

# JUVENILE DELINQUENCY IN EUROPE LEGISLATIVE APPROACH AND FORENSIC EVALUATION

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**Abstract:** Given the upward trend of crime in youngsters that finds the most varied forms of manifestation – some of them very serious – and the political changes at European level with an increase in trans-border mobility under all its aspects, including crime, the present study analyses the method of approach of juvenile delinquency in different European countries from the legislative perspective (jurisdiction, penal majority, criminal responsibility, system of punishments, methods of re-education) and the contribution of forensic psychiatric evaluation to the elucidation of various cases in which they are involved. We noticed the existence of extremely heterogeneous methods of approach in the European systems of law which makes extremely difficult the legislative harmonization with the purpose of finding the most adequate means of fighting this phenomenon.

**Cuvinte cheie:** juvenile delinquency, forensic psychiatry, conduct disorders, criminology

**Rezumat:** Având în vedere trendul ascendent al infracționalității în rândul tinerilor care-și găsește din ce în ce mai diverse forme de manifestare - unele de o extremă gravitate – precum și modificările politice de la nivel european cu creșterea mobilității trans-frontaliere sub toate aspectele ei, inclusiv al criminalității, studiul de față analizează modul de abordare al delincvenței juvenile din diferitele țări europene din perspectiva legislativă (jurisdicție, majoritate penală, responsabilitate penală, sistem al pedepselor, modalități de reeducare) precum și al aportului expertizei psihiatrice medico-legale în elucidarea diverselor spețe în care sunt implicați aceștia. Am constatat existența unor modalități de abordare extrem de heterogene în sistemele de drept european ceea ce face extrem de dificilă armonizarea legislativă în scopul gasirii celor mai adecvate mijloace de a combate acest fenomen.

Data of the specialized literature and mass media – with predominance in the last years – show a marked increase in criminology in youngsters and the diversification of its forms of manifestation. It is obvious that the penal systems in the entire world have been caught unprepared to handle the phenomenon and maintaining it at an acceptable level, so a unitary approach is imperiously necessary. I think that forensic psychiatric evaluation has a close-up role in the revelation of data needed for the correct legal framing of the deeds of young delinquents, in finding the adequate measures that aim at their recovery and social reinsertion and providing useful data for the elaboration of programmes of effective measures in fighting this phenomenon.

The forensic psychiatric evaluation has an interdisciplinary character given the relations it establishes – on one hand – with biomedical sciences (physiopathology, internal medicine, endocrinology, genetics) and on the other hand with social and legal sciences (especially criminal law, criminology). In the case of minors, forensic psychiatric evaluation has an important characteristic regarding the aspects of recovery and re-education of the minor that must be individualized depending on his participative quality in the incriminated deed (guilty/defendant, damaged party).

With reference to the legal and organizational framework of the forensic evaluation, the national legislation in force provides the fact that the evaluation is conducted by a commission made up of a coroner, who is also the president of the commission and two psychiatrists mentioning, that for the evaluation of minors, it is recommended that the psychiatrist

have the specialization of paediatric psychiatry, and the commission must also have a psychologist. As for the objectives of the forensic psychiatric evaluation, they are stated in the ordinance and mainly refer to: 1. existence or not of a mental disease; 2. presence or absence of mental capacity/discernment at the moment of committing the deed; 3. if the minor presents a social danger, what are the medical social and pedagogic measures that will help straighten the pathological behaviour. (12) Apart from these three major objectives, the evaluation must respond to a series of other problems such as: features and particularity of the pathological behaviour, if there is a link of causality between the psychic disorder and the deed, what is the intellectual level of the examined person, the evaluation of the school capacity of the minor, child-parent relations, life conditions and development level and their role in committing the antisocial deed. It is also necessary to establish the potential of the social danger of the ill person and what are the measures imposed. The main objective of the evaluation is establishing a correlation between the psychic state, the antisocial action and its result, which involves establishing discernment in the moment of committing the deed. *Mental capacity / discernment is the medical criterion of responsiveness of a person, since responsibility is a psychological category whilst responsibility is a legal notion. We can define the mental capacity/discernment as a “psychic faculty, the capacity of distinguishing between good and bad, legal and illegal, licit and illicit, permitted and unpermitted and is based on a perception and representation of reality and the consequences of your own deeds.”*(11) Irresponsibility implies the psychic incapacity of a person to realize the antisocial character and the consequences of the deed

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and the incapacity of normally controlling his/her will at that moment; therefore that person is not responsible for his/her actions or inactions which remove guilt, so the deed will not have a penal character, and the penal responsibility is extinguished. For the category of minor delinquents, it is recommended that one use a more adequate criterion than the mental capacity/discernment, which is psychic capacity, term that facilitates the elaboration of certain nuances related to the characterization of a personality in process of formation, which is the minor's.<sup>(4)</sup> The integrity of the psychic capacity and the possibility of a person of being responsible for his/her actions implies the integrity of the cognitive, intellectual and volitional capacities, including mental capacity/discernment, its affection leading to an incorrect perception of reality, with the loss of the capacity of correctly and logically judging a situation due to the inability of choosing between several variants of behaviour. The safety measures with medical and pedagogic character that are imposed following the evaluation differ depending on the type of alteration of mental capacity/discernment and the gravity of the deed. If there is an abolition of the mental capacity in rare cases, safety measures are needed (internment in boarding schools or in hospitals of juvenile psychiatry) and for the cases with discernment, there are proper measures of medical and pedagogic character for the social reintegration of the minor (reprimand, under surveillance freedom, internment in re-education centres or medical educational institutes, penalties for extremely serious crimes). In both cases, it is necessary to associate these measures with directional psychotherapy, which will allow the subject a more conscious approach of his/her relations with the environment and the development of an adequate behaviour for the society.<sup>(8)</sup>

*Legislative provisions for delinquent minors in the criminal law systems in the European space*

In *England and Wales*, jurisdiction is ensured by the Youth Courts – as an equivalent term for the Court of Youngsters (for minors – in the legal system that we have), the age of criminal absolute irresponsibility is 10 years of age and the penal majority is 18 (for the participation of persons of age, the jurisdiction belongs to common courts of law. There are certain benefits of minority: until the age of 14, they benefit from a more indulgent treatment, and the educational measures make the rule, and as particular measures there are educational measures if the main delinquents admit their deeds which ensure the celerity of the trial. In *Germany*, jurisdiction belongs to the Court for Youth and the specialized judge, the age of penal absolute irresponsibility is set up to 14, and the age of penal majority is 18 with certain exceptions (represented by the seriousness of deeds, legal antecedents, maturity proven by expertise); in these cases, the jurisdiction belongs to the competent courts for youth aged between 18 and 21. The mitigating circumstances are caused by minority between 14 and 18 (reported to mental capacity at the moment of committing the deed); there is the possibility of a fast and simplified procedure when the court has the pronouncement of educational measures. In *Austria*, jurisdiction is ensured by the Court for minors in Wien, respectively, by the special departments for minors of the Courts in the other lands, criminal irresponsibility until the age of 14 with criminal majority set at 18. To the age between 18 and 21, there is the possibility of maintaining the jurisdiction of the Court for minors. Particularities: the possibility of applying sanctions with executable imprisonment, very favourable release on parole; there is the possibility of taking safety measures of compulsory internment for reasons related to the mental health of the subject. In *Belgium* jurisdiction is ensured by the Court for youth. Criminal irresponsibility is set until the age of 18 in two variants: absolute – with the impossibility of applying

another punishment unless with educational character – until the age of 16; relative – based on a psychiatric evaluation – between 16 and 18 years of age. Criminal majority is set at age of 18 (except for crimes related to driving vehicles, when they are subject to common jurisdiction). After turning 16, the Court for youth decides the existence of mental capacity based on an evaluation, “whether he has enough mental capacity”. Circumstances related to minority: only educational measures can be pronounced, but for the submittal to the common court the regime is the common law reserved for adults. Particularities: social investigation and obligatory medical psychological evaluation prior to the submittal to common jurisdiction. Assistance by a lawyer is obligatory in the cases with minors. In *Scotland*, jurisdiction is unregulated; they conduct the so-called “children hearing” provided by non-professionals of law. Criminal irresponsibility is not legally provided at a certain age. Until the age of 18 educational measures prevail. Criminal majority is set at 18; in extremely serious cases, when there is a high danger degree for society the minor can be judged by a common court. Circumstances related to minority: there are no sanctions with a penal character, but there is the possibility of sanctions privative of freedom as “educational measures”. Particularities: the assistance by lawyer is obligatory (consequence of a Decision of CEDO). In *Spain*, jurisdiction is provided by the judge for minors. Criminal irresponsibility is absolute before the age of 14. Criminal majority is set at 18; legislators are debating over the extension of legal provisions regarding minors until the age of 21. Circumstances related to minority: a sanction regime that is diminished compared to the one provided for the same deeds committed by persons of age. Particularities: Criminal prosecution is ensured by the prosecutor who can decide more freely than in the case of persons of age whether to send the delinquent minors to court; unlike the Anglo-Saxon system there is no possibility of a quiche legal proceeding. In *Greece*, the jurisdiction is ensured by the judge for minors within the Court for minors. Criminal irresponsibility is absolute until the age of 7 and between 7 and 12 only educational measure are applied. Criminal majority is set after 17 (in other words until 18). Circumstances related to minority: punishments privative of freedom with a minimal duration of 6 months and maximal duration of 5 years (or 10 years for a punishment that for an adult is over 10 years); detention is provided in correctional centres, not in prisons. Particularities: legal assistance is not obligatory. In *Italy*, jurisdiction belongs to the Court for children (court made of judges and non-professional assistants); criminal irresponsibility is absolute until the age of 14 and criminal majority is set at 18. Circumstances related to minority: between 14 and 18 the minor must prove the capacity of “understanding” so that a punishment can be applied to him/her (in other words, it is necessary to prove the existence of discernment); the court cannot apply privative punishments with a nature of perpetuity (the maximal sentence is limited to 24 years of age). Particularities: there is the possibility of not applying a sentence to primary delinquents or if the punishment is less than 2 years. There is a preliminary hearing in the first 36 hours after the arrest: if it is possible, the trial is conducted, if not, educational measures are imposed. In *Luxemburg*, the jurisdiction is ensured by the judge for youth within the Court for youth. Criminal irresponsibility is absolute before the age of 16 and is relative at the age between 16 to 18, but it must be established by experts. Criminal majority is set at 18, but the minors over 16 can be submitted to common courts if the educational measures are found inadequate. Circumstances related to minority: a kinder sanction regime – educational measures. Particularities: the crimes are not recorded in the

criminal record, but only in a special register; the social investigation and legal assistance are obligatory, the trial is “with closed doors”. In *Netherlands*, jurisdiction is provided by the judge for minors, criminal irresponsibility is absolute before 12 years of age, and penal majority is set at 18, but there is the possibility of lowering this threshold for serious crimes and reported to the minor’s personality (relapse). Circumstances related to minority: a kinder sanction regime – punishments privative of freedom of at least 2 years for minors aged between 16 and 18 or at most a year for those under 16; the sanction regime can be extended to 21, taking into account the “character” of the judge and the circumstances of the crime. Particularities: educational measures – “work for the benefit of the community”; the crimes are not recorded in the criminal record, except for relapses. *Portugal*: jurisdiction ensured by the judge for minors. Criminal irresponsibility is absolute before the age of 12; prior to this age, they can be entrusted to the “Administrative Commissions of Protection”. Criminal majority is set at 16; the judge for children can only apply educational measures. Circumstances related to minority: a kinder sanction regime, the judge is forced to reduce the duration of the sentence of imprisonment for a minor between 16 and 18 if it is considered to be in favour of his social reinsertion. Particularities: arrest is forbidden for a period longer than 3 months before submittal to the court; psychological assistance is compulsory and the assistance of a lawyer is at request. *Sweden*: jurisdiction provided by a judge (unspecialized) and two specialized assistants. Criminal irresponsibility is absolute before the age of 12 and criminal majority is set at 15. Circumstances related to minority: a kinder sanction regime extended to young people until the age of 21. Particularities: No sanctions privatives of freedom are pronounced before the age of 21. *Switzerland*: jurisdiction provided by a judge specialized in most of the cantons. Criminal irresponsibility is absolute before the age of 15 with criminal majority set at 18. Circumstances related to minority: a kinder sanction regime - sanctions privative of freedom of at least 2 years for minors aged between 16 and 18 or at most a year for minors between 15 and 16; the possibility of educational assistance for young people until the age of 25. Particularities: temporary arrest is limited. In *France*, there is no threshold for the age when the minor can be criminal responsible so that all minors that committed penal crimes as authors or accomplices can make the object of a criminal prosecution if experts prove that they acted with discernment; criminal majority is set at 18. Jurisdiction is different from one case to another: the delinquent minors cannot be submitted to the common court, but they are subject to trial in courts for children or Courts with juries for children, the less serious contraventions are confined to the Common Police Courts. Educational measures prevail over sentences: minors under 13 with mental capacity cannot make the object of any educational measure; the minors between 13 and 16 make the object of educational measures, except for the cases imposed by „circumstances or the minor’s personality” when sentences, such as fines or privative of freedom can be pronounced; the application of mitigating circumstance of minority is obligatory, while the minors between 16-18 make the object of educational measures, but can be sentenced to punishments such as work for the benefit of the community; in this category of age, the court can refuse to apply the benefit of the circumstance of minority depending on the nature of the crime and the minor’s personality; not applying this legal provision must be motivated on this aspect. Therefore, these minors can be sentenced with exceptional title just like persons of age.(2)

*Methodological aspects of forensic psychiatric evaluation in European countries*

The position of European countries regarding the place of the psychiatric evaluation depends on the historical traditions of law and their belonging to the Anglo-Saxon system “common law” or the Roman law. There is also a quasi-philosophical concept when establishing the criminal responsibility from the stage of criminal prosecution with major differences depending on the contradictory or inquisitive character of the penal proceeding, which is different in various European countries. In certain European countries, the forensic psychiatric evaluation is not obligatory; there is also a large variability for the method of designating the experts. As a general rule, the task of ordering the evaluations and their conduct is incumbent on the competent authorities that can be prosecutors, judges or specialized judges depending on the law system of each country. In France, the evaluations are disposed by a specialized judge, the judge of instruction (equivalent of prosecutor) or another judge that judges a cause in which a minor is involved. The practice of forensic psychiatric evaluation of the child or adolescent for less serious crimes implies a social investigation, a psychological examination or more rarely, a psychiatric examination. It is incumbent on competent authorities such as PJJ (Protection Judiciaire de la Jeunesse/ Legal Protection of Youth) or other agreed by the Court. In the case of a serious nature, the psychiatric evaluation is systematically requested by Ordinance, by the specialized judge of instruction. The clinical analysis and the reply to the objectives of the Ordinance must take into account the specific aspects caused by the method of mental functioning of a personality in process of formation.(9) Just the simple diagnosis framing the case cannot bring the answers to the substance of the problem that is represented by the need to establish if we have a minor with conduct disorders, but it is extremely important to report the crime to the stage of psychological maturity of the minor. In general, the objectives of the evaluations resemble those for persons of age, requesting the determination whether “the examination of the subject presents mental or psychiatric anomalies, and in the case of a positive answer, to describe and mention the nosological framework to which it reports”. The next objective, connected to the first, is to mention whether the crime imputed to the subject is caused by the presence of those anomalies. The psychiatric evaluation must explain to what extent the criminal behaviour corresponds to the expression of evolutionary structural disorders or represents a moment of a development crisis; it must also explain the causality link between these disorders and the criminal behaviour before giving a treatment to the problem. Just the clinical examination is not enough, being necessary the contribution of other sources of information on the minor’s evolution. Therefore, it is necessary to provide access to elements of the file, including the data in the report of acknowledgement and research made on the spot; pretty useful are the information on the school activity, reports of educational instructors and data of social investigation. The experts are on the lists of experts near the tribunals and Courts of Appeal. The criteria of accession are well defined (seniority in the specialty, moral and professional probity, exams of accession and periodical reconfirmation). There was no specialization in forensic psychiatry until recently; currently they are prepared by University Diplomas or Interuniversity Diplomas of forensic psychiatry.

The system with the list of experts in France is not present in all the other European countries. Austria that previously has a resembling system cancelled these lists of experts so that they can be selected at the proposal of the parties or appointed by the institutions they belong to according to their work obligations based on their labour contracts. Germany has such a system with a list of psychiatrists, but the conditions of

accession are even less regulated.

Finland, Sweden, and Portugal opted just like Romania for national institutions of forensic medicine, some of them independent from the Ministry of Justice, and the evaluations are conducted by different methodological norms. Denmark and England appoint experts for performing psychiatric evaluations based on the territory, after a system that resembles the sectors of psychiatric care in France.

As one can easily notice, there is a large diversity at European level as for the legal provisions regarding the ages of criminal irresponsibility, the methodology of experts' practice, the methods of legal framing the deeds, the application or not of mitigating circumstances of minority and the system of sentences, which are attributes of sovereignty of each state in the European Union and the application of the principle of subsidiarity. A legislative harmonization in EU is imperiously necessary; it remains to be seen with what efforts, to what extent and how much time will be spent to achieve this aim.

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