

Dragan Blagić, PhD, Assistant Professor

University of Pristina, Kosovska Mitrovica, Faculty of law
dragan.blagic@pr.ac.rs

Zdravko Grujić, PhD, Assistant Professor

University of Pristina, Kosovska Mitrovica, Faculty of law
zdravko.grujic@pr.ac.rs

GENERAL RULES FOR IMPOSING A SENTENCE OF JUVENILE IMPRISONMENT

ABSTRACT

Sentence of juvenile imprisonment is analyzed in its theoretical aspect and then in the aspect of legislative regulation in positive criminal legislation. Taking into consideration the content and legal nature, in practice this subject is mainly defined through criminal law in its material aspect, with certain explanation of those questions that are related to procedural and executive law to that level which the subject of investigation allows. In the perspective of criminal law, the legal terms in both national and comparative juvenile legislation are analyzed, in order to determine the complete sense and justification of the punishment. The analysis is done through interrelations of juvenile imprisonment sentence and certain institutes of criminal law, then relevant theoretical and practical concepts and discussions. Normative aspect aims to better explain the content and function of this punishment based on certain legal modification both in national and in comparative law, especially in European criminal legislation. Criminal justice analysis of the terms of juvenile court, contributes to clear differentiation from other criminal sanctions, above all, corrective measures, with special effect on its practical use. The investigation made in regards to the content, conditions of passing and justification of juvenile imprisonment sentence provides certain knowledge of its efficacy and justification in the system of criminal sanctions. The necessity of studying general and specific circumstances for its imposing contributes to more complete approach to the discussions both in the theory and court practice. Allowing the possibility that the sentence of juvenile imprisonment is only imposed on senior juveniles, simultaneously leads us to think that a special attention will be paid to two groups of circumstances: level of maturity and necessary time for both behavioral and professional education of the juvenile. In parallel to this aspect, some other questions appearing both in theoretical and practical aspect of this serious and only punishment have been discussed.

Keywords: *minors, juvenile imprisonment, criminal law, criminal procedure*

1. INTRODUCTION

Juvenile criminal law in the legal system of a country is determined by special criminal law provisions, which aim to contribute to the achievement of a better criminal position in accordance with the criminal responsibility of the minor. The task of criminal law, firstly, relates to the exercise of a protective function in terms of protecting the most important assets and values in the society. Therefore, the protective function of criminal law is the essence and the reason for its existence, indicating the need to protect individuals and society from crime. At the foundation of the criminal law, there is a need for criminal sanctions to be applied only against an individual whom can imposed the appropriate criminal sanctions for unlawful conduct.¹

Provision of criminal law protection to the most important goods and values is realized through criminal law norms, which determine socially dangerous behavior, or which present the criminal offense.² In this way, criminal sanctions are prescribed for the perpetrators of the criminal offense, when certain legal good is already hurt or endangered. Thus, criminal protection is achieved through the application of criminal sanctions and other measures aimed at combating crime.³ Taking into account many of the relevant international documents⁴ and in the juvenile criminal legislation of the Republic of Serbia it is prescribed how and what types of criminal sanctions and measures can be imposed and applied to minors. In many European legal solutions it is also envisaged that the sole punishment that can be imposed against a minor is a punishment of juvenile imprisonment. Criminal law action by the social community with the penalty of juvenile imprisonment is an exception to the possibility of imposing numerous educational measures. Therefore, the sentence of juvenile imprisonment is a special type of deprivation of liberty that qualitatively differs, both in terms of content and in the terms of pronouncement in relation to the sentence of imprisonment applicable to adult persons.⁵

¹ Stojanović, Z., *Politika suzbijanja kriminaliteta*, Novi Sad, 1991, p. 59

² *Ibid.*, p. 60

³ Jescheck, H. H., Weigend, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, Berlin, 1996, p. 5–6

⁴ The 1989 Convention on the Rights of the Child, signed by virtually all UN member states and representing the most widely accepted international document dealing with children's and juvenile issues from the point of view of human rights. The Beijing Rules of 1985 (Standard Minimum Rules for the Juvenile Judiciary) are very important. Also important are the Riyadh Guidelines (UN Guidelines for the Prevention of Juvenile Delinquency) since 1990. Tokyo Rules (The UN Standard Minimum Rules for Alternative Institutional Treatment Procedures since 1990, as well as the UN Rules for the Protection of Juveniles Deprived of Freedom since 1990, constitute an important international document on the protection of the rights of children and juveniles Child Rights and Juvenile Justice, Belgrade, 2011

⁵ Eltern, M., *Jugendstrafrecht, Delinquenz und Normorientierung Jugendlicher, Eine empirische Überprüfung des Zusammenhanges von Sozialisation*, Hamburg, 2003, p. 19–20

In the course of further discussion, we will first analyze different European solutions regarding the rules of pronouncing the sentence of juvenile imprisonment, and because of their specificity and content, we will specifically explain the guilt as the only subjective condition and its degree, in order to show in a more comprehensive manner different legal solutions and theoretical considerations in our and comparative criminal legislation in which these rules are explicitly prescribed.

2. PRONOUNCEMENT OF JUVENILE IMPRISONMENT IN EUROPEAN LEGISLATION

In contemporary criminal justice system, in comparative view, the sentence of juvenile imprisonment is characterized by different conditions of pronouncement and treatment of a perpetrator in its execution. First, in addition to the fact that it is not the sole punishment in the system of juvenile criminal offenses, the sentence of juvenile imprisonment is regulated differently in the criminal legislation of individual countries. Thus, in many European countries, the legislator does not prescribe, in a unique manner, the pronouncement, assessment, duration and execution of the sentence of juvenile imprisonment, but in accordance with its particularities of the normative system, it adapts to adequate social circumstances. Bearing in mind the great significance and impact of German criminal law in general, it is particularly noticeable the legislator's efforts to build a system of juvenile criminal law that is different from the one which is related to adult persons. That direction started very early, having in mind the aforementioned Laws on Juvenile Justice, which refer to position, age, criminal responsibility and special procedure against juvenile offenders.⁶

The Law on Juvenile Courts (Jugendgerichtsgesetz) provides for various types of sanctions, depending on the age and personality of the minor. In addition to educational measures, Article 16 of the JGG contains a provision related to different modalities of deprivation of liberty (Jugendarrest) in terms of the length of its duration.⁷ Juvenile Prison (Jugendrest) is the most severe type of disciplinary mea-

⁶ Dünkel, F., „*Juvenile Justice in Germany*“, Schriften zum Strafvollzug, Jugendstrafrecht und zur Kriminologie, 32/4, Greifswald, 2005, p. 6-7

⁷ In the theory of juvenile criminal law there are different perceptions of this type of criminal sanction. Namely, whether here we are talking about juvenile imprisonment or detention, that is, Is this just one of the foreseen educational instruments (Zuchtmittel) or a kind of penalty of deprivation of liberty? There is a perception that this is a punishment for deprivation of liberty with regard to its content and character and that the juvenile is deprived of liberty for a certain time, that is, it is a measure of an institutional character with pronounced elements of educational character. More on this: Schaffstein, F., Beulke, W., *Jugendstrafrecht: eine systematische Darstellung*, 13., überarbeitete Auflage, Stuttgart, Berlin, Köln 1998; Carić, A., „*Provedba standarda Ujedinjenih naroda za maloljetničko pravosuđe u hrvatskom maloljetničkom zakonodavstvu*“, Zbornik radova Pravnog

sure ie. educational mean, which can be implemented in three ways. First of all, a prison at leisure or a prison at weekend (Freizeitarrrest) cannot last longer than two weekends. Then, the short-term imprisonment (Kurzarrrest) is pronounced instead of a prison at leisure, if it is purposeful for educational reasons, and if there is no interruption in the education and work of the minor. Two days of imprisonment for a short period of time replace one prison measure in free time, the duration of which may not exceed six days. And finally, a long-term prison (Dauerarrrest) is determined for at least one, and for a maximum of four weeks, it is calculated on full days and weeks.⁸ This type of measure of institutional character, according to research of German court practice,⁹ has not proved to be particularly purposeful. Named as a substitute for the short-term punishment of deprivation of liberty of a minor, this type of deprivation did not provide satisfactory results.

Namely, today's attempts to achieve the retention of juveniles in terms of shorter provision of help and it are possible to achieve the best possible education impact on the juvenile. Given that in this case, it cannot be provided a longer devotion to the juvenile's personality, thus removing the behavior that contributed to his/her abandonment, then the assumption confirms that this measure does not achieve a corresponding educational impact.¹⁰

Unlike the measure of deprivation of liberty for a shorter duration, the Law on Juvenile Justice in a separate chapter on penalties in Article 17 provides for only one sentence - juvenile imprisonment sentence (Jugendstrafe). The said provision respects the principle of minimum intervention that the punishment is the last resort (*ultima ratio*) in respect of juvenile justice and is applicable only in cases where all other legal possibilities have been exhausted. Therefore, the sentence of juvenile imprisonment is a subsidiary punishment, because it is applied only if

fakulteta u Splitu, Split, br. 1/2006, p. 147 et seq. More recently, the view that here is first of all thought of only one modality of deprivation of liberty for a shorter duration, as is also stated in the law in the chapter on educational means. In this way, the Jugendarrest can be understood as a juvenile prison - a modality of deprivation of liberty for a shorter duration, rather than a real punishment of juvenile imprisonment, because this is only a disciplinary sanction by which a minor deprives of liberty for a shorter duration in order to provide appropriate assistance and protection.

Dillenburg, C., *Jugendstrafrecht in Deutschland und Frankreich: Eine rechtsvergleichende Untersuchung*, Universität zu Köln, German, 2003, p. 177-179; Laubenthal, K., Baier, H., Nestler N., *Jugendstrafrecht, 2. Auflage*, Würzburg, 2010, p. 303

⁸ Eltern, *op. cit* note 5, 16-17

⁹ Research was conducted over a period of five years, indicating that almost 60% of minors were returnees, although they had some educational treatment of juvenile imprisonment for different duration. Streng, F., *Jugendstrafrecht (Erfolg und Misserfolg von Jugendarrest)* Erlangen, 2003, p. 202

¹⁰ *Ibid.*, p. 203

the harmful consequences which led to the commission of the crime cannot be remedied by the educational measures or means.¹¹

In the criminal law of France, the system of punishing minors has been resolved in a special way by finding that the age of thirteen years makes juveniles criminally responsible. In the existing French criminal legislation, the Regulation, as amended in 2009, envisages in Art. (20-2) that a court may impose a penal sentence of deprivation of liberty (*peine privative de liberté*) to a juvenile aged thirteen, with the jury specifying in particular their decision and the reasons for which the sentence of deprivation of liberty and not some other milder measure was imposed. Regarding the length of the sentence, the Regulation stipulates that minors who have reached thirteen years may not be punished as adult persons, so that the court cannot impose a sentence on a juvenile that would be more than half the amount foreseen for a particular criminal offense. When it comes to imposing a sentence of life imprisonment, than in that case, a minor of thirteen years could not be sentenced to more than twenty years of imprisonment.¹² Furthermore, the punishment of a juvenile aged sixteen to eighteen years, who is accused of a serious criminal offense, may be sentenced to life imprisonment, with the juvenile panel in that case appreciating all the circumstances under which the criminal act was committed and assessing the personality in the sense of the existence of conditions for the pronouncement of this sentence or a sentence of deprivation of liberty for a certain duration. Also, the French Code (Code Penal, Articles 131-4) provides for a sentence of six months to ten years of imprisonment for appropriate offenses. Anyway, the trial chamber shall take into account all circumstances of the commission of the offense and, according to the personality of the juvenile, determine the sentence of deprivation of liberty for certain duration.¹³

Also, the legal provision (20 - 2 II) foresees that the institute of mitigation of sentences cannot be applied to minors who have reached the age of sixteen, because in case of a recidivist and severe circumstances when committing a criminal offense. It is also regulated by the law that serious crimes (against life, sexual

¹¹ Ostendorf, H., *Jugendgerichtsgesetz, Kommentar. 8. Auflage*, Baden-Baden 2009, p. 146

¹² As can be seen from the stated above, the French legislation provides for the punishment of minors from the age of thirteen, with the rules governing the application of penalties applicable to adults. This further means that the sentence of deprivation of liberty is, in principle, possible, with the plaintiff or panel of juveniles specifying in particular the reasons for imposing the sentence. In addition to this, it can still be said that in French legislation the punishment of deprivation of liberty is an exception, i.e. it is pronounced only when the court finds that the offender cannot act on the perpetrator in a certain measure. Dillenburger C., *Jugendstrafrecht in Deutschland und Frankreich: Ein rechtsvergleichende Untersuchung*, p. 73

¹³ *Ibid.*, p. 74

morality) with elements of violence cannot be mitigated.¹⁴ The determination of the sentence of deprivation of liberty against juveniles, according to the legal solutions, with regard to the number of educational measures, relates primarily to the protection and assistance, and less to punishment. Therefore, the juvenile panel, when possible, will apply the institute of mitigation of punishment or impose some milder educational measures, instead of the penalty of deprivation of liberty (20-2 I). Thus, in the French criminal legislation, under the influence of many international conventions, the sentence of deprivation of liberty is increasingly pronounced for a shorter period of one year, all for the purpose of educating the minor perpetrators.¹⁵

However, in addition to the above, it can be noted from the legal provisions that the lower age limit of juvenile criminal responsibility at age of 13 is low compared to other criminal legislation, and that the court can pronounce some measure of the court warning or may impose a sentence in that sense. Also, unlike other criminal legislation that is familiar with the category of juvenile adults, in the French criminal law persons who have reached the age of 18 years are considered to be adult (*jeunes adultes*) and are subject to the criminal sanctions provided for adult perpetrators of criminal offenses.¹⁶

In accordance with contemporary trends, the comparative juvenile legislation provides for the sentence of deprivation of liberty, ie, the special punishment of juvenile imprisonment in the Austrian legal system. The adoption of the Law on Special Juvenile Court (*Jugendgerichtsgesetz*) is of great importance for the Juvenile Criminal Law of Austria not only in the normative sense, but also in the special approach of the society towards the personality of the juvenile. The provision of the juvenile imprisonment sentence in Austrian criminal law is characterized by a number of foreseen conditions for imprisonment (*Freiheitsstrafe*) in Article 5 of JGG. According to the aforementioned provision, it is foreseen that, instead of life imprisonment (*Lebenslange Freiheitsstrafe*) or imprisonment sentence (*Freiheitsstrafe*) from ten to twenty years, it may be imposed a sentence of imprisonment from one to fifteen years if the minor has reached the age of 16 at the time of

¹⁴ *Ibid.*, p. 75

¹⁵ Carić A., Kustura I., „Kamo ide hrvatsko maloljetničko kazneno zakonodavstvo?“, Zbornik radova Pravnog fakulteta u Splitu, 47/2010, p. 796

¹⁶ According to prof. Peric, special attention is given to the system of penalties in French legislation, which is characterized by, first of all, backward legal solutions, which are precisely the application of a milder punishment of a juvenile who has reached the age of sixteen. The Trial Chamber, when assessing the penalty of deprivation of liberty, often assesses the personality of the juvenile in a stereotypical way, that the circumstances under which the act was made more than the price, rather than the maturity of the minor. Perić, O., Milošević N., Stefanović, I., *Politika izricanja krivičnih sankcija prema maloljetnicima u Srbiji*, Beograd, 2008, p. 38-39

the commission of the criminal offense. It is also legally regulated that a sentence of imprisonment of one to ten years may be imposed against a minor who has not reached the age of 16 (Article 5, paragraph 2). In addition, there is a possibility that a juvenile will be sentenced to imprisonment of six months to ten years instead of a sentence of imprisonment of ten to twenty years. In all other cases, the law provides that half of the prescribed imprisonment may be imposed, whereby the court is not bound to impose the minimum amount of that sentence (Article 5 § 4 JGG).¹⁷

The progressive efforts to further develop juvenile criminal law in Anglo-Saxon law are encountered in Canada's criminal legislation. In that sense, legal solutions regulating the criminal law status, age limit, and punishment of minors reflect the need for of the legal system for occasional reform of Canada's juvenile criminal law. In the first place, the Law on Criminal Justice for Juveniles was adopted in 2003 (*The Youth Criminal Justice Act*), which specifically provides for principles in terms of establishing a more just and effective juvenile law.¹⁸ The Law on Criminal Justice for Juveniles (YCJA), unlike European legislation, contains the Preamble shown in several points at the very beginning, and outside the legal text also the Declaration of Principles (Article 3) on which this law is based.¹⁹ The basic principles contained in the Declaration first refer to guidelines on how juvenile justice affects the prevention of juvenile offenses in terms of preventive action and the imposition of extra-judicial and criminal sanctions, differing from those pertaining to adult persons.²⁰ In the system of criminal sanctions, the Law provides for the punishment of minors in Art. 38. (YCJA) where the conditions for the application of a sentence of deprivation of liberty (Custody a young person) are explained in more details. Firstly, the purpose of criminal sanctions is defined, where the minor is held accountable, where by this sentence his/her rehabilitation and reintegration into society is accelerated. It is then individually emphasized in several points that: a) the punishment imposed against a minor cannot be more severe than the one which would have been imposed on adult person for the same offense under approximately equal circumstances; b) a punishment of (juvenile) imprisonment

¹⁷ Maleczky, O., *Österreichisches Jugendstrafrecht, Kommentar*, Wien, 2008, p. 14

¹⁸ Krawchuk, M., D., *The Use of Custody Under the Youth Criminal Justice Act, A Review of Section 39, Prohibitions on the Use of Custodial Sentences*, Manitoba, Canada, 2008, p. 16

¹⁹ The preamble first refers to the views of the Parliament of Canada in the sense that the society should respond to the needs of the proper development of the minor, their relationship with the family, about the rights of the victim of the crime. It is then pointed out that the most stringent measures are applied to the most serious crimes, whereby criminal sanctions are imposed only when necessary and purposeful. Pru, Ž., „*Kanadski zakon o krivičnom gonjenju maloletnika*“, Zbornik, Krivičnopravna pitanja maloletničke delikvencije, Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2008, p. 38

²⁰ Perić, Milošević, Stefanović *op. cit.* note 16, p. 41–42

may be imposed against a minor who has reached the age of 14, knowing that the stated is regulated in such way where the provinces can independently raise that limit to 15 or 16 years; c) the punishment must be proportionate to the gravity of the offense and the degree of responsibility of the minor; g) It is also of importance for deliberation of a punishment whether and to what extent the juvenile compensated the damage, whether he/she has been convicted in the past, with the existence of aggravating or mitigating circumstances.²¹ A sentence of (juvenile) imprisonment under the mentioned law can be pronounced only for crimes involving elements of violence, perpetrators of serious crimes and minor's recidivists. The law states that these are crimes of first and second degree murder, as well as serious crimes for which prison sentences of more than two years can be imposed, and there are no conditions for pronouncing the so-called *non-custodial sentence*.²²

Particular attention is given to a greater number of the following specific sentences (Youth sentences), which can be imposed on a juvenile for up to two years of deprivation of liberty, except in the case of criminal offenses committed in the course, where the imprisonment of up to three years can be imposed. Also, in the provision of Article 42 (YCJA), different types of sentences are mentioned, which in European criminal legislation more resemble to measures of diversion. These are measures of warning, work in public interest, compensation of damages, fines, protection of minors with intensive supervision and support. Shortly, all these measures (special punishments) are left to the court to use the possibility of a different reaction to the conduct of the minor. Prior to the fact that the penalty of deprivation of liberty and the Canadian legislation is the last resort, the court first decides on different types of alternative measures, based on less strict sanctions.²³ In addition to prescribing so-called special penalties, Art. 42 (YCJA) also stated that for the murder of first degree the sentence of imprisonment for a term of up to ten years is prescribed, while for the murder of a second degree, imprisonment for a term of up to seven years is imposed. Therefore, the legislator prescribed that even for the most serious crimes the sentence of deprivation of liberty will be for a certain duration, i.e. that it cannot be higher than ten or seven years respectively. However, in addition, the law also recognizes a special circumstance that refers to the existence of two new types of punishment, namely: a) a delayed imprisonment sentence (Probation for delayed custody) that refers to the fact that if the minor

²¹ Pru, *op. cit.* note 18, p. 45, Bala, N; Sanjeev, A., „The First Months under the Youth Criminal Justice Act, a Survey and Analysis of Case Law“, *Canadian Journal of Criminology and Criminal Justice*, Vol. 46, 2004, p. 256

²² Bala, N., Carrington, P., J., Roberts, J., V., „Evaluating the Youth Criminal Justice Act after Five Years: A Qualified Success“, *Canadian Journal of Criminology and Criminal Justice*, Vol. 51, 2009, p. 146

²³ Spratt, J. B., „The Persistence of Status Offences in the Youth Justice System“, *Canadian Journal of Criminology and Criminal Justice*, Vol. 54, 2012, p. 320–321

does not respect and does not fulfill the envisaged obligations, in this case, this type of punishment is replaced by a sentence of deprivation of liberty for a certain duration; b) and deprivation of liberty with intensified rehabilitation and supervision, where the sentence is pronounced for criminal offenses with an element of violence (murder, attempted murder, murder by negligence, serious sexual offenses), whereby a minor suffers from mental or psychological disorders, so it is necessary to prevent his treatment and apply special programs for the recovery of minors.²⁴

As can be seen, in general terms, the further development of juvenile criminal law internationally is accompanied by significant reforms of the criminal legislation of England and Wales. In English provisions of criminal law on minors (the Criminal Justice and Public Order Act 1994), the chapter on penalties provided for a special form of deprivation of liberty (the Secure Training Order) applicable to minors aged 12 to 14 years. Therefore, they are juveniles who have committed at least three times the criminal offense for which the imprisonment is prescribed and which present a permanent danger for further commission of criminal acts. This type of deprivation of liberty (imprisonment) may last for at least six months to two years, with the possibility that half of the sentence is executed at a prison, while the other half may be executed outside with the proper supervision of the competent authority.²⁵ The second type of deprivation of freedom provided for in the legal act of 1998 (Crime and Disorder Act) is a special type of sanction Detention and Training Order that is issued to minors aged 12 to 17 years. This type of deprivation of liberty appears to be a possibility of pronouncing instead of the Secure Training Order, as it is considered more effective and more useful in order to criminal law reaction against juveniles.

The measure of institutional character is mainly imposed against minors older than 15 years, who show a constant need for committing criminal offenses. In addition, it is also legally regulated that this type of measure can be imposed on

²⁴ Barnhorst, R., „*The Youth Criminal Justice Act: New Directions and Implementation Issues*“, Canadian Journal of Criminology and Criminal Justice, Vol. 46, 2004, p. 242–243

²⁵ Until 1994, this type (prison sentence) was applied to minors aged 15 to 17 years. One in the series of murders committed (in this case, a child under three years of age) by minors under the age of 15 led to a change in the provision and to punish persons aged 12 to 14 years. However, according to the records, the execution of the aforementioned sentence in the period from 1998 to 2001 led to the fact that it soon proved to be an unreasonable and very expensive sanction. Insufficiently trained officers, then inadequate supervision and support programs for minors, indicate that the sentence is very rarely pronounced or replaced with some other type of detention, such as the Detention and Training Order. More about: Graham, J., Moore, C. „*Beyond Welfare Versus Justice: Juvenile Justice in England and Wales*“, International Handbook of Juvenile Justice, New York, USA, 2006, p. 86

minors aged 10 and 11, provided that it is determined by the Secretary of State.²⁶ According to minors, this type of deprivation of liberty is levied for at least four to twenty-four months, with half of the imposed sanction being enforced at the institution, while the other half is carried out under the supervision of the competent service for providing assistance and support. This measure can also be imposed on minors who have committed more serious crimes with elements of violence and in cases of committing more serious sexual offenses. When the court assesses this sanction, it takes into account all the circumstances, under which the crime was committed, as well as the time spent in police custody, hospital or other accommodation provided by the local authorities.²⁷ Another in the series of criminal sanctions for juvenile offenders for the most serious offenses is the long-term imprisonment (*Long-Term Detention*) provided for in the statutory act in Article 91 of the 2000 Powers of Criminal Courts (Sentencing) Act. This legal act envisages that the Crown Court, which undertakes proceedings for adults, determines the punishment also for juvenile offenders for serious crimes. In this case, the Crown Court indicts the juvenile aged 10 to 14 only for the criminal offense of murder, since in principle, the indictment is not raised against this category of persons. Against to the juveniles aged between 14 and 17 years for the committed murder and other serious crimes (robbery, rape), the court raises the indictment, and in the case of adult persons where the imprisonment for more than 14 years is provided and are charged with juveniles, then there is the need to judge have them on trial together.²⁸

3. SOME RULES IMPOSING A SENTENCE OF JUVENILE IMPRISONMENT

The concept of punishment of minors in a criminal legislation is mainly the result of the existence and development of a special criminal status of minors. For these reasons, a special criminal justice status of minors is different in respect to adults also in terms of punishment, and therefore, minors are punished only in exceptional circumstances by sentence of a special juvenile imprisonment. The punishment of minors is an exceptional measure in most foreign legislation and

²⁶ Hazel, N., Hagell, A., *Assessment of the Detention and Training Order and its impact on the secure estate across England and Wales*, London, 2002, p. 24–26

²⁷ In addition to the good sides of this sanction with the aim of enforcing them in institutions with very favorable treatment and supervision of minors, there are serious objections that are made in the sense that this measure is carried out in a place that is most remote from the home of a minor, that he/she does not have enough communication with the family, and that often after only a few weeks after release, crimes are repeated. More on this: Graham, J., Moore, C., „*Beyond Welfare Versus Justice*, 87

²⁸ Ashworth, A., *Sentencing and Criminal Justice*, Cambridge University, USA, 2005, p. 35–36; Murray, R., *Children and Young People in Custody*, London, 2011, p. 79-81

in our legislation expressly stated by Article. 9 paragraph 3 of Law on the Juvenile Offenders (ZOMUKD).²⁹

Imposing a sentence of juvenile imprisonment essentially means the actual implementation of punishment against the senior juvenile for a committed criminal offense. In the theory of criminal law concerning the conditions for imposing of a punishment, which are prescribed by law, there are different points of view, because the conditions of sentencing followed a number of reforms in criminal law. Bearing in mind the temporal connection of many legal solutions on a number of terms of imposing a juvenile imprisonment, there is a different understanding of their systematization. Thus, the prevalent view is that the legal conditions for pronouncing juvenile imprisonment sentence can be divided into objective, subjective and criminal-policy conditions. The objective conditions are: prescribed punishment of imprisonment of more than five years, the age of the offender; while the subjective conditions include all circumstances related to the high degree of criminal liability of the offender. Criminal-policy conditions are related to the existence of the serious consequences of the offense and because of the high degree of criminal liability, it would not be justifiable to apply an educational measure.³⁰ Among other things, there is a thought that the conditions for the imposition of a sentence of juvenile imprisonment are classified into two legal groups: substantive and procedural. Substantive are related to the stated objective and subjective conditions, while procedural are related to the legal possibility of Article 446 of the CPC that the juvenile imprisonment cannot be imposed, if criminal proceedings are conducted without the motion of the public prosecutor or if the public prosecutor withdrew the motion during the procedure. As a reason for the division of the conditions in this way is the fact to mitigate as much as possible already problematic legal systematization, especially because it is about punishment of older juveniles.³¹

Generally speaking, the conditions of imposition provided in the provision of Article 28 of ZOMUKD can be also divided in three mandatory: (that is about an older juvenile, that there is a guilt and that he/she committed a criminal offense for which a sentence of imprisonment of over five years is provided). Three circumstances must be taken into account: that due to the high degree of guilt, the nature and gravity of the offense, it would not be justifiable to apply an educa-

²⁹ Educational measures can be imposed to older juveniles, and exceptionally a sentence of juvenile imprisonment (Art 9 para 3 ZOMUKD). Excellence in punishment, therefore, refers to the particular age category of minors on whom this punishment can be imposed, but these are older juveniles aged 16 to 18

³⁰ Lazarević Lj., *Položaj mladih punoletnika u krivičnom pravu*, Beograd, 1963, p. 254

³¹ Perić O., *Maloletnički zatvor*, Beograd, 1979, p. 32

tional measure. These circumstances must be assessed by the the court in each individual case to impose a sentence of juvenile imprisonment, as the punishment of juveniles is determined as optional and represents the ultimate measure to resort to. All of the above conditions must be cumulatively met in order to implement the juvenile imprisonment, so it is necessary to indicate that these conditions are of such a nature that without their existence would not be possible at all to talk about the application of the punishment.³²

3.1. HIGH DEGREE OF GUILT – SUBJECTIVE CIRCUMSTANCE FOR IMPOSING THE SENTENCE OF JUVENILE IMPRISONMENT

In a direct and close relationship with the guilt as one of the conditions for the punishment of minors is also a high degree of guilt. In addition to determining guilt as a subjective element of the overall concept of criminal offense, the provisions of Article 28 of ZOMUKD requested a high degree of guilt for the older minor, in order to impose juvenile imprisonment. In essence, it is required that this circumstance is met both in qualitative and quantitative manner, which would still mean that existence of high degree of guilt in a meaningful sense of the word must be graded in each case, when it comes to punishing of older juveniles.³³

On the occasion of these circumstances, we should first point out that grading of guilt is done in accordance with all the subjective circumstances of the offense. Special attention requires a statement that the grading of guilt should be done in the same way as it is done with sentencing adults. Therefore, when considering this issue, Stojanović points out that the grading of guilt is demanded as an essential factor on which may depend the imposition of juvenile imprisonment. When it comes to adults, a high degree of guilt is only relevant to determination of the sentence, in the sense of the existence of mitigating or aggravating circumstances, not as a decisive factor when sentencing older juveniles.³⁴

When grading the guilt, the starting point should be that the older minor in the commission of the crime, showed great persistence, ruthlessness, cruelty, insensitivity or a similar relationship. The mentioned subjective circumstances indicate the existence of a high degree of guilt, whereby they must be established in each particular case. The task of the juvenile judge in any case is to examine all subjective elements which relate to the character of older juveniles and thus to perform the grading of guilt correctly in the best possible way. In any case, a high degree

³² Stojanović, *op. cit.* note 1, p. 355

³³ Radulović Lj, *Maloletničko krivično pravo*, Beograd, p. 150

³⁴ Stojanović Z., *Krivično pravo*, Beograd, p. 354

of guilt must be different than the normal or average degree of it, where no coarsening, severity or rough persistence or other indicators exist.³⁵ The level of guilt, among others, may be affected by motives or motives as internal reasons which led the juvenile to commit a criminal offense. Motives or incentives can be ethically evaluated and thus it can be determined the intensity of subjective factors, which have led to a high degree of guilt. Given that the guilt consists of intent or negligence, we can rightly ask if the intent only (direct or eventual) refers to the existence of high degree of guilt or when it comes to negligence as shape as guilt.

On this issue there are thoughts in the theory of criminal law that only the intent as a severe form of guilt refers to the existence of a high degree of guilt. As a legitimate reason for this position it is stated that it is almost impossible to take negligence as a form that may involve a high degree of guilt.³⁶ However, the guilt is manifested in two forms - as an intentional or negligent criminal offense which was committed and for that reason, it can mainly be possible to the negligence can also include a high degree of guilt in the theoretical and practical sense.³⁷ No matter that negligence can be graded, high degree of guilt will not exist when it comes to the existence of any grounds for mitigation of punishment of subjective character (offense committed under the influence of compulsive force or threats), or in the event when the minor did not know that the act is prohibited, but was obliged and could have known, i.e. he/she was in rectifiable legal delusion.³⁸

In view of the high degree of guilt, it is necessary to point out another issue that is of significant importance to jurisprudence, rather than the theoretical considerations. In some situations a question of impacts of reduced or substantially diminished accountability at the level of guilt, and what is the assessment of the court in concrete case and how to properly evaluate and implement the above

³⁵ Milošević N., *Maloletnički zatvor, zakonodavstvo i sudska praksa*, Pravni život, Beograd, br. 2/2002, p. 561

³⁶ Lazarević LJ., Grubač M., *Komentar zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*, Beograd, 2005, p. 73

³⁷ Drakić D., *O krivičnoj odgovornosti maloletnika*, Novi Sad, 2010 p. 55

³⁸ Stojanović, *op. cit.* note 34, p. 355; Perić O., *Komentar zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*. Beograd, 2005, p. 85; Radulović, *op. cit.* note 33 p. 151. Contrary to the mentioned standpoint, there is a perception that negligent criminal conduct and diminished mental capacity, although generally do not indicate a high degree of guilt, sometimes could not exclude the existence of a high degree of guilt. As an explanation it is stated that all forms of guilt can be graded and this may exceptionally occur that lesser degree forms (negligence, diminished mental capacity) can compensate with the other two elements of guilt (intent, the awareness of the illegality). More on this: Drakić D., *O krivičnoj odgovornosti*, p. 56–57. We believe that the presented standpoint is theoretically and practically possible, but in a legal criminal view, juvenile imprisonment is optional measure and a last resort of criminal justice response, where particularly it must be taken into account the reality and the purpose of punishment of juveniles

circumstances. According to the general provisions of the Criminal Code, when it comes to adult offenders, it provides that significantly reduced mental capacity does not exclude guilt, but it can be ground for mitigation of punishment (art. 23, para 3 of CC), while diminished mental capacity can have an impact on punishment. In the first place, diminished mental capacity and its manifestation in the form of lower degree of mental development of minors, in any case, results into a question of existence of a high degree of guilt. It further follows that in this situation among minors one cannot talk about the existence of a high degree of guilt. Namely, when the offender is a minor, the determination of significantly reduced mental capacity should be particularly taken into account, as for punishment of minors is not enough to have a statement that there is guilt, but it requires a determination of high degree of guilt.³⁹ Accordingly, for a long period of time in the jurisprudence the position has been taken that the existence of significantly reduced mental capacity is not the basis and circumstance for punishment, because the mental state of minors does not allow it.⁴⁰

Bearing in mind the importance of a proper assessment of the high degree of guilt from the standpoint of jurisprudence, it is necessary to explain this issue as well, which is perhaps of greater relevance to practical application in relation to the theory itself. It is known that in spite of well-written legal formulation in terms of clarity and precision, the standpoints of courts occupy a very important place when it comes to determining the conditions and imposing a sentence of juvenile imprisonment. Very complex task at the end is left to judges to, based on all characteristics in each specific case, determine the existence of a high degree of guilt in relation to the committed criminal offense. Determining of this circumstance in judicial practice is not easy, because it is a very sensitive issue that requires special commitment and expertise of the juvenile judge. During imposing of a sentence to juvenile imprisonment, it is necessary that in addition to meeting other requirements, to require the existence of a high degree of guilt in the commission of the criminal offense, where the older juvenile manifested great persistence, ruthlessness, cruelty, insensitivity or a similar kind of approach. During an inspection in a big number of court decisions, when it comes to assessment and explanation what constitutes a high level of guilt in a particular criminal offense (murder or severe forms of rape and robbery), there is a superficial approach, without any special explanation and stating reasons in imposition of a sentence of juvenile imprison-

³⁹ Stojanović *op. cit.* note 34, p. 355; Perić, *op. cit.* note 38, p. 87

⁴⁰ Standpoints of the contemporary jurisprudence, in a very similar way as those previously stated, point out to interpretations with regard to issue of diminished or significantly diminished state of mind. See Decision of the Supreme Court of Serbia, Kžm. 44 / 09 dated 11.05.2009., *Bilten sudske prakse VSS*, 2/2009, p. 31

ment. Therefore, it is mainly stated that the high degree of guilt “is reflected in the overall behavior of older juveniles according to his mental maturity and intellectual capacity to understand the significance of his actions.”⁴¹

Accordingly, in terms of special clarification and stating of reasons which are crucial for the implementation of juvenile imprisonment, the court does not state or specify the decisive facts, which influenced the decision on the imposition of this punishment. Mainly the general view is taken, which is implemented by judges to not enter into a specific explanation and grading of circumstances, to which the law itself indicates, however, it often happens that the first instance verdict is appealed, referring to the absolutely significant violation of provisions of the criminal procedure, Art. 438 paragraph 2 point 2 of the CPC. Also, in some court decisions, it can be observed the fact that some circumstances, which are more significant to the imposition of juvenile imprisonment, are taken as those that are related to explanation of the high degree of guilt. As an example, it can be stated that during the commission of the offense it was a minor who has repeatedly been prosecuted, against whom correctional measures were imposed and are thus the conditions for the imposition of a sentence to juvenile imprisonment.⁴²

Regarding legal solutions in some European criminal legislation, such as Croatia, it is identically resolved like in the Serbian legislation. Namely, it is explicitly required in Art. 24. Of the Law on Juvenile Courts prescribes (a high level of guilt) where it is the court’s obligation to determine whether a high level of guilt has been achieved during the commission of a criminal offense.⁴³

⁴¹ As an example, from practical reasons we are going to state several judgments in relation to reviewed judgments, not just of the court in Belgrade, but also in Užice and Šabac. Verdict of the Higher Court in Belgrade Km. 387/06 of 31 December 2008, the Higher Court Judgment in Belgrade, Km. 275/11 dated 6 September 2012, the verdict of the Higher Court in Užice Km. 103/09 of 19 August 2009, the verdict of the Higher Court in Šabac, Km. 28/13 of 24 July 2013. These judgments indicated a high degree of guilt, which comprises in the existence of direct intent by which the minor manifested a persistence in committing the criminal offense. The reasoning of those judgments indicate only the type of intent, then that the minor is guilty, referring to Art. 22 of the Criminal Code and thus perform the grading of guilt if possible, while not analyzing other subjective circumstances arising during the commission of the offense.

⁴² Therefore, Milošević rightly pointed out that multiple recidivist with a distinct educational neglect (in this case a senior juvenile), indicates the existence of circumstances and conditions for imposing this penalty, but this fact cannot be subsumed under the concept of a high degree of guilt, but it can only be taken as a circumstance which is of importance for sentencing juvenile imprisonment; Milošević N, *Maloletnički zatvor*, Pravni život, Beograd, br. 2/2002 p. 76

⁴³ The juvenile can commit a serious criminal offense, for example, the murder of a parent who for a long time in an alcoholic state committed psychological violence against a minor and other family members. Is there a high level of guilt in this situation? Regardless of the serious crime of murder, the author believes that it is not possible to speak of a high level of guilt, due to the specific conditions in the conduct of this criminal offense. Cvjetko, B., Zakonska i sudska politika kažnjavanja maloljetnika

As far as legal solutions in some European criminal legislation are concerned, such as Germany, the high degree of guilt (Schwere der Schuld) is reflected in a similar way in our criminal legislation. It is taken as subjective condition which is necessary for the application of juvenile imprisonment. First, the existence of guilt in the psychological and normative sense of the word is determined, after which the guilt is graded, and it is established whether there is a high degree of guilt. Intent and negligence as the two forms of guilt which are determined according to the categories of mental awareness will, while the consciousness of the illegality relates to reproach, which is ordered against the juvenile offender.⁴⁴

Establishing guilt is a very complex issue in court practice, since it requires the fulfillment of all elements of guilt in order to charge the juvenile with a criminal offense and at the same time imposes a sentence of juvenile imprisonment. There is no doubt that guilt must be established in each particular case, in order to consider that an older minor has committed a criminal offense. The court's assessment implies that all subjective circumstances related to the personality and the committed offence are determined and in this way the older minor can be punished with other fulfilled conditions.

4. CONCLUSION

The penalty of juvenile imprisonment, regardless of the differences that exist in many criminal legislation, is still considered one of the most severe criminal sanctions that can be applied to a juvenile. It should also be pointed out that the punishment of juvenile imprisonment in almost all of the aforementioned European legislations is pronounced only as a last resort, that is, *ultima ratio*. This further means that respecting the principle of minimum intervention, the deprivation of liberty of a minor occurs only when there is no other way for the criminal law to react. In other words, as a rule, minors are initially sanctioned with milder criminal-law measures, which are not of institutional charter, thus avoiding the application of deprivation of liberty for a shorter duration. Then, the current solutions in Anglo-Saxon criminal legislation are significant in terms of punishing juveniles in various forms of deprivation of liberty. So we can say that Canada's criminal legislation on the one hand presents the precedential legal solutions, while on the other, it points to some similar solutions envisaged in the continental law that has already been discussed. The legal possibility of applying different models of depri-

i mlađih punoljetnika kaznom maloletničkog zatvora“, Hrvatski ljetopis za kazneno pravo i praksu, 2/2004, 843

⁴⁴ Dillenburg, C., *Jugendstrafrecht in Deutschland und Frankreich: Eine rechtsvergleichende Untersuchung*, Universität zu Köln, German, 2003, p. 188

vation of liberty and its specific duration indicates the similarity of the normative solutions of Germany, Austria, France and our law.

Grading of guilt as an independent prerequisite for the imposition of this sentence implies that there is recklessness or similar relationship of subjective character of the juvenile offender, which indicates that they were manifested when carrying out the criminal offense. Moreover, in the literature one can meet the understanding that the primacy is given to existence of the high degree of guilt, rather than the severity of the crime, when it comes to the conditions for imposing punishments. As the reason for this opinion, it is stated that a personality of a minor, i.e. his inner side of his personality is the most important component which influence his/her behavior in a given situation.⁴⁵

REFERENCES

BOOKS AND ARTICLES

1. Ashworth, A., *Sentencing and Criminal Justice*, Cambridge University, USA, 2005
2. Bala, N, Sanjeev, A., „*The First Months under the Youth Criminal Justice Act, a Survey and Analysis of Case Law*“, Canadian Journal of Criminology and Criminal Justice, Vol. 46, 2004
3. Barnhorst, R., „*The Youth Criminal Justice Act: New Directions and Implementation Issues*“, Canadian Journal of Criminology and Criminal Justice, Vol. 46, 2004
4. Carić A., Kustura I., „Kamo ide hrvatsko maloljetničko kazneno zakonodavstvo?“, *Zbornik radova Pravnog fakulteta u Splitu*, 47/2010.
5. Diemer H, Schoreit A, Sonnen B, R., *Jugendgerichtsgesetz, Kommentar*, Heidelberg, 2011
6. Dillenburg, C., *Jugendstrafrecht in Deutschland und Frankreich: Eine rechtsvergleichende Untersuchung*, Universität zu Köln, German, 2003
7. Dünkel, F., „*Juvenile Justice in Germany*“, Schriften zum Strafvollzug, Jugendstrafercht und zur Kriminologie, 32/4, Greifswald, 2005
8. Drakić D., *Neuračunljivost*, Novi Sad, 2007
9. Drakić D., *O krivičnoj odgovornosti maloletnika*, Novi Sad, 2010
10. Eltern, M., *Jugendstrafrecht, Delinquenz und Normorientierung Jugendlicher, Eine empirische Überprüfung des Zusammenhanges von Sozialisation*, Hamburg, 2003

⁴⁵ High degree of guilt is sufficient presumption that after imposing juvenile imprisonment, the juvenile will be provided with intensive psychological treatment and other necessary support and assistance in the penitentiary institution. German system of juvenile criminal law is not only based on the idea of punishment, but the so-called three pillars: education, guilt (punishment) and proportionality in terms of measures or criminal sanctions correspond to the gravity of the offense and that are tailored to the personality of the juvenile. Diemer H, Schoreit A, Sonnen B, R., *Jugendgerichtsgesetz, Kommentar*, Heidelberg, 2011, p. 206

11. Graham, J., Moore, C. „*Beyond Welfare Versus Justice: Juvenile Justice in England and Wales*“, International Handbook of Juvenile Justice, New York, USA, 2006
12. Hazel, N., Hagell, A., „*Assessment of the Detention and Training Order and its impact on the secure estate across England and Wales*“, London, 2002.
13. Jescheck, H. H., Weigend, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, Berlin, 1996
14. Lazarević LJ., *Položaj mladih punoletnika u krivičnom pravu*, Beograd, 1963
15. Lazarević, LJ., *Krivično pravo - Opšti deo*, Beograd, 2000
16. Lazarević LJ., Grubač M., *Komentar zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*, Beograd, 2005
17. Maleczky, O., *Österreichisches Jugendstrafrecht, Kommentar*, Wien, 2008
18. Milošević N., „*Izbor i odmeravanje sankcija prema maloletnicima*“, Pravni život, Beograd, 9/2011
19. Milošević N., „*Maloletnički zatvor*“, Pravni život, Beograd, br. 2/2002
20. Murray, R., *Children and Young People in Custody*, London, 2011
21. Ostendorf, H., *Jugendgerichtsgesetz, Kommentar. 8. Auflage*, Baden-Baden 2009
22. Perić O., *Krivičnopravni položaj maloletnika*, Beograd, 1975
23. Perić O., *Maloletnički zatvor*, Beograd, 1979
24. Perić O., *Komentar zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*. Beograd, 2005
25. Radulović LJ., *Maloletničko krivično pravo*, Beograd, 2010
26. Soković S., Bejatović S., *Maloletničko krivično pravo*, Kragujevac, 2009
27. Sprott, J. B., „*The Persistence of Status Offences in the Youth Justice System*“, Canadian Journal of Criminology and Criminal Justice, Vol. 54, 2012
28. Srzentić N., Stajić A., Lazarević, LJ., *Krivično pravo - Opšti deo*, Beograd, 2000
29. Stojanović, Z., „*Postupak pripreme krivičnog zakonodavstva i njegov uticaj na sadržaj zakonskog teksta*“, Zbornik, Zakonodavni postupak i kazneno zakonodavstvo, Beograd, 2009
30. Stojanović Z., *Komentar Krivičnog zakonika*, Beograd, 2010
31. Stojanović Z., *Krivično pravo*, Beograd, 2014
32. Streng, F., *Jugendstrafrecht (Erfolg und Misserfolg von Jugendarrest)* Erlangen, 2003
33. Ćorović E., „*Neke pravnoteorijske dileme u vezi sa kažnjavanjem maloletnika*“, Revija za kriminologiju i krivično pravo, Beograd, 1/2013
34. Škulić M., *Maloletničko krivično pravo*, Beograd, 2011

LIST OF NATIONAL REGULATIONS

1. Novel Criminal Code FNRY, Official Gazette 30/1959
2. Criminal Code RS, Official Gazette 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13
3. Youth Courts Law RS, Official Gazette 85/2005

SUPREME COURT DECISIONS

1. Kžm 09/1996
2. Kžm. 42/2000
3. Kžm. 17/2003
4. Kžm. 44 /2009

HIGH COURT DECISIONS

1. Km. 387/2006
2. Km. 103/2009
3. Km. 746 / 2010
4. Km. 275/2011
5. Km. 28/2013.