplified procedures.⁵³ When alternative measures to prosecution are applied, it is necessary to emphasize that the procedures in which decisions are made must meet the requirements of a fair trial, which primarily involves respecting the presumption of innocence. Alternative measures cannot be imposed by the prosecuting authority’s decision on an individual who is innocent, or in cases where there are obstacles to their criminal prosecution. Furthermore, an individual to whom the public prosecutor offers alternatives to prosecution must be informed about the procedural consequences of rejecting or failing to adequately comply with the measures/obligations imposed on him/her – the initiation of criminal prosecution against him/her.⁵⁴

4.1. Germany

In proceedings involving juveniles in Germany, the principle of specialization of the procedural actors applies. Juvenile prosecutors (“youth public prosecutors”) and juvenile judges should have the necessary educational qualifications in relevant fields (such as criminology, pedagogy, social education, youth psychology) and experience in working with young people (§ 37 Jugendgerichtsgesetz⁵⁵). In German youth justice, two types of the principle of opportunity are distinguished: 1. *The classical/real form* of opportunity, when the juvenile public prosecutor decides to waive prosecution, for which no court approval is required. 2. *The improper form of opportunity*, which grants the juvenile judge the authority to discontinue the proceedings with the consent of the public prosecutor.

The first form, unconditional opportunity and diversion involving non-intervention, is applied in the case of “waiver of prosecution in cases of minor offense”

53 See Nenadić and Miljuš, 2023, p. 157.

54 Consultative Council of European Prosecutors (CCPE) – Opinion No. 2 (2008) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on “Alternatives to prosecution”, Conclusions, paras. m., o.

55 Jugendgerichtsgesetz (JGG), in der Fassung der Bekanntmachung vom 11. Dezember 1974 (BGBl. I S. 3427), das zuletzt durch Artikel 21 des Gesetzes vom 25. Juni 2021 (BGBl. I S. 2099) geändert worden ist.

under the conditions of the Code of Criminal Procedure (§153 StPO⁵⁶). The public prosecutor is authorized to decide not to prosecute a young person under the following conditions: 1. The offense in question is a *petty offense* – misdemeanour (“*Vergehen*”). 2. Previously, it was assessed that the *guilt of the “offender” is considered minor*. 3. Earlier, it was assessed that there is *no public interest* in prosecuting such an offense. Practically, in cases of applying the principle of opportunity, a reliable assessment of guilt is not possible because no trial has taken place. Therefore, only a “preliminary assessment” can be conducted, considering all the circumstances of the specific case.⁵⁷ More precisely, the evidence must indicate a relevant degree of suspicion that the guilt is minor. The literature shows that circumstances related to the personality of the “offender” and the offense are assessed, implying circumstances that are typically considered during sentencing.⁵⁸ The second condition is the absence of public interest in initiating proceedings, where the requirements of both special and general prevention should be considered.⁵⁹ Public interest entails a “balance between the general interest of the community and the protection of individual freedoms and rights”, and circumstances necessary for its assessment are the circumstances of the commission of the criminal offence, including the guilt of the suspect, harm caused, and the impact of the offence on the community.⁶⁰ The public prosecutor practically “weighs” all the circumstances to assess whether public interest necessarily requires the initiation of criminal proceedings and punishment.

In German youth justice, diversion can be applied with measures undertaken by parents, schools, or other institutions or combined with mediation, which represents “the second level of diversion” – “*diversion with educational measures*”.⁶¹

The public prosecutor shall refrain from prosecution if an educational measure has already been carried out/initiated.⁶² The condition is that the public prosecutor assesses that it is not necessary for the court to be involved in the application of prosecutorial discretion, such as issuing a warning, instructions, or conditions, or filing charges for the offence. It is stipulated that “the juvenile’s efforts to reach a settlement with the injured party are considered equivalent to an educational measure” (§ 44 (2) JGG). This protects the victim, the victim’s interest, and achieves a preventive effect.

Diversion with intervention (*complex diversion*) is the type of conditional opportunity that can be applied only if the young person *admits to committing the offence*. The

56 Strafprozeßordnung (StPO), Strafprozeßordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319), die zuletzt durch Artikel 2 des Gesetzes vom 25. März 2022 (BGBl. I S. 571) geändert worden ist.

57 Karlsruher Kommentar, 2023, 153a, Rn 11.

58 Đokić and Čvorović, 2021, p. 38.

59 Ibid.

60 Bejatović, Kiurski and Ilić, 2022, p. 13.

61 Dünkel, 2016, p. 5.

62 § 44 JGG.

second material condition for the application of complex diversion is that the public prosecutor must assess that it is necessary to impose an appropriate measure on the young person and that it is not appropriate to conduct criminal proceedings against them before a juvenile court. The procedural condition is a proposal by the public prosecutor to the juvenile court judge to issue a warning to the young person or impose a specific measure, which may be an instruction or a condition. Instructions may include providing work services, offender-victim settlement, or attending a traffic safety training course. Conditions are obligations that may be imposed on a juvenile by the juvenile court judge. These include: 1. restitution for damages, 2. apologizing to the injured party, 3. providing work, and 4. payment of a sum of money to a charitable organization. When a juvenile fulfils the instructions or obligations, the public prosecutor refrains from the prosecution, and the judge may discontinue the proceedings.

Additionally, diversion without intervention or with intervention, in one of the mentioned forms, can also be applied if an indictment has been filed (§ 47 JGG). As regards the application of diversion with intervention, once the conditions, instructions, or educational measures are fulfilled, the juvenile judge discontinues the proceedings.

4.2. Ireland – Diversion Programmes

Ireland is an example of the use of law-based diversion programmes for youth who commit a criminal offence or realize some form of anti-social behavior. As the criminal prosecution authority, the police can decide, based on the principle of discretion, whether to apply diversion or to prosecute a young person. The Garda Youth Diversion Programme, established as a tool to address the issue of juvenile delinquency, is led by the police. It is defined as a “formalized system of intervention between young people and police”.⁶³ Diversion Programmes are applied if the juvenile accepts responsibility for the offence and agrees to participate in the programme. It includes a *warning* to young people, which can be informal and conducted in a home setting, or formal and carried out at the police station in the presence of a parent/guardian. The implementation of a formal warning may be followed by restorative elements if the victim participates in the procedure, such as inviting the young person to apologize to the victim or to provide compensation to the victim. A formal warning may be followed by placing the young person under supervision, which is carried out by the Juvenile Liaison Officer (JLO).

Within the Garda Youth Diversion Programme, for a juvenile under supervision, a (family) conference can be held, organized by the JLO, with the participation of the

63 KilKelly, 2011, p. 2.

child, parent/guardian, JLO, and the victim, if deemed appropriate for the victim to attend. The aim of the conference is to discuss the child's behavior, the reasons for such conduct, and how the family can help the child and prevent the child from repeating the offence.⁶⁴ If the victim participates, mediation is conducted. As a result of the conference, an action plan for the juvenile may be formulated with the goal of achieving special preventive effects. It can include, apart from compensation, some educational and sports activities. The new "Youth Justice Strategy" supports the increased use of restorative processes that involve the participation of children, victims, and/or families, as well as broader practitioner training in restorative practices.⁶⁵ Additionally, the latest report indicates the intention to increase restorative cautions.⁶⁶

4.3. Sweden

Referring cases to social services is a deeply rooted tradition in Sweden. The primary responsibility lies with social services, which predominantly implement measures in the form of non-institutional care.⁶⁷ Voluntary measures are commonly applied. Co-operation between social services and the juvenile criminal justice system is essential during the entire legal process, from preliminary investigation to the final court decision.⁶⁸

We can identify the following forms of diversion throughout the phases of the procedure: 1. *police discretion*; 2. *police directing juveniles to repair the damage they caused*; 3. *the prosecutor's decision to dismiss the case and the decision to issue a penalty warning*; 4. *prosecutorial decision not to pursue prosecution*; and 5. *the imposition of special care measures by a court*. A police officer may choose not to report a criminal offence to the prosecutor if it is deemed "less serious" or likely to result in a fine. Police caution is a form of minimal intervention. A police officer is authorized to direct a juvenile aged 15 to 17 to repair the damage if he/she confesses or if "the perpetration is obvious".⁶⁹ A public prosecutor may dismiss the case and issue a penalty warning if the juvenile is under care (which includes measures taken by social services) or subject to other measures that provide help and support. A penalty warning may be revoked if the juvenile does not comply with the care plan. After an investigation, the prosecutor may decide not to pursue prosecution for a less serious crime if the

64 Ibid., p. 8.

65 Marder and Forde, 2023, p. 202.

66 Marder and Forde, 2023, pp. 208–209.

67 See Pettersson, 2017, p. 8.

68 Hollander and Tarnfälv, 2017, p. 1.

69 Act (1964:167) making special provisions for young offenders (Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare – LUL), § 13.

juvenile has confessed. Also, the court may impose special care measures instead of a criminal sanction for any offence committed by a young person aged 15 or older. The decision is made based on the evaluation of the report from the competent social welfare authority regarding potential measures appropriate to address the child's needs. In that case, based on a court decision, social services are responsible for the care or treatment of the offender. The sanction of youth care, determined by a court decision, may be imposed if there is a "special need for care".

5.

Instead of a Conclusion

Diversion procedures and programmes are alternative and informal responses to juvenile offences, grounded in law. They are implemented when the competent authority (police or prosecution)/authorities (court and prosecution) deem it appropriate not to initiate/not to continue criminal proceedings, or when the court decides that instead of criminal sanctions, upon the conclusion of criminal proceedings, appropriate social care and treatment measures should be applied by relevant social services. These procedures also incorporate elements of restorative justice. The primary goal of instruments of restorative justice is to establish a dialogue between the victim and the juvenile offender, find solutions to their issues, make the youth accountable for their actions by confronting their victims, achieve the social reintegration of the juvenile, ensure rapid compensation for the victim, and achieve satisfaction for the victims. This is accomplished through the voluntary cooperation of the juvenile with the relevant authorities and the condemnation of the offender's behaviour without the stigmatization associated with formal condemnation.

In proceedings involving juveniles in the Republic of Serbia, alternative measures are various diversion orders that allow for juveniles to avoid criminal prosecution and for proceedings against them to be discontinued. In prosecutorial and judicial practice, there is generally a low level of application of diversion orders, sporadic application, or non-application, as well as numerous difficulties in their implementation. The challenges in application primarily stem from the lack of or insufficiently developed institutional frameworks for their implementation, including the absence of detailed regulations governing the procedure for applying diversion orders. However, the application of the principle of opportunity has shown an increase, according to reports from the Supreme Public Prosecutor's Office in 2024, both in terms of its use by the prosecution and by the courts. Starting from 2021, a growing trend in the application of conditional opportunity has been observed.

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