

Discernment Issues in Context of Juvenile Delinquency

Nicoleta-Elena Hegheş¹, Cristina-Gabriela Şchiopu²

¹ Professor PhD "Dimitrie Cantemir" Christian University of Bucharest, Faculty of Juridical and Administrative Sciences, Bucharest, Romania, nicoleta.hegheş@ucdc.ro

² Dr. Institute of Psychiatry "Socola" Iași, Romania, schiopu_cristina_gabriela@yahoo.ro

ABSTRACT: The latest statistics have shown a rise of juvenile delinquency over the the past 10-20 years. Not only the number of offences have risen but also the character of the offences have become more complex. Law enforcement has faced this phenomenon unprepared and it's systems of penalty, reeducation and social reinsertion of these youngsters have failed in many cases as the approach on this matter has failed to solve psycho-social and familial problems that reside under the behavioral deviation of youngsters. The truth is that dealing with a child in law system has a more complex and difficult elements the need to be considered, unlike adult delinquency. From under 10 years old to 18 or 21 years there is an abrupt and oscillating evolution of the child's psychology, personality and cerebral physiology with complex influences by near environment, social and familial factors, intellectual and emotional stimulation. Juvenile delinquency needs to be a multidisciplinary evaluation of the youngster and a complex psychological and psychiatric evaluation of the child's discernment and personality in order to insure a healthy social adaptation and integration of the future adult.

KEYWORDS: delinquent, underage, discernment, psychiatry, penalty

Introduction

The psychiatric forensic expertise of minors is a very complex science with multidisciplinary characteristics. On one side, there is the forensic medicine which is the major coordinating forum and an important communication and translating link between medicine and law. The other side resides on the psychiatry and connected disciplines which in minor's cases are, psychology, neurology, genetics and social sciences (Ash 2004, 452).

Until 1960, in Romania, expertise on minors was made by adult psychiatrists researching family and school references producing high issues on the subjectivity of the evaluation. After 1960, child psychiatry was developed as an independent domain which made underage penalty investigation evolve into a much fair and objective process. Furthermore, involving social assistance has made preventive care, protection, and reintegration of the child much easier, without disrupting his future evolution as an adult (Ostrovari & Baltaga 2019, 19-22).

General considerations

Forensic psychiatric expertise of minors tends to be one of the most difficult forensic expertise in the field of legal medicine. Analysing a child's mind, behaviour, personality and the characteristics of the environment he develops in, is a complex process whether the investigation concerns the minor as a felon or as a victim. For penal cases, every minor involved as an offender, no matter the case, has to be submitted to psychiatric expertise but only those over 14 could be submitted to different forms of punishments or re-education. On the other hand, in the cases of victimology, complex and serially evaluation is needed and the follow-up of the investigation and decisions for the child and for those involved directly depends on the psychiatric expertise (Schetky & Benedek 2003, 45).

The complex and difficult part of this expertise resides in the fact that from childhood to adolescence, there are constant changes in the personality, emotions, behaviour and judgement of the minor with high influences from the family, educational stimuli and the social environment he lives in. evolution of the future adult is oscillating and impregnated with low control over impulses and emotions which will affect deeply the way he responses to stressing factors (Gherasim 2013, 259).

Analysing such a fragile and volatile mind and personality and concluding all elements into an objective and measurable evaluation involves a hard interdisciplinary effort and a great responsibility as the bio-psycho-social balance of the future adult could be affected (Van Nieuwenhuizen, Bongers & Barendregt 2011, 89-90).

Responsibility of minors. Legal and psychiatric aspects.

The concept of minority is represented by the bio-physiological state of the individual up to 18 years of age, as well as by the socio-legal state of the individual, comprising three periods: until the age of 14, when the minor is not criminally liable regardless of the gravity of the act committed; the period between 14-16 years, when the minors are criminally liable if they have the discernment of the facts produced and the period between 16-18 years, when the minors are not liable unless they have the discernment of the committed deeds. Through the sanctions that may be applied, the minors benefit from the special favorable regime regarding the criminal punishments, as well as the educational measures adopted against them. The liability of minors thus appears as a specialization of criminal liability, a feature that aims mainly at reducing punishment and increasing the effectiveness of educational measures for social reform of the individual. The essential feature of the legal regime in favor of the sanctions of the minor offender consists in diminishing the maximum and minimum limits of criminal punishments, the punishment being between half the minimum and half of the maximum sanction provided by the criminal law. The process of differentiating the sphere of the concept of minority is carried out in criminological science, in four phases: childhood, adolescence, maturity and old age, thus there is a diverse range of criteria for establishing favorable causes and conditions, the effects of crimes and means and ways of social reform of juvenile offenders. From the point of view of the terminology of criminal law, only the concepts of "minor" - minority and "major" - immaturity, the concepts of "child" - childhood and "old man" - old age have legal significance, being devoid of legal importance, because compared to the legal criterion of age, both responsibility and individuality will take into account the person of the offender (who may be overwhelmed by experience or may suffer from a severe sensory, physical, mental disability due to old age). Therefore, the two forms of reporting the age of the offender: the minority period and the adult period, occupy a precise place in the activity of criminal investigation, legal and judicial individualization of criminal penalties (Tănărescu I., Tănărescu C. & Tănărescu G. 2002, 647).

The non-custodial educational measures regulated in the Romanian Criminal Code are the civic training period, supervision, weekend recording and daily assistance. *Educational measures depriving of liberty* are hospitalization in an educational center (for a period of 1 to 3 years) and hospitalization in a detention center (for a period of 2 to 5 years or 5 to 15 years).

Responsibility in the face of law involves psychological and physiological maturity of a person and is the main condition of penal liability. So, responsibility depends on the level of development of the cognitive and psycho-social capacity and attributing these elements to a minor can be relative and disputable even for children with near full age. So how much responsibility can be submitted in those cases.

In law, there are 2 factors that describe the state of responsibility: the intellectual factor and the volitional factor. The intellectual factor refers to a person's capacity of realizing their actions or non-actions and their social significance and implications. The volitional factor refers to a person's capacity of consciously directing his actions. Furthermore, responsibility implicates a strong, healthy psychologic foundation, orienting a person's actions to a desired goal by discerning the meaning and finality of those actions. Responsibility is correlated to imputability, as a person's capacity of being submitted to a punishment for his mistake understanding the wrong in their decisions and correcting himself. Imputability is directly proportional to responsibility so the psychiatric expertise will conclude not only if a person is responsible for his actions but also if he has the capacity of going through a trial and accept the law repercussions as the main objective of any law is to give justice to the victim but also to correct the felon, integrating him back to society as a normal individual (Monden 2003).

The medical definition of responsibility and what the goal of the psychiatric expertise is, resides in the notion of discernment. Evaluating discernment with all psychological elements of the person will translate in the state of responsibility at a certain time and a specific action. In order to assess discernment, there are elements to examine and those are psychological capacity, consciousness and personality. In fact, discernment is a dynamic synthesis of consciousness and personality that motivates and executes an individual's actions. Evaluating discernment in minors can have a good and a bad aspect because of the meaning of discernment. The bad part is that the commission is trying to evaluate a growing and incomplete personality with consciousness still being bombarded by emotional and socio-cultural and familial factors. That problem is somehow fixed by assessing not only the biological age of the minor but also his socio-psychological age which reveals the qualities and non-qualities that his personality and mind have collected to that point. Furthermore, instinctual is what drives a youngster to take most of his actions, emotions are his motivation, leaving aside the mental analyze of all aspects of an action. That being said, revealing a young man's discernment can be as difficult as relative and debatable. On the other hand, a raw personality can absorb the essential elements out of a critical situation so law enforcement in minor cases can have a defining educative role in forming the future adult as a healthy participant of the society (Bailey & Dolan 2004).

As said above, responsibility depends on discernment. Psychiatric expertise conclusions can go in 3 directions based on that aspect: if the minor has a psychiatric pathology which affects his psychological capacity, clinical protective measures will be taken as well as for his well-being but also for social well-being. In these cases, the child has no legal capacity to take responsibility for his actions as he is unable to assess and conduct his behavior in a mature psychological manner. In Romania, until the age of 14, the minor is legally absolved of any guilt as he is considered to be lacking discernment. For over 14 years old, minors with mental deficiency and a small part of psychiatric pathology can cause a fault of discernment. Those cases tend to appear rarely in comparison with adult psychiatric diseases. Of course, if there are some psychiatric problems, but the minor is not considered a social danger, he can receive treatment in liberty or in confinement if that is the case (Kraus & Thomas 2011, 1308).

A second direction of the expertise is the of a present discernment, in which case, an over 14 year old minor can be submitted to correction procedures or even a punishment in case of a severe offence. For over 16 years old minors, law is applied equally to an adult. There are still, some concerns regarding responsibility in adolescences as we stated above, because some experts believe that their personality and consciousness are not in a perfect symmetry but in a still fragile immature state (Dulcan & Wiener 2004).

The third direction is that of a diminished discernment. That means that a special circumstance at the moment of the action has interfered with the minor's capacity of judgment at that moment, making him unaware of the dangerous result of his actions. Of course the first thought are those states of intoxication that decrease judgment and impulse control by directly affecting the nervous system. In Romanian legal system, as well as for forensic psychiatry, only involuntary intoxication, if proved, can be considered as such. Voluntary intoxication with psychoactive substances can be considered, in some cases, a premeditation of the antisocial act. There is also some somatic pathology that can affect one's motivation, instinct and consciousness but these are extremely rare. In contrast with other countries, psychiatric expertise can state the diminished discernment but cannot state, in these cases, the state of low responsibility, the investigation and trial following to decide whether these special circumstances will affect or not the minor's responsibility (Leş 2015, 36-40).

Behavioral disorders and criminality

Although the majority of cases are concluded with full present discernment and responsibility, the most of adolescents that undergo a psychiatric expertise will be diagnosed with behavioral disorders. There are many ethical and moral debates on the subject as a young mind, submitted to negative impact factors from family and near environment with low intellectual stimuli and unfavorable material conditions could really understand the gravity of his actions. It is true that the law takes

protective measures for these youngsters but if the offences are more complex or involve a more aggressive phenomenon they could face liberty deprived measures in a re-educational centre. There are serious questions about the quality of the re-educational process for these minors as statistics have shown over the years that most of them will rebound to antisocial behavior and law offences at some time after exiting the program (Rutter 1992, 455). Psychiatry and bio-psychology could explain this phenomenon by characterizing specifically what deviant behavior is and how it can affect an individual's character or it can remain as an isolated state in a specific situation involving external factors. There are also social elements that sometimes prevent the young to return to a normal life. Unfortunately, social groups tend to marginalize the former felon or the family he returns to cannot offer him a better adaptation, making him return to the only path that insures him with acceptance and material balance - the criminal world, and that is the problem with adults also, but minors tend to be the most affected part (Hasking 2007, 740).

Analysing behavioural disorders in minors will assess a multilateral evaluation of the child's psychology and external factors. In most literature, deviant behavior is represented as material and symbolic actions, conducted repeatedly, persistently or continuous, in most cases being a response to frustrations that he accumulates during interaction with the environment and which will cause social damages. As stated above, juvenile delinquency is a psychological phenomenon bases on behavioral disorders which are disrupted responses to stress and psycho-traumatic elements from the environment. Some common elements of the deviant behavior are disorganized thinking and activity, incomplete system of values, opinions and principles, an addiction to other people's opinion over himself, those people being members of groups or individuals that he look up to for various social and material reasons, high emotivity and low impulse control (Fedorova 2015, 4, 6).

Prior to a delinquent act, there are signs and elements in the minor's personality and behaviour that could precede a future deviant outcome. Oppositional reaction when requirements are high, there is attention deficit from adults or even severe restrictions from the family, are trigger factors for antisocial and aggressive behavior; this reaction appears when the child is unable to accept authority and impose his own interests above rules. Imitation of a personal hero from real life or media, not necessarily a good role model, could impact on a child's reaction to his own environment (Kjelsberg & Frestad 2009, 18-22). Hobbies and passion for a domain (art, culture, religion or others) could create subcultural groups that are specific to adolescents but not always lead to social benefits; rebellion is a known state of mind and a somewhat normal stage in young people but sometimes, it's valances such as denial, compensation or emancipation can be extreme, leading to denial of normal social and familial values exiting the healthy value standards. Delinquency could not mean breaking the law in early stages but breaking social and educational norms (school absence, psychoactive substance usage and in some cases, fraud or theft committed before the age of legal responsibility. In the late stages of deviances there is the criminal behavior, usually with more important negative aspects such as severe law breaking with aggression and severe antisocial acts (Gurev & Strulea 2014).

The common feature of all deviant behaviors is breaking the social expectations, rules and official and unofficial values and most of the pre-delinquency activity are manifesting together leading to more serious issues. The results can be organized into a chronological evolution, not necessarily for one disorder to imply the next. Recognizing early stages can also be important in corrective process, before getting to severe cases with traumatic and negative outcome for the minor (Côté, Zoccolillo, Tremblay, Nagin & Vitaro 2001, 678-684).

In order to understand more of the deviant behavior one could analyze the gravity of offences and the recurrence of antisocial activity. From this point of view, there are occasional behavioral disorders such as rebellious acts committed out of bravery or as a demonstrative reason; usually, these youngsters are under the influence of negative group effect or low parental control. These behaviors can be corrected by educational and familial support. Furthermore, there are deviant structured and recurrent behaviors, with high antisocial risk which characterize children with low adaptive skills into scholar and social environment and disrupted response to frustration and stressing elements. Recurrent deviant misbehavior is represented by severe actions with high aggression and law

breaking. These cases involve important outcomes and sanctions which will affect the legal and social aspects of the minor's life (Kaltiala-Heino 2015, 760).

Of course there are multiple ways of describing and classifying behavior disorders but in children and adolescents, the bio-psycho-social imbalance will always be the leading cause and motivation. In order to conclude a fair and objective evaluation of a young involved in legal offences it is important to separate bio-social aspects, psychology and personality in the cases of minors with full present discernment. (Moffitt 2006) Doing that will determine whether the young has acted on a transitory impulse affected by an difficult situation or a stressful external factor or the propensity for deviance resides deep in the characteristics of his personality affected by close traumatizing factors such as family, social status, material aspects or educational lack of stimuli. In cases of children, maybe not only those with damaged psychological capacity should be protected but also the one that are considered as normally developed. Recognizing the signs and pre-delinquent activity could set the corrective measures before reaching to a high risk behavior and anti-social actions (Ratner 2002, 890).

Conclusions

Responsibility represents a legal attribute of a person's psychological capacity to understand, motivate and organize his actions. Responsibility depends entirely on the discernment which is a characteristic of personality and consciousness and their dynamic relationship. The integrity of these elements is being assessed during a psychiatric forensic expertise in penalty cases that will conclude whereas the subject of the evaluation is capable of assuming and understanding a sanction for the antisocial actions he committed.

As responsibility is dependent on the stage of psychological and physiological development, in cases of minors there are very relative and debatable aspects on the subject of true existing responsibility and imputability, as they are individuals with still ongoing personal evolution and fragile mind and personality.

For those with mental deficiency, severe psychiatric pathologies or, in some cases those with affected state of consciousness at the moment of the illegal activity, protective measures can be imposed, these minors being absolved completely or partially of responsibility for their actions.

Evaluating behavioral disorders assumes, for over 14 years old minors, a complex assessment of the minor's personality, internal factors that influence their conduct and external factors that influence their response to critical situations and personal frustrations.

Comparing healthy social behavior to deviant behavior will always reveal an important social, education and familial cause so maybe, juvenile delinquency could represent not only the fault of the child but also the fault of the system and near environment. That being said, we can debate whereas the deviance and anti-social act is a response of the minor to his own problems and negative emotions and frustrations or is a representation of a failed social and educational system in those cases where family and material status cannot help with a healthy development.

Furthermore there is the problem of corrective measures for those who committed severe antisocial acts. It is a social truth that sanctioning measures and liberty deprived re-educational programs are not sufficient and certainly not effective in correcting young individuals, especially if they will return to the same negative environment or they will be stigmatized and isolated in society. Rebound to criminal offence will surely happen at some point in these cases. That being said, preventive activity, social efforts and mild educational corrective actions could increase the development to a deviant behavior in the first place, sanctions could be reassessed or at least, social and educational integration for these young individual could be encouraged for a future well adapted and highly functional adult.

References

- Ash, P. 2004. "Children and adolescents." In: *Forensic Psychiatry for the Clinician*, pp. 449–470. Edited by Simon, R.I. and Gold, L.H., Washington, DC: American Psychiatric Press.
- Bailey, S., & Dolan, M. 2004. *Adolescent Forensic Psychiatry*. CRC Press.
- Côté, S., Zoccolillo, M., Tremblay, R. E., Nagin, D., & Vitaro, F. 2001. "Predicting girls' conduct disorder in adolescence from childhood trajectories of disruptive behaviors." *Journal of the American Academy of Child & Adolescent Psychiatry* 40(6): 678-684.
- Dulcan, M.K., & Wiener, J.M. (Eds.). 2004. *Textbook of child and adolescent psychiatry*. American Psychiatric Pub.
- Fedorova, T.V. 2015. "Neuropsychological approach to the diagnosis and prevention of deviant behavior." *Научный резульмат. Педагогика и психология образования*, (4 (6). References).
- Gherasim, S. 2013. "Conceptiile contemporane cu privire la managementul serviciilor de expertiză medico-legală psihiatrică Contemporary conceptions of management of psychiatric forensic services)". *Analele Științifice ale USMF „N. Testemițanu”* 14(2): 259-263.
- Gurev, D., & Strulea, M. 2014. "Formele comportamentului deviant al minorilor (Forms of deviant behavior of minors)." *Revista Științifică a USM „Studia Universitatis Moldaviae* 8(78): 159-167.
- Hasking, P.A. 2007. "Reinforcement sensitivity, coping, and delinquent behaviour in adolescents." *Journal of Adolescence* 30(5): 739-749.
- Kaltiala-Heino, R., & Eronen, M. 2015. "Ethical issues in child and adolescent forensic psychiatry: a review." *The Journal of Forensic Psychiatry & Psychology* 26(6): 759-780.
- Kjelsberg, E., & Friestad, C. 2009. "Exploring gender issues in the development from conduct disorder in adolescence to criminal behaviour in adulthood." *International Journal of Law and Psychiatry* 32(1): 18-22.
- Kraus, L.J., & Thomas, C.R. 2011. "Practice parameter for child and adolescent forensic evaluations." *Journal of the American Academy of Child & Adolescent Psychiatry* 50(12): 1299-1312.
- Leș, A. 2015. "Psihologia criminologică și expertiza psihologic-criminologică în România: 'motoarele' psihologice ale criminologiei (Criminological psychology and psychological-criminological expertise in Romania: the psychological 'engines' of criminology)." *Revista de Criminologie, Criminalistica si Penologie* (4): 36-40.
- Moffitt, T.E. 2006. "Life-course-persistent versus adolescence-limited antisocial behavior." In D. Cicchetti & D.J. Cohen (Eds.), *Developmental psychopathology: Risk, Disorder, and Adaptation*, 570–598. John Wiley & Sons, Inc..
- Monden, Y. 2003. *Principles and practice of forensic psychiatry*. CRC Press.
- Ostrovari, P., & Baltaga, V. 2019. "Specificul expertizei medico-legală psihiatrică." *Vector European* (1): 19-22.
- Ratner, R.A. 2002. "Ethics in child and adolescent forensic psychiatry." *Child and Adolescent Psychiatric Clinics of North America* 11(4): 887-904.
- Rutter, M. 1992. "Adolescence as a transition period: continuities and discontinuities in conduct disorder." *Journal of Adolescent Health* 13(6): 451-460.
- Schetky, D.H., & Benedek, E.P. 2003. "Principles and practice of child and adolescent forensic psychiatry." *Tijdschrift voor Psychiatrie* 45, 12.
- Tănăsescu I., Tănăsescu C., & Tănăsescu G. 2002. *Drept Penal General (General Criminal Law)*. Bucharest: All Beck Publishing House.
- Van Nieuwenhuizen, C., Bongers, I.L., & Barendregt, C.S. 2011. "Quality of life in youth forensic psychiatry." *Tijdschrift voor Psychiatrie* 53(1): 89-90.