Protection of Minor's Rights in the Romanian Criminal Trial

PhD. Laura Stănilă
Senior lecturer
Faculty of Law
West University of Timişoara
Romania

Adrian Stan
Lawyer
Timiş Bar
Romania

Abstract

The legal treatment of juvenile delinquents constitutes an issue raising several difficulties, regarding the age stated by the Romanian legislator for imposing criminal liability and, on the other hand, regarding their special requirements in the criminal trial. The comparative criminal law deals extensively with this issue. As a matter of fact, the legal aspects and difficulties of the criminal trial in case of minors are even more under debate in comparison with the aspects of criminal trial in case of adult perpetrators, the doctrine pointing out the conflict between the two criminal procedure systems: the repressive model and the liberal model1. The best solution is undoubtedly the one of implementing and diversifying alternatives to deprivation of liberty in case of juvenile offenders, the strongest argument being their age and their insufficient awareness of their criminal conduct results.

Key-words: minors, special procedure, liberal model, educational measures, deprivation of liberty, compulsory assistance, participation of the legal representative, procedural guarantees, the right to defense, recognition of the accusation, plea bargaining.

1. Extended procedural guarantees under Romanian Criminal Procedure Code (RCPC). The restorative justice paradigm

The new orientation of the 2010 RCPC is part of the restorative justice paradigm that dominates the current European legal framework. Restorative justice is a rediscovery and refinement of criminal practices specific to "acts of justice", which seeks to provide a viable and effective response to crime and conflict. To this end, restorative justice imposes the need to enable the victim and the offender to play the leading roles in making the decision to resolve the conflict between them. Restorative justice treats offenders with respect, to ensure legal behavior on their part and to reintegrate them into the community[2].

[1] J. Pradel, *Droit penal compare*, 4 eme edition, Dalloz, 2016, pp. 705-714.

[2] United Nations, Office on Drugs and Crime (2006), *Handbook on restorative justice programmes*, New York: Criminal Justice Handbook Series, https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf, accessed 10.05.2018.

The purpose of restorative justice within a legal relationship of criminal nature is to analyze and bring balance, in order to solve all the problems generated by it, namely problems specific to the victim and the need to assist him/her in the recovery process, problems of the community related to the need for public order and security, problems related to the restoration of the losses caused, by imposing the direct responsibility of the offender, as well as the problems in relation with the offender, such as his/her need for social reintegration[3]. Restorative justice is based on three fundamental principles: responsibility, restoration and reintegration. Based on these three principles, restorative justice has as its main objectives, among others, the need of increasing the responsibility of offenders towards the person and the community they have victimized; the need of increasing the responsibility of the community in engaging liability of the offender and of identifying solutions to the needs of the victim and offender; preventing recidivism by reintegrating offenders into the community. In almost all countries, as the case may be, three ways to deal with juvenile delinquency are followed, namely: social assistance; punitive-criminal nature justice; a mixed path that aims to achieve a compromise between the previous two paths[4].

As regards the sanctioning aspects, from the perspective of substantive criminal law, the Romanian Criminal Code entered into force on February 1st, 2014, brought a series of innovations with beneficial effects on the social reintegration of minors with criminal conduct. From the perspective of criminal procedural law, the Romanian Criminal Procedure Code in force on the same date, provides many novelties in comparison with the former regulation. Their role is evident in enhancing the procedural rights and guarantees of perpetrators the state has considered that it is not necessary to be judged entirely in accordance with the common procedural rules applicable to the majority.

At European Union level, the ratification by the Member States of several important European conventions - the European Convention of Human Rights (ECHR), the International Covenant on Civil and Political Rights and the UN Convention of Lanzarote - was considered not sufficient for the effective protection of minors. Thus, in 2016, the Directive 2016/800 on procedural safeguards for children who are suspected or accused in criminal proceedings was adopted[5]. In short, the directive lays down additional rights for juveniles and increased correlative obligations for the judiciary.

Thus, the content of the information communicated to the accused, the obligation to inform the person who exercises parental authority, the right to privacy, the right to an individual evaluation, the right to limit the deprivation of liberty duration, the obligation of the states to provide legal assistance to the minor, were all extended.

First of all, as regards the judiciary organization and the *rationae personae* jurisdiction, it is important to point out that in the Romanian criminal procedural system, although the Law no. 304/2004 on the organization of the courts provides for this possibility in art. 37, there are no specialized tribunals established to deal with

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[3] Niță, N., (2017) Considerații privind justiția restaurativă pentru minori din România, *Acta Universitatis George Bacovia. Juridica* - Volume 6, Issue 2/2017, http://juridica.ugb.ro/, accessed 10.05.2018.

[4] Laura Stănilă, Darian Rakitovan, The Sanctioning System Applicable to Juvenile Offenders: The Child Friendly Vision of the Romanian Legislator, in Ivana Stevanovic (editor), Institut za KriminoloŠca i SocioloŠka Istrazivanja, Beograd 2018, pp. 147-148.

[5] Published in the Official Journal of EU, L 132 /21 mai 2016, transposition term on 11th of June 2019.

cases concerning indicted minors, and there are only special chambers or designated judges to whom such cases are assigned, but they also take decisions in other cases. So, we can affirm that there are no specialized judges dealing exclusively with cases involving minors. The aforementioned organizational law also provides the possibility of setting up specialized chambers for minors and family to deal with cases involving both juvenile offenders and minor victims, but the provision is not in fact fully applied. However, in Romania there is only one specialized court for minors set up in 2004, the Brasov Tribunal for Minors and Families. This court was established under a pilot program through the Order of the Minister of Justice[6], while in the other counties only specialized sections for minors and families were set up in the courts.

According to the new RCPC, the detention and pre-trial detention of the juvenile offender is an exceptional measure and it is executed under a special detention regime, taking into account the particularities of the age so that the deprivation of liberty does not prejudice the physical, mental or moral development of these persons[7].

According to Law no. 272/2004[8] on promoting the rights of the child, art. 2 par. (4), the principle of the best interest of the child shall prevail in all approaches and decisions concerning children undertaken by public authorities and authorized private bodies, as well as in the cases dealt with by the courts. In addition, in the process of individualization of criminal sanctions against juvenile offenders, the courts should focus on the re-education and reintegration function, the responsibility of the minor regarding his/her future conduct, the promotion of the minor's cohesion with the society[9].

2. Special provisions regarding juvenile offenders in RCPC

RCPC has opted for the principle of general provisions application in case of juvenile offenders on trial, with the regulation in a separate chapter of the derogatory rules, which applies only to juvenile criminal justice. That is why the Romanian legislator had not considered necessary to lay down general principles for the cases with this specificity, general rules of criminal procedure provided by art. 4-12 RCPC being fully applicable (we refer here to the presumption of innocence, the principle of finding the truth, *ne bis in idem*, Purpose and use of criminal action, the fairness and reasonable duration of the criminal trial, the right to freedom and security, the right to defense, the respect for dignity, privacy and the right to have an interpreter).

Therefore, art. 504-520 RCPC regulates the issues that distinguish the judgment in case of minors from the other trials, even Art. 504 stating that the criminal investigation and prosecution of juvenile offenders, as well as the enforcement of the sentences concerning him, are following the usual procedure, with some additions and derogations. The provisions shall apply only if at the date of committing the offense for which he/she is investigated, respectively at the date of the court hearing, the person who committed the offense was a minor between 14 and 18 years old.

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[6] Order no. 3142/C/22.11.2004 of the Romanian Ministry of Justice.

[7] Neagu, I., Damaschin, M., (2014) *Tratat de procedură penală. Partea generală. În lumina noului Cod de procedură penală*, Bucureşti: Editura Universul Juridic, p. 646.

[8] Republished in Official Monitor, part I, no. 159/5.03.2014.

[9] Laura Stănilă, Darian Rakitovan, *cited*, pp. 148-149.

The National Probation Directorate, a structure organized within the Romanian Ministry of Justice, and its 42 territorial structures, called probation services, play an important role in the criminal trial. The National Probation Directorate is a structure established and organized by Law no. 252/2013[10] on the organization and functioning of the probation system, and by Government Decision no. 1079/2013[11] for the approval of the Regulation for the application of the provisions of Law no. 252/2013 regarding the organization and functioning of the probation system.

Thus, according to art. 6 RCPC, in cases with underage defendants the criminal investigation bodies can, when they deem it necessary, require an evaluation report from the Probation Service attached to the Tribunal in whose territorial jurisdiction the underage person lives, as under the law. In cases with underage defendants the court is under an obligation to order the evaluation report from the Probation Service attached to the Tribunal in whose territorial jurisdiction the underage person lives, as under the law. In the situation where the report has already been required during the criminal investigation, as under par. (1), the court's ordering an evaluation report is optional.

The evaluation report is prepared by the Probation Service and represents an act through which the specialized institution, after the hearing the juvenile accompanied by a legal representative, draws up an evaluation on his/her general, personal family situation, on the impact of the committed deed on his/her personality, the benefits of avoiding reiteration of criminal offenses and the risks involved. The Probation Service makes proposals for the court on the educational measure provided by the RCC that suits the juvenile offender the best.

Regarding the persons called to the criminal investigating body during the hearing of the suspects or defendants, very recently, the Constitutional Court of Romania ruled on the extension of their right to be assisted by the legal representatives. According to the provisions of art. 505 Criminal Procedure Code, subject to the criticism of unconstitutionality, *"when the suspect or defendant is an underage person who has not turned 16, for any hearing or confrontation of the juvenile the criminal investigation body shall summon their parents or, as the case may be, their legal guardian, custodian or person in whose care or under whose supervision the juvenile was placed temporarily, as well as the General Department for Social Assistance and Child Protection in the locality where the hearing is to take place."* The law also stipulated that *"when the suspect or defendant is an underage person who has turned 16, summoning the individuals described in par. (1) shall only be ordered if the criminal investigation body deems it necessary. Failure by the legally summoned individuals to attend the hearing or confrontation of the juvenile does not preclude those procedures from taking place."*

By decision no. 102/2018[12], the Romanian Constitutional Court upheld the objection of unconstitutionality and found that "the provisions of art. 505 par. 2 of the RCPC, as well as the phrase "who has not reached the age of 16" in art. 505 par. (1) of the RCPC are unconstitutional. Therefore, in case of all minors, and not just of those under the age of 18, will be required, from the publication of the Mandatory Decision, to summon the legal representatives in front of the judicial body.

The Constitutional Court has stated that there has been a discrimination between suspects and defendants who have reached the age of 16 and suspects and defendants

[10] Published in the Official Monitor, Part I no. 512 /14.08.2013.
[11] Published in the Official Monitor, Part I no. 5/7.01.2014.
[12] Published in the Official Monitor, Part I no. 400/10.05.2018.

who have not reached that age yet. Considering the nature of the procedural measure in question, the Court stated that the legislator mistakenly appealed to the distinction made in art. 505 par. 2 of the Criminal Procedure Code, by applying a criterion related to the age from which the juvenile is held criminally liable, according to art. 113 par. 3 of the Criminal Code. On the contrary, in this normative hypothesis subjected to constitutional control, it is stated that the main issue is the specificity of "being a minor" of the suspect/indicted person, while the age criterion is a secondary one, which can not prevail in relation to the obligation of protection of the State under art. 49 of the Romanian Constitution. Therefore, the legislator must grant to minors, irrespective of the age they have, the same procedural guarantees as to the hearing or confrontation carried out by the criminal prosecution bodies. Therefore, the Court stated that the legal provisions criticized discriminated against the child aged over 16 years, being excluded from the right to be assisted in any hearing or confrontation by the persons referred to in art. 505 paragraph 1 RCPC.

As emphasized above, the central element of the criminal trial around all the rights of suspects and defendants are gravitating, is the right to defense. Considering the increased vulnerability of minors, aspect generated by their age, the Romanian procedural law established the obligation to ensure legal assistance, according to art. 90 al. 1 RCPC. In cases of mandatory assistance (including the situation of the arrested indicted person or detained in an educational center), it is presumed that the juvenile defendants in these situations could not provide their own defense.

Obviously, the juvenile's lawyer enjoys all the rights granted to the defense, generally those guaranteed by the provisions of art. 92 and 94 RCPC, such as the right to assist in any criminal procedure act other than that involving the hearing of his client, the right to study the case file, to copy data and information from the case file necessary for the defense, and to obtain photocopies of acts of prosecution.

As regards *the preventive measures,* they can be taken against minors at the same duration and under the same procedures as for the adults, with some nuances. Thus, at the end of the Title V RCPC governing the preventive measures, the legislator has placed a distinct chapter laying down the derogatory rules on preventive measures applicable to minors. Taking in custody and pre-trial arrest may be ordered exceptionally against an underage defendant, only if the effects of their deprivation of freedom on their personality and development are not disproportionate to the objective pursued by such measure. In determining the duration of a pre-trial arrest measure, the defendant's age at the date of ordering, extending or maintaining such measure shall be considered.[13]

The legislator does not speak here of home arrest, although this is also a measure of deprivation of liberty, probably considering that only the closed detention environment would have serious consequences on the juvenile's psyche, without further safeguards against home deprivation of liberty. The law also imposed an obligation to notify the juvenile's legal representative on his/her deprivation of liberty.

3. Plea bargaining and guilty plea in case of minors

The procedural rights of the minor had followed an interesting evolution in the recent criminal procedural law regarding some abbreviated procedures in which the accused acknowledges his guilt. The Romanian legislator introduced in 2014 (in the

[13] Art. 243 par. 2-3 RCPC.

same time with the restructuring of the institution of plea bargaining, already in force since 2010) the procedure of the guilty plea concluded with the prosecutor and the waiver of the criminal prosecution. It has been appreciated that these are elements of adversial justice, elements of *common law*, grafted on the continental model in which the Romanian criminal proceedings are traditionally placed, the aim of these procedures being the efficiency of the criminal process, to the detriment of the truth, the defendant actually giving up on a certain defense, while the prosecution drops in return the full investigation of the case. The doctrine[14], in attempting to argue the legislator's choice to stop access to these procedures, considered that the lack of experience of the minor would pose a particular disadvantage in the negotiation procedures and would call into question the requirements of recognition guilt, even under the conditions of mandatory assistance. The minor would not fully understand, in these cases, the consequences of renouncing a trial in its natural form, with the elements of contradictoriality and fairness guaranteed by the law.

Thus, initially, as of February 1st, 2014, RCPC omitted, willfully or by mistake, to provide the possibility for minor defendants to plead guilty before the court, with the consequence of alleviating the severity of criminal liability. We tend to believe, joining other scholars, that the omission was, however, caused by the fact that, from the point of view of criminal law sanctions against juveniles, in the new system, there are no longer punishments but educational measures, even in the case of the deprivation of liberty, the courts having no means of sentencing *stricto sensu*, but one of establishing an educational measure with deprivation of liberty. So it was quite difficult to establish, at least in the case of non-positive measures, what and how it would be reduced when the trial runned under the simplified procedure.

Even the Romanian case-law faced difficulties in assessing the solution to be followed, although the legal text did not expressly provide the possibility of applying the plea procedure in case of minors. Thus, at the meeting of the representatives[15] of the Superior Council of Magistracy with the presidents of the criminal sections of the High Court of Cassation and Justice and the Courts of Appeal held on 24-25 September 2015, there were several opinions. We present them as follows:

In an opinion, it was thus considered that plea bargaining leading to the simplified procedure is also applicable to juvenile offenders, since the provisions of the law relating to this institution did not contain any exception to exclude them, an exception found in other such institutions be, for example, that of the guilty plea, art. 478 par. 6 RCPC, stipulating that juvenile offenders can not conclude agreements on the guilt plea. So it was oppinated that when the law wanted to exclude a category from the application of a procedural institution, it expressly provided it.

In another opinion it was considered that plea bargaining is not applicable to the juvenile defendants, since art. 396 par. 10 RCPC stipulates that if this procedure is applied, the penalty of imprisonment or fine is to be reduced by a third or a quarter, but only educational measures can be applied to minors according to art. 114 and art. 115 RCPC, conditions in which the application of the procedure remains without legal effects.

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[14] G. Bodoroncea, in M. Udroiu (coord), *Codul de procedură penală, Comentariu pe articole*, Ed. CH Beck, Bucharest, 2017, p. 1908.

[15] http://www.inm-lex.ro/fisiere/d_1164/Minuta%20intalnire%20sectii%20penale,%20Sibiu,%2024-25%20septembrie%202015.pdf, accessed 1.05.2018.

The opinion proposed by the National Institute of Magistracy was that in spite of the fact that the minors are not expressly excluded by the legislator from the application of the plea bargaining, as in the case of the guilt plea, its effects, as a legal cause of reducing punishment, in terms of substantial criminal law, entitle us to conclude that juveniles can not opt for abbreviated court proceedings; it is also said that the opinion of the broad interpretation of the law can not be supported, meaning that, in the case of minors, the plea bargaining may lead to a re-individualization of the educational measure, by establishing an additional criterion, so that a mitigating educational measure be applied.

The unanimous opinion expressed by the participants in the meeting was that, by law, it is not possible to apply the institution of plea bargaining regulated by art. 349 par. (2) RCPC., art. 374 par. (4) RCPC and art. 396 par. (10) RCPC; we can not give effect to the provisions of art. 396 par. (10) RCPC concerning the reduction of penalty limits. Plea bargaining can only be taken as a general criterion of individualization when considering and applying the educational measure, without changing its limits.

Government Ordinance no. 18/2016[16], however, regulated the situation and placed it, in our opinion, on the path of normality. Thus, the legal norm regarding the plea bargaining was completed in the sense that "if the defendant is minor, the consent of the legal representative is mandatory." The text thus expressly provides the admissibility of the special proceedings in case of minors, but also introduces an additional guarantee (in addition to the already existing obligation of being assisted by a lawyer), the consent of the person who legally represents the minor.

The normative act also explained, through a substantive provision introduced in art. 396 al. 10 RCPC, the way in which the plea bargaining will materialize in case of the minor, showing that "for minor offenders, the court will consider these aspects when choosing the educational measure; in the case of custodial educational measures, the limits of the period for which these measures are ordered are reduced by one third. The concept is therefore a mixed one, the reducing of time duration in case of non-custodial educational measures being banned. The actual reduction of time duration only operates in case of custodial educational measures provided by the text of the Criminal Code.

By the same Ordinance no. 18/2016, the legislator, intending to maintain the line of provisions above, to extend the access of minors to negotiated adversarial procedures, has abrogated the rule of express prohibition, and stipulated that "minor offenders may enter into agreements on guilt plea with the consent the legal representative, under the terms of the law. It has been appreciated by some authors that the approval of the representative would not be necessary if, at the time of signing the recognition agreement, the minor would be 18 years old, even if he committed the offense as a minor. At this time, the juvenile has acquired the full capacity of exercise and can conclude by himself any legal act, without the need for the consent of the legal representative.

4. Conclusion

In conclusion, without claiming to carry out a complete analysis of the additional safeguards for the rights of minors facing a criminal charge, we believe that it is

[16] Published in the Official Monitor, part I, no. 389/23.05.2016.

important to point out that the Romanian criminal procedural system has brought some welcome novelties, some originating and others as a result of legislative amendments or of the Constitutional Court decision, with the result in increasing the rights of minors in the criminal trial.

References

1. Pradel, J., *Droit penal compare*, 4 eme edition, Dalloz, 2016;
2. United Nations, Office on Drugs and Crime, *Handbook on restorative justice programmes*, New York: Criminal Justice Handbook Series, 2006, https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf, accessed 10.05.2018;
3. Niță, N., *Considerații privind justiția restaurativă pentru minori din România*, 2017, in *Acta Universitatis George Bacovia. Juridica* - Volume 6, Issue 2/2017, http://juridica.ugb.ro/, accessed 10.05.2018;
4. Stănilă, L., Rakitovan, D., *The Sanctioning System Applicable to Juvenile Offenders: The Child Friendly Vision of the Romanian Legislator*, in Ivana Stevanovic (editor), Institut za KriminoloŠca i SocioloŠka Istrazivanja, Beograd, 2018;
5. Neagu, I., Damaschin, M., *Tratat de procedură penală. Partea generală. În lumina noului Cod de procedură penală*, Editura Universul Juridic, București, 2014;
6. Bodoroncea, G., in M. Udroiu (coord.), *Codul de procedură penală, Comentariu pe articole*, Ed. CH Beck, 2017;
7. http://www.inm-lex.ro/fisiere/d_1164/Minuta%20intalnire%20sectii%20penale,%20Sibiu,%2024-25%20septembrie%202015.pdf, accessed 1.05.2018.