

Brief Considerations on Minors and the Criminal Treatment of Minors

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Abstract

The first part of this article aims to clarify terms such as ‘minority’ or ‘minor’, and phrases such as ‘juvenile delinquency’, in relation to which appropriate legal treatment may be applied, such as educational measures, safety measures, medical treatment or custodial measures, in order to protect their fundamental rights, as stipulated in the UN Convention on the Rights of the Child, the Romanian Code of Criminal Procedure, Directive (EU) 2016/800 and other international conventions or recommendations. Under our legislation, juvenile offenders constitute a special category due to their age, a fact also highlighted by the sanctions devised by the Romanian legislature. In this regard, it is recommended that sanctions should, as far as possible, be educational rather than punitive, and that imprisonment should be considered a last resort, applied only in cases of serious breaches of criminal law. The second part analyses the conditions, situations and limits of criminal liability for minors, in the context of compliance with the provisions of the legislative acts mentioned above. The psychological and emotional vulnerability of minors requires a sensitive and specific approach during hearings, in order to avoid any influence or retraumatisation, and to respect the dignity and fundamental rights of minors.

Keywords: minors, adults, minorities, discernment, mental, offenders, juvenile delinquency, criminal liability, legislators, justice, sanctions, criminal treatment, educational measures, punitive measures, lawyers, sociologists and psychologists.

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1. Some Preliminary Aspects Intended to Clarify Certain Terms and Phrases That Are the Subject of the Study

The Explanatory Dictionary of the Romanian Language states that the

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term '*minor*' derives from the French '*minorité*', the Latin '*minoritas-atis*' and the German '*Minorität*', denoting the age of a minor; the period during which a person is a minor; the status of a minor; minority – minor + suffix -at.

We consider that it would have been more appropriate to use the term '*Juvenile Delinquency*' or the word '*Minor*' to title this chapter, as only this term clearly defines the period to which reference is made, until the attainment of the age of majority.

During a person's psychophysical development, there is a period in which they, lacking the mental capacity necessary to understand the social significance of their actions or to discern between their actions and inactions, cannot be the active subject of a criminal offence².

Thus, as noted in the specialist literature³, the juvenile offender has been and continues to be a subject of interest not only to the legal scholar, but also to the sociologist, the educator, the psychologist, etc., due to the specific nature of the issues they raise, issues that have become even more topical given the resurgence of juvenile delinquency in our times.

It would be interesting to determine how the findings of psychological, pedagogical and sociological research are reflected in the regulation of the juvenile rehabilitation system. In other words, how the Romanian legislature has utilised the aforementioned scientific data in creating the legal framework for the rehabilitation of juvenile offenders.

These aspects are closely interlinked and, in a sense, mutually dependent. It is difficult to conceive of developing a legislative system with modern solutions regarding the re-education of juvenile offenders without taking into account the results of relevant psychosocial and psycho-pedagogical research, research which, by probing the inner world of the juvenile offender, seeks to clarify the inner processes that lead them to antisocial behaviour, compelling society to take action through criminal law.

Educational measures become effective only if they correspond to the juvenile's re-education needs, taking into account the internal mechanisms that determine their antisocial behaviour as well as the way in which the juvenile perceives the influences of the outside world, including the various forms of social reaction to their actions⁴.

Juvenile delinquency is a social phenomenon faced by many countries around the world, and is the focus of attention for numerous international bodies, as was the case at the First United Nations Congress on the Prevention of Crime

² Gheorghe Alecu, *Institutions of Criminal Law: General and Special Parts, in Accordance with the New Criminal Code* (Constanța: Ovidius University Press, 2010), 183.

³ Ortansa Brezeanu, *Minors and Criminal Law* (Bucharest: All Beck, 1998), 7.

⁴ Gheorghe Bică et al., *Criminal Law: General Part* (Bucharest: Fundația România de Măine, 2016), 224.

and the Treatment of Offenders⁵. The same issue was revisited at the Second Congress⁶, without a unified agreement being reached. Ultimately, a recommendation was adopted to the effect that, as far as possible, the term ‘juvenile delinquency’ should be used only in relation to acts provided for under criminal law. Discussions on this issue have continued, and were taken up again at the Sixth United Nations Congress, held in Caracas in 1980.

According to Romanian legal doctrine, the concept of delinquency encompasses all acts constituting a breach of criminal law, rightly emphasising the failure of attempts to redefine the concept of criminality from a perspective other than that of criminal law; most authors now revert to the traditional concepts of crime⁷, criminal, and criminality.

Minority is a concept that has been discussed and written about since antiquity, where certain differences in criminal treatment between juvenile offenders and adults in the same category can be observed. Thus, the death penalty was also applied to children. *Quintilian* noted that the Areopagus of Athens sentenced a child to death for having plucked out the eyes of a bird⁸.

Ayrault cited several examples of children being punished, even from the age of 9, in Greece⁹.

Pastoret rightly criticised this punishment, noting that a child deserves correction, not torture¹⁰.

Jousse distinguished between children (impuber) and adolescents: *the impuber, that is, those under 14 years of age (boys) and 12 years of age (girls), are excusable, and if the perpetrator is close to puberty, they are not entirely excusable but are punished with a lesser penalty*¹¹.

Thus, *the Law of the Twelve Tables* divides minors into two age categories, *puberus* and *impuberus*, with the age of puberty being 14 for boys and 12 for girls. At the same time, the law provides diminished criminal liability for the

⁵ Held in Geneva in 1955.

⁶ Held in London in 1960.

⁷ Andrei Nastas and Sergiu Cernomoret, *Criminology: A Treatise* (Bucharest: Pro Universitaria, 2024), 25; Rodica Mihaela Stănoiu, *Criminology*, vol. 1 (Bucharest: Oscar Print, 1995), 20; Aurel Dincu, *Fundamentals of Criminology* (Bucharest: Proarcadia, 1993), 15; Gheorghe Nistoreanu and Costică Păun, *Criminology* (Bucharest: Europa Nova, 1996), 22–23.

⁸ Quintilian, *Institutio Oratoria*, bk. 5, chap. 9, quoted in Ioan Tanoviceanu, *Course in Criminal Law*, vol. 1 (Bucharest: Atelierele Grafice SOCEC & Co., 1912), 378.

⁹ Pierre Ayrault, *L'ordre, formalité et instruction judiciaire*, bk. 3, art. 3, no. 12, 327, quoted in Ioan Tanoviceanu, *Course in Criminal Law*, vol. 1 (Bucharest: Atelierele Grafice SOCEC & Co., 1912), 378.

¹⁰ Claude-Emmanuel-Joseph-Pierre de Pastoret, *Des lois pénales*, vol. 2, pt. 3, art. 2 (Paris: Buisson, 1790), 145, quoted in Ioan Tanoviceanu, *Course in Criminal Law*, vol. 1 (Bucharest: Atelierele Grafice SOCEC & Co., 1912), 378.

¹¹ Daniel Jousse, *Traité de la justice criminelle de France*, vol. 2 (Paris: Debure, 1771), 616–17, quoted in Ioan Tanoviceanu, *Course in Criminal Law*, vol. 1 (Bucharest: Atelierele Grafice SOCEC & Co., 1912), 378.

impuberus, but not in the sense of being completely exempt from punishment, but in the sense of incurring lighter penalties. *Justinian's legislation* provided that a minor under the age of 7 was considered incapable of criminal responsibility; between the ages of 7 and 14, they were liable only if they had committed the act with discernment; upon reaching the age of 18, and only at 25, they were treated in all respects as an adult¹².

In England, from the period corresponding to the reign of Edward II, the capacity to commit offences was judged more on the basis of the offender's knowledge than on the basis of age, which means that in Western Europe children were punished with the most severe penalties even from a very young age, although, in general, a certain degree of leniency was shown towards them¹³.

The earliest Romanian laws treat minorities as a category of circumstances which either exempt from punishment or mitigate the penalty. See in this regard *Vasile Lupu's Cartea Românească de Învățătură* (Romanian Book of Instruction) of 1646, published at the Trisfetitelor Monastery in Iași, and *Matei Basarab's Îndreptarea Legii* (*Correction of the Law*) of 1652, in Muntenia, published in Târgoviște. According to these documents, children under the age of 7 were not criminally liable. Boys aged between 7 and 14, and girls aged between 7 and 12 were subject to a mitigated system of sanctions. A third age category is also mentioned: between 14 and 20 years for boys and 12 and 25 years for girls, who benefited from a more lenient penalty regime, as, in the words of the legislator, such persons *would be less likely to be punished for all offences*, with the exception of particularly serious acts¹⁴.

The Penal Code of 1864, which came into force on 1 May 1865, contained provisions similar to the legislation it replaced, with the criminal treatment of minors being regulated in Title IV, entitled '*Cases Exempting from Punishment or Reducing Punishment*', in Articles 61, 62 and 63, with minorities being both a ground for criminal incapacity and a ground for mitigation of punishment.

Three age groups of minors are distinguished from the perspective of criminal law:

- a) up to the age of 8, when the minor was not criminally liable (Article 61);
- b) between 8 and 15 years of age, when the minor was criminally liable if it was proven that they had acted *with intent*, thus establishing a relative presumption of lack of *intent* (discernment); if the presumption of lack of discernment was not rebutted, the minor in question was either entrusted to their parents for supervision or sent to a monastery;

¹² Versavia Brutaru, *The Criminal Treatment of Minors* (Bucharest: Hamangiu, 2012), 17.

¹³ William Blackstone, *Commentaires sur les loix angloises*, vol. 5 (Brussels: J. L. de Boubiers, 1776), 344, quoted in Ioan Tanoviceanu, *Course in Criminal Law*, vol. 1 (Bucharest: Atelierele Grafice SOCEC & Co., 1912), 379.

¹⁴ Brutaru, *Criminal Treatment of Minors*, 76–77.

c) minors aged between 8 and 15 who acted *with discernment* and those aged between 15 and 20 were always considered responsible and held criminally liable, though the minority constituted a mitigating factor in sentencing, these categories of minors being punished with a sentence that could never be a criminal sentence, even if the minor had committed an act classified as a *crime*¹⁵.

The Romanian Penal Code of 1937, also known as the Carol II Penal Code, sets the age of criminal responsibility at 19 years (Art. 138), whilst also stipulating that minors under 14 years of age are not criminal. Liable, whilst those aged between 14 and 19 (adolescents) are liable only if it is proven that they acted with discernment at the time of the offence. Minors under the age of 14 or those who had committed the act without discernment were subject to preventive educational, guardianship and protective measures (Art. 140), which ceased when the child or adolescent reached the age of 21 (Art. 142), whilst for those whose capacity to discern at the time of the offence had been proven, security measures (supervised liberty and corrective education) were taken or penalties such as reprimand, corrective imprisonment or simple detention were imposed. By the Law of 24 September 1938, this Criminal Code was amended to lower the age of criminal responsibility from 19 to 18 years and the age of exemption from criminal responsibility from 14 to 12 years; thus, a minor under the age of 12 was never criminally liable, a minor aged between 12 and 15 was criminally liable only if they committed the act with discernment, and those aged between 15 and 18 were criminally liable, but with a mitigated penalty.

Minors aged between 12 and 15 who committed the offence with full understanding and minors over the age of 15 were subject to two types of criminal sanctions: security measures and penalties.

Safety measures (educational measures, as termed in the Romanian Criminal Code in force) were supervised liberty and moral re-education, whilst the penalties that could be imposed on a minor were a reprimand, imprisonment and a fine, the latter penalty being subject to certain conditions (if the minor had reached the age of 15 and only if they had assets or a profession).

Apart from these criminal law sanctions, the criminal court was entitled to take certain protective measures in respect of minors aged up to 12 years if they had committed an offence under criminal law, as well as in respect of minors who had not committed offences but who were at risk of committing such acts; these measures consist of placing the minor under special supervision by the family, a close relative who would be entrusted with the task of supervising the minor, or a person of good character, a welfare organisation, or a public or private institution authorised by the state for this purpose, or a moral re-education centre, as appropriate, as well as notifying the school authorities, so that they may reprimand the minor and take the disciplinary measures provided for in the school

¹⁵ Brutaru, *Criminal Treatment of Minors*, 19.

regulations¹⁶.

Another concept we work with and which we feel the need to explain is that of *the re-education* of the juvenile offender.

The institution of re-education constitutes a specific means by which society expresses its stance towards this category of offenders and, at the same time, articulates its choice regarding the principal methods to be employed for the enforcement of criminal sanctions and the rehabilitation of guilty minors. These features are interwoven within the concept of re-education, imbuing educational measures with the substance necessary to achieve their purpose¹⁷.

Being involved in both the implementation and the purpose of educational measures, it could be argued that re-education constitutes, at the same time, both the means of achieving and the aim of these measures. In this way, the functional capabilities of educational measures are utilised as a category of criminal law sanctions designed to compel and re-educate, under specific conditions, those offenders who are in the midst of their personality development.

It is evident that, in the context of the organisation of all social life on democratic principles and in accordance with the law, the process of re-educating the minor, taking place in a climate of legality, order and social discipline, also benefits from those positive educational and formative influences emanating from the social environment, which accelerates the minor's rehabilitation and paves the way for more effective social reintegration.

One might even speak of a mutual conditioning of the various educational influences and measures, the institution of re-education presenting itself, by its origin, structure, essence and purpose, as a system of relationships and interdependencies at all the stages the minor goes through, from coming into conflict with the law to his or her full reintegration into society.

Romanian society's response to the issue of juvenile delinquency in terms of legislation, sanctions and programmes designed to combat it is a subject that must not be overlooked, with a view to finding the best solutions for correcting the behaviour of juvenile offenders.

Under the law, juvenile offenders constitute a special category due to their age, a fact also reflected in the sanctions devised by the Romanian legislature. In this regard, it is recommended that sanctions should, as far as possible, be educational rather than punitive, and that imprisonment should be considered *a last resort*, applied only in cases of serious breaches of criminal law. As an alternative to custodial sentences, probation is recommended for juvenile offenders who are either first-time offenders or have committed minor offences, with

¹⁶ Alexandru Boroi, *Criminal Law: General Part, in Accordance with the New Criminal Code*, 2nd ed. (Bucharest: C. H. Beck, 2014), 316.

¹⁷ Vintilă Dongoroz et al., *Theoretical Explanations of the Romanian Criminal Code*, vol. 2 (Bucharest: Editura Academiei, 1970), 250.

the aim of protecting them from the negative effects of imprisonment. Opportunities are provided for their social reintegration and for overcoming delinquent behaviour through measures that are predominantly re-educational rather than punitive.

2. The Conditions, Circumstances and Limits of Criminal Liability for Minors

The provisions of Article 113 of the Criminal Code, concerning the limits of criminal liability of minors, are identical to those of Article 99 of the previous Criminal Code, which means that the drafters of the current Criminal Code considered the age limits for the criminal liability of minors in the 1969 Criminal Code to be scientifically grounded and justified from the perspective of criminal policy¹⁸.

Since the provisions regarding the criminal liability of minors in the two Criminal Codes are identical, the question of the more favourable criminal law does not arise in transitional situations.

A comparison of the provisions in the two codes can, however, only be made at the level of those in Article 113 of the current Criminal Code, as well as at the level of the entire group to which they belong. The specific nature of the provisions of Article 113 of the current Criminal Code, as well as those of Article 99 of the old Criminal Code, stems from the fact that they belong to a distinct group of legal provisions which, in terms of substantive criminal law, regulate the criminal liability of minors.

Thus, the provisions of Title V of the General Part of the current Criminal Code, entitled '*Minors*' and comprising Articles 113–134, correspond to the provisions of Title V of the General Part of the previous Criminal Code, also entitled '*Minors*' and comprising Articles 99–110 of that code¹⁹.

The 22 articles comprising Title V of the General Part of the current Criminal Code are grouped into four chapters and concern: the regime of criminal liability of minors (Articles 113–116), the regime of non-custodial educational measures (Articles 117–123), the regime of custodial measures (Articles 124–127) and special provisions concerning the criminal liability of minors.

In turn, the 15 articles comprising Title V of the general part of the previous Criminal Code contained provisions concerning the limits and consequences of criminal liability of minors, educational measures (Articles 99–108) and penalties for minors (Articles 109–110).

Both codes provide a special penalty regime for juvenile offenders, and

¹⁸ George Antoniu et al., *Preliminary Explanations of the New Criminal Code*, vol. 2 (Bucharest: Universul Juridic, 2011), 327.

¹⁹ Ilie Pascu et al., *The New Criminal Code with Commentary: General Part*, vol. 1 (Bucharest: Universul Juridic, 2012), 650.

this is their main common feature. In terms of content, however, the regulations in this area sometimes differ significantly, as will be evident from an analysis of the relevant provisions²⁰.

Thus, for example, with regard to sanctions, whilst the previous Criminal Code provided, in addition to educational measures – some of which involved deprivation of liberty – and penalties applicable to minors, the current Criminal Code provides only for educational measures, both involving and not involving deprivation of liberty²¹.

Through the newly created institutions in this area, the drafters of the current Criminal Code express a tendency to draw upon the experience and positive results achieved internationally in combating juvenile delinquency.

Therefore, to understand the differences in the regulations concerning the criminal liability of minors between the current Criminal Code and the previous Criminal Code, one must take into account the entirety of the provisions relating to minors in both codes.

Breaking with the existing tradition in Romania regarding the regulation of criminal liability of minors, the drafters of the current Criminal Code have concentrated in Title V of its General Part all the substantive legal provisions relating to the specific penalty regime for juvenile offenders, distinct from the general penalty regime applicable to offences committed by adults.

In this respect, the Romanian Criminal Code ranks among those criminal law systems in which the specific sanctioning regime for juvenile offenders is provided for in the Criminal Code (such as the Italian, Swiss and Russian Penal Codes, the Penal Codes of the former socialist countries of Central and Eastern Europe, and others) and differs from other criminal law systems, such as the French, Spanish, German, Belgian and others, in which the criminal liability of minors is regulated by special laws (for example, Ordinance No. 45–174, of 2 February 1945, on juvenile delinquency in France, the Law of 8 April 1964, on the protection of young people in Belgium, the Juvenile Law of 1923 in Germany, the Law of 2000 on the criminal liability of minors in Spain, etc.)²².

Setting aside all these differences in legislative technique, the systems mentioned, like most contemporary criminal law systems, share the same criminal policy orientation, which recognises the need for a special sanctions regime for juvenile offenders, distinct from the general system intended for adults.

The scientific basis for this policy is provided by criminological research on juvenile delinquency, which highlights the particularities of the juvenile offender's personality, characterised by insufficient biopsychological formation

²⁰ Ilie Pascu and Andreea Simona Uzlău, *Criminal Law: General Part*, 3rd ed. (Bucharest: Hama-ngiu, 2013), 438.

²¹ Versavia Brutaru, "The Criminal Treatment of Minors: Comparative Law," *Revista de Drept Penal* no. 1 (2009): 171.

²² Antoniu et al., *Preliminary Explanations*, 328.

and development, which is reflected in the decision to commit and carry out an unlawful act.

Given these characteristics, the social defence response to juvenile delinquency cannot be implemented rationally and effectively through the same type of sanctions as those applied to adult offenders²³.

Therefore, a separate system of criminal law sanctions must be applied to juvenile offenders, consisting mainly of sanctions of a predominantly educational nature and only subsidiarily of sanctions of a repressive nature, such as penalties. The latter, however, given the conditions under which they are to be applied and enforced, must also lead to the re-education and re-socialisation of juvenile offenders.

At the same time, it should be noted that the progress made both in criminology and in other criminal sciences, such as penology and prison science, has necessitated new approaches to the criminal sanctions system in general, aiming at the diversification of penalties, a significant shift towards non-custodial sentences, and the diversification of means for individualising and personalising sentences.

All these changes in criminal policy regarding the response to crime, in general, could not fail to have an impact on the sanctions system for minors, all the more so, as the new approaches are applied primarily within this system²⁴.

The drafters of the current Criminal Code are no strangers to these trends either, having provided a system of sanctions for minors consisting exclusively of educational measures, even though some of these measures involve deprivation of liberty²⁵.

The above statements are borne out by the fact that the drafters of the current Criminal Code have based their provisions on the criminal liability of minors on the latest scientific and penal policy findings in this field, as set out in various rules and guiding principles adopted at the various United Nations Congresses on the Prevention of Crime and the Treatment of Offenders²⁶.

Among the rules and principles adopted at these congresses, we note in particular the Beijing Rules, a set of minimum standards for the administration of juvenile justice. The draft of these rules was drawn up at the 1984 international meeting of specialists in Beijing and was adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985. They were subsequently approved by the United Nations at the

²³ Alexandru Boroi and Georgeta Ștefania Ungureanu, "The Juvenile Sanctioning System from a European Perspective," *Revista de Drept Penal* no. 2 (2002): 30.

²⁴ Pascu et al., *New Criminal Code with Commentary*, 652.

²⁵ Pascu and Uzlău, *Criminal Law*, 440.

²⁶ These congresses, organized by the United Nations Economic and Social Council (ECOSOC) on various criminal-policy topics, have been held every five years since the First Congress convened in Geneva in 1955.

96th session of the General Assembly on 29 November 1985, through Resolution No. 40/33, which reproduces these rules in an annexe²⁷. According to the 1985 United Nations Standard Minimum Rules (International Year of Youth) on the Administration of Juvenile Justice²⁸ (the Beijing Rules, adopted by Resolution 40/33 of 29 November 1985), ‘a juvenile is a child or young person who, in relation to the legal system, may be held accountable for an offence in ways different from those applied to an adult²⁹. And a juvenile offender is a child or young person accused of or found guilty of having committed an offence³⁰.’ The Beijing Rules stipulate that the meaning of the concept of criminal capacity must be clearly defined and that the age of criminal responsibility must not be set at too low a limit, taking into account the child’s degree of emotional, psychological and intellectual maturity. The age of criminal responsibility must be defined within a legal framework that takes into account a child’s capacity, developmental abilities and contextual experience.

The United Nations Standard Minimum Rules for the Administration of Non-custodial Measures (the Tokyo Rules) define *a minor as any person under the age of 18*.

Minority, being an aspect of social life, implicitly have various implications in the field of criminal law. Our criminal justice system, which focuses more on punishment and re-education, ignores the reality that, in fact, because minors are compelled to form and develop within the environment in which they grow up, juvenile offenders are victims rather than offenders.

I would also draw attention to the so-called Riyadh Guidelines, drawn up at the International Meeting of Experts in Riyadh, in Saudi Arabia, in 1990 and adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which took place in Havana, Cuba, between 27 August and 7 September 1990.

The Riyadh Principles, which have become the United Nations guiding principles for the prevention of juvenile delinquency, recommend the development of educational policies tailored to the needs and interests of young people, both at the community level and within governmental and non-governmental structures. Finally, mention must also be made of the so-called Tokyo Rules, representing the United Nations’ minimum standards for the development of non-custodial measures, adopted at the 45th session of the UN General Assembly,

²⁷ Brezeanu, *Minors and Criminal Law*, 67.

²⁸ Recommended for adoption by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from August 26 to September 6, 1985, and adopted by the General Assembly in Resolution 40/33 of November 29, 1985.

²⁹ United Nations General Assembly, “United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),” G.A. Res. 40/33, annex (November 29, 1985), art. 2.2(a), <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-administration-juvenile>.

³⁰ United Nations General Assembly, “Beijing Rules,” art. 2.2(c).

together with the recommendation of the Committee on Crime Prevention and the Fight against Crime that these rules be named the Tokyo Rules, after the place where they were drawn up.

In drafting the new Criminal Code, all these international documents on the prevention and control of juvenile delinquency were taken into account; these documents, having been approved by the UN General Assembly, have the character of recommended standards for all Member States. It should also be noted that the preamble to the United Nations Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989³¹, refers to the Beijing Rules.

It is also worth noting that the United Nations Rules and Guidelines for the Prevention and Control of Juvenile Delinquency are also applicable through the Council of Europe, in particular through the recommendations of the Committee of Ministers, which are binding on the governments of member states.

These recommendations are also based on the conclusions drawn from criminological and sociological research on juvenile delinquency, carried out under the auspices of the Council of Europe, particularly among minors and young people from immigrant families or from indigenous minority populations.

Of particular significance in this regard is Recommendation No. R/87/20 on *the Social Response to Juvenile Delinquency*, adopted by the Committee of Ministers of the Council of Europe on 17 September 1987, and Recommendation No. R/88 on *Social Responses to Deviant Behaviour Among Young People From Immigrant Families*, adopted on 18 April 1988. To these, however, are added numerous other recommendations adopted between 1985 and 1991 with implications for issues of juvenile delinquency³².

The provisions of the current Criminal Code relating to juvenile offenders have been drafted in accordance with the rules and principles mentioned above.

Article 113 of the current Criminal Code, concerning the limits of a minor's criminal liability, not only bears the same heading as Article 99 of the previous Criminal Code, but also has the same content.

Its provisions regulate, as in the previous Criminal Code, the limits of criminal liability of minors in relation to their age and capacity for discernment. The terms '*minor*' and '*minority*' have the meaning established by civil law.

According to the provisions of Article 8 of Decree No. 31/1954 concerning natural persons and legal persons, full legal capacity commences on the date on which the person reaches the age of majority (paragraph 1), and a person reaches the age of majority upon reaching the age of 18 (paragraph 2).

Since the legislator of the Criminal Code uses the terms '*minor*' and '*mi-*

³¹ Constantin Butiuc, "Criminal Liability of Minors," *Revista de Drept Penal* no. 4 (2002): 32.

³² Ortansa Brezeanu, "The Re-education of Juvenile Offenders," *Revista de Drept Penal* no. 4 (2005): 30.

nority’ in the sense used by civil law, it would be incorrect to use the terms ‘*criminal minority*’ or ‘*criminal majority*’ in criminal law³³.

In determining the limits and conditions of criminal liability for minors, the criminal legislator takes into account, on the one hand, the fact that criminal liability generally presupposes a person’s capacity to understand the antisocial nature of their acts and to consciously control and direct their conduct, and, on the other hand, the fact that a person does not acquire this capacity at birth, but gradually, through the process of growth and biopsychological development³⁴.

It is well known that a person generally goes through four main stages or phases in life: childhood, adolescence, adulthood and old age, with each stage characterised by certain biopsychological features that influence the attributes necessary for the existence of criminal legal capacity, that is, the capacity to be held criminally liable and to understand the meaning of society’s reaction to the person’s conduct.

Therefore, the legislator must determine at which stage of development a person may be considered to possess the necessary attributes to be held criminally liable. In practice, the issue concerns only the stages of childhood and adolescence, known as stages of biopsychological personality development, since in the stage of maturity a person normally possesses those qualities that determine criminal capacity, qualities which are maintained into old age, which is why there is no question of an age limit beyond which a person cannot be held criminally liable³⁵.

As regards the stage of childhood, this is characterised by a minor’s normal psychophysical inability to understand the requirements of criminal law and to consciously express their will in accordance with those requirements; the inability of a minor, whilst in the period of childhood, to be held criminally liable stems from their natural state as a person who is insufficiently developed in biopsychological terms.

For this reason, it has always and everywhere been accepted that a minor during childhood – even though the upper age limit for this has varied and continues to vary from one criminal law system to another – can never be subject to criminal liability³⁶.

During adolescence (from 12 to 13 to 18–20 years of age), although the individual generally possesses the capacity to understand the nature of their actions and to exercise self-control, it is nevertheless observed, especially in the

³³ Matei Basarab and Matei Mircea Basarab, “Reflections on Certain Educational Measures,” *Revista de Drept Penal* no. 2 (2002): 19.

³⁴ Dan Semenescu and Elena-Maria Semenescu, “Juvenile Delinquency—Between Criminal Liability and Safeguarding Minors’ Rights,” *Revista de Drept Penal* no. 2 (2009): 48.

³⁵ Viorel Pașca, *Criminal Law: General Part* (Bucharest: Universul Juridic, 2011), 439.

³⁶ Ortansa Brezeanu, “From the History of the Sanctioning Regime for Juvenile Offenders in Romania,” *Revista de Drept Penal* no. 2 (1995): 83.

early stages of adolescence, so-called pre-adolescence (12–15 years)³⁷, that the minor has an incomplete psychophysical capacity, which means that in certain situations they may be able to realise the nature of their actions and exercise control over them, whilst in other situations they may lack this capacity.

Conversely, in the second stage of adolescence, that is, in full adolescence, the individual generally possesses full criminal capacity.

In establishing the limits and conditions of criminal liability for minors, the legislator has taken these findings of developmental psychology into account, stipulating, on the one hand, the maximum age limit of childhood up to which the minor is presumed, *de jure*, to lack the capacity to fully understand the socially dangerous nature of their actions and to exercise control over them, and thus of the capacity to be held criminally liable; and, on the other hand, it has established the minimum age limit from which the adolescent is also presumed, *de jure*, to have the capacity to be held criminally liable, being treated, in this respect, as an adult³⁸.

Between these two age limits, the minor, depending on the nature and social significance of the acts committed and in relation to their level of development, education and life experience, may have the capacity to understand the antisocial nature of the acts and to exercise control over them, and thus be criminally liable, or, conversely, lack this capacity and, therefore, criminal liability. Consequently, a minor at this intermediate age is presumed, until proven otherwise, to lack the capacity to be held criminally liable.

This presumption of the minor's lack of capacity to bear criminal responsibility may be rebutted by proving, on the basis of the aforementioned arguments, that the minor had the capacity to bear criminal responsibility at the time the act was committed; and if such proof is provided, the liability of the minor in this situation is mandatory.

The situation described above is governed by the provisions of Article 113 of the current Criminal Code, where paragraph 1 stipulates that *a minor who has not reached the age of 14 is not criminally liable*, thus setting 14 years as the upper limit of childhood³⁹. In favour of these minors, there is an *absolute presumption of criminal incapacity*, which cannot be rebutted by evidence to the contrary⁴⁰.

The existence of discernment cannot be established on the basis of a priori criteria, but only in relation to the nature of the act committed, the specific circumstances in which it was committed and the characteristics of the minor.

This continues the trend of raising the upper age limit for childhood, with a view to removing as broad a category of minors as possible from the scope of

³⁷ Paul Popescu-Neveanu, *Dictionary of Psychology* (Bucharest: Albatros, 1978), 150.

³⁸ Brezeanu, "History of the Sanctioning Regime," 83.

³⁹ Pascu et al., *New Criminal Code with Commentary*, 658.

⁴⁰ Alecu, *Institutions of Criminal Law*, 391.

criminal law.

This is, moreover, in keeping with the tradition and specific geographical conditions of our country and is also consistent with the Beijing Rules, which provide that states are encouraged to establish a reasonable minimum age applicable internationally⁴¹.

A minor aged between 14 and 16 at the time of committing the offence, in accordance with the provisions of Article 113 (2) of the Criminal Code, is criminally liable only if it is proven that they committed the offence with discernment.

Since a minor of this age is liable only in certain situations and in relation to certain acts, their criminal liability is conditional upon establishing, in each individual case, the minor's capacity for discernment, that is, their ability to realise the anti-social nature of the act they have committed and to consciously express their will, a capacity considered not in general terms, but in relation to the specific act.

Discernment thus appears as the minor's ability to realise the socially dangerous nature of their act and to consciously express their will in relation to a specific act. The existence of discernment does not imply the general existence of the person's psychophysical capacity, but only the existence of this capacity in the specific case.

Furthermore, the existence of discernment in the commission of an act provided for by criminal law does not imply the existence of guilt, but merely a prerequisite for it. Without proof of the existence of discernment, established by the criminal investigation authorities, there can be no criminal liability for a minor who has reached the age of 14, but not the age of 16, at the time of committing the act⁴².

It may be argued that a minor at this intermediate age enjoys a *relative presumption of non-liability*, since, as long as this presumption is not rebutted by evidence to the contrary – which the prosecution must provide – criminal liability cannot arise, this minor being treated, in this respect, in the same way as a minor who has not reached the age of 14.

As regards the minimum age at which a minor is considered criminally liable in the same way as an adult, the provisions of paragraph 3 of Article 113 of the Criminal Code, currently in force, stipulate that a minor who has reached the age of 16 is criminally liable in accordance with the law, that is, under the same conditions as an adult.

Taking into account the minor's biopsychological development and life

⁴¹ M. Coca-Cozma, Cristina-Mihaela Crăciunescu, and Lavinia Valeria Lefterache, *Justice for Minors* (Bucharest: Universul Juridic, 2003), 92.

⁴² Ortansa Brezeanu, "The Juvenile Delinquent in United Nations and Council of Europe Documents," *Revista de Drept Penal* no. 3 (1996): 39.

experience within the context of our society, the Romanian legislature has considered that, having reached the age of 16 at the time of committing the offence, the minor is fully capable of realising the anti-social significance of their act and of controlling their conduct in exactly the same way as an adult⁴³.

This gives rise to a category of minors, aged 16 or over at the time of the offence, who are always criminally liable, being presumed *de jure* to have the capacity to be held criminally liable in the same way as adults.

A comprehensive examination of the provisions of Article 113 reveals that, in terms of criminal liability, a distinction is made between two categories of minors⁴⁴: minors who are not criminally liable, which includes minors under the age of 14 and minors aged between 14 and 16, in respect of whom it has not been proven that they committed the act with discernment, and minors who are criminally liable, including minors aged between 14 and 16, in respect of whom it has been proven that they acted with discernment, and minors who had reached the age of 16 at the time of committing the act⁴⁵.

The first category of minors falls outside the scope of the criminal legislator's concerns, the purpose of defining it being precisely to exclude from the scope of criminal law this category of minors who are not criminally liable.

In determining this status, the legislator of the Criminal Code does not limit itself to identifying this category of minors within the limits of criminal liability (Art. 113, Criminal Code, and Article 99 of the previous Criminal Code), but makes the perpetrator's minority, where they are not criminally liable, one of the grounds for nonimputability (Article 27, Criminal Code), and one of the grounds that removes the criminal nature of the act (Article 50 of the previous Criminal Code).

Under this provision, a minor who, at the time of committing an act covered by criminal law, does not meet the legal requirements for criminal liability cannot be a party to a criminal legal relationship and is therefore not subject to criminal law.

The social response to acts committed by this category of minors, a response which, in accordance with the Beijing Rules and the other international documents to which we have referred, can consist only of protective measures, is regulated not by the Criminal Code, but by a non-criminal law, namely Law No. 272/2004 on the protection and promotion of children's rights⁴⁶.

The Criminal Code is limited, in this case, to establishing the age limits

⁴³ Marcel Ioan Rusu, "Probation: The Assessment Report," *Revista de Drept Penal* no. 2 (2009): 28.

⁴⁴ Pascu and Uzlaş, *Criminal Law*, 443.

⁴⁵ Gabriel Salontai and Alexandru Salontai, "Some Theoretical Aspects concerning the Rights of Juvenile Offenders," *Dreptul* no. 2 (2005): 146.

⁴⁶ Romania, Law No. 272/2004 on the Protection and Promotion of Children's Rights, *Monitorul Oficial al României*, pt. I, no. 557 (June 23, 2004), chap. V, arts. 80–84, <https://legislatie.just.ro/Public/DetaliuDocumentAfis/52909>.

for this category of minors, through the provisions of Article 113, which we have analysed. In practice, in order to define the category of minors who are not criminally liable, it must be established that the conditions laid down by law are in fact met, that is to say, the date on which the offence provided for by criminal law was committed must be established, as well as the fact that the perpetrator was under the age of 14.

If the minor was 14 years of age but had not reached the age of 16 at the time the offence was committed, it must be established that the criminal investigation authorities have not proved, in accordance with the law, that the offence was committed with discernment. The reason why this proof was not provided is irrelevant.

It also follows from an analysis of the provisions of Article 113 that the only category of minors of interest to criminal law is that of minors who are criminally liable.

The provisions of Title V of the General Part of the Criminal Code and the specific penalty regime they provide for refer to this category of subjects of criminal law.

As this is a sanction regime different from that for adults, it is natural that, for its application, the age limits provided for by law should also be taken into account with regard to this category of minors, namely that the minor between the ages of 14 and 16 committed the act with discernment or that the minor had reached the age of 16 at the time of committing the act⁴⁷.

In the case of offences of a continuing nature, such as continuous or repeated offences, which are committed at different stages of the minority, some at a stage when the minor lacked the capacity to discern and others at a stage when they had such capacity, only the acts committed with the capacity to discern are taken into account.

Only those acts of execution which were committed with discernment and which, by virtue of having been committed, express the unity of criminal intent in the commission of the offence in question may form part of the same continuous or ongoing offence.

If a continuing or repeated offence was committed in its entirety during the period of minority, even if part of it was committed by a minor aged between 14 and 16 who acted with discernment and another part after the minor had reached the age of 16, it shall be subject to the specific penalty regime for minors.

Conversely, when such ongoing offences are committed partly whilst the minor is under the age of 18 and partly after the minor has reached the age of 18, since they are completed at the time the offender is of age, the penalty regime is that applicable to adults.

⁴⁷ Magdalena Iordache, "On the Sanctioning Regime for Juvenile Offenders in Light of the New Criminal Code," *Dreptul* no. 5 (2005): 154.

In judicial practice, it has been held that the existence of diminished capacity, arising from an immature emotional and volitional psyche, does not amount to a total lack of capacity and does not exclude the criminal liability of the defendant, a minor aged between 14 and 16, for the offence committed⁴⁸.

The fact that the defendant was not lacking in discernment in relation to the offence committed is evident, in this case, not only from the psychological assessment carried out, but also from his particularly coherent statements, in which the minor described in detail how he acted⁴⁹.

It has also been held that a minor who marries before reaching the age of 16, although acquiring full capacity to exercise civil rights, is criminally liable in accordance with her age⁵⁰.

A minor aged between 14 and 16, even if they committed the act with full understanding, cannot be an active subject of the offence of begging, as they do not have the full capacity to exercise the right to work in order to be employed; in this case, the consent of the minor's legal representative and a doctor's opinion are required⁵¹.

An act committed immediately after the expiry of the day on which the perpetrator reached the age of 18, calculated as the expiry of the day corresponding to the day on which the perpetrator was born, constitutes an act committed by an adult⁵². The commission of certain acts, forming part of a continuing offence, as a minor and others as an adult, attracts criminal liability as an adult for the entire continuing offence⁵³.

A minor aged 14 years and one day who, out of revenge, throws a metal rod from a short distance at the victim's head, causing their death, is criminally liable for the offence committed if medical records show that he possesses the discernment appropriate to his age, that his mental faculties are developed and that, in relation to his education and life experience, his intellectual capacities are not impaired⁵⁴.

3. Conclusions

The legal framework described above, as well as the views set out in the specialist literature examined, provide a comprehensive set of procedural safeguards to protect the rights of minors during hearings and other criminal proceedings. These regulations ensure a fair trial, adapted to their vulnerability, designed

⁴⁸ Florean Ivan, "Application of the More Favorable Criminal Law to Offenses Committed by Minors," *Revista de Drept Penal* no. 3 (1995): 124–26.

⁴⁹ Bucharest Municipal Court, Criminal Division, Decision no. 470/1992.

⁵⁰ Supreme Court, Criminal Division, Decision no. 405/1979.

⁵¹ Supreme Court, Criminal Division, Decision no. 569/1972.

⁵² Timiș County Court, Criminal Division, Decision no. 899/1974.

⁵³ Supreme Court, Criminal Division, Decision no. 46/1973.

⁵⁴ Supreme Court, Criminal Division, Decision no. 80/1972.

to reduce the negative impact that judicial proceedings may have on them. However, practical realities highlight certain shortcomings, arising from institutional resource constraints and difficulties in tailoring educational measures, which may undermine the system's preventive and educational purpose. In this regard, there is a need to strengthen intervention mechanisms and ensure the ongoing harmonisation of judicial practice with European and international standards. At the same time, the legislation provides a solid basis for obtaining reliable evidence without compromising the emotional or mental health of juvenile offenders.

The criminal treatment of minors must be interpreted as a complex legal mechanism, situated at the intersection of criminal law and child protection, whose essential purpose lies in the rehabilitation and social reintegration of the minor, in accordance with the values of a democratic rule of law.

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