

THE CRIMINAL PROCEDURE IN THE CASES OF UNDER AGE – THE PREMISE OF FIGHTING CRIMINAL OFFENCES AMONG UNDER AGE.

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Abstract:

The special criminal procedure in the cases of under age is presented in summary, highlighting the role of special normative dispositions for the protection of under age who have committed misdemeanours. The author asks himself whether this derogatory procedure can contribute to reduce the rate of criminal offence among under age. It is noticeable that the system of procedure norms only creates a legal basis that is flexible enough to fight against criminal offence among under age, expressing only the possibility.

Key words: special criminal procedure, criminal offence, under age

1. Introductory observations

The protection of the under age, the evolution of criminal offence among the under age has represented a continuous preoccupation for the governments who have succeeded after 1989, at a declarative level as well as from an institutional or operative point of view. Romania has ratified the Convention concerning children's rights¹ and has adapted its internal legislation concerning children's rights according to the principles devoted in this convention. The internal legislation has been subject to numerous and important modifications in what concerns the special protection that is granted to children as well as the adoption system.

The entire Romanian legislation has in view the fact that the family, as a basic element of society and as natural environment destined to the growth and well being of all its members, and especially of the children, must benefit from the protection and assistance that it needs in order to fully assume the responsibilities within society and that every child must grow and develop in a family environment, with happiness, love and comprehension.

Adapting the internal legislation has represented a significant success recognized internationally; bringing the law into operation had brought a visible improvement in the administrative systems for the protection of children's rights and in assuring the efficient functionality of the legal instrument for protection and control.

¹ The Convention concerning children's rights has been ratified by Law nr. 18/2001 and published in the Official Gazette nr. 314/13.06.2001

However, the statistics and the daily events point out situations in which children live in difficult conditions and need a special care; also significant is the information pointing out the increase of criminal offence among the under age and the involvement of children in extremely serious actions of crime.

Such a reality, which may not be extremely alarming, needs special attention and care forcing us to ask ourselves whether the legal procedural instruments destined to contribute in a direct or indirect way to repressing the criminal offences and to represent a general or special prevention are adapted to the exigencies imposed by the UNO concerning children's rights and whether they can assure the adequate legal basis against this social calamity: under age criminal offence.

2. The procedure in the cases that involve the under age

The current criminal law foresees a special procedure¹ in the cases involving under age criminals: dispositions that are applicable to the prosecution and charge as well as special dispositions concerning preventive measurements related to applying educational measurement of the under age; Furthermore, special courts have been created for the cases involving the under age and the family, as well as specialized judge panels or sections besides court houses or courts of appeal².

Thus, the procedural protection that is granted to under age criminals is manifested in two ways: on one hand a special jurisdiction for the under age is established, formed of specialized prosecutors who have the capacity to better understand the under age and their behaviour, the possibilities to correct themselves, and on the other hand, procedural dispositions are adopted in order to better defend their legitimate rights during the prosecution and the trial.

The specialized procedure in the case of the under age is applicable to all under age persons who are responsible from the legal point of view, namely the under age between 14 and 18 years old³.

Accordingly, the procedure protects the under age, considering that he cannot fight for his interests and defend himself. However, the procedural protection extends after the under age turns 18, when at the date of notification of the court, the defendant was under age, even though meanwhile he has turned 18⁴. The special procedure in the cases involving under age defendants is compulsory⁵, In the sense

¹ Art.480-493 criminal law

² Art. 36 of Law nr.304/2004 concerning judicial organization, republished in the O.G. . Nr 827/2005 of September 15th 2005; such specialized courts shall be established by order of the ministry of justice with the according agreement of the superior council of magistrates; until the establishment of the court the causes shall be judged by judicial panels consisting in specialized judges. Besides the courts for the under age and the family, specialized prosecution offices shall function as well (art. 89-90 of law nr. 304/2004).

³ The under age who have committed criminal offences but have not turned 14 and therefore are not legally responsible are applied the dispositions of the art. 80-84 of law nr, 272/2004; the under age is liable to special protection measurements after an administrative procedure controlled by the judge.

⁴ Art. 483 of the criminal law

⁵ By the guiding decision nr. 6/1973 the former Supreme Court has statued the the decisions that have been pronounced with a severe infirmgement of the special norms foreseen for the prosecution and trial of the under age defendants are rendered void.

that an under age cannot be prosecuted and judged according to the common procedure due to the fact that he would not be granted the special protection granted by the special procedure.

A. The prosecution of under age defendants.

There are two kinds of special dispositions: some are applicable only to the under age that have not turned 16, for whom operates the relative legal presumption of lack of judgement, and other that are applicable to all the under age¹.

a. regulations that are particular to under age between 14 and 18 years old:

-at any hearing or confrontation the tutorial authority, by its delegate and/or the parents are subpoenaed or, if necessary, the legal representative; the subpoena is optional trying to create an intimacy that is necessary in order for the under age not to feel isolated and to have faith during the hearing; when presenting the prosecution material, it is compulsory that these persons be subpoenaed; the unattendance of these persons does not prevent the procedure from taking its course;

-the under age of this age cannot be restrained for a period longer than 10 hours, except if he has committed severe crime (the restraining can be extended with other 10 hours); the custody cannot exceed 15 days. This measurement is limited to a reasonable term and not longer than 60 days, and each extension of time cannot exceed 15 days².

b. regulations that apply to all the under age that are legally responsible

-for the under age that is charged, granting the legal assistance from a attorney is compulsory during the entire prosecution, in the conditions foreseen by the law.

- furthermore it is compulsory to draw up evaluation reports by the probation services³ necessary in order to establish the sanctions that shall be applied to the under age.

-the under age with an age comprised between 16 and 18 can be arrested during the prosecution for a period of 20 days at most which can be periodically extended with 20 days but without surpassing a reasonable term (but no longer than 90 days)⁴.

B. The trial procedure of the under age defendants

The crimes committed by the under age or those committed against the under age are judged by specialized judge panels and departments for the under age and the family and, as they are created, by specialized courts of law. The

¹ If the under age is 18 at the date when the prosecution organs are noticed or if during the prosecution the special procedure ceases to apply, with the exception of the evaluation report, necessary to establish the special legal basis.

² Exceptionally when the punishment foreseen by the law for the committed crime is life detention or 20 years in jail or more, the imprisonment before trial can be extended during the prosecution up to 180 days.

³ By the G.O. nr 92/2000 services for the social integration of the under age have been created in which there are counselors for social integration and specialists in social assistance, psychology, sociology and pedagogy

⁴ Exceptionally when the punishment foreseen by the law is life detention or imprisonment for 10 years or more, the arrest of the under age defendant can be extended to 180 days;

unobservance of the dispositions concerning the constitution of the court draws the complete voidness of the procedural acts carried out differently. In this type of causes the presence of the prosecutor is compulsory.

As well as in the case of the prosecution, during the trial the tutorial authority, the parents or, according to the case, the legal representatives of the under age are subpoenaed. The unattendance of the persons that are compulsory subpoenaed does not prevent the cause from being trialed.

The trial must take place in the presence of the under age except the case in which he eludes the trials. The presence of the under age must be assured at each term and during all the stages of the trial in which measurements that influence the solutioning of the cause are taken¹. The legal assistance is compulsory during the procedures that take place in front of the judge.

The session in which an under age is trialed is not public. However, the persons who are subpoenaed for the trial are admitted in the court.

In the hypothesis in which the case involves various defendants who are under age and in age, the cause is severed, separating the trial of the under age from that of the defendants in age. If the severing is not possible, the case is subject to trial on the whole, observing the special procedural regulations: the court is formed of judges from under age legal panels and for the under age defendants all the regulations that concern them are observed.

The trial of the cases in appeal takes place according to the special procedure applying the derogatory dispositions for the protection of the under age². These dispositions apply in the case in which at the date of the notification of the court of appeal the defendant was under age³.

3. Conclusions

The procedural system exposed in a synthetic way constitutes itself in a modern legal basis, flexible and adaptable enough to the social realities as to offer legal solutions and equally a pragmatic perspective in order to fight against under age criminality. The internal and international legislation that regulates children's rights can be observed and applied even considering the unfavourable hypothesis in which the under age, forced by the circumstances, must go through the legal process of criminal procedures. Legal perspectives for the recuperation of the under age defendants from the degrading environment of crime are opened.

The specialization of the prosecutors, the establishment of special jurisdictions offer the possibility for the person who brings into force the criminal law to better understand the causes who have led to committing the crime and to better penetrate the personality of the under age defendant in order to find the

¹ Dec.1039/2000, Supreme Court of Justice, stated in Law nr. 6/2001, p.154

² In the penal dec. 235/2000, Supreme Court of Justice the decision of the appeal court has been annuled in a cause involving under age defendants, trialed in absence without proving they eluded criminal prosecution, cited by Grigore Teodoru, Treaty of criminal procedural law, Hamangiu publisher, Bucharest, 2007, p.961.

³ Adrian Stefan Tulbure, Romanian criminal procedure, Constant publisher, Sibiu, 2005, p.447

educational or sanctioning measurement meant to recuperate the under age sooner or later.

The obligativity of going through the specific procedures imposed by the norms of public order whose unobservance leads to the voidness of the procedural actions (subpoena of the tutorial authority, legal assistance from an attorney that is compulsory, drawing up the evaluation reports by the probation services, the mandatory participation of the prosecutor as a representative of the society in these cases, the mandatory participation of the under age defendant at the trial, the separation of the trial from other causes) grants a sufficient legal basis in order for the under age's interests to be protected during the prosecution and the trial itself. These procedural obligations protect the under age as well as the third parties in the complex process of establishing the responsibilities for committing the crime. The legal system that regulates the beginning of the legal procedure and conducting the penal action as well as the one that encourages the means of attack have the role of avoiding the excess and abuse against under age irrespective of their source: authorities, parents, third parties and even the prosecutors.

However it must be mentioned that the system of procedural norms only creates the legal basis adaptable enough in order to fight against under age criminality. Only by itself, without initiative and coordinated actions from the prosecutors, the government authorities for social and economical order, of the parents as well as of the society, this system is expressed only at the level of possibility, without visible effects, as far as we are concerned.

The decrease of the rate of criminality among the under age can only be achieved by means of a complex activity of reforming the social and economical life where the initiatives of the government and of the civil society have a predominant role and where there space enough for action. This can be achieved in time and it will be fundamented only on a durable economical success.

However, the procedural legal basis exists from this moment. It offers the guarantee the the rights of the under age defendants are respected and that their legitimate rights are protected. At the same time it offers the possibility to those who have committed criminal offences to come back to a normal life in society.