AGE LIMITS OF PENAL LIABILITY OF THE MINORS

PhD lecturer **Petru Tărchilă**
„Aurel Vlaicu" University of Arad

Abstract:

The penal national legislation understood the necessity of raising the age limit when the minor child can answer for the penal nature of the crime he had commited, in order to protect and correct him by social educational means.

Only if the court considers that the educative measure is not enogh for correcting and reforming the minor, a fine or imprisonment punishment is applied, with the mention that the minimum and maximum limits are reduced to half.

In all the cases of penal inquiry or action of minor deliquents, the legislation in the matter provides the obligatory character of social inquiry performed by the Tutorial Authority, which will investigate the circumstances and causes of the crime and will provide the necessary data to the court.

Key words: legislation, penal responsibility, educative measure, imprisonment punishment

The criminological and educational psychology researches led to the conclusion that it is necessary to raise the age limit at which the minor can answer, aspect reflected in all international legislations, in order to and remove from the severe coercion field of the penal law, a later intervention following in order to reform them by educational means. The 1864 Penal Code provided that the minors under the age of 8, are protected from punishment those between 8 and 15 could be penalized if it was proved that they had acted with judgment, and the minors with ages between 15 and 20 answered penal, if they were at least 15 years old.

In the 1937 Penal Code, the penal liability of the minors was established at the age of 15 years turned, and between the ages of 13 and 15 the minor only answered if if it was proved that they had acted with judgment. As a consequence, the age from which the minors are penal liable was raised from 8 to 13, which seems to us as a progress compared to the 1864 Penal Code.

The 1968 penal Code, which is still in force today, has raised the age limit from which the minor is penal liable.

The period of the minor's formation until his full maturity, reported to his age was divided into three stages:

1) before the age of 14;
2) between the age of 14 and 16;
3) between the age of 16 and 18[5].

[5] Maria Zolyneak, *PenalLaw – general part*, „Chemarea" Foundation Publishing, Iaşi, 1995, p.853;

Thus, according to article 99 Penal Code, the minor who has not turned 14 is presumed that has the ability of neither understanding the social meaning of his deeds, especially the antisocial character of an offense nor of manifesting his will consciously. It a presumption with absolute character (jurist et de jure), in the way that it is not allowed to prove it in any way different. This is an absolute legal presumption of penal incapacity, which does not allow to be proved contrary[1]. The minor's deed, is just a deed provided by penal law and not an offense, and cannot represent a reason for penal liability, in absence of guilt.

Between the age of 14 and 16 this stage is characterized by a relative lack of penal liability of the minor who committed a deed stated in the penal law. The minor answers only if it is proved that he acted with judgment. One can notice the existence of a conditioned penal capacity of establishing the judgment, which is defined in the specialized literature as the biopsychic capacity of a person to act in complete awareness, in the way that he is aware of the action (inaction) and its dangerous repercussions and he can control his will towards the actual action (inaction)[6]. In this stage basically works the presumption that the minor does not have the capacity of understanding antisocial character of his penal acts and of consciously manifesting his will. If at the first age the presumption is absolute, this time it has a relative character (jurist tantum), in the way that the presumption can be removed if the contrary is proved. Paragraph 2 from art.99 Penal Code provides that the minor aged between 14 and 16 answers penal, only if it is proved that he acted with judgment". In jurisprudence and legal practice, the judgment was given different meanings. The judgment must be proved, and its existence brings the minor's penal liability, this word meaning only that the minor had the capacity to understand the antisocial character of his deed and to consciously manifest his will.

The third stage, ages between 16 and 18, is characterized by the existence of the penal liability of the minor who has committed a deed comprised in the Penal Code. It is presumed that the minor with the age between 16 and 18 has the possibility of understanding the social value of things. If the minor with the age between 16 and 18 cannot prove the lack of judgment, he can prove his innocence demonstrating the court, just like the full age delinquent, that the deed was not committed with intention or guilt.

The minor having the age of 16 answers penal, from this age existing the legal presumption of penal capacity. The presumption is relative, because the contrary can be established, the inexistence of responsibility, art.48 Penal Code. In the new Penal Code, art.113 provides the limits of the minor's penal liability, the age from which the penal liability operates remaining unchanged, art.113 from the new Penal Code being an almost identical transposing of art.99 New Penal Code.

In order to apply the penal law with all its consequences, the age limit that the minor had when he did the deed is of interest, and not the age he reached when the offense was discovered and taken to trial. In the case of repeated offenses, the

---

[6] Matei Basarab*, PenalLaw – general part*, „Chemarea" Foundation Publishing, Iaşi, 1995, p.97;

minor's legal system is applied only if the moment when these deeds were finished took place in the period when he was still a minor, if not, the punishing system will be that applying to full aged delinquents. Nowadays, some authors [7] argue that the age from which the minor answers penal must be lowered from 14 to 12, due to the fact that the juvenile delinquency phenomenon has developed much in our country after December 1989, and people's lifestyle and way of expressing as well as the development of the society impose another standard of appreciation of individuals' behavior and, of the society's reaction to antisocial manifestations.

We consider that the lowering of the age from which minors should answer penal is not needed since the minor must be by the law and the measures taken against him must be focused on the minor's reeducation and reintegration in the society. By Law no.272/2004 regarding the protection and promotion of the child's rights a set of child's special protection measures such as placement, emergency placement and specialized survey were regulated. By chapter 5 of this law, protection measures were instituted for the child who has committed a penal deed and does not answer penal so there are measures for the minor under the age of 14 too focused mostly on reeducation and reintegration in the society.

1.1 The legal nature of nonage

The insufficient psycho-physical development of the minors, the lack of experience, the easier attraction to committing offenses due to the lack of maturity and of the incompletely formed personality, but also the increased reeducation possibility imposed a special regulation of the penal liability of the minors and their punishment, with the purpose to protect this category of people even in the hypothesis of offense committing and total recovery.

From the entire regulation of the punishing system introduced, as well as from other provisions of the penal code regarding minors' penal liability, included in other chapters of the penal law, it can be considered that nonage represents a cause for differentiation of penal liability of the minors reported to full age delinquents, legal nature which has positive effects on all penal regulations, which gives this category of criminals a special legal having as purpose their protection and reeducation in the best conditions and their re-adaptation to normal social life.

Law no.272/2004 initiates the best interest of the child principle, which will prevail in all steps and decisions regarding children taken by the public authorities and private authorized bodies, as well as in the cases solved by courts.

According to this principle and sue to the minor delinquent special punishing system, different from the full aged one, consisting of special protection measures, educational measures that are applied with priority in punishing offenses committed by them and punishments that have secondary applicability, interfering only when the educative measures do not provide a punishment corresponding to the severity of the deed committed and do not correspond to the reforming of the minor delinquent, the courts must take into account the best interest of the minor when applying the educative measure, the special protection or a punishment.

[7] Iulian Poenaru, *Problems of penal legislation*, Lumina Lex Publishing, Bucharest, 1990, p.30;

If it is considered that the educative measure is not enough for the minor's reforming, an imprisonment of fine penalty is applied but the special minimum and maximum limits are reduced to half, these becoming the legal limits of penalizing of the minors.

The minors' special status is also distinguished regarding the system of execution of the imprisonment penalty applied to the minor, which is executed separately from the full aged criminals, in special conditions, appropriate for the specific needs of education of this category of delinquents.

Institutions like conditioned suspension of penalty execution and liberation on license mention conditions more favorable if they are applied in the case of minors than in the case of the full aged, in the way that in the case of conditioned liberation, the duration of the penalty that must be executed, from the period established by the court, is shorter in the case of minors than it is in the case of the full aged delinquents (art.60, alin 4 Cod Penal). In the case of conditioned suspension, the term of imprisonment provided by law is shorter, being comprised between 6 months and 2 years, the duration being left to the court's estimation (art.110 Penal Code), and in the case of fine, the duration of the imprisonment term is 6 months.

In the case of other penal law institutions too, the legislator instituted a special system favorable for the minors. Thus, art.38 letter a of the Penal Code, provides that an imprisonment punishment longer than 6 months, for an offense committed during the nonage does not attract the status of relapse into the situation of committing a new offense with intention in the future. There are also other favorable conditions provided in other matters/subjects such as prescription, in the way that the terms of penal liability prescription and of penalty execution are reduced to half for those who were minors at the time they committed an offense (art.129 Penal Code).

1.2 Peculiarities of the penalizing system for minor delinquents

In penal law science, the nonage is part of the larger sphere of the problem of age of persons subject of judicial reports of penal law. The insufficient psycho-physical development of the minors, their lack of experience, the easier attraction to commit crimes, due to lack of maturity and incompletely formed personality, but also the increased possibility of reeducation, the compulsory protection of this category of people even in the hypothesis of committing offenses and their total recovery has imposed a special regulation of minors' liability and their penalization.

The regulation of the judicial system of minor delinquents is comprised in the work V- Cod Penal in force, called "Nonage'' art. 99-110. The limits of the minors' penal liability, art.99, regulates the limit of penal liability, the legislator understanding to mention the cases in which, reported to the minor's age and judgment, he answers from penal point of view or not which means he is obliged or not to bear a penal penalty as a result of committing a deed mentioned in the penal law.

The concept of nonage is presented by the bio-physiological condition of the individual under the age of 18 as well as by the socio-judicial status of the individual, comprising three periods: until the age of 14 (when the minor does not answer penal no matter the severity of his deed), the period between the ages of 14-16 (when the minors answer penal if they have judgment of the committed deeds)[8] and the period comprised between the ages of 16-18 (when the minors do not answer unless they don't have judgment for the committed deeds). The upper age limit until which the individual is considered a minor is the age of 18, regardless of if the full exercise capacity was obtained by marriage ,, because the minor in Penal Law is considered the person under the age of 18" [9].

The minors' liability thus appears as a specialization of penal liability, a peculiarity aiming mostly at the reduction of penalty and increase of the efficiency of the educative measures for the individual's social reforming. A permanent concern of penal policy of the modern states is represented by the prevention and fighting juvenile delinquency. This prevention of juvenile delinquency is accomplished also by the special penalizing system for the underage delinquents, which is different of the penalizing system for the adults. The Romanian Penal Code focuses on educative measures – penal law punishments applicable only to minor delinquents, not to adults too and only subsidiarily on punishments, but even in the case of application of these punishments they have a smaller total value and a special execution system.

To this special penalty system for minor delinquents corresponds a special proceeding (in the penal proceeding law field) comprising specific aspects regarding penal inquiry and trial as well as regarding the execution of the penal decision.

Unlike civil law which divides the natural persons into two major categories: minor persons (comprising childhood and adolescence) and full aged persons (comprising adulthood and old age), penal law divided minors into two major categories, each of them with two subgroups, namely[10]:

- Minors that are penal liable;
- Minors that are not penal liable.

Minors that are not penal liable comprise two subgroups too:

- Minors under the age of 14;
- Minors with age between 14 and 16 for which it was not proved that they had committed with judgment the deed provided by penal law.

One of the conditions necessary so that a person can be active subject the crime is that that person must have the capacity to realize the social significance and character of his actions and inactions and to freely guide his will regarding these actions or inactions. The features characterizing the mental capacity,

[8] Constantin Bulai*, Penal Law – general part*, vol..- II, C.H.Beck Publishing, Bucharest, 2006,p.138;
[9] Constantin Mitrache, *Romanian Penal Law – general part*, 4th edition reviewed and completed, ,,Şansa'' Press house and publishing, Bucharest, 2000, p.161;
[10] Alexandru Boroi, *Drept Penal – partea generală*, Editura C.H.Beck, Bucureşti, 2006, p.302;

inexistent in the first years of life, are gradually formed and developed, as the person grows older, until the moment when the adolescent achieves full knowledge abilities and free manifestation of will. Along the mental-physical development of the individual, there is a period in which he, lacking the mental capacity of understanding the social meaning of his actions and in order to control them, cannot be an active crime subject.

Thus, the nonage constitutes a cause which annuls the penal character of the deed so that the deeds provided by the penal law committed by minors who do not answer penal do not constitute delinquencies because in the absence of the capacity of understanding and will, they are not committed with guilt, and guilt represents an essential feature of. In this way, art.50 Penal Code provides that "the deed provided by penal law committed by a minor who, at the tome did not meet the legal conditions to answer penal, does not constitute a delinquency"[11].

There is judgment when, in the moment when the actual action is performed, the minor had the capacity to realize the dangerous of its consequences, effects that he followed or accepted and could control his action. Judgment means responsibility, but not full responsibility like in the case of adults, because the physical and mental development of the minor is in process.

The stipulations of art.99 Penal Code establish the age of minors' penal liability, so, the minor under the age of 14 does not answer penal (art.99 paragraph 1). In this case, the legislator considers that until this age the minor lacks judgment and regulates a presumption of penal incapacity that cannot be removed by contrary evidence.

The minor aged between 14 and 16 answers penal, only if it is proved that he had committed the deed with judgment (art.99 paragraph 2). IN the case of this category of minors, the legislator institutes a relative presumption of penal incapacity, which can be removed by contrary evidence, i.e. by proving the judgment in the moment of committing the socially dangerous behavior. Thus, it is possible that a minor aged between 14 and 16 to answer penal, but "only if it is proved that he had committed the deed with judgment".

The 16 years old minor can answer penal without any condition (art.99 paragraph 3 New Penal Code). The upper age limit until when a person is considered a minor is 18, regardless of the achievement of full capacity of exercise by marriage.

The category of penal liable minors comprises minors aged between 16 and 18, as well as minors aged between 14 and 16 for which the relative presumption of penal incapacity was removed. The penal capacity age must exist at the time when the delinquency is committed. In the cases of repeated delinquency, started before the age of penal capacity, the minors will only answer for the criminal activity performed after reaching the penal liability age. In the case of relative incapacity, the judgment must be established in connection with every actual deed done, at the time they were committed, but not commonly. When there are doubts regarding the

[11] Vasile Dobrinoiu, *PenalLaw –general part*, Europa Nova Publishing, Bucharest, 1997, p.323;

minor's age and his judgment, the situation is interpreted in the minor's advantage, according to the Latin adage ",in dubio proren" (i.e. the doubt favors the defendant).

When establishing the existence of minor's judgment, the court must take into account the nature and type of delinquency committed as well as the circumstance, if the minor took the criminal decision by himself or was he allured, encouraged, instigated by a person with full penal capacity, in which case the minor only served as a means for committing the delinquency by the fully responsible person.

The age limits and judgment are established are established according to the Romanian penal law only for the minors that are Romanian citizens or those without citizenship having the domicile in the country or abroad, for whom, according to art.5 New Penal Code, the Romanian legislation is applied exclusively.

Penalty of minors committing delinquencies must correspond to their psycho-physical peculiarities, ensure their education and reeducation. The special penalty system applicable for minor delinquents is based on psychological reasoning, since the mental capacity, the judgment develop during nonage, life knowledge is gathered, including those regarding social coexistence rules, but also based on an analysis of the factors that influence and determine juvenile delinquency.

The Romanian Penal Code in force stipulates a special penalizing penal system for the penal liable minors, system consisting of educational measures and punishments (the educational measures were stipulated by the 1937 Penal Code too, but under the name of "educational safety measures''), both categories being penal law punishments. This mixed system corresponds to the specific minors who are in an objective process of continuous and intense transformation from physical point of view, social experience and knowledge acquiring but also in the most proper period for their general training and for their initiation in professional training. Only by taking into account these specific situations in which minors answer penal, the penalties provided for them will be able to lead to the achievement of the penalty goal and in the end, of the penal law. The penal penalty represents the final stage in the action of social reforming of the minor factor, in the sense of his thinking and will determination only in the sense of respecting the penal law. The penal punishment ios adopted against the minor only when there is a certainty that it represents the only way of punishment of the severity of the illegal deed and reeducation of the person who did it. Since the object of educative measures is constituted by the activity of fining, punishing a practiced antisocial behavior, it results that, in concrete cases, although the deed was committed during nonage, its discovery, trial or execution may prolong objectively, and in the period when the author reached full age, moment implying adaptation of some solutions having special content, and different levels of judicial consequences. In this sense it can be seen that, if the reformation of the minor's behavior failed after the application of an educative measure, which should have influenced his sensibility, affectivity, the application of a penal punishment will follow, in the characteristic

limits of minors' punishing, which will have a reformative influence appropriate to the general rules and principles of behavior characteristic for the penal law.

1.3 The national legislation regarding the minor with delinquent behavior.

The provisions of the Romanian Constitution in this matter

In the provisions of the Romanian Constitution, adopted by national referendum in October 2003, an important place is occupied by the child as a person. So, in the article 16 the equality in rights in front of the law of all citizens of Romania is provided.

In chapter II „Fundamental rights and liberties" of the Constitution the fundamental rights and liberties of the Romanian citizens so of the minors too, are regulated.

The Constitution regulates the following fundamental rights and liberties:

1. the right to life, mental and physical integrity – art.22 paragraph 1;
2. the citizen's individual freedom – art.23;
3. the right to defense all along the trial – art.24 paragraph 2;
4. the right to education - art. 32;
5. the right to health protection – art.33;
6. the right to a family – art.44;
7. the protection of children and young people – art.45 (the most important article in the matter);
8. the right of a person injured by a public authority – art. 48;
9. the restraint of some rights exercise or liberties – art.49.

1.4 Aspects regarding the minor with delinquent behavior provided by the Romanian Penal Proceedings Code

The penal trial is carried on in the case of minor delinquents, according to art.480 Penal Proceedings Code, se according to the usual procedure with the completions and derogations regulated by art.480-493 Penal Proceedings Code. Along with the usual proceeding regulating the penal action stage, the legislator stipulated two more additional dispositions:

a) – summoning of some people to hear the minors
b) – the mandatorycharacter of social investigation.

According to art.481 paragraph 1 Penal Proceedings Code, when the accused or the defendant is a minor under the age of 16, at any hearing or confrontation of him, if the penal action authority considers it necessary, it summons the tutorial authority deputy as well as the parents, and when the case, the tutor, curator or the person in whose care or supervision minor is.

As results from the content of this regulation, summoning the listed persons is not mandatory, but remains at the consideration of the penal action authority.

When hearing the minor, in the presence of the above mentioned persons, the penal action authority or the prosecutor tries to avoid some difficulties, determined by the young age of the minor that could manifest by excessive emotiveness or exaggerated tendency to distort reality.

According to art.481 paragraph 2 Penal Proceedings Code, summoning the tutorial authority deputy as well as the parents and when the case, the tutor, curator or the person in whose care or supervision minor is, is mandatory when presenting the penal action material.

If the persons legally summoned at the hearing or presentation of the penal action material fail to come, this does not prevent these acts from executing (art.481 paragraph 3 Penal Proceedings Code).

In causes involving minor delinquents, the penal action authority or the court have the obligation to order the social inquiry (art.482 paragraph 1. Penal Proceedings Code). The penal action authority always has the obligation to ask for a social investigation.

The court has the obligation to ask for a social investigation only if the minor has committed a delinquency for which the penal action is started at the previous petition of the injured person and this can address directly to the court (art.279 paragraph 2 letter 1 Penal Proceedings Code). In such a case, the penal action stage is missing, being an atypical trial.

The social investigation is performed by the Tutorial Authority of the Local Council in the jurisdiction of which the minor's address is. It consists of gathering data regarding the usual behavior of the minor, his mental and physical condition, his antecedents, the conditions he was raised and lived in, the way his parents, tutor or the person in whose care or supervision minor is fulfill their duties towards him, in general, regarding any elements that can help to take a measure or apply a penalty to the minor (art. 482 paragraph 2 Penal Proceedings Code).

If the minor is also in the records of a specialized public service, it is requested for drafting a mental-social report on the minor.