THE APPROACH OF THE EDUCATIONAL, NON-DETENTION MEASURES APPLIED TO THE MINOR, FROM THE POINT OF VIEW OF THE NEW CRIMINAL REGULATIONS AND THE ELEMENTS OF COMPARED LAW

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Abstract
The criminal liability of the underaged criminals is a very delicate matter, in the sense of the criminal constraint imposed on them. The comparative approach of the sanctionary system from the point of view of the freedom of movement of the minor wishes to analyse on the one hand the regulatory framework, and on the other hand to underline the reason according to which one has to distinguish between penalties and educational measures.

Keywords*: judgement, minority, penalty, freedom, education*

Introduction

The minor charged criminally can either be applied an educational measure, or a penalty. The sanctionary system applied to the minors gives priority to the educational measures which by their action and completion are more appropriate to lead to the minors' re-education and to guide them to good conduct. The educational measures aim first of all to re-educate the minor by adequate means to people who have not reached yet their full psychophysical maturity. Unlike educational measures, penalties are intended to both the constraint and re-education of the underaged criminal. Generally speaking the safety measures mainly aim to remove the danger state, regardless if the criminal is a mature person or a minor[1].

Taking into account the aspects concerning the serving of the educational measures, the New Criminal Code considered the following instruments: The United Nations Convention regarding the child's rights, the rules of the United Nations Organization regarding the protection of the minors deprived of freedom, the minimal rules of the United Nations for the draft of some non-detention measures (The Tokyo Rules), the Protocol of the minimal rules of the United Nations concerning the administration of justice for minors (Beijing Rules), the Recommendation 87 (20) of the Committee of Ministers concerning the social reactions to juvenile delinquency.

The Beijing Rules provide that the meaning of the notion of criminal capacity has to be clearly defined and that the age for criminal liability should not be set at a too low a limit, taking into account the degree of emotional, physical and intellectual maturity of the child. The defining of the age for criminal liability has to be done in a legal framework considering the capacity, development skills and the contextual experience of a child.

According to art. 40 paragraph 3 letter a of the Convention regarding the child's rights, the Member State must establish a minimal age for criminal liability, under which children cannot he held accountable for the presumed committing of a crime.

The New Criminal Code erases the possibility of applying a penalty to the minor who committed a crime. Also, no other article provides the possibility to apply a penalty to the minor, as it

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[1] Autoritatea Națională pentru Protecția Drepturilor Minorilor, *Rolul judecătorilor şi al procurorilor în protecția şi promovarea drepturilor copilului.* Bucureşti. 2006.

is done at the moment, the penalties that can be applied to the minor being: imprisonment and fine, their limits being reduced to half.

The educational, non-detention measures are sanctions of criminal law that apply to the underaged who committed a crime whose seriousness does not require freedom deprivation. These are: *the stage of the civic formation*, *the supervision*, *weekend confinement*, *daily assistance*. The court can impose the minor throughout the execution of the non-detention, educational measures one or more of the obligations provided in art. 121 Criminal code.

With regard to **the preventive measures that can be ruled for children who have violated the criminal law**, the new Criminal Procedure code contains some special provisions, suggesting as a general rule, the possibility to preventive detention, only if the effects of such a measure on their personality and development are not disproportionate to the legitimate purpose aimed by taking the measure, regulating at the same time the necessity to inform in writing the person subject to any preventive measure on all the rights the law grants him.

The new criminal Code provides that minors aged between 14 and 18, who committed a crime, to be applied only educational measures, these being **non-detention** (*the stage of civic formation*, *supervision*, *weekend confinement* and *daily assistance*), or **with freedom deprivation** (registration in an educational centre and internment in a detention centre), the rule being that the detention measures are to be taken only if the criminal minor is in one of the situations expressly provided here:

- the underaged has already committed a prior crime for which he was applied an educational measure which was executed before committing another crime;
- the crime for which he is trialled was committed by exercising violence or threats or ended with a person's death;
- the penalty provided by law for the crime committed is 10 years in prison or more, or life detention;
- the minor is trialled for committing a recurrent crime if by its nature, seriousness, number or frequency, the criminal's dangerous character is emphasized.

In Germany, ever since the beginning of the 20th century, a special status of the underaged criminal was adopted as opposed to the major one. In Germany, the status of the criminal minors is integrated in an ensemble of normative acts which make up a complex system of measures with social-educational and protection character, where the repressive aspects constitute an exception of the steady rules for a law well differentiated and adapted to the specific of this age group. In this sense, we should note that Germany is one of the few countries in the world where there is a Law regarding the youth welfare (Jugendwohlfahrtgesetz), which constitutes a reference act in the field of social treatment and of the measures that need to be taken so as to ensure some normal conditions of life to children and young people.

The status of the criminal minor and "young adult" (Herranwachsende) is provided in the Law of the youth court (Jugendgerichtsgesetzbuch) since 1923 with further amendments, which is completed by the provisions of the Criminal Code. Germany is one of the countries that have a distinct criminal law for minors in what concerns the general part.

The minor of up to 14 years old is considered irresponsible and he can only be punished by a social-educational measure, of protection and assistance, whose execution is placed on the competence of different institutions and authorized bodies or set-up local "youth offices" (Jugendamnt).

The minor of 14-18 years old is considered responsible, if on committing the deed he had a level of moral and intellectual development that allowed him to be aware of the illicit character of his conduct.

Towards the minor that proves he does not have this degree of maturity, there can only be applied educational and protection measures. In other words, the minor aged between 14 and 18 benefits of a relative presumption of irresponsibility that can be removed by proving his moral

maturity and the capacity of understanding the illicit character of the committed deed. This is a good thing because there are minors that develop more quickly, both physically and psychically, which allows them to become aware of the prejudicial nature of their deeds. The minor who committed a crime can basically be applied only educational measures. When these are considered insufficient, the underaged is punished with corrective measures or with a penalty. If the judge for minors thinks it is necessary, he can rule that instead of the penalty or corrective measures, the minor be placed in a psychiatric hospital or in a detention institution.

For the underaged offenders there can also be taken certain safety measures of "correction" with a preventive nature, provided by the common law, namely placing them into a psychiatric hospital, sending them in an institution with a detention regime or supervising their conduct, as well as the withdrawal of the licence to exercise a certain skill, such as driving a vehicle.

The safety measures may remain in force also after the coming of age[2] (*2011 OVERVIEW OF THE CHANCELLOR OF JUSTICE ACTIVITIES* 2012). Also, the judge may rule on the minor delinquent several educational or corrective measures, as well as educational measures associated with coercive measures.

The arrest for minors cannot be cumulated with the educational measure of the educational assistance (Fursorgeerziehung). As educational measures, "the guidance for behaviour" applies – there are some indications and prohibitions ruled by the judge for minors as to how the life of the minor should be organized and his education unfold, "educational assistance and placing under care." When the judge considers that the educational and coercive measures are not enough, the prison penalty applies. The prison penalty can be for a definite period of time or indefinite.

The system of justice for minors is based on the principle of subsidiary or of the minimal intervention (Subsidariatsgrunsatz)[3]. This means that the criminal penalties are to be ruled only if they prove irreplaceable. Moreover, these penalties are limited by the principle of proportionality.

In **France,** the current Criminal Code states in art. 122 the principle of the absolute lack of criminal liability, according to which "the minors capable of judgement are criminally liable for the crimes, misdemeanours or offenses they were acknowledged to be guilty of, under the conditions set by a special law which provides measures of protection, assistance, surveillance and education, for them.

At the moment, the legal status of the delinquent minors is regulated by the ordinance no. 45-174 since 2 February 1945 regarding minor offenders. According to art. 1, the minors who committed a crime were not sent to the common law criminal jurisdiction, but to the tribunals or jury courts specialized for minors. Art. 2 stipulates that the Tribunal for minors and the Jury Court for minors rule accordingly for protection measures, assistance or surveillance measures, protection or education ones.

When the circumstances and the personality of the minor demand it, an educational sanction can be ruled for the minor aged between 10 and 18 or a penalty for the minor aged between 13 and 18, taking into account the criminal liability. The Tribunal for minors cannot give a prison punishment, with or without suspending the execution, unless by accounting for it[4]. On the minor who did not reach 13 years of age, the measure of detainment cannot be ruled for unless on exceptional cases.

If a minor of 16 was said to be held, the prosecutor or judge has to assign a doctor that examines the minor. The interrogation of the minor is subject to an audio-visual recording. The recording in original is placed under seal and its copy is filed for the record. The dissemination of the recording by a person is punished with one year in prison or 15,000 euro fine.

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[2] *2011 Overview Of The Chancellor Of Justice Activities.* Tallin: Chancellor Of Justice, 2012.
[3] F.Dunkel, *Juvenile Justice in Germany: Between Welfare and Justice,* Berlin, 2010.
[4] http://www.unifr.ch/derechopenal/legislacion/es/rpmendix.html

The penalty regime. The minor criminals are applied a mixed penalty regime, made up of educational measures, measures for mediation-compensation and punishments, the selection of either one being left at the court's free will.

In the **Italian** legal system, in approaching the issue of the criminal minor, the main idea is that of a close connection between the criminal, substantial law and the criminal, trial law, placing on the first place the application of some compensation penalties and taking the pedagogical-educational factor, this being actually also the characteristic of the report between interest-duty of the state, imposing finally the search for the most adequate forms of re-education, with a structure entirely particular of unfolding the criminal trial[5].

The age for criminal liability coincides with the one for coming of age, meaning 18, but in certain situations it can drop to the age of 14. The sanctionary regime if made up of alternative measures and probation. The Tribunal for minors is the only competent instance. This and the magistrate for supervising the execution of the ruled measures, remain competent also after the minors reached the age of 18, up to 25 at the most.

The legal provisions state that youth are applied the same penalties as the adults, but in a subdued form[6]. With minors, the Criminal procedure code, by art. 169 gives the judge the possibility to rule for not sending to trial or give up the conviction (perdono giudiziale), if the law provides for the committed crime prison time which cannot exceed 2 years or fine. As a rule, this transferring of penalty cannot be granted more than once. The judge can replace the prison penalty exceeding 2 years with one of the following penalties: supervised freedom or semi-freedom. Also the judge has the possibility to suspend the trial for a period between 1 and 3 years, function on the seriousness of the deeds and to subject the minor delinquent to a probation period.

The provisions concerning minors are found in the **Spanish** Criminal Code and in Law no. 5/2000 concerning the criminal liability of the minors[7]. The criminal liability age coincides with the criminal coming of age. Among minors, we distinguish two categories, when applying the law and establishing the consequences for the crimes committed, from 14 to 16 and from 16 to 18. For the minors who have reached the age of 16, the law provides an aggravation in the case of committing crimes with violence, intimidation or placing the person in danger. When the committed crimes are qualified as misdemeanours (faltas), there can be ruled measures such as: reprimand, community service, with a maximal duration of 50 hours, confiscating the driver's licence and of other administrative licences.

When the deeds were done by using violence, threats or by endangering the life or physical integrity, the measure of placing in a closed-circuit institution can be ruled. When the deeds are committed in guilt, the measure of internment cannot be ruled, which underlines the main principle, of re-socialization of the law.

In **Portugal**, the Criminal Code in art. 19 sets the principle of the absolute lack of liability of the minor who has not reached the age of 16 and provides the application of a special law for young people between 16 and 21 years old. (Law-decree no. 314 from 7 October 1978 regarding the criminal status applicable to the youth).

In the case of the minors of 12 to 16 years old, who have not yet committed deeds provided by the criminal law, the provisions of the tutoring-educational law approved by Law no. 166/99 become applicable. Art. 1 provides that the present law-decree applies to all youth who have committed a deed qualified as crime. By *young person*, we mean any person who at the time of committing the crime is of 6 to 21 of age. The provisions of this decree do not apply to the young people who are not held accountable due to some psychic disorders.

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[5] M. Pisani, A. Molari, V. Parchinuno, P. Curso, *Manuale di procedura penale,* Italy: Monduzii editore, 1994.

[6] Sedletzki, Vanessa. *Championing Children's Rights: A global study of independent human rights institutions for children*, 2012.

[7] http://www.unifr.ch/derechopenal/legislacion/es/rpmendix.html

As for the law for minors in **England and Wales**, it is to be found in the Law for preventing criminality and disturbance of Public order (Crime and Disorder Act) since 30 September 1998 and in the Police and Criminal Evidence Act since 1984.

The age of the criminal liability is 10, but the criminal coming of age is 18. According to art. 34 of Crime and Disorder Act, which abrogated the presumption of non-responsibility, minors are held accountable criminally since the age of 10. When the minor is of 12 to 14 years old, a special measure can be ruled on him, *secure training order*, lasting between 6 months to 2 years. During the execution of the first half of this measure, the minor is detained in a special centre, later is released, but is to be under the supervision of a probation agent.

The legal condition of the criminal minor in England highlights particularities that have to do with the specificity of the English system of law, based on tradition. What is characteristic to the English criminal law when it comes to the deeds committed by minors was the excessive harshness throughout time. Until the 19th century, over 200 crimes were punished with death penalty, and minors were considered after the age of 8, as adult offenders. The future growth of a legal system separated for minors, in England, constituted an answer to the threat represented by the juvenile delinquency to the order set in state, under the circumstances that the jury refused to convict them because of the penalties that were too harsh for minors to suffer.

It is no coincidence that the probation as a practice of courts to maintain the convicted defendant under surveillance and under the influence of community appears in the practice law of English courts ever since the beginning of the 18th century. At the moment, within the Ministry of Internal Affairs, that the penitentiary system belongs to, there is a probation system with offices throughout England. Among the objectives of the probation offices and the collaboration with the personnel in prisons where minors are held being the collaboration with the Establishments for minors.

In 1974 there was a breakthrough of this system by regulating the service for the use of the community. Within this programme, the minors participated in activities of carpentry, painting, gardening, maintenance of the youth clubs, helping in hospitals etc. These measures later entered into the law and practice of other states in Europe too.

A new measure is "the intermediary treatment", which is located between the supervised freedom and the placement in an institution and implies adopted programs to various categories of minors and young offenders (for example, programs for first-time offenders, for old offenders etc;) they comprise a multitude of activities which are to be unfold in the centres where the minors are summoned to spend their day; certain minors might be forced to spend their weekend there.

On avoiding, as much as possible the trial courts by the criminal minors help also "The Youth Contact Offices", which are made up of a probation officer, a police officer, a social worker and often a representative of the school system. They gather daily or weekly and assess the seriousness of each of the deeds committed by minors (or young people) on that day or in a week and decide on the corresponding educational measure.

The Criminal Justice Act of 1982 is in favour of applying the non-detention penalties to the minor offender, which establishes the principle that a sentence of the minor deprived of freedom is possible only if other forms of penalty would not work or for reasons of protecting the society in case of more serious crimes.

By the 1982 Law concerning the criminal justice, the English criminal law contains general principles of behaviour with young criminals, indicating in Title 1 the applicable penalties for them. According to these principles, the trial cannot set the prison punishment of the person that has not yet reached the age of 21 at the time when the crime was committed.

Conclusions

Regardless of the laws of the states we are talking about, the reference coordinate is the biophysical status, psycho-physical of the minor, the prison penalty being less appropriate for

attaining the purpose of the criminal law in relation to the minor offenders. This means of constraint tends to the reeducation of the major offender, while for the reeducation of the minor offenders, it would be necessary not a reeducation, meaning a recovery of the prior education, but an initial education with proper means. Moreover, the serving of the penalty in a penitentiary can affect the fragile psyche of the minor because of the harsh detention regime, as well as the negative influence of the other convicts.

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