

The Individualization of Criminal Law Sanctions of Deprivation of Liberty for Minors in the Romanian Criminal Law

08 Luglio 2017

Ion Rusu

[Contributo selezionato da Filodiritto tra quelli pubblicati nei Proceedings “Fifth International Conference Multidisciplinary Perspectives in the Quasi-Coercive Treatment of Offenders – SPECTO 2016”]

Per acquistare i Proceedings clicca qui:

http://www.filodirittoeditore.com/index.php?route=product/product&path=78&product_id=116

[Contribution selected by Filodiritto among those published in the Proceedings “Fifth International Conference Multidisciplinary Perspectives in the Quasi-Coercive Treatment of Offenders – SPECTO 2016”]

To buy the Proceedings click here:

http://www.filodirittoeditore.com/index.php?route=product/product&path=78&product_id=116

Ion Rusu[1]

“Danubius” University of Galati & lawyer - Vrancea Bar, (ROMANIA)

Abstract

Throughout the current study we have proceeded, for starters, to a brief examination of criminal law sanctions of deprivation of liberty for juvenile offenders in the Romanian criminal law. In order to highlight the attention paid by the Romanian legislator to this institution, we have examined the provisions that regulated it starting with the Criminal code since 1865 and continuing with the Carol II Criminal Code and the 1969 Criminal Code. This examination considers the institution's evolution over time and the Romanian legislator's concern to improve it, bringing it in line with the European law. The paper also highlights the ways of individualizing these criminal law sanctions by the court, based on general criteria, which are otherwise characteristic to adult criminals and also to other special laws only for juvenile offenders. Regarding some special criteria of individuation we insisted upon their examination, given their importance in the complex process of individualization achieved by the court. The work can be useful to both theorists and practitioners in the field. The novelties within the paper consist in the examination of the legislative evolution of the institution in the Romanian criminal law, highlighting the progress in legislation and the importance of individualizing ways of the custodial educational measures.

1. Introduction

The issue of criminal liability of minors was at all times extremely sensitive, with major implications regarding the general evolution of human society. Since the beginning of the emergence of the criminal law and hence criminal liability of physical entities, it was insisted on the tangible ways of criminal liability of minors. In the evolution of the sanctioning system of juvenile we observe ever since the beginning the legal provisions which aimed at two stages, namely a first stage where minors are not criminally liable and the second stage where juveniles are criminally liable, both differentiated by their age at the time of the offense [1]. Another feature of the legal sanctioning system of the minor is that the criminal law sanctions provided by the law have always been milder, in relation to the sanctions against adult offenders. A final general observation relates to criminal law sanctions provided by law and applicable to minors which could be deprivation or non-deprivation of liberty, every time being predominant the non-deprivation of liberty.

2. The Individualization of Criminal Law Sanctions of Deprivation of Liberty. Historical References

1865 Criminal Code provided for a series of separate provisions by which it was regulated the regime of criminal liability of the juvenile offender. According to article 61 the *offense committed by a child younger than 8 years old, is not punishable*. Regarding the criminal liability of the minor aged between 8 and 15 years, it is not criminally liable if they prove that *“the minor acted without understanding.”* In that case, the law provides for two categories of sanctions, the first non-custodial consisting in bringing into custody of the family the juvenile offender in order *“to have closer care”* and the second involving deprivation of liberty which consists in entrusting him to a monastery where he may be kept until the age of 20 years (*or they will be sent in a monastery with the purpose of correcting such children, where they will remain for some years established by the court, without exceeding the age of 20 years*).

The examination of the criminal law sanction of deprivation of liberty referred to the Criminal Code of 1965 (to which we referred above) leads to the conclusion that this was the purpose of the current criminal law, an educational measure of deprivation of liberty, without being confused with a punishment. Where it appears that the minor is aged between 8 and 15 years and has *acted skillfully* or he is aged between 15 and 20 years, the minor will be criminally liable (art. 63 of the 1865 Criminal Code). Thus, if the committed offense was under the penalty of *hard labor for life or limited time*, the juvenile in question will be sentenced to imprisonment of 3 to 15 years. Regarding the competence of judges, the law stipulated that in the case of those less than 20 years who had no older accomplices will be tried by the correctional courts (art. 65). Special provisions appear also on the regime for the execution of the imposed sentence, the law provides that the prison sentence will be executed, either in an establishment specifically designed for it, or in a separate part of the house, in a correctional prison [2]. The examination of the provisions of the 1865 Criminal Code concerning the criminal sanctions of imprisonment applicable to minors, by age categories, leads to the conclusion that they were ordered by the special courts, their execution was carried out in a special regime, separate from the adult offenders, and the punishment limits were lower. However, the legislator of that time did not take into consideration a clear distinction between the sanctioning regime of minors aged between 8 and 15 and those over 15, as the applied sanctions were identical. In the doctrine of the time it was discussed whether the provisions of article 62 were or not applicable in the case of the commission of an offense, appreciating that *the thing regarding article 62 of the Criminal Code applies to also contraventions is controversial. Cas. fr. by a decision of 12 February 1863 has established the principle that art. 62 does not apply to contraventions, a provision which was mentioned. Faustin-Helie believes, however, that the minor who committed a contravention must be acquitted if he acted without understanding. Garraud concludes that the issue is a matter of discernment a case of independent imputability, a matter of jurisdiction, where the minor is sued and regardless of the nature of the crime*

[3].

The Carol II Criminal Code provides for new age limits of criminal liability for juvenile offenders, as follows: *minor* is the one who is below the age of 19 years; *the child* is the one who has not reached age 14 and the teenager is a minor between 14 and unfulfilled 19 years (art. 138). In the interwar Romanian doctrine it was claimed that one of the most important issues in criminology is the genesis, prevention and the therapy of infantile criminality. The social importance of this issue had to find echo also in criminal law, in the criminal legislation. (...) *The basic principles are: the principle of classification, the individualization principle, principle of education or social and moral recovery, the protection principle, the principle of rehabilitation* [4].

Regarding the criminal liability, both the child and the teenager who acted without discernment will not be criminally liable (art. 139). In the case where it is found that at the moment of committing the offense the teenager acted with discernment, against him it could have apply safety measures or penalties. The safety measures represent the supervised freedom and corrective education, and the punishments are reprimand and correctional imprisonment or simple detention. Regarding individualizing the criminal law sanctions applicable to minors, in the specialized literature of the time it was shown that *safety measures have the widest field of application. The penalty applies only as an extreme measure, but its function is eminently educative. Pedagogy, education, treatment and placement are imperatives of the stipulations regarding the minors* [4]. Given the subject of the study, we will refer to corrective education which is a measure of deprivation of liberty and also the correctional imprisonment or simple detention, regarded as penalties applicable to teenagers who committed crimes. Thus, corrective education runs in a certain institute, for an indefinite period of time, which may only last until the age of 21, this measure aims *moral recovery of the adolescent, learning to have an honest life, and learning a trade* (art. 148). After passing a period of at least one year, if it finds that he was recovered, he is released on a trial period of two years. If during the testing period the teenager behaves appropriately the sanction was deemed to be executed. However, in the case of misconduct during the trial period, he will again be admitted to the Institute of corrective Education, unless he has 21 years old (art. 149). Regarding the penalties, regarded as criminal law sanctions of imprisonment, there was the correctional prison or simple detention. The limits of punishment provided by the law were correctional imprisonment or simple detention for a period of 3 to 15 years, in the case where the committed crime was punishable by law with a penalty for murder and half the penalty if the offense was punishable by law with correctional imprisonment or simple detention; in this case the maximum penalty could not exceed 3 years. If the teenager was less than 16 years, in the case of murder, the punishment could not be of more than 10 years [4].

Thus we find that in the complex process of individualization of criminal law sanctions of deprivation of liberty, the court had at its disposal fitting the punishment within the limits provided by law, reduced in relation to an adult offender, maximum limits beyond which it could not pass. Also in the individualization of educational measure, these penalties could be imposed only in cases where from the examination of the circumstances of the offense and the morals of the teenager, the court reaches to the conviction that the application of non-custodial educational measures was not sufficient. We note that in all circumstances the correctional imprisonment or simple detention passed against the teenager was executed in a correctional institute specifically designed for this purpose. The examination of the depositions of Carol II Criminal Code leads to the conclusion that they represent progress in relation to the provisions of 1865 Criminal Code. A first observation concerns the different ways in which it was established the criminal liability of minors in relation to two stages of age, respectively 14 years (in which case the child is not criminally

liable) and between 14 and 19, the age at which the minor was criminally liable, but only if it was proved that he had committed the crime with discernment.

The criminal liability of a minor who turned 14 was directly conditioned, in addition to establishing the discernment when committing the offense and the manner in which the court achieved the individualization of the criminal sanction which was to be applied to the juvenile delinquent. Thus, within the complex process of individualization of the criminal law sanction applicable to a minor offender, the court must first determine the sanction to be applied, namely, a safety measure or punishment. If it was set a safety measure, the next step was to identify and establish one of the two safety measures, in our case corrective education. In the situation where after the process of individualization of the criminal law sanction, the court considered that a sentence should apply, it also established its nature, namely, deprivation or non-deprivation of liberty. Whatever the nature of the punishment, the court could not rule also a measure for deprivation of rights. After establishing security measure or a sentence of deprivation of liberty, the last step was the one conducted by the court in the individualization of the criminal law sanction, which consisted in determining its quantum (the limit). As a general conclusion, we consider that the legislator of the Carol II Criminal Code, took into consideration in particular the institution of criminal liability of the juvenile offender, primarily by increasing the age limit at which the juvenile is criminally liable, from 8 to 14 years (as it is currently) and due to specific provisions regarding the individualization of educational measures, sanctions, competence of judges, as well as the execution of the security measure or the sanction of deprivation of liberty in specialized institutions.

3. Individualization of Criminal Law Sanctions of Deprivation of Liberty according to the 1969 Criminal Code

In the 1969 Criminal Code the criminal liability of minors is regulated separately in a way with many elements of similarity with the previous law. Thus the minor under the age of 14 is not criminally liable, the minor who at the moment of the crime was at an age between 14 and 16 was criminally liable only if it is proved that he committed the act with discernment, and the minor of the age of 16 years was criminally liable. Regarding the enforcement regime, we mention that against the juvenile who is criminally liable could have, in a chronological order, educational measures or punishment, and in the process of individuation in the case of both criminal law sanctions it could enforce the execution under the regime of non-deprivation or deprivation of liberty. Given the subject of the study, we proceed in briefly examining the individualization of the custodial educational measures, i.e. hospitalization in a rehabilitation center and internment in a medical-educational institution and punishment. In the process of individualization of the criminal law sanction the competent court we will conduct an examination of the circumstances of the offense and of the minor in an order imposed practically by the legal provisions at the time. Thus it will be taken into account the seriousness of the committed offense, the physical condition of the child, his intellectual and moral development, his behavior, the conditions in which he was raised and lived, as well as any other items capable of representing the minor. Regarding the concrete degree of social danger of the committed crime, according to the doctrine, it is in principle accepted as the very serious offenses (e.g.: *murder, serious bodily injury, robbery, espionage*) **to be sanctioned under the consideration that the offender is a minor with a simple educational measure** [5].

The physical condition of the minor is not only a reality that stands out, but it is the evidence of a serious presumptions either of serious shortcomings when the condition is too bad (weakness) or a strong misunderstood tendency of emancipation when it is too good (full force). Of course, these assumptions are not absolute, but carefully examined it may give initial guidance when choosing the category of sanctions. The educational measures are more indicated for debilitated and less efficient, for the vigorous

ones [5]. *The intellectual development of minor* constitutes another criterion of individualization of the criminal law sanction to be considered by the court. Thus, ***a minor with a high intellectual and moral level, but nevertheless committed an offense under the criminal law, demonstrates that he acted with perfect discernment and so for him, most times, the suitable remedy is the penalty. Conversely, for a minor with deficient intellectual and moral development, whose behavior is dominated by impulses and influences easily accepted, the action of educational measures can always be indicated and fruitful*** [5].

Another criterion established by law is *juvenile behavior* i.e. *conduct which the minor has in his usual environment (family, school, friends) can also procure a serious criterion for making the choice between educational measures or penalties. A minor with a bad reputation with bad habits, needs more reeducation - through penalty, than education through educational measures* [5].

The conditions in which the minor was raised and lived, are generally the most telling clue to the causes that brought the minor into the situation of committing criminal offenses. There are cases where it is proved that the child grew up and lived in completely contrasting conditions to its condition, hence the conclusion that not the objective conditions, but the influence of other factors pushed him towards bad deeds; for such minors, punishment is usually more appropriate. There are other minors who grew up and lived under harsh and totally unsuitable conditions for a small piece of education so that their behavior betrays the influence of these shortcomings. These minors are, by contrast, in no needed of the re-educational coercion of the penalty, but of the highly desirable affection of educational measures [5].

The law allows in the process of individualization of criminal sanctions to be taken into account *other elements capable of representing minors*; among those factors we mention: *the fact that the child is closer to the lower limit or near the upper limit of age regarding criminal liability of minors (for the first case there are more recommended the educational measures, for the second case taking educational measures often enough it is not possible); or the fact that the juvenile committed previously any offense under the law or during the times when he was under the age required for criminal liability or after becoming a minor with criminal liability and he had already been submitted to educational measures (for such minors it requires most often resorting to punishment)* [5]. Given the above criteria and the provisions according to which the ***penalty applies only if it is considered that taking an educational measure is not sufficient for the recovery of the juvenile***, the court will assess whether to apply an educational measure or a punishment.

The second step in the process of individualization of the criminal law sanction requires the establishment of the execution of the educational measure or punishment, or more specifically whether the set sanction will be executed under non-custodial or custodial regime. Regarding the educational custodial measures the court, having regard the criteria listed above, will decide whether the child will be admitted to a rehabilitation center, during which it will be provided the opportunity to gain necessary teaching and a vocational training suited his skills, or he will be admitted to a medical-legal facility, which will ensure adequate treatment and a special regime for education. Between the two measures, although both regard deprivation of liberty, there are fundamental differences, which is why during the process of individuation, the court should take into account both elements of the minor's personality, and those relating to the seriousness of the committed offense. Thus, the first educational measure to be considered by the court, in the context of the circumstances of the offense and the minor, will be hospitalization in a rehabilitation center. This measure will be taken under the conditions where the court has, within the process of individuation, appreciated that the minor can be reeducated under the conditions of ensuring the possibility to acquire the necessary teaching and training in relation to his skills. A second educational measure that

could be imposed against the juvenile offender is hospitalization in a medical-educational institute.

This measure will be imposed by the court, if it finds that in the process of individuation the juvenile offender was suffering from a mental or physical illness and he needs medical treatment and a special education. In the case where in the process of individualization of the criminal law sanction, the court considers that taking an educational measure of deprivation of liberty is not sufficient for the reeducation of the minor, it will apply a penalty with imprisonment or a fine, whose limits are reduced to half. Following the reduction, the special minimum will not exceed 5 years, and when the law provides life imprisonment for the committed offense, the limits of the penalty for minors is between 5 and 20 years. Also we mention that to the minor there are not applied supplementary penalties, and the convictions do not attract disabilities or deprivations.

No doubt that to such educational measures in the process of individualization of the execution of the sentence, the court may order the suspension of parole for the execution of the sentence or suspension of sentence execution under surveillance or control according to articles 110 and 110¹ of the 1969 Criminal Code. As a general conclusion we appreciate that the way it was regulated the criminal liability regime and implicitly the individualization of criminal law sanctions for minors in the 1969 Criminal Code represented significant progress, if we refer to previous legislation i.e. the provisions of the Carol II Criminal Code.

4. The Individualization of Criminal Law Sanctions of Deprivation of Liberty according to the Current Law

The new Criminal Code retains the tradition of the Romanian and European law concerning the enforcement of separate legal rules by which it is established the criminal liability of the juvenile offender. The main novelty regards the renunciation of the legislator to penalties and the establishment for juvenile offenders of a sanctioning regime that imposes only educational measures. According to the doctrine, *the education measures are criminal sanctions restrictive to rights and freedoms, but with a strong educational feature, their execution is focused on carrying out and completion of educational and vocational training of the juvenile offenders* [6]. The educational measures that can be arranged against minors that are criminally liable who have committed an offense under the criminal law regard deprivation and non-deprivation of liberty. Given the subject of the study, we will refer to as the individualization of custodial educational measures, namely, *internment in an educational center and confinement in a detention center*. We should note that under the provisions of the law, the minor, who at the time of the offense, was aged between 14 and 18, it will be taken a non-custodial educational measure (art. 114 par. (1) Criminal Code). So, the general rule established by the Romanian law is that for the criminal charge against a juvenile who has committed a crime it will applied non-custodial educational measures. However, against a minor it can be applied one of two custodial measures, if one of the following conditions is met:

- If it has committed an offense for which it was taken an educational measure that has been executed or for which execution began before the commission of the offense for which he is judged;
- When the punishment provided by the law for the committed offense is imprisonment for seven or more years or life imprisonment.

We note however, that in the process of individualizing the educational measure, the court, even if it has met one of those two mentioned conditions, is not required to apply one of two educational measures of deprivation of liberty, being able to apply also a non-custodial educational measure. Consequently, the court may not impose a custodial educational measure if it is not fulfilled one of the mentioned conditions. When individualizing the educational measures of deprivation of liberty, the court will consider both the

above mentioned conditions and also the general criteria for the individualization of penalty provided in article 74 of the Criminal Code. *Admission to an educational center* consists in placing the juvenile in an institution specialized in recovering minors, where he will attend a training program for school and vocational training according to his skills, and social reintegration programs for a period between one and three years. In the process of individualization of educational measure mentioned above, the court will consider the following:

- Fulfilling one of the conditions provided in 114 para. (2) of the Criminal Code;
- Convincing the court that taking a non-custodial educational measure it will not achieve the ultimate goal of re-educating minors;
- General criteria assessment of individualizing the penalty provided for in art. 74 of the Criminal Code.

Admission to a detention center consists in placing the juvenile in an institution specialized in recovering minors, security and surveillance regime, where he will follow intensive programs of social reintegration and programs for schooling and training according to his skills on a period between 2 and 5 years, or between 5 and 15 years (when the punishment provided by the law for the offense committed is of 20 years or more or life imprisonment). In the process of individualization of this educational measure of deprivation of liberty, in addition to the above mentioned circumstances, the court will take into account also the fact that the measure of internment in an educational center is not sufficient for the re-education of the child. As a general conclusion it may be asserted that the provisions regarding the sanctioning regime of juvenile delinquent and implicitly the individualization of the educational measures of deprivation of liberty provided for in the new Criminal Code represent an indisputable progress, in relation to the previous law.

5. Conclusions

In the Romanian and European legislation, the enforcement regime of the juvenile offender was an issue of major importance; the relevant legislation knew many changes and additions, aiming at its improvement. The ultimate goal was to achieve the best possible conditions for re-educating the minor offender and his rehabilitation into society in terms of its overall evolution. The special situation in which juvenile offender finds himself, taking into consideration primarily the age, imposed the reorientation of the legislator regarding the sanctioning regime, giving priority to educational measures non-deprivation of liberty, followed only under certain conditions to apply one of the two of the educational measures of deprivation of liberty. As one general conclusion we can say that the current regime of penalties for minors regarding educational measures of deprivation of liberty is part of the national criminal policy, being incident only under certain conditions expressly provided by the law.

References

- [1] Rusu, Ion (2011). *Individualizarea sanc?iunilor de drept penal, Curs master/Individualization of criminal sanctions, master course*. Bucharest: Ed. Universul Juridic, p. 474.
- [2] B?dulescu, George ?t. & Ionescu, George T. (1911). *Codul penal adnotat, cu jurispruden?? ?i doctrin? rom?n? ?i francez?/Criminal Code Annotated with Romanian and French jurisprudence and doctrine*. Bucharest Ed. Tip ziarului CURIERUL JUDICIAR 5, pp. 112-120.
- [3] Scriban, ?tefan, *Curierul Judiciar/Judicial Courier*, No. 23/909, p. 183.
- [4] R?tescu, Constantin C.; Asnavorian, H.; Ionescu-Dolj, I.; Traian Pop, I.; Perie?eanu, Papadopulu, Gr.; Mihail, I.; Dongoroz, Vintil?; Pavelescu, N. (1937). *Codul penal Carol al II-lea adnotat, vol. I, Partea general?, art. 1-183/Carol II Criminal Code Annotated, vol. I, General Part, art. 1-183*

. Bucharest: Editura Librăriei SOCEC & Co., pp. 343-372.

[5] Dongoroz Vintilă în, Dongoroz, Vintilă; Fodor, I.; Kahane, S.; Iliescu, N.; Oancea, I.; Bulai, Constantin; Stănoiu, R. & Roșca, V. (1970). *Explicații teoretice ale Codului penal român, Partea generală, vol. II/Theoretical explanations of the Romanian Criminal Code, General Part, vol. II*. Bucharest: Ed. Academiei R.S.R., pp. 244-245.

[6] Pașca, Viorel (2012). *Curs de drept penal, Partea generală, Ediția a II-a, actualizată cu modificările noului Cod penal/Course of criminal law, General Part, 2nd Edition, updated with the changes of the new Criminal Code*. Bucharest: Ed. Universul Juridic, p. 464.

TAG: *crimine, detenzione, privazione della libertà, reato, sanzioni penali, Diritto dei Paesi dell'UE, penale, Diritto penale internazionale, Procedura penale*

Avvertenza

La pubblicazione di contributi, approfondimenti, articoli e in genere di tutte le opere dottrinarie e di commento (ivi comprese le news) presenti su Filodiritto è stata concessa (e richiesta) dai rispettivi autori, titolari di tutti i diritti morali e patrimoniali ai sensi della legge sul diritto d'autore e sui diritti connessi (Legge 633/1941). La riproduzione ed ogni altra forma di diffusione al pubblico delle predette opere (anche in parte), in difetto di autorizzazione dell'autore, è punita a norma degli articoli 171, 171-bis, 171-ter, 174-bis e 174-ter della menzionata Legge 633/1941. È consentito scaricare, prendere visione, estrarre copia o stampare i documenti pubblicati su Filodiritto nella sezione Dottrina per ragioni esclusivamente personali, a scopo informativo-culturale e non commerciale, esclusa ogni modifica o alterazione. Sono parimenti consentite le citazioni a titolo di cronaca, studio, critica o recensione, purché accompagnate dal nome dell'autore dell'articolo e dall'indicazione della fonte, ad esempio: Luca Martini, La discrezionalità del sanitario nella qualificazione di reato perseguibile d'ufficio ai fini dell'obbligo di referto ex. art 365 cod. pen., in "Filodiritto" (<https://www.filodiritto.com>), con relativo collegamento ipertestuale. Se l'autore non è altrimenti indicato i diritti sono di Inforomatica S.r.l. e la riproduzione è vietata senza il consenso esplicito della stessa. È sempre gradita la comunicazione del testo, telematico o cartaceo, ove è avvenuta la citazione.