

UNIVERSITY OF CRAIOVA
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Law

PhD Thesis

**THE PRINCIPLE OF CHILD'S
SUPERIOR LEGAL PROTECTION**
Summary

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SUMMARY

The paper conceived as PhD Thesis and entitled „ The principle of child's superior legal protection” is a scientific approach meant to analyze the particularities of the legal framework designed to protect children, legal framework characterized by „ unity in diversity”, unity in scope and diversity in the means of protection. By comparison to previous legislation, I underlined the novelties brought by the coming into force of the new Civil code without forgetting the still existing legislative omissions and inconsistencies. I emphasized the provisions which entitle me to ascertain that there is a principle of child's superior legal protection.

With a view to provide the thesis with unity and consistency I structured it into six chapters, each of these comprising multiple sections. Throughout the chapters I set out to research the objectives established when choosing the theme, to present the knowledge gathered so far in this field and to explain my own point of view. The thesis ends with the Conclusions, summing up the main ideas and proposals.

The first chapter, entitled”Preliminary considerations”, represents the introductory part of the paper containing generalities regarding child's legal protection.

A brief retrospection into the history of child's legal protection shows that children haven't always enjoyed the same protection as nowadays, especially because of the inexistence of the concept of child and childhood as values in themselves.

In Antiquity, the law referred to children especially in connection to inheritance law and property law, their protection being subservient to the protection of the family's patrimony. Although children's legal status progressed during the Middle Ages as compared to Antiquity, the idea of childhood, as we

know it today, lacked since, as soon as the child overgrew biologic dependency, he directly entered the adults' society, being welcomed as a "miniature adult".

There was a slow transition from the period when parents could behave like despots with their children, child abuse and neglect being regarded as a family matter, to the interest for and protection of children, and finally to child's superior interest, the process being characterized by the comprehension of the duties which the state has regarding child protection. It was only in the second half of the 20th century that explicit regulations regarding children's rights begun to appear, declarations of the rights of the child were adopted in 1924 by the League of Nations and in 1959 by the United Nations.

Ever since The United Nations Convention on the Rights of the Child was adopted in 1989, the concern for children and their legal protection became a topical issue with a constant presence on the political agenda and in the scientific, cultural, educational environment, at international, national and regional level.

Without identifying and presenting in extenso the content of the universal and European legal framework regarding children's protection, such an undertaking exceeding this paper, I pointed out the main legal instruments in the domain. From their content one can notice that nowadays children enjoy acknowledgement as persons and not as extensions of their parents, having rights which derive from this status and taking into consideration their bio-psycho-social particularities which can limit their legal capacity in certain situations.

I also presented an overview of the national law in the domain. I noticed that the terminology is not unitary, different terms being used, sometimes in the same field, to refer to the same notion, i.e. "child", "minor" and "minor child". Despite the de lege ferenda proposals to use a unitary terminology, the new Civil cod continues to use all three terms. I considered that the pleonastic expression

”minor child” should not be used when referring to child protection while ”child” and ”minor without competence” can be used as synonyms.

The national legal system of child protection means all laws which protect the child as a person in a special situation due to his age which translates into lack or insufficient judgment associated with limited life experience. The system is characterized by ”unity in diversity” unity in scope and diversity in the means of protection.

In the second chapter, entitled ”The protection of children by means of parental authority”, I analyzed the main means to protect a child, namely by his parents' authority. I defined parental authority and I pointed out that the institution, as we know it today, is the result of centuries of evolution and of countless transformations as a natural consequence of the development of human society, of religious, moral, economic and even politic influences.

I discussed about the duration of parental authority, insisting on the controversial aspects regarding the moment when parental authority begins and on the new provisions of the Civil cod regarding the ending of parental authority when the child acquires competence attached to adulthood earlier than at the statutory age.

I presented the principles according to which the protection of children by means of parental authority takes place, namely the exercise of parental rights and obligations according to the child's best interest; the equivalence of the legal status of the children born in or out of wedlock, of the natural and adopted children; the equality of parents; judicial dispute resolution. I underlined the fact that child's best interest is the corner stone the exercise of parental rights and obligations, showing the legislator's concern for the child's wellbeing.

I analyzed the content of the protection of children by means of parental authority, namely the rights and obligation regarding the child and his patrimony, underlining the new provisions of the Civil cod. Those rights and obligations are: to grow the child, to support him, to demand that he be given

back by the persons who unlawfully keep him; to establish the child's domicile; to have personal relations with the child; to supervise the child's growth and education; to administer the child's patrimony; to represent the child when concluding contracts and to give consent in order for the child to conclude contracts. From these legal provisions one can notice that parental authority was conceived to serve the child's interest of being raised and educated in the best conditions. Parents' obligations prevail, their rights being recognized only so that they can fulfill their obligations. The rights and obligations regarding the child prevail over those regarding the child's patrimony.

The fact that the legislator had in mind the promotion of child's best interest is underlined by the provisions of the Civil code regarding the way in which parental authority is exercised. The rule is that parental authority is exercised by the parents together. As a novelty parental authority isn't exercised together only when the parents are married but also after they divorce because the parental couple must survive the conjugal couple according to the saying "you can divorce your spouse but not your children". The exceptions, when parental authority is exercised by only one parent are also subordinated to the principle of child's best interest.

In the section dedicated to parental authority I pointed out a special situation arisen as a result of Romania becoming a member of the European Union, of the opening of the borders and liberalization of labour regarding Romanian citizens who wanted to work abroad. An immediate and visible result was the increasing number of children left at home, children who, in fact, no longer enjoyed parental supervision. In my opinion, the legislator should fill this legislative void and create a legal certitude for the paradoxical situation of these children in whose case, although parents should exercise parental authority, are in fact deprived of any protection.

As a guarantee that parental obligations are properly fulfilled, the legislator stipulated a series of penalties which can be applied to parents who

don't fulfill their obligations. I analyzed the sanctions which are applied both in the case of the obligations regarding the child and of the obligations regarding his patrimony. I also presented the new provisions regarding parents civil liability for the illicit acts of their children and the restraint order, meant to correct a legislative void which could encourage child victimization. I underlined the necessity to correlate the provisions of the Criminal cod with the provisions of the Civil cod regarding the applicability of art.307 of the Criminal cod.

The third chapter, entitled "Child's protection by guardianship", is dedicated to the study of child's guardianship and focuses on the novelties brought by the new Civil cod.

Regarding the historical evolution of the legal institution, I noticed that it has existed ever since Roman law, originally being designed to take care of the agnates' patrimony rather than of the incapable person. During the classical age the character of the institution changes, becoming a means of protecting the incapable, but the guardian was still considered rather an administrator of the goods as long as the child's supervision and education could be entrusted to another person. For the first time in our written law, the protection of the child was carried out by means of the institution of trusteeship which was mentioned as early as 1652 in Matei Basarab's "Îndreptarea legii". Legal provisions regarding guardianship can be found in "Calimah Cod" and "Legiuirea Caragea", standing out the state's intervention by means of specialized organs, namely "Comisia epitropicească" in Moldavia and "Obșteasca epitropie" in Romania, in child's protection.

I presented the definition, the legal regulation in the new Civil cod, the characteristics and the principles according to which guardianship is presently carried on. I noticed and found it positive that the legislator abandoned the mandatory character of the guardianship. I also pointed out that, as a rule guardianship is unique both regarding the child and his patrimony. But,

concerning the patrimony, the new Civil cod allows that the guardianship be exercised by a specialized person or legal person. Regarding the principles of guardianship, art.133 of the new Civil cod stipulates that it is exercised only in the child's interest. The continuous control and fast resolution of requests by the court is another principle, the court overtaking the guardian authority's prerogatives.

Regarding the beginning of the guardianship, the new Civil cod maintains the same situations as the ones in the previous law, from their formulation resulting the guardianship's subsidiary character. This means that guardianship can be instituted only when the child is deprived of parental care. In the new provisions the obligations for the persons who find out about a child deprived of parental care to inform the court is maintained. The information of the court is equivalent to bringing the case before the judge. The public prosecutor and the police have been omitted from the list of persons who have this obligation, but I strongly believe that the public prosecutor still can inform the court by virtue of the provisions of art.92 alin.1 from the new Civil procedure cod. The 5 days period since finding out about the existence of a child deprived of his parental care is replaced by "as soon as" .

Regarding the person who will be guardian the rule remains that of the competence the exception being the incompetence but, with the view to protect the child's best interest, the legislator extends the cases of incompetence. As a innovation, art.114 stipulates that parents can name a person to be guardian for their child, but he or she will be appointed by the court.

Just like in the previous legislation, guardianship is concerned both with the child and his patrimony. On the personal side, the guardian needs the agreement of the family council in order to fulfill his obligations, save the case when urgent measures must be taken. With a view to protect the child's best interest, the power of the guardian is limited when it comes to changing the

child's schooling or professional training which he was receiving when the guardianship begun. In order to make such a decision, the court must agree.

The exercise of the guardianship regarding the child's patrimony is regulated by art.140-150 of the new Civil cod, the regulation being much more detailed than the one in the former law so as to offer a better protection to the child's goods. Greater importance is given to the inventory of the goods and to the debts which the guardian and the members of the family council have to the child. The effective and permanent control by the court regarding the way the guardian fulfills his tasks is instated.

Regarding the ending of the guardianship, as novelties, I discussed about the fact that the obligations of the deceased guardian are transmitted to his heirs until a new guardian is appointed in order to minimize the effects that the demise of the guardian might have on the child's interests and rights. I pointed out that the court has the possibility to sanction the guardian who refuses to carry on with his tasks by fining him, the fine going to the budget. This could lead to permanent misunderstanding between the guardian and the child.

In another section of this chapter I presented the institution of the family council having the role of looking after the activity of the guardian and of controlling if he fulfills his obligations. I also presented the history of this institution as well as its organization, functioning and attributions.

In the forth chapter, entitled " Child's protection by trusteeship", I analyzed trusteeship as a subsidiary way of protecting the child.

I presented the historical evolution of the institution of trusteeship, starting from the Roman law up to the Family cod.

I then analyzed the notion and the content of trusteeship in the new Civil cod, showing that there is a trusteeship for the persons of legal age by means of which legal protection is assured to competent persons who can't look after their interests because of reasons independent of their competence. Then there is the child's trusteeship, the two institutions shouldn't be confused because their rules

are different. In the case of the trusteeship for the persons of legal age the rules from contracts are applied while in the case of the child's trusteeship, the rules from the guardianship are applied.

I also discussed about the cases when trusteeship begins and when it ends and about the trustee's liability.

In the final section I presented the special trusteeship from the new Civil procedure cod making a distinction between this institution and the trusteeship from the new Civil cod.

In the fifth chapter of the paper, entitled "The special means of protection for child deprived of parental care", I analyzed the special measures of protection from Law 242/2004.

Law 242/2004 underlines the primary role of parents and family in raising an educating the child as well as the fact that society's efforts should be pointed towards strengthening and supporting the family in assuming its responsibilities for the child. Any separation of the child from his parents and any limitation of parental rights exercise should be preceded by systematic provision of services, conciliation, therapy and mediation to the parents. Should the child be separated from his parents, he has the right to alternative protection which includes guardianship and special measures of protection regulated by Law nr.272/2004 and adoption.

Foster care, urgent foster care and specialized supervision as well as the procedure according to which these measures are taken are presented in different, cases from the recent jurisprudence being used to illustrate how the provisions work in practice.

The sixth chapter of the paper, entitled "The protection of the child in special situations" offers an overview of the legal provisions meant to grant protection to the child who finds himself in exceptional situations such as the refugee child, the child during armed conflicts; the child in conflict with the criminal law and the exploited child. From the analysis of the legal provisions

one can notice that in each situation the legal treatment of the child is different from that of the adult's, being comprehensive, aligned to international standards and subordinated to the principle of the child's superior interest.

The PhD thesis ends with the Conclusions identifying the fundamental ideas and proposals derived from the examination of the selected theme, synthesizing the main conclusions and proposals elaborated in the content.