

# PROBLEMATIC ASPECTS IN APPLYING THE JUDICIAL NORMS AND THEIR EFFECTIVENESS IN THE CASE OF DISABLED PEOPLE. A CASE-STUDY ON THE TENSIONS BETWEEN LEGISLATORS AND PROFESSIONALS CONCERNING INCLUSIVE EDUCATION

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## **Abstract**

*At European level, the education of the children with disabilities occurs in a variety of institutions (implemented models include schools and special institutions, integrated schools and / or inclusive schools), and in many countries they operate in two parallel systems - special and inclusive ones. In 2004 the Law nr. 272 concerning the protection and promotion of children rights were adopted, fully adopting the guidelines of the Convention of Children Rights. Concerning children with disabilities, including those with special education needs, the principles which establish their special education are prescribed by the National Education Law. Based on several human rights principles, including the main principles as inclusion, normalization and non-discrimination, the issue of people with disabilities stirs controversy in several areas.*

*The article underline the pivotal importance of conceptual delimitation and principles application, claiming a positive action generated by the need of compensation of disadvantaged people, with a focus on special education for children in order to promote the effective equalization of opportunities, the access and participation in school and social groups. The specialists in special education signalized<sup>1</sup> some issues in certain new legislative changes, in which some of the needed steps of education and inclusion process appear to be "burned", which raises the alarming arise of some dysfunctions generated by the new measures and regulations imposed without rest (or precautious measures), from "top to down".*

**Key Words:** *Special educational requirements / (human) rights of persons with disabilities / child protection / inclusion principle / normalisation principle / ecological approach*

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## **1. Introduction**

There always existed divergences, asymmetries and even tensions between the legislative framing and effective applying of laws on the one hand and the

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<sup>1</sup> In response to the legislative initiative launched in 2014 by the Romanian Government - *Draft Law on the Rights of Children with Disabilities* – Special Education Departments from two Romanian Universities written a memoir based on specialized study on the situation in special schools, where there were integrated both parents, teachers as well as specialists in special education. A series of deficits and vulnerabilities of this law, and also several proposals were exposed.

corresponding social realities on the other hand. Social realities are usually way too complex and dynamic and so they are hard to be fully covered by legislation.

One of such divergence is represented by the existing *two visions* concerning the way in which disability should be treated. In this respect there are two approaches: *the legislative approach* refers to the judicial treatment of people with disabilities, while the *professional approach* concerns those theoretical discourses and corresponding practices which are specific for psychology and special pedagogy.

Another *discrepancy* exists between the *conceptualizations*, especially in the case of children, *of disability* and *special educational requirements* (SER).

The disability approach of the European Union is based on the “social model” which is rooted in the rights of each people to have an equal and full participation in the life of the society. Thus, on international and European level it is acknowledged that the problem of disability should be treated from the perspective of human rights.

The already mentioned discrepancies have on their base two apparently opposing visions: the medical, respectively the social model concerning health (Seedhouse, 1990):

- *The medical model* accentuated the negative aspects of health, diseases and disability and considers that people are a sort of mechanisms which should be fixed once they are facing a problem (ibidem). At this point medical approaches enter the ground much more focused on the treatment of symptoms rather than on obtaining a fully healthy status. Thus, this is a reductionist approach of health and disability and, inevitably, it accentuates the isolation of the ill or disabled person in order to treat him/her in specific medical contexts.
- *The social model*, on the other hand, does not consider illness as a dysfunction, and accentuated the role of social and ecological factors both in generating the disability and in recovery. From this perspective, engaging the family, community and society in the recovery of the disabled person is essential. This approach is linked to the multi-disciplinary perspective on disability: biological, psychological, socio-cultural and ecological factors are understood to have a synergic contribution on the health and integrity of the individual (Downie, Fyfe and Tannahill, 1991).

An analysis of the special literature of health models, including those which are applied to the health and education policies (Beckman Murray and Proctor Zentner, 1985) suggests a too harsh delimitation between these two visions. Thus,

there is the need for an integrative approach as otherwise been suggested for decades. For instance, the *ecological model* (Bronfenbrenner, 1979) recognizes the role of the socializing processes and that of the social environment in the well-being of the individual.

Thus, we have the law on the one hand which is anchored in the needs formulated in international treaties and agreements, but which is also influenced by internal political interests and, on the other hand, we have the professionals who are effectively working with children and adults placed on several points of the handicap – deficiency – disability continuum.

## 2. Legislative anchors

At international level, the United Nations General Assembly adopted, on December 13 2006, the *UN Convention on the Rights of Persons with Disabilities*. This convention was ratified by Romania in 2010; in 2010, at the European level it was adopted the *European Strategy 2010-2020* for the people with disabilities, representing a renewed commitment to a barrier-free Europe. These documents recommend the development of new strategic documents that must reflect the approaches at global and European level, especially the deep changes related to the transfer from the medical model to the social model.

The new documents recommended the development of a coherent strategy and construction of an operational plan aimed to be effective on removing barriers and to facilitate the social inclusion with a focus on prevention and early intervention, including (for România) the *National Plan for the implementation of the Convention on the Rights of Persons with Disabilities*.

*The Convention on the Rights of Persons with Disabilities* (2006) provides a unifying framework and stipulates the right of persons with disabilities for inclusive education and individualized support, and the European countries have ratified this document. Under the Convention, educating people with disabilities in inclusive environments should be a priority in all countries.

Article 24 of the Convention emphasizes the need to ensure equal access of such persons to an inclusive education system at all levels and to provide the necessary support to touch this goal. *Special education* is influenced by these changes and finds new roles and responsibilities. The role of special schools depends on the education system in each country. The responsibilities of these centers are different, but basically they create and disseminate materials and methods of work; provide support for the mainstream schools and for the parents; provide training and courses for teachers and other professionals; offers short-term individual support for the students; and offers support on the transition to the labor market for them (Meijer, 2010).

In Romania the adoption of the *GEO* (Governance Emergency Ordinance) nr. 26/1997 concerning the protection of children in difficulty<sup>2</sup> served as a framework for significant reform processes and for the construction of a child protection system based on the principle of decentralization. In this sense, the Department for Child Protection was established within the framework of the government which has the role of coordinating and policy elaboration in the field. Starting from 1998, county level (and sector level in the case of Bucharest) public services for child protection have gradually overtaken those foster care institutions which until then had been subordinated to other central institutions.

In 2004 the *Law nr. 272 concerning the protection and promotion of children rights* were adopted. This law fully respects the guidelines of the *Convention of Children Rights* and extends the actions from the protection of children in need to the protection of children rights in general.<sup>3</sup>

From the viewpoint of the institutional construction, the *Law nr. 272/2004* established the National Authority for Children Rights Protection (Autoritatea Națională pentru Protecția Drepturilor Copilului) which is a central authority for coordinating the implementation of children rights in accordance with the *Convention of Children Rights*. The Authority fulfills also the role of monitoring the applying of children rights.

Lately, this institution (similarly to other institutions like the National Authority for People with Handicap) was dissolved and its activity was overtaken by the Ministry for Work, Family and Solidarity.<sup>4</sup> The same normative act dissolved in 2010 the National Institution of the Prevention and Fight of Social Exclusion of Handicapped Persons (*Institutul Național pentru Prevenirea și Combaterea Excluziunii Sociale a Persoanelor cu Handicap*), which had the duty to issue analyses and comparative studies in the field of disability. However, the duties of such authorities have not been transferred to other institutions.

Concerning children with disabilities, including those with SER, the principles which establish their special education are established by the National Education Law<sup>5</sup> and they are the following:

- guaranteeing the right to education for each children;
- children have the right to learn together, irrespective of their difficulties and differences;

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<sup>2</sup> Government Emergency Ordinance - *GEO no. 26/1997 on the protection of children in difficulty*, republished in Official Gazette nr. 276/1998.

<sup>3</sup> *Law no. 272/2004 on the protection and promotion of children's rights*, published in Official Gazette no. 557/2004.

<sup>4</sup> Government Emergency Ordinance - *GEO no. 68 of 30 June 2010 on measures to reorganize the business Ministry for Work, Family and Solidarity and institutions subordinated, coordinated or under its authority*, published in Official Gazette no. 446/2010.

<sup>5</sup> *National Education Law* from 1 of January 5, 2011.

- each child is unique and has a specific potential for learning and development;
- school and community ensures equal opportunities for accessing education for each children;
- ensuring specialized services centered on the special needs of children with disabilities;
- correlation of the types of education and form of schooling with the functions and aims of the education, with the general and specific objectives of the education and with the final objectives of education;
- ensuring the connection of education through complex activities.

In this context, on the European level the following directions can be outlined:

- a) in those countries where exist special schools as well as integrative or inclusive schools there exist also diverse forms of collaborations between such structures (and special schools are frequently transformed in resource centers for inclusive schools);
- b) many countries have introduced laws which effectively sustain inclusive education. A high percent of pupils with disabilities are educated in special schools in countries where there is a well established educational system; such schools correspond to specific needs in accordance with the disabilities and educational requirements of these pupils.

School centers for inclusive education include a series of therapeutic cabinets: for language therapy; for psychometric education; physical therapy (kineto-therapy); psycho-diagnosis; psychological concealing. Due to these cabinets such schools can offer prevention services as well as diagnosis and intervention for the whole community in which they are situated. In this way, such schools are ensuring the practical application of the psycho-pedagogic principle of early intervention.

Such centers can also be considered as resource centers and centers for documentation for the families of children with disabilities as well as for the whole community, a fact which illustrates the practice of the entrepreneurial education. The relationship between inclusive and special schools is a complementary relationship, especially in such cases when there arises the problem of therapeutic and educational treatment of a child with sensorial disabilities.

### **3. Psychological-pedagogical arguments**

In response to the legislative initiative launched in 2014 by the Romanian Government - *Draft Law on the Rights of Children with Disabilities* - a memoir based on specialized studies - *Report concerning the legislative proposal in*

*regard to the rights of children with disabilities* (2014), conducted by the Department of Special Education (Psycho-Pedagogy) at the Babes-Bolyai University of Cluj-Napoca and the Department of Special Education at the University of Bucharest, included one illustrative study on the situation in special schools, where there were integrated both parents, teachers as well as specialists in special education.

This research (*Study on Special and Integrative Education* - Roșan, Runceanu, Costea-Bârluțiu et al., 2014) indicates that:

- Early education and inclusive education are achieved since the kindergarten regardless of the type of disability;
- Special education is more appropriate to the needs of children with disabilities regardless of the type of disability;
- There are significant differences between the options for special education vs. general (mass) education according to the professional category included in the analysis;
- Irrespective of the type of disability, parents of children expressed dissatisfaction about the opportunity to integrate children in special education schools or general education ones, regardless of type of disability; the adequacy of the educational needs of these two forms of education being seen differently in the research sample;
- There are significant differences between the options for special education vs. general (mass) education by the investigated professional category;
- The parents of children with disabilities have unfavorable views on both special education and mass education, related to the suitability of the educational needs of children with disabilities regardless of its type.

The memoir then reports a number of serious *deficits* of the *Draft Law on the Rights of Children with Disabilities* and provides a range of solutions based on scientific premises and best practices within the educational systems of the EU countries and the US. The memoir shows also *the main vulnerabilities of the law*, signaling for the special consultants (psychologists, psychologists, speech therapists, etc., i.e. inclusive education specialists) within the special committees of the Romanian Senate, the followings:

1. The law is deficient in scientific definition of the concept of disability and does not refer to all types of disabilities (neuromotor disabilities, autism spectrum disorders, multiple disabilities / associates disabilities);

2. The law does not consider the concept of *adaptive behavior*. Specialists show that the severity is determined by the *functional ability, not based on IQ, or adaptive functioning compared to rules the same age group*, and should be evaluated in *three areas*: (a) conceptual deficits: language, reading, writing, mathematics, reasoning, knowledge and memory; (b) social deficits: skills of interpersonal communication, friendship, social judgment, empathy; (c) practical deficits: personal

care, organisational skills in school and work activities, money management, job's responsibilities;

3. The law establishes a single evaluation of children with innate intellectual disabilities (an unfortunate formulation and uncoated scientifically) through 18 years and nowhere speaks of retrospective diagnosis as required, and who is performed in the EU and the US as a result of various errors, including assessment ones, that may occur. Moreover, the law *does not introduces the concept of screening*, considered essential in preventing disability or in aggravation of the functional consequences thereof, but is concerned to establish the disability state;

4. There is not clearly stated the role of the Centre for Early Intervention, and if it replaces special school, being well known that in special schools there was early intervention centers;

5. Early intervention is performed in the first 3 years of life, followed by the age 6-7. What happens after 7 years with children with severe disabilities, given that this bill provides schooling for children with disabilities only: general schools, inclusive schools, non-formal education units and occupational schools (skills centered). But this provision is not supported by the infrastructure, how long can not be achieved the enrollment in educational institutions and non-formal occupational schools that are not there or are not clearly defined as units of formal education or at least the way in which the special schools will be transformed into occupational (skills centered);

6. The law stipulates that specific intervention services (speech therapy, physical therapy, cognitive stimulation, compensatory therapies) must be included on formal establishments. But are not created the financial circumstances and methodologies for applying the measures, raising the issue of the intention of the legislators that these units would take over the infrastructure and material resources of special schools;

7. The law introduces the discrimination for teachers who will work with children with disabilities in the psychological assessment and also are discriminatory selected the experts who will perform a psychological evaluation of teachers. The same segregation or discrimination occurs when its determining that NGOs can have warrants of monitoring in schooling of the school units proposed by the law;

8. The law does not explicitly show what means the availability and the ways by which it can be achieved; the same situation appear on the adapting of the curricula. Thus it is not mentioned the concept of Universal Design underpinning accessibility, or concepts of curricular adaptation, curricular augmentation and curricular change that can really operationalize a curriculum tailored to the needs of children with various disabilities.

9. The law does not provide guidelines about how the exclusive education of children with sensorial disabilities should be realized.

10. The law stipulates that the Centers for Early Intervention and Occupational (Skills) Schools are subordinated to the General Directorate for Assistance and Child Protection and not to the Ministry of Education, which is considered by the authors to be inconsistent with the constitutional educational goals. It indicates the need for intervention and early education centers to operate under the auspices of the Ministry of National Education.

11. Instead to encourage evidence-based research for the rehabilitation and recovery of children with disabilities or therapeutic interventions or to stimulate the specialised services payment by the House of Health Insurance, the law provides funds settlement from House of Health Insurance for the supply of homeopathic products and alimentary supplements.

12. The law requires the existence of an independent civil society observer at the hearings on disputes for children with disabilities, which is considered ambiguous in the current text of the law.

*Several proposals* can be drawn from this statement, signaling a series of errors and vulnerabilities of the law proposed for approval, as follows:

- The definition of *disability*, of *adaptive behavior*, of *accessibility* and of the ways by which these concepts can perform, and the explicitness of curriculum adaptation from a conceptual point of view.
- *Early Intervention Centres should operate under special kindergartens where are specialists and appropriate infrastructure* for assessment and intervention.
- All teachers should be evaluated psychologically, not just those working in inclusive school. I another proposal is that experts in psychological assessment to be represented not just by those recommended by NGOs legitimate to monitoring the disability, but in order to eliminate the favoritism (associative, political, etc.), to be clear established who can evaluate the level of expertise of specialists from NGOs mandated to monitor the disability.
- Clarifying the functional role of the independent observer to the hearings on disputes for children with disabilities.

As such, it is considered that the law does not correspond in terms of scientific and methodological content of any pragmatic point of view, since the abolition of special education will destroy an effective intervention for qualified specialized training and socio- professional insertion of people in difficulty, with future costs that can not be quantified and supported by the current socio-economic conditions.

In addition, experts consider that the proposed law eludes scientific, educational, therapeutic standards, and also reduce the rehabilitation chances of children with disabilities, ignoring the scientific-educational experiences and recuperative programs from Romania and worldwide.

Therefore, the authors of the statement demanded the withdrawal of the law in his initial form and its development by involving all stakeholders in this issue, in order to achieve a law for the benefit of children with disabilities.

#### 4. Discussions and conclusions

With regard to *tensions on the definitions of the concepts*, it is clear that disability is only a part of the Special Educational Requirements (SER), which includes other groups of children (children with learning difficulties and / or behavioral disorders, children with various social-cultural disadvantages and / or language disabilities - following the OECD definition of 2000), including the children with "additional education needs, complementary to the general objectives of education, tailored to the individual features, adjusted to certain particularities of the deficiencies / disabilities or disorders / learning disabilities or other issues, and a complex assistance (from various fields: medical, social, educational, etc.)", so not only those with certified disabilities, thus requiring - compared to normal children - special support (additional), especially in terms of education.

Thus, the conceptual delimitation claims the importance of a positive action, i.e. affirmative action, generated by the need of disadvantaged compensation. Basically, without this support there cannot be achieved the effective equalization of opportunities, the access and participation in school and social groups, as stated by the experts.

A relative confusion between the way they are dealt with Special Education Needs and disability can be felt also in legislation (see the OECD Report: *Education policies for the risk situation' and for the disabled students from South-Eastern Europe*, 2007).

Likewise, it is noted that "One of the major problems in understanding of the size and severity of disability worldwide phenomenon is the considerable variation that exists in its definition and classification." (UNICEF, 2006: 95)

The policies and the practices relating to the education of disabled people in Europe reflect a diversity of situations specific to each country. Educational models implemented include schools and special institutions, integrated schools and / or inclusive schools. Therefore, at European level, the education of the children with disabilities occurs in a variety of institutions, and in many countries they operate in two parallel systems - special and inclusive ones. In general, special schools in Europe are transformed into resource centers and *are not dismantled* as it is required by the law subjected by the mentioned specialists pleading.

Based on several *human rights principles*, including the main principles as inclusion, normalization and non-discrimination, the issue of people with disabilities stirs controversy about: on what premises their application turns, what is the way of their implementation and by which mechanisms of functional

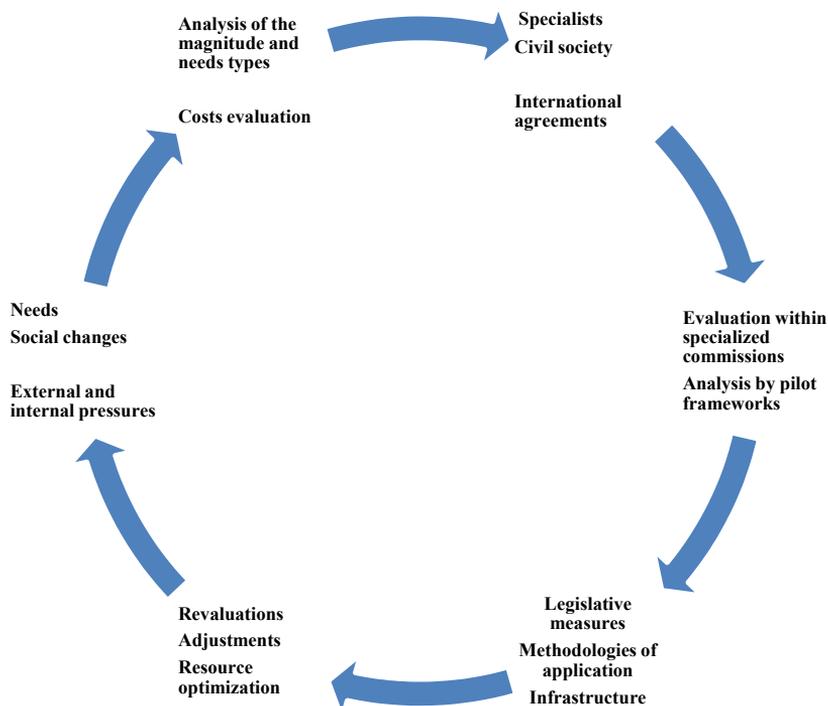
integration and optimal assimilation of the measures, among the target group, but also among the experts and interested professionals.

Another issue concerns the *perspectives and ideologies* underpinning of change initiatives. In the case study that we presented, it appears in the background, a tension between medical and social model.

The proposals in the statement made by representatives of psychopedagogical field tried to bring elements of *ecological vision, integrative and interdisciplinary*; their arguments are based on needs, and less on macro-vision of nature as the bill proceeds. The legislative proposal is obviously anchored in international commitments and proceeded to fulfill agreements without making a systematic assessment of the appropriateness of such changes on many levels based on real needs analysis, through a evidence-based strategy.

In the figure below, we plotted the mediated circularity that exists between the main elements of the decision-making process. One can see that in many of the new legislative changes, some of the steps are "burned", which raises the alarming possibility of certain dysfunctions generated by the new measures and regulations imposed without rest (or precautions measures), from "top to down".

Figure 1. *The causal circularity and the mediator role of the specialists in the process of needs coverage through legislative measures*



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