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THE FACULTY OF LAW

The penalties applicable to the juvenile offenders

SUMMARY

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INDEX

c. Spain

Chapter II: The limits of the criminal liability of the minors

Section 1: The criminal capacity of the minors

a. Minors without criminal capacity
b. Minors with relative criminal capacity
c. Minors with criminal capacity

Section 2: The infancy of the offender, non-imputability cause;

Section 3: The administrative measures for protection of the minors without criminal liability

Section 4: The criminal liability of the minors in the case of the criminal unit

a. Natural unit
b. Legal unit

Chapter III. The educative measures

Section 1: The system of penalties applicable to the minors

Section 2: The consequences of the criminal liabilities

Section 3: The juridical individualization of the educative measures

a. General individualization criteria
b. Assessment report

Chapter IV. The non-custodial educative measures regime

Section 1: General considerations

Section 2: Civic traineeship

a. Preliminary concepts
b. Content of the measure
c. Enforcement
d. Comparative law stipulations

Section 3: Monitoring

a. General considerations
b. Content of the measure
c. Enforcement
d. Compared law provisions

Section 4: Detainment at the end of the week

a. General considerations
b. Content of the measure
c. Enforcement
d. Compared law provisions

Section 5: Daily assistance

a. General considerations
b. Content of the measure
c. Enforcement
d. Compared law provisions

Section 6: Monitoring obligations

a. Content of the monitoring obligations
b. Modifications or termination of the obligations

Section 7: Extension or replacing the educative non-custodial measures

Chapter V: Regime of the educative custodial measures

Section 1: General considerations

Section 2: Admission in an educational centre

d. General considerations
e. Content of the measure
f. Enforcement

Section 3: Admission in a detention centre

a. General considerations
b. Content of the measure
c. Enforcement

Section 4: Changing the enforcing regime

Chapter VI: Criminal law provisions with special application in the juvenile subject

Section 1: Effects of the attenuation and aggravation causes

a. Circumstances applicable to the juvenile offenders
b. States of attenuation and aggravation applicable to the minors
1. The attempt
2. The special causes to reduce the punishment
3. Aggravation states

Section 2: Plurality of the offence

Section 3: Discovering the offence committed during the juvenile period of time

Section 4: Limitation period for the criminal liability of the minor and the limitation period for the educative measures enforcement

a. Limitation period for the criminal liability of the minors
b. Limitation period for the educative measures enforcement

Section 5: The minor came of age

Section 6: Effects of the educative measures

Conclusions and proposals of lege ferenda/ future law

Bibliography

1. The theme of the research and its scientific importance

By this doctoral dissertation, called **The penalties applicable to the juvenile offenders,** I analyzed, to the requisite legal standard, the special importance and the role of the educative measures in the process of behavioural shaping of the juvenile offender and also, I pointed out the usefulness of a protection system for the minor who is in conflict with the criminal law.

In our opinion, the examination of such an issue also implies the examination of the international provisions on the juvenile delinquency and the Romanian criminal enforcement regulations specific to the educative measures.

With the entry into force of the new Criminal Code, on the 1st of February of 2014, the criminal provisions applicable to the juvenile offenders suffered fundamental modifications, the legislator preferring to abandon the mixed system of penalties made of educative measures and penalties to the detriment of a regime made exclusively of educative measures.

Such an approach is fully according to the European criminal politics and it is likely to help, efficiently, at the re-education and the protection of the minor offenders.

Notwithstanding, by establishing new educative measures, custodial and non-custodial, and by amending the criminal enforcement law, the judicial

proceeding outlines many failures in the process of their interpretation and application.

By a detailed research of the criminal provisions regarding the penalties applicable to the juvenile offenders by reporting to the international provisions and to the criminal enforcement ones, we consider that this thesis can prove its interest and scientific usefulness, being able to contribute to the creation of the necessary assumptions for ensuring an uniform practice of the law courts.

II. The structure and the content of the thesis

The thesis is structured in six chapters, divided into sections and subdivisions, and a chapter for the conclusions and proposals of *lege ferenda*.

The first chapter is dedicated to the general notions, the thesis beginning with a research of the evolution of the criminal rules and criminal procedural rules applicable to the juvenile offenders.

For this purpose, I presented the opinion of the Honourable Professor Ioan Tanoviceanu who pointed out in his book that „the Ancients punished the children even by death" and offered as example the testimonies of Quintilian who said that Athena`s Areopagus punished by death a child who took off the eyes of a bird[1].

Along with the evolution of the development of the societies, these trends of punishment for the juvenile offenders suffered significant modifications.

[1] I. Tanoviceanu „Tratat de drept și procedură penală", 2nd edition, Tipografia Curierul Judiciar publishing house, 1924, vol. I, p. 695;

Thus, since Antiquity the legislators started to show the concern for taking-up a segregated criminal penalty regime for the juvenile delinquents.

In this respect, the Roman law, by the Law of the twelve tables, divided the minors into two age categories respectively, impuberus and puberus, the age of puberty being 14 years for boys and 12 years for girls.

Regarding the provisions existent in Wallachia, in the XVI- XVIIth centuries, it started the progress of the idea of excluding the minor from the punishment application, and part of the codes from the XIXth century, because of the forward of the punishment individualisation principle, constituted some special criminal provisions applicable to the juvenile delinquents.

The first Romanian regulations containing references to the minority condition were „Cartea Românească de Învățătură"/ " Romanian Learning Book" of Vasile Lupu, in 1646 in Moldova and „Îndreptarea Legii"/ " Amendment of the Law" of Matei Basarab, in 1652 in Muntenia.

Entering on the 1st of May of 1865 under the reign of Alexandru Ioan Cuza, the first Romanian Criminal Code took away the variety from the criminal area, replacing the Criminal Code of Ioan Sandu Sturdza from Moldova and the Criminal Code of Barbu Știrbei from Muntenia.

The legislator of the Code from 1865 applied, in the Title VI of the Chapter I, called „Causes that protect from penalty or that increase the penalty" (art. 61-65), provisions applicable to the juvenile offenders.

By the entering of the Criminal and criminal procedure Code in 1937, it was established a new penalty treatment, as well as special rules for investigation and trial of the juvenile delinquents, considerably improved.

Regarding the Criminal Code from 1969, it dedicated the minority matter in a separate title, respectively the Title V of the general part.

Also, it was outlined the fact that the new criminal law recorded a new progress meaning that it stipulated the minority among the causes that resolve the criminal character of the act.

The examination of the evolution of the criminal law norms and the criminal procedural law applicable to the juvenile delinquents proves itself compulsory if a better understanding of the educative measures is wanted.

Also in this chapter one can find the analysis and a series of international documents by means of which a series of principles with general character were established, constituting a solid basis for the development of the programs of preventing the juvenile delinquency and of protection of the minors occurred in this situation, respectively:

1. The European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4.11.1950;
2. The Ensemble of the Minimal Standard Rules of the United Nations in the Administration of the justice for minors (Rules from Beijing), adopted by the General Meeting of U.N.O. by the Resolution 40/33 on 29.11.1985;
3. The Convention regarding the Child rights, adopted by the General Meeting of U.N.O. by the Resolution no. 44/25 on 20.11.1989;
4. The Rules of United Nations for the protection of the detained minors (Rules from Havana), the General Meeting of U.N.O. by the Resolution no. 45/113 on14.12.1990;

5. The Minimal Rules of the United Nations for the elaboration of the non-custodial measures (Rules from Tokyo), adopted by the Resolution no.45/110 on 14.12.1990;
6. The Principles of the United Nations for preventing the juvenile delinquency (Principles from Riyadh), adopted by the Resolution no.45/112 on 14.12.1990;
7. The CM/REC (2003)20 Recommendation of the Committee of the Ministers of the Member States regarding the new ways of treating the juvenile delinquency and the role of the juvenile justice, adopted by the Committee of Ministers on 24.09.2003;

The first chapter is concluded by a subsection dedicated to the notions of compared criminal law.

So, taking into consideration the fact that in the process of drafting the new educative measures the Romanian criminal legislator was inspired especially by the Spanish law, the French law and the German one, I think that it is appropriate to examine the criminal dispositions of these law systems regarding the limits of the criminal liabilities, as well as the penalty treatment applicable to the juvenile offenders.

Regarding the French law, the criminal legislator dedicated to the juvenile delinquency phenomenon a separate normative document of Criminal Code, respectively the Ordinance no. 45-174 on the 2nd of February of 1945.

In this respect, it is pointed out the fact that the Ordinance is structured in 5 chapters and it contained provisions on the procedure of prosecution and judgement of the offences committed by the minors, as well as the applicable sanctions.

The limits of the criminal liability are well defined and are reported to the age of the minor at the time of the criminal acts as well as the presence of the discernment.

The penalty applicable regime is a mixed one, composed from educative measures, mediation- reparation measures and penalties.

In Germany, the dispositions of the Criminal Law on the minor offenders are completed with the ones provided in the Law of Juvenile Courts (Jugendgerichtsgesetz).

The penalty regime applicable to the minors is composed from a variety of educative measures and disciplinary measures, able to support the process of re-education of the juvenile offenders and the detention punishment.

As well as in the situation of the French legislator and the German one, the Spanish legislator preferred to regulate the juvenile delinquency by a special law containing derogatory provisions from the common law, respectively the Spanish Organic Law no. 5 on the 12th of January of 2000 on the criminal liability of the minors.

According to the Organic Law, the minors under 14 years old beneficiate of an absolute presumption because of the lack of criminal capacity, determining the application of the normative documents that regulates the child protection, respectively the Civil Code as well as the Organic Law no. 1 on 15th of January of 1996.

Regarding the juvenile delinquents aged between 14 and 17, these are criminally liable in all the situations where it is not noticed the incidence of a cause of removing the criminal liability.

Same as in the Romanian criminal regulation, the system of penalties applicable to the juvenile delinquents is unique, formed from custodial and non-custodial measures, with educative character.

In order to choose a measure with educative character, the Judge for juvenile will take into account personal circumstances and the maturity level of the juvenile offender, the nature and the gravity of the act. In exceptional cases, the Court can order to the juvenile delinquent the execution of two educative measures.

In the second chapter of the thesis, I focused on the examination of the criminal liabilities limits of the minors existent in the Romanian law.

For this purpose, I appreciated that the provisions provided by the current Criminal Code are perfectly according to the ones settled by the Ensemble of the minimal rules of the United Nations on the Administration of the Juvenile Justice (Rules from Beijing) with the recommendation for the legal systems to settle a limit of the criminal liability in conformity with the level of emotional, psychic and intellectual development of the minors.

Also, I noticed that by establishing a minimum age level under which the minors that commit acts provided by the criminal law cannot be punished, there were observed the provisions of the Convention on the child rights, adopted by the General Meeting of the Organisation of the United Nations.

Thus, according to the Romanian Criminal Law, the minor under 14 years old beneficiates of an absolute and conclusive presumption because he/she has not discernment and as a consequence, the criminal liability cannot be engaged.

If an offence is committed by a minor under 14 and 16 years old, the criminal dispositions settle that he/she is criminally liable in the case the act was committed with discernment.

In order to understand the legal dispositions I presented that, according to the Law no. 487/2002, „by discernment one can understand the component of the psychic capacity, referring to a certain act or the possibility of the certain person to appreciate the content and the consequences of these acts ".

Contrary to the first category, the juvenile delinquents aged between 14 and 16 beneficiate of a relative presumption because of the lack of criminal capacity, presumption that can be reversed by the administration of contrary evidences.

Regarding the last category, it is composed from two subcategories, respectively:

- Minors aged between 14 and 16 who committed an offence with discernment;
- Minors over 16 years old, the legislator introducing no special condition for engaging the criminal liability.

Other important notion is represented by the fact that, on the contrary to the previous Criminal Code that situated the minority of the offender among the causes of replacing the criminal character of the act, the present dispositions, as a consequence of the modification of the offences as fundamental institution of the criminal law, it qualifies the minority as a non-imputability cause. In all the cases where the criminal liability of the minors who commit a criminal act, the provisions of the Law no. 272/2004 became incident on the protection and the

promotion of the child rights, whereby the following special protection measures are settled: the placement and the specialized surveillance.

In the next section I analyzed the criminal liability of the minors in the cases of the forms of criminal units, because when the minors commit such offences it is necessary to determine the time of the consumption and respectively, the depletion of the criminal acts reporting to the age and discernment conditions established by the legislator.

In the third chapter of this doctoral thesis I focused on the examination of the criminal penalty system applicable to the juvenile delinquents as well as the criminal liability in the case of the minors.

Thus, I pointed out that for the minors, in the justice area two penalty systems were noticed, respectively a mixed traditional regime formed by educative measures and penalties and another exclusively composed from educative measures, called tutorial.

The legislator of the current criminal provisions preferred a more modern approach, completely in line with the jurisprudence of the European Court of the Human Rights, renouncing the mixed, traditional penalty regime in the favour of a system composed from custodial and non custodial educative measures.

In our opinion, the reason for adopting the tutorial penalty system is the reconsideration of the statute of the juvenile delinquents from offender into victim of its own social environment needing special protection and education measures.

The educative measures represent criminal law penalties applicable only to the minor individuals who committed criminal acts and that have the capacity to educate and re-integrate them in the society.

By the art.114 1st paragraph of the Criminal Code, it is determined the rule that noncustodial educative measures are applicable to the minors aged between 14 and 18 who commit criminal acts.

The action area of the above mentioned provisions is limited by the provisions of the 2nd paragraph who regulates the situations when custodial educative measures can be made respectively:

a) If he/she committed an offence, for which it was applied an educative measure that was executed or of which execution started before the commitment of the offence that was the subject of the judgement;
b) When the punishment provided by the law for the committed offence provides detention for 7 years or more or life detention.

The final section of the third chapter is structured in two subdivisions and has as research object the dispositions regarding the legal individualisation of the educative measures.

According to the dispositions of the art.116 of the Criminal Code, in order to realise the evaluation of the minor, according to the criteria provided by the art. 74, the Court will request to the probation service to file a report containing motivated proposals regarding the nature and the duration of the programs of social inclusion where the minor attend to, as well as other obligations that can be imposed to him/her by the Court of Law.

By filing the evaluation report the identification of all conditions is aimed of the basis of the deviant behaviour of the juvenile delinquent in order to apply, in proper manner, some educative measures that will have effect in the re-education process.

It can be stated that the main role of the evaluation report is to offer an extra help to the Court in the individualisation process of the educative measures.

The forth chapter of the doctoral thesis contains a detailed research upon the educative non-custodial measures regime.

The site of the educative non-custodial measures matter is represented by the Chapter II from the Title IV of the Criminal Code regulating them in ascending order, depending their seriousness.

The civil traineeship, taken from the French Criminal law, has no counterpart in the previous Criminal Code and we consider that this can be a measure aiming to remove some little gaps occurred in the education of the minor offender.

The monitoring represents a measure newly introduced in the Romanian criminal law with an educative effect that can be applied to the juvenile delinquents in order to improve their behaviour and their inclusion into society.

The detainment at the end of the week also represents a new noncustodial educative measure, that can be disposed to the minors with an antisocial behaviour who committed criminal acts.

The daily assistance, taken from the Spanish criminal law, has no counterpart in the previous Criminal Code and it is considered the most severe noncustodial educative measure that can be imposed to the juvenile delinquents.

The analysis of the above mentioned measures is completed with the examination of the criminal enforcement provisions and of the international

criminal law provisions that were an inspirational source for the Romanian legislator.

Regarding the Chapter V of the thesis, it has as study object the custodial educative measures regime.

By the provisions of the Recommendation (2008)11 of the Ministers Committee it is stated with principle title the fact that the lack of liberty of a juvenile delinquent have to be considered as a measure of last resort and have to be applied for a short period of time.

In complete agreement with the European dispositions, the Romanian legislator establishes by the provisions of the art. 114 of the Criminal Code, that the custodial educative measures have an exception character and have to be applied only fulfilling some special conditions.

The site of the educative custodial measures matter is represented by the Chapter III from the Title IV of the Criminal Code regulating them in ascending order, depending their seriousness, respectively the admission in an educational centre and the admission in a detention centre.

By the dispositions of the art.124 of the Criminal Code it is stated a custodial educative measure with an educative-preventive effect that can be disposed against the minors with a deviant behaviour who, by their action and lack of action, can commit severe criminal acts.

Also, as it was mentioned in the specialty literature, the admission in an educative centre can be imposed to the juvenile delinquents when the noncustodial educative measures cannot lead to their re-education.

Regarding the admission in a detention centre, it represents a measure with an educative-preventive effect that can be disposed as final solution when the commitment of severe acts is noted.

The difference between an educative centre and a detention centre resides in the regime of monitoring and custody and the programs of social reintegration with intensive character.

As in the case of the educative non-custodial measures, the analysis of the above mentioned measures is completed by the examination of the criminal enforcement provisions.

The sixth chapter of the thesis is dedicated to the study of the criminal dispositions with special application in the minority matter, respectively the provisions of the art.128 –art. 134 of the Criminal Code.

Thus, in the research of the causes -effects of attenuation and aggravation, I pointed out that, unlike the previous criminal law enforcement that did not distinguished the offenders aged under or more than 18, referring to the effects produced by the attenuation- aggravation causes, the new Criminal Code includes some significant modifications in this matter.

For this purpose, the art. 128 of the Criminal Code states with derogatory title from the dispositions of common law, that in the case of the offenses committed during the minority the causes of attenuation and aggravation are taken into consideration when choosing an educative measure and they produce effects between the limits provided by the law for each educative measure.

Regarding the dispositions on the concurrent infringements committed by a juvenile delinquent, I determined that by the regulation of the art. 129, 1st

paragraph of the Criminal Code, the current Criminal Code represents an evolution beyond the previous criminal law provisions that did not refer of any of the educative measures in case of concurrent infringements.

The thesis concludes by a chapter dedicated to the conclusions and the suggestions of lege ferenda.

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