A COMPARATIVE STUDY OF PUNISHMENTS FOR MINORS OFFENDERS UNDER THE OLD(AND STILL VALID) AND THE NEW CRIMINAL CODE

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Abstract

The issue of criminal liability of the juvenile offender as well as the prevention and combating of juvenile delinquency have been and continue to represent an actuality in the criminal policy in modern states.

It is presumed that the child needs special treatment in terms of criminal liability since he does not possess the correct representation of what his procedural rights and obligations provided by law are.

Although the current Code gives preference to re-educational measures for juvenile offenders, leaving punishments as a last resort, court practice reveals the preponderant application of punishments, which, nonetheless, has not diminished the rate of criminality among juveniles.

The institution of minority has, in the new Criminal Code adopted by Law no 286/2009 a distinct regulation from the one in force, aimed at the development in this line of the criminal law, to bring it into line with European requirements.

The "non-criminal" pattern, as it is called in legal literature focuses on the educational measures and monitors the social reintegration of children in conflict with criminal law in ways appropriate to their age and personality, to ensure their impunity treatment for their well-being, directly proportional to their status and seriousness of the crime committed.

By way of exception, a juvenile offender may be sentenced to a custodial re-educational measure ,if he is a repeat offender who served a previous re-educational measure, or if he started service of such measure prior to commission of the crime for which he/she is being tried, or when the punishment provided by law for the crime committed is imprisonment for terms of 7 years or more, or for life.

Keywords:

criminal code, minor, treatment, daily assistance, re-educational measure, supervision, penalties

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Worldwide, juvenile justice is given increasing attention. Whether they are perpetrators, instigators or accessories, children are increasingly involved in commiting crimes. The international community and most companies have agreed, to a greater or lesser extent, that juveniles should receive treatment different from that applied to adults, when suspected to be in conflict with law.

This foundation is based on the fact that the individual in a state of minority is considered to be underdeveloped in the the psychophysical level, which leads to the idea that in this period psychic ability and discernment are developing knowledge is accumulated about life, including social rules of conduct. In this context, it is presumed that the child needs special treatment in terms of criminal liability, since he/she does not have the correct representation of his/her procedural rights and obligations provided by law are. (Ciofu-Ciuhodaru, (2009), :187)

On these grounds, the institution of minority has, in the new Criminal Code adopted by Law no. 286/2009[1], a distinct reglementation from the regulation in force, aimed at developing in line with the criminal law, to bring it into line with European requirements.

Title V, intitled "Minority" treats the regime of minor liability as well as the sanctioning system applicable to children who have commited criminal acts and respond in terms of criminal law, establishing the educational system of non-custodial measures and edcucational measures for custodial arrangements.

Changes in the system of enforcement in respect of children are of essence and in full accordance with the international documents of juvenile justice, the new regulations excluding, in what children are concerned, the punishment of imprisonment or fine. The "non-criminal" pattern, as it is called in legal literature focuses on the educational measures and monitors the social reintegration of chidren in conflict with criminal law in ways appropriate to their age and personality, to ensure an impunity treatment for their well-being, proportional to their status and seriousness of the crime commited. [2]

Chapter I of this Title provides for the system of juvenile liability. The new Criminal Code maintained the division established in the previous code between juveniles who have criminal capacity and respond to criminal law and those criminal incapacitated, not criminally responsible.

Currently, lowering the age of criminal responsibility would be required due to the lower age levels at which juveniles begin their "criminal career'. The age group most exposed to committing thefts, acts of vagrancy and beginning is between 11 and 14 years, while crimes of robbery, battery and other violence,

[1] Legea nr.286/2009 privind Codul penal a fost publicata in „Monitorul Oficial al Romaniei", partea I, nr.510 din 24 iulie 2009

[2] http://alternativesociale.ro/_images/servicii_sociale/publicatii_si_resurse/reforma_justitiei/pentru%20web_AlternativeSociale_Book_Justitia Juvenila_pdf

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rape, murder, drug trafficking and possession are committed by minors of 14-18 years. (Banciu, Radulescu, (2002), :265).

Another argument in support of reducing the age at which criminal responsibility can b possible is the forced development of children today, because of their access to a wide range of information that can influence them both positively and negatively. But this forced development is not to be identified with their maturation since, despite the knowledge that they acquire, they fail to acquire a rich experience of life that would give them a balanced way to judge.

For this reason I don't think that legislature should use the solution of lowering the age limit for minors criminally responsible, but a most effective intervention is necessary for uncovering the the causes that motivate them to defeat the mandatory provisions of juvenile criminal law.

Article 114, paragraph 1 provides that the rule is to apply to minors educational non-custodial measures. Measures of deprivation of liberty is the exception and is subject to the following two situations: if he/she has previously committed a crime for which he/she was applied an educational measure which was executed or the execution of which began before the crime that is subject to the trial, or if the crime is serious, that is the punishment provided for the offense is imprisonment for seven years or more or life imprisonment (Art.114, par. 2).

Compared to current regulation, the new Criminal Code includes a wider range of educational measures, giving the court a better opportunity to measure minor customization. In accordance with art. 115 of Law no. 286/2009 these are non-custodial measures namely: the length of civic education, monitoring confinement at weekends and daily assistance, while the second category provides two specific measures, custodial detention in a center of education and admission in a detention center.

The criteria for choosing one of these measures are the general ones of individualization of punishment, provided for in Art. 74 paragraph 1 of the new Penal Code.

This change came as absolutely necessary, since even if under the current penal code the system of enforcement of minor criminals is mainly focused on alternative educational measures and only subsidiarily on penalty, the judicial reality phenomenon revealed substantial application of penalties. Romanian legislature realized that the penalties applicable to minors although different in nature, limits and method of implementation, appear to be less suitable for achieving the purpose of criminal law in relation to juvenile offenders. This form of coercion aims at the rehabilitation of the major criminal, while for juvenile offenders re-education should not be necessary, i.e remaking of prior education, but an initial education with appropriate means. (Dongoroz, (2003), :230).

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Moreover, the sentence in a prison may affect the fragile psyche of the child due to harsh prison regime and the negative influence of other convicted. Prisons and places of detention in general are known as real " universities of crime".(Institute for Penal Reform, (2005), :6).

Such a measure, which avoids placing juveniles in the prison environment and allows them to receive services in the community, enables children to maintain positive ties with their families, school and community, thus increasing the chances of re-socialization and reducing possible trauma resulting from the execution of the sentence in a closed environment.

In Chapter II of the new Criminal Code the regime of non-custodial measures is regulated, in ascending order of seriousness. Legislature was inspired in regulating non-custodial measures by the Law no. 5/2000 on criminal liability of minors from Spain, as well as French law (Ordinance no. 2 of 1945 as amended).

The first measure provided for in Art. 117, know as the *civic education stage*, is to order the juvenile to participate in a program lasting no more than four months, to help him/her understand the legal and social consequences, the criminal is exposed to and to make him/her responsible for future behaviour. Paragraph 2 provides that the organization, ensuring the participation and supervision of the minor during the courses of civic education, are under the supervision of the probation service. This measure has the advantage of being consistent with the minor's concerns and it does not affect the school program, being able to be performed in parallel.

Another educational measure imposed by the new Criminal Code is the *supervision*, regulated in art. 118. In fact it is the only non-custodial measure maintained for the current Criminal Code, but it differs in content and duration. Supervision as educational measure consists in controlling and guiding the child in his/her daily program for a period between two months and six months, under the supervision of the probation service to ensure participation in educational or training courses and prevention of conducting activities or contacting certain people who could affect the process of correcting him/her.

Confinement provided in art.119 is another educational measure that consists in the child's obligation not to leave home on Saturday and Sundays for a period between four and twelve weeks, unless, during this period, he/she is required to participate in certain programs or to conduct certain activities imposed by the court. And in this case surveillance is coordinated by the probation service.

A final non-custodial measure is *daily assistance*, provided in art. 120, and the minor is required to comply with a timetable set by the probation service, which contains the schedule of activities and conditions and prohibitions imposed to the minor. This measure is taken for a period between three and six months, under the coordination and supervision of the probation service.

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It may be noted that educational non-custodial measures provided in the Criminal Code shall have a maximum duration of six months, unlike supervised freedom of the present code, which has a duration of one year. Legislature intended to limit the period for which these measures can be taken, taking into account the age and personality of the child, appreciating that a period of six months is sufficient. (Fanu-Moca, Rosu, (2010), :79)

Probation Service has the task to coordinate the exercise of these non-custodial measures, from simple monitoring of the child's activities, for the supervision measure, to the active intervention for the daily assistance measure, when the child's daily schedule is drawn up including not only the common elements of the minor age and schooling, but also those imposed by the court under art.122 – any activities necessary for attaining the aim of the educational measure (eg. Participation in social and educational activities designed to facilitate the social integration of the minor).

Probation counselors are designed to monitor compliance to the obligations imposed by the court on the sanctioned person and to provide them with assistance and advice to increase their chances of reintegration into the community. Therefore, the selection of probation counselors is subject to certain conditions:[1] the person must be licentiate in social work, psychology, sociology, pedagogy or law (art.20 of Law 123/2006 on the status of the probation services personnel) and possess certain personality characteristics (kindness, politeness, courteousy).

All these conditions are necessary because we deal with minors who certainly manifest behaviour disfunctions which need to be corrected and this is possible only under coordination of highly specialized persons. (Fanu-Moca, Rosu, (2010), :80).

The new Criminal Code provides a great number of obligations that can be imposed to the minor along with one of the educational non-custodial measure :to follow a course of education or vocational training; not to exceed without the agreement of probation service, the established territorial limits imposed by the court; not to be in certain places or at certain sporting events, cultural or other public gatherings, set by the court; not to come close and not communicate with the victim or its family members, with participants in the crime or other persons determined by the court; to report to the probation service on the dates fixed by it; to be subject to control measures, treatment or medical care.

The obligations imposed by the court may changed on the occurance or grounds for imposing a new obligation, either increasing or decreasing the performance of existing conditions. Changes must be taken to ensure the supervised person a better chance of correcting. The court may order

[1] Legea nr.123/2006 a fost publicata in Monitorul Oficial al Romaniei, partea I, nr. 407 din 10 mai 2006, cu modificarile si completarile din Ordonanta de urgenta a Guvernului nr.26/ 2010

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termination of some of the obligations imposed on them when thez consider that their maintenance is no longer necessary.

Art.123 covers the situation when the child does not comply, in bad faith the conditions or obligations of enforcement of the educational measure imposed. The court shall order: extension of the educational measure, but not to exceed the maximum provided bz law for it, or replace it with another non-custodial educational measure far more severe, or replace the measure with the admission in an educational center, when initially it has taken the most severe educational non-custodial measure during the maximum period. A similar regulation is provided when the child who is in the execution of a non-custodial educational measures commits a new crime or is trie for a concurrent crime commited before (art.123 para 3).

Chapter III provides for educational measures with deprivation of liberty. The new Criminal Code covers two such measures: **confinement into an educational facility and confinement in a detention center.**

- confinement in an educational facility means that the child is sent to an institution specialized in rehabilitation of the juvenile, where he will follow a program of educational and vocational training according to his abilities, and social reintegration programs. Confinement is disposed over a period between one and three years.
- confinement in a detention center is an educational measure consisting of the confinement of the minor in an institution specialized in child recovery with confinement security and surveillance regime, where he will follow intensive programs of social reintegration and training programs and training school according to his abilities.

Art.105 of the current Criminal Code concerning the confinement in a medical-educational institute finds no counterpart in the current educational measures. It is true that, in fact, these institutions do not exist.

The question is: what happens to the child who has commited one or more crimes, suffers from a mental disability, doesn't have a family, or carers are deprived of their rights, needs specialized medical care and an appropriate educational system? It is clear that his place is not in psychiatric hospitals. A preliminary impact study would have been helpful for sizing these educational measures.

Confinement in a detention center has a period of between two and five years, or, exceptionally, a period between 5 and 15 years, in cases of extremely serious crimes for which the law provides for penalty of 20 years imprisonment or more or life imprisonment. The duration measure is compatible with international regulations and standards that States should not provide for penalties of imprisonment of children to exceed 15 years (for ex. Resolution of Congress of the International Association of Penal Law adopted in Beijing in 2004).

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Enforcement regime of deprivation of liberty measures offers broad customization options, allowing adaptation to each child's conduct during the measure. Thus, when the minor proves that he has made significant progress towards social reintegration, after serving at least half of the measure, it may be ordered the replacement of this measure with the measure of daily assistance, if he is not 18 yet, or to release him when he reached this age.

In both cases, the court will enforce one or more obligations, as referred to in Article 121. This provides surveillance of the minor in the period immediately following re-establishment of freedom, knowing that the risk of commiting new crimes is higher in this period.

If the child has a behaviour which does not permit his release before the end of the measure, he will remain in specialized centers to its full performance.

If the person confined reached the age of 18 has a negative behaviour or impedes the recovery and reintegration of others confined, the court may order the continuation of the execution of the educational measures in a prison, such as not the criminal sanction, but the institution of enforcement being changed.

A novelty is the provisions that exclude prison sentences resulting from the application of comulating a sentence with a custodial educational measure which is subject to the provisions on postponing the enforcement of suspending it under surveillance. This is because custodial educational measures can not be applied in this new ways of individualizing the enforcement of sentences.

Finally, special terms were provided for the prescription of educational measures enforced(art. 132), at the same time, the current regulations regarding the calculation of limitationary for criminal liability were maintained. (art.131).

Conclusions

We consider tht it is appropriate to establish a sanctioning system of juvenile offender, which, by its content and, especially, the modern vision that was conceived, comes in the way of expectations of theorists of law, and especially of practitioners with appropriate solutions in an area as sensitive as minority.

Minority, as our legislature understood to regulate by Law no. 286/2009, is one of the focal points of the reform plan proposed in penal policy by waiving the juvenile sentencing in favour of educational measures. A greater diversity of educational measures will lead to a better individualization of the measure related to the actions committed and circumstances of each minor, because of age, educational measures appear more appropriate as punishment, whose application to subjects showed no correction of the beneficiares up to the present.

In order to achieve justice for children, international recommendations would give priority to initial and continuous training of magistrates in this

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matter, so that it becomes absolutely necessary for all magistrates who handle such cases, to be trained in child justice. Also, timely preparation of the judges on the regulated institutions in the new codes can be useful for the uniform application of new procedures.

Issues are also raised by cooperation between judges and professionals in psychosocial support services. Most often the lack of the services for children in conflict with the law is denounced. In this respect, the establishment and development of community services to support the rehabilitation of this category of minors is necessary.

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