

CONSTITUTIONAL PROTECTION OF CHILDREN AND YOUTH IN ROMANIA

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Abstract

The exercise of fundamental rights recognized by the Constitution of Romania presents particular features concerning children and youth, derived primarily from the legal and biological situation of these categories. Thus, although article 16 of the Constitution proclaims the absolute equality of citizens before the law and public authorities, without privileges and discrimination, children and young people benefit from so-called positive discrimination, resulting from the establishment of special protection.

A series of legal and constitutional stipulations are built around this special protection: exercise of the right to information in order to assure the protection of young people, provision of social scholarships to children coming from disadvantaged families and to those institutionalized, encouragement of youth and adults education in respect for national cultural values and national traditions, or the derogation provisions of employment of young people.

Our study highlights all these special means of constitutional and legal protection, confirmed by the jurisprudence of the Constitutional Court.

Key Words: *children, youth, protection, Constitution, fundamental rights, jurisprudence of Constitutional Court.*

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1. A special category of fundamental rights

Approaching the issue of children and young people rights, a subject at the same time dynamic, with vast valences and always current, we must ask ourselves, first of all, if we can really identify such rights or if we are in the presence of applying general rights recognized by the Constitution of Romania in the special case of this category of persons. In other words, are there specific rights for children and young people or is it a circumscribed exercise of a special status, as in the case of other categories, such as people with disabilities, women, etc.? This connexion from general to particular cannot be ignored, children's rights representing an integral part of human rights. Nevertheless, the promotion of these rights cannot be limited only to human rights in general, but they must obtain a special protection, expressing the special social status recognized to a child, as a human being with specific needs and rights according to their age and development.

In Romania, the system of children and youth rights is regulated by the Constitution and special laws, in accordance with the international conventions.

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From the analysis of Title II of the Constitution of Romania, it may be easily noticed that many rights and freedoms enshrined at constitutional level regard children and young people directly: right to education, right to work, right of children and young people to social protection, exercise of the right to information so that it does not bring prejudice to the protection of young people, etc. At domestic level, the constitutional mechanism of protection of children and youth is detailed by the Law no. 272/2004 on the protection and promotion of children's rights and Law no. 350/2006 – Young People Law. Internationally, the UN Convention on the Rights of the Child, assumed by Romania by Law no.18/1990, represents the cornerstone of the protection of children's rights and their recognition as autonomous holders of rights. The Convention echoed at European level, too, in the practice of the European Court of Human Rights, which, in the absence of express provisions in the text of the European Convention, has developed a rich jurisprudence of children's rights, and, more recently, by inserting aspects of children's rights in the Charter of Fundamental Rights of the European Union, article 24.

In the following, we will focus on the provisions of the Romanian Constitution relating to children and young people and their rights, as well as on the jurisprudence developed by the Constitutional Court of Romania on these rights, but not before we make some clarifications concerning the subjects of this special protection.

The Fundamental Law does not specify the criteria on which it can be identified the persons falling within the category of protected beneficiaries under discussion, namely children and young people. However, according to Law no. 272/2004, a child is a person below the age of 18 years and that has not acquired full legal capacity, under the law. The legal definition is consistent with the provisions of article 1 of the UN Convention on the Rights of the Child. Under the Romanian law, the following human beings shall be protected: children of Romanian citizenship found on the Romanian territory; children of Romanian citizenship found abroad; Stateless children found in Romania; children seeking or receiving a form of protection under legal regulations of the status of refugees in Romania; children of foreign citizenship found in Romania, in emergency situations established under the law by the competent Romanian public authorities. Children of Romanian citizenship found in Romania enjoy the plenitude of rights guaranteed by the Romanian legislation.

We must also mention that according to Law no. 350/2006, by young people it shall be understood citizens between 14 and 35 years.

An important issue that ought to be observed is that, in the matter of children and young people rights, there is a particular application of the principle of equality. Although article 16 of the Constitution proclaims that all citizens are equal before the law and public authorities without privileges and discrimination, children and young people benefit of a special protection resulting from their special social and biological status.

The doctrine sometimes qualifies this special protection as “positive discrimination”, a term that we consider to be particularly unfortunate. In fact, this protection is recognized to all those who benefit from it, on account of belonging to a group that *virtually* is in a disadvantageous position, inferior to other persons, in a given situation. This relationship is appreciated *in abstracto*. When according this protection, there is no relevance that, in a particular case, the presumed disadvantage would be missing. Some authors distinguish between formal equality, regarding the equal treatment of every individual both by public authorities and by law (equality before the law, before the justice, equality between women and men, etc.) and real equality, which aims precisely this “positive discrimination”.

A particular application of the principle of equality is found in article 48 paragraph (3) of the Constitution, under which, children born out of wedlock are equal before the law with those born in wedlock.

We are not in the presence of a discriminatory treatment even if the establishment of parentage to father differs for the child born in wedlock to the child born out of wedlock. Recognition of paternity of the child born out of wedlock may be challenged by any interested person, the legislature giving *locus standi* to all persons having a patrimonial or a non-patrimonial interest, precisely to defend the minor’s interest to have a civil state in line with reality, the first interested in establishing paternity being the child out of wedlock. Therefore, from this point of view, there is no discrimination between children born in wedlock and those born out of wedlock because, as it is regulated, the denial of paternity seeks to rebut the presumption of paternity. Furthermore, the regulation of contesting the recognition of paternity outside marriage is also necessary. The purpose in both cases is to establish the paternity of the child according to reality without discrimination between children born in wedlock and those born out of wedlock¹.

2. A protection focused on the child’s interests

If we should find a red wire traversing through the whole regulation, both constitutional and legislative, on the child’s rights, it would be pursuing the sole interest of the child. Moreover, we can find the roots of this principle since Roman times, when the special status of the child was determined from the moment of his birth, and when his interest required it since its conception, according to the principle of *infans conceptus pro nato habetur, quotienes de commodis eius agitur*.

European Court of Human Rights held in its case-law that the expulsion of a stateless person who was married and with two children having the citizenship of the State that ordered the expulsion was contrary to the Convention on Human Rights and Fundamental Freedoms. This conclusion emerged because such a measure, if it is not justified by a legitimate aim and if it is not necessary in a

¹ Constitutional Court, Decision no. 1554 of 7 December 2010, the Official Gazette no. 106 of 10 February 2011.

democratic society, constitutes an interference with family life (case of *Al-Nashif v. Bulgaria*, judgment delivered on 20 June 2002).

According to Law no. 272/2004, the exercise and fulfilment of parental rights and obligations must always consider the best interests of the child and it must seek to provide material and spiritual welfare of the child, in particular by taking care of the child, by maintaining personal relationships with him, by ensuring his growth, education and living costs, as well as by his legal representation and management of his assets. Where parents jointly exercise parental authority, in the event of disagreement between them on the exercise of parental rights and obligations, the guardianship court, after hearing both parents, decides the best interest of the child. Related to this matter, it should be noted that the concern for children rising should not be approached in a unilateral manner, reported only to women but also to men, in a broad application of the principle of equality and, from this perspective, the situation of the two sexes is comparable.

From the case law of the Romanian Constitutional Court it results that the application of the principle of equality for children and young people must be done in the best interest of the child, which is a principle enunciated by article 3 of the Convention on the Rights of the Child.

Thus, the stipulation by law of the rule after which the court will be entitled to reject the application for declaration of invalidity of adoption, if it finds that keeping the adoption is in the best interests of the adopted person, it is not contrary to the rules and principles of the Constitution. On the contrary, given the purpose of adoption, namely increasing and educating children in a family environment, this stipulation is fully consistent with article 49 paragraph 1 of the Fundamental Law². Furthermore, the postponement of imprisonment or life imprisonment when a female convict is pregnant or has a child under one year was established by the legislature especially to protect the interests of the child, so as to be granted the opportunity to be nurtured by his mother in the period assessed as having the greatest need of this care, stipulation consistent with the provisions of article 49 of the Constitution on the protection of children and young people³.

The Constitutional Court decided that between the adopter and the adopted child it cannot be an equal legal treatment, since they cannot be in the same legal situation when talking about the possibility of disposing of adoption. The law denies the adopter's right to request the dissolution of adoption, because the adoption is not concluded in his interest, but only in the interest of the adopted child, and it is not, by its nature, a contract that can be terminated by one of the contracting party by resolution of termination, for failure by the other party to comply with the assumed obligations⁴.

² Constitutional Court, Decision no. 1023 of 14 September 2010, the Official Gazette no. 739 of 5 November 2010.

³ Constitutional Court, Decision no. 413 of 12 October 2004, the Official Gazette no. 1056 of 15 November 2004.

⁴ Constitutional Court, Decision no. 434 of 21 October 2004, the Official Gazette no. 80 of 24 January 2005.

In the same context, establishing the subsidiarity of the international adoption towards the national one it does not give expression to discrimination, and, furthermore, it represents a strong guarantee of protection of the child's interests. The fact that by law it is established a certain order of preference does not constitute discrimination. Such discrimination would mean total exclusion of certain category of persons from the right to adopt, because they are foreigners or Romanian citizens living abroad. Or, the law does not exclude the right of these people to adopt Romanian children, but, on the contrary, it recognizes this right, under the conditions we have already mentioned. Subsidiarity implies here a measure of family policy, which is fully compatible with the principle of best interest of the minor to be adopted⁵, given that international adoption involves moving the child abroad, thus integrating him into another linguistic, social, cultural, religious environment, which can constitute only an exceptional measure, in relation to the principle of continuity in the growth and education of the child⁶. Promoting the supreme interests of the child must be also monitored when a judgment of divorce is delivered, when the constitutional protection enshrined in article 49 of the Constitution is made by giving the child's custody to one parent, who exercises his parental rights, the other parent enjoying the right to have personal relations with him and to watch over his growth, education, teaching and professional training⁷.

By derogation from the rule according to which every right gives expression to a legitimate interest, the parent's right to have personal relations with the minor is recognized, as shown above, in consideration of the exclusive interest of the child. A particular application of this right can be extracted from the provisions of articles 2 and 8 of the European Convention on Human Rights. According to these provisions, the interference by a public authority with the exercise of this right cannot be admitted, except the situation in which it is required by law and constitutes, in a democratic society, a necessary measure for the national security, public welfare of the country, prevention of disorder or crime, for the protection of health, morals, rights and freedoms of others. The Court in Strasbourg, in its case-law (Judgment of 22 June 1989 in Case Eriksson v. Sweden), related the application of this provision to the parent's right to receive an active and positive involvement from the State so as to preserve a bond with the child. In order to respect the above EU provision, the national authorities have, therefore, the concrete obligation to take measures to ensure this connection, obligation bound to respect the rights of each person in such situation, and primarily to observe the interests and rights of the minor child. Thus, in the Judgment of January 25, 2000 (Case *Ignaccolo Zenide v. Romania*), the European Court of Human Rights ruled that where the interests of the child would suffer from the contact with his parents, the national authorities are obliged to ensure a fair balance between all interests. In respect of such an

⁵ Constitutional Court, Decision no. 62 of 21 October 1993, the Official Gazette no. 49 of 25 February 1994.

⁶ See Avram M., 2013, *Drept civil. Familia*, Bucharest, Hamangiu, p. 411; also see Cetean-Voiculescu L., 2012, *Dreptul familiei*, Bucharest, Hamangiu, pp. 280-296.

⁷ Constitutional Court, Decision no. 1045 of 14 July 2009, the Official Gazette no. 551 of 7 August 2009.

obligation, even the denial of the right to maintain contact with the minor child by conducting visits is acceptable, when there is danger of some consequences that would seriously affect the normal development of the child in his family, consequences due to serious tensions between parents (Judgment of 8 July 2003 in Case Sahin v. Germany).

In the practice of the Romanian Constitutional Court, the fact that the minor is hostile to maintain personal relationships with the other parent is far from being an argument in support of the objection of unconstitutionality of article 43 paragraph 3 of the Family Code (now article 401 paragraph 1 Civil Code) - the parent's right to have personal relations with the minor. In most cases, parents have towards their children deep feelings of affection, generosity and altruism, even if, sometimes, their expression may induce a contrary impression because of an infant mental impairment, the lack of discernment or an insufficient discernment. Thus, the severity or the exigency of a parent, motivated and driven by salutary reasons, may generate the child's hostility when the parents are separated, and the other parent is comparatively highly concessional. Moreover, in such circumstances, it may happen that the parent who enjoys custody to burst out angrily, sending to the child the hostility felt towards the former husband, hostility perhaps justified in his view, but not likely to disqualify the former husband as a parent, being lacked of proper justification from the point of view of the child. Therefore, the affective and emotional instability of the minor, based on an immature mind and lack of life experience, deprives him of the opportunity to realize which is his true interest and, often, to discern between good and evil. In this regard, recognizing to the child a right of veto to assert the rights conferred by law to his parent is tantamount to disregard, on the one hand, the logic and purpose of the legal text deducted to control and, on the other hand, the whole regulation in matter with which it corroborates. Therefore, the text that allows the parent's right to have personal relations with the minor is not contrary to the constitutional provisions⁸.

Nationally, the reflection of the provision enshrined by article 8 paragraph 2 of the European Convention on Human Rights is found in the recognition of the action requiring the forfeiture of one parent from the exercise of parental rights, the recognition of *locus standi* exclusively for the guardianship authority, and not for the other parent. This fact does not represent a violation of article 48 of the Constitution, because there is no self-interest of the right holder. Therefore, it is natural that the recovery of his right, in the extreme situation in which he tends to annihilate the rights of the other parent, to be subject to a restrictive regime, involving the state authority⁹.

Another materialization of the State's obligation to ensure the maintenance of the bond between the parent and his child is represented by the incrimination

⁸ Constitutional Court, Decision no. 82 of 25 February 2003, the Official Gazette no. 189 of 26 March 2003 and Decision no. 411 of 16 May 2006, the Official Gazette no. 530 of 20 June 2006. Also see Constitutional Court, Decision no. 1045 of 14 July 2009, the Official Gazette no. 551 of 7 August 2009.

⁹ Constitutional Court, Decision no. 526 of 31 May 2007, the Official Gazette no. 559 of 15 August 2007.

of the person entrusted, by court order, with the care and education of the minor, person who repeatedly tried to hinder any of the parents to have personal relations with the minor, as determined by the parties or by the competent body. By this measure, the State protects not only the intimate, family and private life, but also the special protection and assistance system for children and young people in realizing their rights¹⁰.

3. Valences of the rights that are recognized to children and youth

3.1. Right to education

The right of children and young people to education offers huge potential for promoting their rights, because education is a precondition for the exercise of other rights such as the right to development, repeatedly stated in the Convention on the Rights of the Child, or the right at work. This right should be interpreted broadly, and it should not be misinterpreted for the education offered in schools, which circumscribes to the right to education, otherwise a component of the right to education.

According to article 48 paragraph 1 of the Constitution of Romania, the family is founded on the right and duty of parents to ensure the upbringing, education and instruction of children. So, as referring to the content of the right to education, it is distinguished not only by the multitude of components, but also by combining freedom with obligation.

The right to education of children and youth represents an important component of the right to education. Its purpose is to educate the person for this one to become, from a professional and civic point of view, able to play a useful role in society¹¹.

The first paragraph of article 32 of the Constitution of Romania - article fully dedicated to ensuring the right to education - lists the main forms of education: compulsory general education, secondary and vocational education, higher education, as well as other forms of instruction and postgraduate improvement. The other paragraphs state the fundamental principles of exercise of the right to education: achieving education in Romanian, ensuring the rights of persons belonging to national minorities to learn or to be educated in their mother tongue, free education, supporting social disadvantaged categories, university autonomy, and freedom of religious education.

Some of these principles represent a particularly interest for the constitutional protection of children and young people:

- although the constitutional text stipulates the achievement of the compulsory education in the official language – Romanian, according to paragraph 3 of article 32 of the Constitution, children and youth belonging to

¹⁰ Constitutional Court, Decision no. 474 of 20 April 2010, the Official Gazette no. 324 of 18 May 2010.

¹¹ Constantinescu M., Iorgovan A., Muraru I., Tănăsescu E.S., 2004, *Constituția României revizuită, comentarii și explicații*, Bucharest, All Beck, pp. 67- 68.

national minorities may learn in their mother tongue and may be educated in this language. All children and young people have the right to learn in a foreign language of international use (article 32 paragraph 2);

- free education, enshrined in paragraph 4 of article 32 of the Constitution, implies obligations and material benefits from the state, especially in terms of access to compulsory education. The constitutional rule which provides free education must be understood in terms that the education carried out in establishments of the State cannot be conditioned by any tuition fees. Or, the stipulation of a sign that individualize and differentiate students of various schools does not affect the free education, because the necessary sums for such a purpose does not have such destination, but aim at increasing safety in schools¹².

However, the Fundamental Law does not exclude the possibility of state education with tuition fees, according to the principle of autonomy of the universities enshrined by article 32 paragraph 6. Therefore, the institutions of higher education are allowed to prepare, together with students receiving free education, students who agree to pay tuition fees¹³.

As for free education, the same constitutional provision – article 32 paragraph 4 – has established the State's obligation to grant scholarships to students coming from disadvantaged families and to those institutionalized. The purpose of this provision is to facilitate access to education of disadvantaged children and young people, contributing to the social function of the Romanian State.

In this regard, the Constitutional Court ruled that the State's guarantee of the right to education is not affected by the grant of the survivor's pension, under certain conditions. Moreover, paragraph 4 of article 32 of the Constitution provides that the State education shall be free and grants scholarships to children and young people from disadvantaged families¹⁴.

3.2. Right to social protection

The Romanian Constitution guarantees a special social protection of children and youth through the provisions of article 41 paragraph 2, according to which young people have the right to special measures of social protection of labour, and through those of article 49, which refer to the special protection and assistance of these individuals in achieving their rights.

In order to ensure the necessary conditions for the harmonious intellectual and physical development of children and youth, the Romanian State will be obliged to grant allowances for children and benefits for the care of ill or disabled child. In its case law, the Constitutional Court pointed out that in the definition of persons entitled to benefits granted by the State under article 49 of the Constitution it does not provide for and it does not allow any other conditions but for the beneficiaries to be children, without any relevance if they follow or not any form of

¹² Constitutional Court, Decision no. 548 of 15 May 2008, the Official Gazette no. 492 of 2 July 2008.

¹³ Constitutional Court, Decision no. 165 of 1 April 2004, the Official Gazette no. 431 of 13 May 2004.

¹⁴ Constitutional Court, Decision no. 852 of 8 July 2008, the Official Gazette no. 563 of 25 July 2008.

education¹⁵. On the contrary, regarding the right to allowance for the rise of the child and the amount thereof, it may be noticed that this particular right does not represent a fundamental right under the Constitution, but a mixed form of insurance and social assistance. According to article 49 paragraph 2 of the Constitution, this right shall be established by law. Changing the conditions for granting or the calculation of the parental allowance do not violate the State's obligation to grant allowances for children and benefits for the care of ill or disabled children¹⁶.

Conditioning the right to survivor pension of the child until graduation without exceeding a certain age does not violate any constitutional norm, as it is natural and necessary to set an age limit even where the young person continues his studies. Age of 26 years is a reasonable limit to which a young person can finish secondary education and higher education¹⁷.

Another dimension of the protection conferred by article 49 of the Constitution refers to protecting children against economic exploitation. Thus, the constitutional provisions of the above-mentioned text stipulate in paragraph 3 the prohibition of using children and minors in activities that might be harmful to their health, morals or that might endanger their life and normal development.

As we have already shown, according to article 41, young people have the right to special measures of social protection of labour. Moreover, paragraph 4 of article 49 of the Constitution stipulates the prohibition of employment of persons under the age of 15, so that from a legally point of view these young people do not have the capacity to work. This interdiction regulates in the domestic law an international rule according to which the minimum age for employment in a paid function or labour must not be inferior to the age that is compulsory for school attendance, and in no case under the age of fifteen¹⁸.

The interest of protecting young people requires that the safeguard measures granted to them to be exempted from the citizens' right of access to information, according to Article 31 paragraph 3 of the Fundamental Law.

3.3. Right of young people to participate freely in the political, social, economic, cultural and sporting life of the country

Paragraph 5 of article 49 imposes in the State's duty to help ensure conditions for the free participation of young people in political, social, economic, cultural and sporting life of the country. In this regard, the goal of county

¹⁵ Constitutional Court, Decision no. 277 of 21 March 2006, the Official Gazette no. 348 of 18 April 2006.

¹⁶ Constitutional Court, Decision no. 261 of 20 March 2007, the Official Gazette no. 283 of 27 April 2007. In this respect, also see Decision no. 749 of 26 October 2006, the Official Gazette no. 957 of 28 November 2006.

¹⁷ Constitutional Court, Decision no. 212 of 28 June 2001, the Official Gazette no. 665 of 23 October 2001. Also see Constitutional Court, Decision no. 749 of 26 October 2006, the Official Gazette no. 957 of 28 November 2006.

¹⁸ Council Directive 94/33 / EC on the protection of young people at work; Article 32 of the Charter of Fundamental Rights of the European Union.

foundations for youth and those of Bucharest is to ensure the development, organization and funding of specific programs, as well as instruction, education and training of youth in the spirit of humanist traditions, the values of democracy and aspirations of the Romanian society, giving expression to the constitutional provisions of article 49 paragraph 5¹⁹.

Also, the establishment of distinctive sign that individualize and differentiate students of various schools under agreement of Council of Parents' representatives and after the students express their opinion on this issue in consultation with their representatives give expression to the right of free participation of young people to the social life of the country, according to article 49 paragraph 5 of the Constitution²⁰.

From what has been stated above, we may see that the Fundamental Law of Romania does not only stipulate the need to protect children and young people, but it also establishes and recognizes some independent rights for them, such as the right to be consulted on matters that concern them directly.

4. Conclusions

Under the Constitution, the Romanian state assumes a positive obligation to respect, protect and guarantee the rights of children and young people. Thus, besides the general affirmation of human rights, the Fundamental Romanian Law particularly approaches the interests of children and young people who are considered holders of rights and not only human beings in need of protection. The whole regulation in matter takes into account and assumes the desire to guarantee the supreme interest of the child and the promotion of young people as the human potential of tomorrow's society.

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¹⁹ Constitutional Court, Decision no. 475 of 4 November 2004, the Official Gazette no. 41 of 12 January 2005.

²⁰ Constitutional Court, Decision no. 548 of 15 May 2008, the Official Gazette no. 495 of 2 July 2008.