“Without Resorting to Judicial Proceedings”: Diversion and Mediation

The Case of Georgia

Rusudan Mikhelidze

Introduction

Article 40 (3)(b) of the Convention on the Rights of the Child (CRC) obliges the States Parties to promote measures without resorting to judicial proceedings in dealing with children in conflict with the law, whenever appropriate and desirable.1 This paper analyses diversion as an alternative to judicial proceedings2 in the light of the Georgian Diversion and Mediation Programme (the Programme) – a revolutionary breakthrough introduced into Georgia’s criminal justice system in 2010. The paper highlights the success of the Programme and makes recommendations for its further development.

Part I

1 Overview of International Standards

1.1 Non-judicial Alternatives to Criminal Proceedings: Relevant International Standards

According to the Committee on the Rights of the Child, state authorities can use two types of intervention for dealing with juveniles in conflict with penal law. These are measures without resorting to judicial proceedings and measures in the context of judicial proceedings.3 At the same time, international standards expressly recognize a non-judicial mechanism as a strongly preferred option due to its advantages for the child, for society and consequently for the State using it.

First and foremost, Article 40 (3) of the CRC requires the States Parties to promote non-judicial alternatives for juveniles in conflict with law while

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2 Committee on the Rights of the Child, General Comment No. 10 on Children’s Rights in Juvenile Justice (2007) defines diversion as “removal from criminal/juvenile justice processing and referral to alternative (social) services.”
3 Ibid., p. 8.
ensuring that human rights and legal safeguards are fully respected. The Committee on the Rights of the Child in its General Comment No. 10 underlines that the alternative measures should have primacy over judicial proceedings as they avoid stigmatization, have good outcomes for children and society, and are cost-effective.⁴

Along with the CRC, international soft law instruments provide guidance and recommendations. Legally non-binding alternatives include Beijing Rules,⁵ the Council of Europe Guiding Principles,⁶ Model Law on Juvenile Justice,⁷ and the UNICEF Handbook.⁸

The supremacy of alternatives to conventional criminal proceedings can be inferred from the general principles of juvenile justice enshrined in the CRC and related international documents. The cornerstone principle of juvenile justice in Article 3(1) of CRC provides that the best interests of child should be a primary consideration in all actions concerning children.⁹ It is further explained in General Comment No. 10 that the best interest of a child is served only if the child is dealt with in a system that complies with international standards and norms in juvenile justice, most importantly the CRC provisions.

Another key principle, enshrined in Article 37(b) of CRC and in Beijing Rule 17 (1)(c), provides that any restriction of liberty of a child shall be a measure of last resort and that careful consideration has to be given to using it as an intervention in relation to juveniles. In exceptional circumstances when restriction of liberty is applied as a last resort, it should be used as briefly as possible.

Further, as stated in Article 40 (1) of the CRC, a child in conflict with the law should be treated in a way that promotes “the child’s sense of dignity and worth” and “the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”¹⁰

⁴ Ibid., p. 9.
⁶ Council of Europe, Guideline of the Committee of Ministers of the Council of Europe on child friendly justice and Their Explanatory Memorandum (Nov. 17, 2010).
⁸ UNICEF, Toolkit on Diversion and Alternatives to Detention (2009).
⁹ Committee on the Rights of the Child, General Comment No. 14 (2013). See also Committee of Ministers of the Council of Europe, Guideline of the Committee of Ministers of the Council of Europe on child friendly justice, p. 8.
¹⁰ Convention on the Rights of the Child, Article 40 (1).