

# The Application of Preventive Measures Against Minors in the Romanian Criminal Procedure Code

Nicoleta-Elena Hegheș

*Researcher 2nd Degree, "Acad. Andrei Rădulescu" Legal Research Institute of the Romanian Academy, nicoleta.hegheș@icj.ro; Professor PhD, Faculty of Juridical and Administrative Sciences "Momcilu Luburici" "Dimitrie Cantemir" Christian University of Bucharest, Romania, nicoleta.hegheș@ucdc.ro*

**Abstract:** Preventing and combating juvenile crime is a constant concern in modern criminal justice systems. In Romania, the Criminal Procedure Code distinctly regulates the application of preventive measures against minors, taking into account the specific nature of this category of perpetrators. In the context of a constantly changing society, in which minors are increasingly exposed to negative influences and risks of a criminal nature, the issue of their preventive application on them acquires particular importance in the criminal process. The Romanian criminal justice system, aligned with international standards on children's rights, has developed a legislative framework that aims to combine the efficiency of the act of justice with the need for protection, re-education and social reintegration of the minor who comes into conflict with the criminal law.

**Keywords:** Detention, Preventive Arrest, House Arrest, Judicial Control

## Introduction

Minors represent a vulnerable category in criminal proceedings, and national legislation, in accordance with international instruments, provides for special rules for their protection. Preventive measures, although restrictive in nature, must be adapted to the age, maturity and needs of the minor, avoiding, as far as possible, deprivation of liberty.

Minors cannot be treated like adults in criminal proceedings. Their lack of psychological maturity, their reduced capacity to understand the consequences of their actions and their high potential for rehabilitation require a differentiated approach. These particularities are recognized in both national and international legislation (Brutaru, 2012, p. 161), which impose on states the obligation to regulate procedural measures adapted to their age and needs.

The application of preventive measures to minors poses a number of challenges (Buzatu, 2012, p. 88): identifying the most appropriate measure, avoiding deprivation of liberty in conditions that may be traumatic, but also ensuring a balance between the need to protect society and respect for the fundamental rights of the child. In this regard, the Romanian Criminal Procedure Code provides for special rules governing the legal regime of these measures when the suspect or defendant is a minor. In Romania, preventive measures applicable to minors are regulated by the Romanian Criminal Procedure Code. As regards minors, the following principles apply: the subsidiary and exceptional nature of custodial measures; the best interests of the child, in accordance with the UN Convention on the Rights of the Child; individualization of the measure depending on the personality of the minor and the circumstances of the act.

The conditions for criminal liability of minors are provided for in art. 113 of the Romanian Criminal Code. The problem arises in the case of minors aged between 14 and 16 years (Buzatu, 2010, p. 837), and in order to determine whether they had discernment at the time of committing the crime, the judicial bodies order a forensic psychiatric examination (Hegheș, Șchiopu & Damian, 2022, 296).

Towards minors who are criminally liable (minors who have reached the age of 16 and those between the ages of 14 and 16, if they committed the act with discernment), any of the preventive measures provided for adult defendants may be taken, in compliance with the same

conditions and for the same duration, but also with the additional requirement in the case of detention and preventive arrest that the effects that the deprivation of liberty would have on their personality and development should not be disproportionate to the purpose pursued by taking the measure (Tocan, 2017, p. 1140).

Unlike the Romanian Criminal Procedure Code of 1968, the current Romanian Criminal Procedure Code no longer imposes a minimum punishment ceiling compared to the special maximum provided by the criminal law for the act of which a defendant between 14 and 16 years old is accused, nor a duration lower than that provided for taking the measure for adults (Tocan, 2017, p. 1140-1141; Franguloiu, 2012). The duration of the preventive measure involving deprivation of liberty is subtracted from the duration of the educational measure involving deprivation of liberty.

From our point of view (Buneci, 2022, p. 309), the judicial body must have certain data about the minor, namely the environment from which he comes, his age, family situation, school situation, health status, personality, in order to be convinced that the preventive measure applied does not affect his physical, mental or moral development. Relevant in this regard is also the evaluation report of the minor that can be requested from the probation service.

Regarding the taking of a preventive measure, one must take into account both the provisions of the Romanian Procedural Criminal Code, the Romanian Constitution on the individual freedom of the person, and the European provisions on the protection of human rights and fundamental freedoms of the person (Franguloiu, 2015; Cărcăle, 2022).

Preventive measures can be taken at any stage of the proceedings, criminal investigation, preliminary chamber and trial and at all levels of jurisdiction provided for by law. The purpose of these measures is to ensure the proper conduct of the criminal trial, to ensure that the suspect or defendant does not evade criminal investigation or trial and to ensure that he will not commit another criminal offense.

### **Types of preventive measures applicable to minors**

According to the provisions of the Romanian Criminal Procedure Code, minors may be subject to all preventive measures provided for in general legislation, but their application must take into account the particularities of age, level of psychological development, family environment and rehabilitation potential (Franguloiu, Moroşanu & Klein, 2012, p. 18).

Thus, preventive measures applicable to minors can be classified into two broad categories:

1. Measures depriving of liberty: detention, preventive arrest and house arrest.
2. Measures restricting liberty: judicial control and judicial control on bail.

The application of measures depriving of liberty in the case of minors must respect the principle of *ultimei ratio*, being justified only in situations where non-custodial measures cannot ensure the purpose of the criminal trial or the protection of the minor and society. In all cases, the courts must thoroughly justify the necessity and proportionality of such a measure.

*Detention* may be ordered if it is established that there is evidence or solid evidence from which there is reasonable suspicion that a person has committed a crime, that it is necessary and proportionate to the seriousness of the accusation brought and that there is no reason to prevent the initiation or exercise of criminal proceedings. This measure may be ordered by the prosecutor or the criminal investigation bodies and may be taken against the suspect or the defendant only during the criminal investigation. Criminal prosecution bodies have a legal obligation to immediately notify the parents, guardian, curator or other legal representative, as well as the General Directorate of Social Assistance and Child Protection, which must provide assistance at all stages of the procedure.

The measure of detention and preventive arrest of the minor defendant is notified to his legal representative or the person in whose care the minor is. The text is consistent with art. 5

of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, as well as the right for a third person to be informed upon deprivation of liberty and the right to communicate with third persons and with consular authorities while deprived of liberty, which imposes on Member States the obligation to ensure that the holder of parental responsibility for the child is informed without delay of the deprivation of liberty and the reasons for it, unless this would be contrary to the best interests of the child, in which case an appropriate adult is informed (Tocan, 2017, p. 1141). The hypothesis from which we start in this analysis is based on the idea that, on the one hand, we cannot currently speak of national law without taking into account international public law and, on the other hand, national law in general cannot exist outside the *acquis communautaire* (Ștefan, 2023, p. 396).

*House arrest* is a measure depriving of liberty, a lighter alternative to preventive arrest, a measure taken from the Italian and French Criminal Procedure Code (Franguloiu, 2003; Brutaru, 2016) and consists of the defendant's obligation not to leave the home or building where he actually lives, for a certain period of time established by the judicial body and without its permission. It can be ordered at any stage of the criminal process after the criminal action has been initiated and the order is made only by the judge (judge of rights and liberties, preliminary chamber judge and the court).

This is a preferable measure to preventive arrest in the case of minors, being ordered when there is reasonable suspicion that the minor has committed a serious crime, but at the same time presents a sufficient level of family and community integration. The measure involves supervision by parents or other designated persons, with an active role in monitoring compliance with the obligations imposed by the court.

*Preventive arrest* is a measure depriving of liberty, ordered only by a judge, having an exceptional character and which involves the deprivation of liberty of the defendant for a certain period of time, which leads to a serious infringement of the individual's freedom. It can be ordered only after the initiation of criminal proceedings, when the suspect becomes a defendant, being a party to the criminal trial. It is the most severe preventive measure, justified only in cases of particular gravity (violent crimes, repeated acts, high social danger). It can be ordered only if other preventive measures are not sufficient (Kádár, 2015, p. 72). In addition, minors arrested on remand are placed in specialized detention centers for minors, where they must benefit from age-appropriate conditions and educational programs.

In order to avoid the negative impact of contact with the prison environment on the developing personality of the minor, the legislator provided special, derogatory provisions regarding the regime for the execution of deprivation measures in his case (Tocan, 2017, p. 1141). During the execution of preventive arrest, minors are housed separately from adults, they are provided with psychological assistance in order to reduce the negative effects of deprivation of liberty on their physical, mental or moral development and, to the extent that the proper conduct of the criminal trial is not impeded, they are ensured the possibility of maintaining contact with persons with whom they had family relations or strong emotional ties, by supplementing the right to visits, telephone or online conversations – art. 117 of Law no. 254/2013 on the execution of sentences and custodial measures ordered by judicial bodies during criminal proceedings, published in the Official Gazette no. 514 of 14 August 2013, with subsequent amendments and completions.

During the trial, minors arrested on remand serve the preventive measure in detention centers or in remand centers, and upon reaching the age of 18, the arrested minor remains or is transferred to the detention center art. 123 of Law no. 254/2013.

*Judicial control* is a restrictive measure of freedom that can only be taken against the defendant after the initiation of criminal proceedings, if it is established that there is evidence or solid evidence from which the reasonable suspicion that a person has committed a crime

results, is necessary and proportionate to the seriousness of the accusation brought and there is no cause to prevent the initiation or exercise of criminal proceedings.

In the case of minors, judicial control is preferred because it maintains their connection with family, school and community, while allowing for monitoring behavior and preventing the commission of other acts (Niță & Grădinaru, 2017, 344).

The measure of *judicial control on bail* may be taken if all the conditions for taking preventive arrest are met, namely if the evidence shows reasonable suspicion that a crime has been committed, if the defendant tries to influence other participants in the criminal trial, to alter certain means of evidence, to flee or evade criminal prosecution or he is liable to commit a new crime after the initiation of the criminal action or if the reasonable suspicion that he has committed a series of serious crimes shown in art. 223 para. (2). Romanian Criminal Procedure Code. Another condition that must be met for taking the measure of judicial control on bail is that this measure is sufficient to achieve the purpose of the criminal trial.

Although theoretically applicable to minors, this measure is rarely used in practice, given that most minors do not have their own financial means, and the involvement of parents in this regard raises additional issues of responsibility and guarantees.

The application of preventive measures against minors must be carried out with discernment, depending on the seriousness of the act, previous conduct, the environment of origin and the real prospects of re-education (Brutaru, 2012). Any measure, especially those involving deprivation of liberty, must be accompanied by support and counseling programs, so that the preventive and educational purpose is truly achieved (Brutaru, 2013).

The application of preventive measures in the case of minors is governed by a set of essential procedural particularities, intended to protect their rights and to ensure an intervention adapted to their age, psychological and social development, as well as to the specific vulnerability of minors in relation to the criminal process. These particularities derive both from national legislation and from international treaties to which Romania is a party, in particular the Convention on the Rights of the Child, the Beijing Rules (1985) and the Havana Rules (1990) (Franguloiu & Alexandru, 2002).

Romanian law expressly provides that in any criminal procedure in which a minor is involved (as a suspect, defendant or even a witness), he must be treated with respect for the best interests of the child. Judicial bodies are obliged to act with celerity and prudence at all procedural stages, taking into account the psychological maturity of the minor, the criminal record (if any), the family and social context, as well as the degree of social danger of the act.

These procedural particularities reflect the modern philosophy of juvenile justice, which is not retributive, but restorative and educational in nature (Niță, 2017), in order to prevent recidivism and the social reintegration of the minor (Vâlcu & Boghirnea 2022, pp. 551-570). They ensure a delicate balance between the interests of the criminal process and the fundamental rights of the child (Vișan, 2018, p. 333), contributing to the construction of a humane and efficient judicial system.

## Conclusions

The application of preventive measures against minors must remain an exceptional instrument and be guided by the principles of protection and rehabilitation. Romanian law, through its provisions, reflects international concerns in the field of juvenile justice, but the practical application must be constantly monitored in order to avoid abuses or decision-making automatism. The application of preventive measures against minors suspected or accused in the Romanian criminal process represents a sensitive and complex area, located at the intersection between the need for the efficient conduct of the criminal process and the obligation of the state to protect and socially reintegrate an individual who is at an essential stage of personal formation.

An essential element that emerges from the study of the regulation and judicial practice is the fact that preventive measures depriving of liberty must be the last resort in the case of minors, being preferable non-custodial measures that allow the child to be maintained in an educational and supportive environment. At the same time, the involvement of parents and other institutions with a role in child protection contributes to an interdisciplinary approach, adapted to the needs of each individual case. However, in practice, careful monitoring of the application of these measures is still required, in order to avoid the abusive use of detention or the ignoring of non-custodial alternatives.

## References

- Brutaru, V. (2011). Tratatamentul penal al minorului în Noul Cod penal adoptat prin Legea nr. 286/2009 (Criminal treatment of minors in the New Criminal Code adopted by Law no. 286/2009) In *Studii de Drept Românesc* no. 4/2011, Ed. Academiei Române, p. 347-370.
- Brutaru, V. (2012). Considerații asupra tratamentului minorului infractor în documentele internaționale (Considerations on the treatment of juvenile offenders in international documents), *R.D.P.* no. 2, p. 161-176.
- Brutaru, V. (2013). *Tratatamentul penal al minorului (Criminal treatment of the minor)*, Hamangiu.
- Brutaru, V. (2016). Răspunderea penală a minorului în diferite sisteme de drept (Criminal liability of minors in different legal systems), *Studii și Cercetări Juridice*, no. 2, p. 267-304, <https://www.rscj.ro/SCJ-2-2016.pdf>
- Buneci, B. (2020). *Drept procesual penal. Partea generală – Curs universitar (Criminal procedural law. General part – University course)*. Universul Juridic.
- Buzatu, N.-E. (2010). Reglementarea minorității în noul Cod penal (Regulations concerning the minors as stipulated in The New Penal Code), vol. II - *Criza actuală în contextul globalizării*. ProUniversitaria, pp. 837 și urm.
- Buzatu, N.-E. (2012). Măsuri ce pot fi luate împotriva minorului care răspunde penal în concepția Noului Cod penal român (Measures that can be taken against a minor who is criminally liable under the concept of the New Romanian Criminal Code), in *Noua legislație penală – o nouă etapă în consolidarea statului de drept român*, Universul Juridic, pp. 88 și urm.
- Cărcăle, V.A. (2022). Observații cu privire la criteriile generale de individualizare a pedepsei într-o viziune europeană (Observations on the general criteria for individualizing punishment in a European vision), *Revista de drept și administrație publică*, nr. 1/2022, p. 70.
- European Convention on Human Rights (ECHR). (1950). Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15. Council of Europe.
- Franguloiu, S. (2003). Delincvența juvenilă și standardele internaționale. Sistemul francez (Juvenile delinquency and international standards. The French system), in *Revista de Comunicări științifice a Universității „George Barițiu” Brașov*.
- Franguloiu, S. (2012). “Ghid de lucru în cauzele penale cu minori” – în lumina Noului Cod penal și Noului Cod de procedură penală, a proiectelor de lege privind executarea sancțiunilor privative și neprivative de libertate, coautor, lucrare publicată de Ministerul Justiției, în cadrul Proiectului PHARE “Dezvoltarea sistemului de justiție pentru minori din România”, în parteneriat cu Fundația IRZ, Germania, București (“Working Guide in Criminal Cases with Minors” - in light of the New Criminal Code and the New Code of Criminal Procedure, of the draft laws on the execution of custodial and non-custodial sanctions, co-author, work published by the Ministry of Justice, within the PHARE Project “Development of the Juvenile Justice System in Romania”, in partnership with the IRZ Foundation, Germany, Bucharest).
- Franguloiu, S. (2015, December). Dispoziții legale naționale și europene în materia audierii minorului victimă a infracțiunii sau acuzat, Proiect „Child-friendly justice project” (National and European legal provisions on the question of hearing the minor victim of the crime or accused, “Child-friendly justice project), organized by Academy of European Law.” National Institute of Magistracy, Bucharest. [https://www.era-comm.eu/child\\_friendly\\_justice/kiosk/pdf/speakers\\_contributions/online\\_speakers\\_contributions\\_115DT101.pdf](https://www.era-comm.eu/child_friendly_justice/kiosk/pdf/speakers_contributions/online_speakers_contributions_115DT101.pdf)
- Franguloiu, S., & Alexandru, M. (2002). Aspecte privind Regulile Minime ale Națiunilor Unite cu privire la administrarea justiției pentru minori (Regulile de la Beijing) (Aspects of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)). Vol. „George Barițiu” University, Brașov. Omnia Unisast.
- Franguloiu, S., Moroșanu, R. and Klein, M. (2012). *Ghid de lucru în cauzele penale cu minori în lumina Noului Cod penal și Noului Cod de procedură penală*. Fundația Germană pentru Cooperare Juridică Internațională IRZ, p. 18.

- Hegheș, N.-E., Șchiopu, C.-G., Damian, S. (2022). *Maturitatea și discernământul în expertiza medico-legală psihiatrică la minori (Working guide in criminal cases involving minors in light of the New Criminal Code and the New Criminal Procedure Code)*, Vol. Conferinței naționale cu participare internațională „Devianță și criminalitate. Evoluție, tendințe și perspective” „DECRET”, 6th ed., vol. VI, pp. 296-304, <https://drive.google.com/file/d/1n77MSudS4PcgPdM8QrrbzOClrz0SwShE/view>
- Kádár, H. (2015). Gondolatok az előzetes letartóztatásról az új román Büntetőeljárás törvénykönyv és az Emberi Jogok Európai Egyezménye tükrében (Thoughts on pre-trial detention in the light of the new Romanian Criminal Procedure Code and the European Convention on Human Rights). *Jogelméleti Szemle*, no. 3, p. 72-82. [http://jesz.ajk.elte.hu/2015\\_3.html](http://jesz.ajk.elte.hu/2015_3.html)
- Niță, N. (2017). Considerații privind justiția restaurativă pentru minori din România (Considerations regarding restorative justice for minors in Romania), *Acta Universitatis George Bacovia. Juridica*, 6(2).
- Niță, N. & Grădinaru, M. (2017). Prevenirea vulnerabilităților la adresa minorilor și tinerilor din România (Considerations regarding restorative justice for minors in Romania), *Vol. „Devianță și Criminalitate - Evoluție, Tendințe și Perspective.”* Universul Juridic, p. 344.
- Romanian Constitution. (2003). Romanian Constitution, amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, republished, published in the Official Gazette of Romania, Part I, no. 767 of October 31st, 2003.
- Romanian Criminal Code. (2009). Republished, with subsequent amendments and supplements. Law no. 286/2009 on the Criminal Code, published in the *Official Gazette of Romania* no. 510 of July 24, 2009.
- Ștefan, E.E. (2023). News and perspectives of public law. *Athens Journal of Law*, 9 (3), 395-406. Athens Institute for Education and Research. <https://www.athensjournals.gr/law/2023-9-3-4-Stefan.pdf>
- Tocan, I. in Udriou M. – coord. (2017). *Codul de procedură penală. Comentariu pe articole (Criminal Procedure Code. Commentary on articles)*. (2nd ed. pp. 1140-1141). C.H. Beck.
- United Nations. (1985). United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Adopted by General Assembly resolution 40/33 of 29 November 1985.
- United Nations. (1989). United Nations Convention on the Rights of the Child, adopted in New York on November 20, 1989, ratified by Romania by Law No. 18/1990.
- United Nations. (1990). United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (The Havana Rules). Adopted by General Assembly resolution 45/113 of 14 December 1990.
- Vălcu, E.N. & Boghirnea, I. (2022). Restorative justice in the case of minor victims of crimes. Union legislative, comparative and sociological approach. *Acta Universitatis George Bacovia*, 11(2), 551-570.
- Vișan, E.R. (2018). Criminal responsibility of children in the global context. *Fiat Iustitia. Review of Jurifical Studies*, no. 1, p. 333.