



**ULBS**

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**THE PARENTAL AUTHORITY IN THE  
REGULATION OF THE CURRENT  
ROMANIAN CIVIL CODE  
(SUMMARY)**

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## INTRODUCTION

The decision to address the theoretical and practical issue of the legal institution of *parental authority* in the Romanian legal system was strengthened by my desire and conviction that I can contribute to the effort of in-depth scientific analysis of the regulations enshrined in the current Civil Code for this important legal institution of *family law*.

Conducting this analysis has given me the opportunity to capitalise on the results of the scientific research carried out as a seminar teacher in the field of *Family Law*, and the passion developed in time for the analysis of legal regulations on the protection and promotion of children's rights, as well as those aimed at the protection of the child by parents or alternative protection.

For the scientific substantiation of the thesis I have creatively and even critically capitalised on works published under the Family Code, especially after 1 October 2011, written by authors of an undeniable scientific prestige, among which I will mention I. Albu, I. P. Filipescu, Al. Bacaci, C. V. Dumitrache, C.C. Hageanu and E. Florian. A special role in devising my PhD thesis was played by the works of my doctoral supervisor, Prof. Teodor Bodoaşca, PhD, especially the book *Dreptul familiei*, 3rd edition, published in 2015 at the Universul Juridic Publishing House, as well as the numerous studies published by him in the journal "Dreptul" in 2009.

Considering that most of the thesis chapters also include comparative law, I also used representative scientific papers in the French, English and Turkish specialised doctrine.

I also paid special attention to the analysis of the enforced case law, both during the implementation of the Family Code and after 1 October 2011, when the current Romanian Civil Code came into force.

The presentation of various theses and jurisprudential solutions was not an end in itself, but, as I have said before, they were used creatively and even critically in order to substantiate my own opinions and, eventually, to formulate *de lege ferenda* proposals that would contribute to the process of improving regulations in the field.

In order to facilitate the achievement of the established scientific objective, I structured the thesis into five chapters, each grouping an important set of legal issues that come within the content of parental authority.

Chapter I, entitled "Introductory concepts on parental authority", includes analyses of: the legal meanings of the phrase "parental authority", the definition of parental authority, the analysis of the meaning of the term "child", the principles of parental authority, the duration of parental authority, the principles and duration of parental authority in comparative law (French, Anglo-Saxon and Muslim).

Chapter II, devoted to “The evolution of Romania’s domestic regulations on parental authority”, begins with the presentation of this legal institution in Roman law. I also opted for this start, since echoes of the old *ius civile* regulations, including those that dealt with *the parental power (patria potestas)*, have survived until the present day.

This chapter includes an analysis of the parental power in the main stages of the evolution of law in the Carpathian-Danubian-Pontic area, as follows: parental power in old Romanian law, parental power in the regulation of the Romanian Civil Code of 1864, and parental protection in the regulation of the Family Code). The presentation of these regulations, sometimes carried out in a detailed manner, has given me the opportunity to identify both the elements of normative progress, and the continuity aspects in the regulation of this important legal institution.

Chapter III is aimed at the detailed analysis of the “Content of Parental Authority” in the regulation of the current Civil Code, i.e. parental rights and duties, with respect to both the person and the property of a child. More specifically, the following are analysed: specific parental duties, disciplinary measures and physical punishment, the rights of a minor parent, religion of the child, the child’s name, the right and duty to supervise the child, the right to demand others to return the child, the child’s home, child support obligations, the right and duty to administer the child’s property, the right and duty to represent the child or to approve legal acts on his or her behalf, as the case may be.

Also in this chapter, the last section is devoted to a brief presentation of the content of parental authority in comparative law (French, Anglo-Saxon and Muslim).

In Chapter IV I distinctly analysed the legal issue of the “exercise of parental authority”, as it is done by both parents or only by one of them. In particular, I addressed important topics, namely: the exercise of parental authority by both parents on a consensual and equal basis; the presumption of tacitly reciprocal mandate between parents; the parents’ agreement on the exercise of parental authority; parents’ disagreements about the exercise of parental authority; the exercise of parental authority by both parents in the case of a child born out of wedlock, if they live together; the exercise of parental authority by both parents in the case of a child born out of wedlock if they do not live together; the exercise of parental authority by both parents in the event of divorce; the exercise of parental authority by a single parent in various typical situations (divorce, death of one of the parents, placing one of the parents under judicial interdiction, termination of parental rights for one of the parents, inability of one of the parents to manifest their will).

This chapter also includes a section which analyses the legal issue of the exercise of parental authority by persons other than the parents of the child, in the case of a child conceived by medical methods with a third-party donor, in the case of an adopted child, as well as in the case of taking a child special child protection measure. Just as in the previous

chapters, in this chapter I also briefly presented the exercise of parental authority in French, Anglo-Saxon and Muslim law.

The last Chapter, no. V is intended for the thorough analysis of the institution of “Termination of the exercise of parental rights” in the regulation of the current Civil Code. In this chapter, I analysed such aspects as the following: the legal nature of the termination of the exercise of parental rights; the conditions under which parental rights are exercised (the actions that lead to the termination and the effects of such actions); the procedure for the termination of the exercise of parental rights (competent court, application for termination, administration of evidence); the effects of the judgement to terminate the exercise of parental rights (the extent of the effects of the termination, the support obligation, the effects of termination in other matters, the establishment of guardianship); the reinstatement of the exercise of parental rights (the conditions and procedure for reinstating exercise of parental rights, the right of the parent whose parental rights have been terminated to have personal ties with the child).

The thesis also includes a selective bibliographic list, conclusions and *de lege ferenda* proposals.

As methods of scientific research, I used, above all, the analytical, historical and comparative method.

The analytical method has facilitated my systematic and in-depth logical and legal analysis of the legal regulations devoted to the legal institution of parental authority, as well as the jurisprudence or doctrine in the field. The use of this method has enabled me to identify a number of regulatory inaccuracies under current regulations, and to devise various solutions for their elimination.

I used the historical method to analyse the evolution of legal regulations for parental authority over time, to identify the elements of progress in the new regulations in the field, as well as the aspects of continuity regarding the regulation of the Romanian authorities’ legal regime in the Carpathian-Danubian-Pontic area.

Finally, the comparative method allowed me to decipher the different aspects, both between the old and the current regulations in the field, as well as between the domestic regulations and comparative law in the field of parental authority.

Keywords: parental authority, child's best interests, parental rights, parental responsibilities, child, parents, divorce, child's home, personal ties to the child, adoption, decree from exercising parental rights.

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## CHAPTER I

### INTRODUCTORY NOTIONS ON PARENTAL AUTHORITY

#### SECTION 1.1.

#### THE LEGAL MEANINGS OF THE PHRASE “PARENTAL AUTHORITY”

##### 1.1.1. Preliminary remarks

The authors of the current Civil Code use the expression *parental authority* to designate the “set of rights and duties that parents have to protect children, with regard to both their person and their possessions”. In fact, the provisions of Art. 483-512 of the current Civil Code are grouped under this name.

The expression *parental authority*, as well as much of the norms that make it up, was taken from the French Civil Code and that of the Québec Province.

It is rightly stated in the doctrine that the use of this expression also translates into an emancipated (modernised) attempt of the Romanian legislator to return to the “distant local normative past”. Thus, the phrase *parental power*, used in the rules of the 1864 Romanian Civil Code, was replaced by the moderate but synonymous phrase of *parental authority*.

Also, the expression *parental authority* replaced the term *protection of the minor*, used as the title of Chapter I (Article 97-141) of Title III (“Protection of persons devoid of capacity, of restricted capacity, and other persons”) in the Family Code.

In doctrine, it is considered that the use of the term *authority* instead of the notion of *protection* “materialises a late alignment of the Romanian legislator to disputable terminological solutions in some European law systems and even to contested projects at European Union level”.

Indeed, in 2001 (1 September), the European Family Law Commission was created, which aims to harmonise family law by creating a set of European principles. Member States should regard these principles as true models for harmonising internal regulations in the field. In this respect, the Commission has drafted a document entitled “The Principles of European Family Law regarding Parental Responsibility” (s.n.).

Likewise, in France, the introduction of the expression *parental authority* (*l'autorité parentale*) by the Law of July 4, 1970 was determined by the need to replace the obsolete phrase *paternal power* (*puissance paternelle*) and to make this phrase compatible with the principle of parental equality in child protection.

The doctrine has noted that “many international normative acts to which Romania is a party, and which it has committed to respect, recognise the *child’s right to protection*, establishing the principle of *responsibility* and the primacy of parental responsibility in the achievement of protection” (s.n). The Hague Convention on Jurisdiction, Applicable Law, Enforcement and Cooperation in the Field of Parental Responsibility and Child Protection Measures and the Convention on the Rights of the Child are mentioned in this respect”.

As mentioned above, in Romania, before the entry into force of the current Civil Code, Law no. 272/2004 which, in the application of the cited international normative acts, provides for the *child’s right to protection*, the principle of “*making parents responsible* for the exercise of rights and the fulfilment of parental obligations” and “*the primacy of parents’ responsibility* for respecting and guaranteeing the rights of the child”. Also, both before and after the republishing of Law no. 272/2004, in many of its texts, which regulate various aspects of the protection and promotion of children’s rights, the expression *parental protection* is used. Conversely, in order to mark the harmonisation of Law no. 272/2004 with the terminological solution used by the Civil Code, the phrase *parental authority* is only mentioned in the contents of three articles.

In agreement with the doctrine, parental responsibility and the primacy of this responsibility, being legal principles in protecting and promoting the rights of the child, impose parental protection as the main form of the child’s protection. In fact, as I have pointed out above, this aspect is enshrined in Art. 106 para. (1) of the Civil Code.

As the *main form of child protection*, parental authority is presented, according to Art. 483 para. (1) of the Civil Code as a “set of rights and duties that concern both the person and the property of the child, and belong equally to both parents”.

Parental authority will be analyzed in my PhD thesis under this aspect.

In the doctrine, it has been noted that the phrase *parental authority* can also be regarded as the decision-making power of the parents with regard to the person and property of the child. From this perspective, parental authority should be considered just as the responsibility and primacy of parental responsibility, as a legal principle of child protection, and not as a form of protection. It has been appreciated that otherwise it will come to the situation where a rule of law with a value of principle (parental authority) is substituted for a form of parental care.

As expressed in the literature, the parental authority, considered as the decision-making power of the parents with regard to the person and property of the child, “sought to

be an implicit reaffirmation of parental power”, as a remedy to the tendency of early emancipation of the child.

Evidently, this terminological solution (parental authority) will remain a desideratum if it is not supported by legal norms establishing for parents *the right to make mandatory provisions for the child* and, correlatively, for the child, *the obligation to respect them*. The finding is particularly relevant since “authority, as a specific element of legal power relations, requires subordination” or, in other words, “the right of a subject of law to decide on a particular matter and the duty of another to obey”.

Contrary to these requirements, the meaning and content of parental authority, as provided by the Romanian Civil Code, do not support the idea of parental authority in the legal relationship with the child. On the contrary, they are conceived in the idea of child protection by the parents, as it was regulated by Art. 97-112 of the Family Code and, as such, it is implied without difficulty from the previously mentioned international normative acts, as well as from Law no. 272/2004.

Finally, parental authority can also be regarded as an important *legal institution* of family law. In this respect, at present, parental authority is regulated mainly by Art. 483-512 of the Civil Code.

The parental authority is not a new legal institution in the Romanian legal system, but by the title. Indeed, it is also found in older regulations. Thus, in the Civil Code of 1864, Title IX (On parental power (Article 325-341)) of Book I (On persons), child protection was achieved through the institution of “parental power”. Parental power meant all the rights the law granted to parents over the person and the property of the child, as long as the child was minor and unemancipated.

With the entry into force of the Family Code, the expression *parental power* was replaced by *parental protection*. *Parental protection* designates all the rights and obligations given to parents by law to ensure the upbringing and education of minors. The conclusion resulted without interpretation difficulties from the content of Art. 97 of the Family Code.

Subsequently, the current Civil Code, referring to parental rights and duties, introduced the expression *parental authority*.

Thus, in essence, parental authority is limited to a set of rights and duties of parents towards their children. In this respect, the doctrine has stated that “... the extent of parental prerogatives has evolved with each regulation under the influence of the dominant socio-legal

trend of one epoch or another in coordinating the strategy of approaching the relationship between parents and children ...”

At international level, the phrase “parental authority” corresponds to the expression “parental responsibility” or “parental liability”. Thus, I consider it useful to recall in this regard some of the international instruments that use this notion, namely: Recommendation R (84) 4 of the Committee of Ministers of the Council of Europe on parental responsibilities, the 1989 UN Convention on the Rights of the Child, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in the Field of Parental Responsibility and Child Protection Measures, the Convention on the Protection of Children and Cooperation in the Field of International Adoption concluded at The Hague on May 29, 1993, etc.

The notion of “parental responsibility” is also reflected in other international documents such as Brussels II Regulation or Recommendation 874 (1979) on a European Charter on the Rights of the Child.

Recommendation 874 (1979) on a European Charter on the Rights of the Child obliges the member states of the Council of Europe to replace the concept of “parental authority” with “parental responsibility” and to contain a clear description of the rights of children as individual members of the family [Chapter II (“Legal Status of the Child”), let. c)]. This document requires Member States for the first time to recognise children as persons with their own rights and needs, and to no longer regard them as a parents’ property. This requirement is the first general principle of the Recommendation [let. a)].

In Anglo-Saxon law, however, the expression used is that of *parental responsibility*, which was introduced by the *Children Act 1989* (CA 1989). This law replaced the concept of *parental rights and responsibilities*, used in other laws and statutes, with the concept of *parental responsibility*. Thus, parental responsibility means “all the rights, duties, powers, responsibilities and authority that a parent has by law in relation to the child’s person and his property”.

Despite these considerations, the authors of the current Civil Code have opted, however, for the expression *parental authority*.

In domestic law, there are two basic normative acts in the matter of parental authority, namely: Law no. 272/2004 and the Civil Code. Law no. 272/2004, referring in various texts (Art. 5 para. (2), Art. 6 let. (d) and Art. 36] to parental rights and obligations, enshrines, in



fact, the legal institution of *parental responsibility*. Conversely, as I have already mentioned, the current Civil Code regulates *parental authority* in Art. 483-512.

### 1.1.2. Definition of parental authority

According to Art. 483 para. (1) of the Civil Code, “parental authority is the ensemble of rights and duties that concern both the person and the property of the child, and belong equally to both parents”. In connection with this definition, some remarks have been made in the doctrine that I find useful in the following.

First of all, the remarkable authors from Sibiu signal the replacement of the expression *parental protection*, previously provided by the Family Code, with the expression *parental authority*. The term “authority” is currently used by the French Civil Code, as amended in 1970, by the Law of 4 July. Indeed, on this occasion, the old and obsolete expression *paternal power (puissance paternelle)* was replaced with the phrase *parental authority (autorité parentale)*. The French legislator’s intention was to revolutionise this institution, and thus the unlimited power of the father was transformed into an instrument for the realisation of the rights of the child, equally exercised by both parents. The provisions of the French Civil Code, which referred to parental authority, were considerably supplemented by Law no. 2002-305 of 4 March 2002 concerning that institution. By adopting this law, the French legislator avoided using the expression *parental responsibility* on the grounds that it implies only obligations, thus ignoring the complex nature of this institution.

As mentioned above, *parental responsibility* is used in the international normative acts in the field.

For example, in Recommendation R (84) 4 of the Committee of Ministers of the Council of Europe on Parental Responsibilities, these responsibilities are defined as “all duties and prerogatives designed to ensure the child’s moral and material well-being, especially those to care for the person of the child, to maintain personal relations with him and to provide his education, maintenance, legal representation and administration of his possessions” (Principle I).

In Brussels II Regulation, Art. 2 para. (7) establishes that parental responsibility is a “set of rights and obligations conferred on a natural person or a legal person by virtue of a judicial decision, statutory instrument or agreement in force concerning the person or property of a child”. Parental responsibility includes in particular custody and visiting rights.

The change in the form and substance of parental authority was imposed by the revival of the child's rights in the twentieth century and by the fact that the Council of Europe regulations used and recommended the use of this expression.

Secondly, in consensus with other opinions expressed in the literature, it is considered that, as far as Romania is concerned, the replacement of the expression *parental protection* previously provided by the Family Code with *parental authority* is unfortunate and was not appropriate at the time of adoption and entry into force of the current Civil Code.

The remarkable authors support this, since the meaning of the word *protection*, which means taking care of, protecting, defending, helping, or supporting, corresponds much better to the way in which this institution is viewed today than the term *authority*. Indeed, as has been emphasised above, this term, though seemingly less aggressive than the *power* used in the old legislation, nevertheless implies the right to impose someone's obedience. Obviously, this very force of the institution is changing, and now the tendency is to emphasise the parents' obligations toward the child, to strengthen the position of the child by dedicating his interest as the only finality of parental actions, and to involve the child in all decisions that concern him.

The complete and unequivocal way in which the legal definition of *parental authority* is drafted is also emphasised and appreciated. Thus, it is mentioned in the definition that the content of parental authority includes both rights and duties of the parents, and that they concern both the person of the child and his or her possessions.

The statement found at the end of the legal definition, that the rights and duties belong equally to both parents, is absolutely natural, as, since the beginning of the last century, the principle of gender equality has been established with regard to civil rights. Equality of parents in the exercise of authority implies that they are usually exercised by them together and, only as an exception, separately. This equality also presupposes that parents decide by mutual agreement on the practical exercise of parental authority.

Finally, the analysis of the legal definition of parental authority also involves the analysis of the term *child*, an analysis which we shall make in the next Section.

As far as I am concerned, I believe that, in order to devise a complete definition for this important legal institution of family law, it is necessary to take into account the provisions of para. (2) and of para. (3) of the Art.483 of the Civil Code. This approach is necessary, since the whole of Art. 483 of the Civil Code bears the marginal name "parental authority", and not just para. (1).

Consequently, this definition should emphasise that parental authority is exercised only in the best interests of the child, with respect for the child and his association with all decisions concerning him. Parents' responsibility for raising their children must also be emphasised.

Finally, the definition cannot bypass the fact that parental authority is, according to Art. 106 para. (1) of the Civil Code, the main form of child protection.

Against this background, I believe that "parental authority is the main form of child protection, consisting of all the rights and duties of the parents regarding his person and property, exercised equally by both parents and in the best interests of the child, with the respect owed to him and his involvement in all decisions concerning him".

## SECTION 1.2.

### MEANING OF THE TERM "CHILD" IN THE DOMESTIC LEGISLATION OF ROMANIA

As outlined above, the analysis of parental authority involves establishing the meaning of the term *child*.

*Ab initio*, I make it clear that, in this respect, there is no unitary terminology in Romanian law. Thus, sometimes, the term *minor* or the expression *minor child* is used as a synonym for the term *child*. In line with some opinions expressed in the doctrine on the normative content of the domestic legal texts in which it is used, the term *child* can be analysed *lato sensu* and *stricto sensu*.

Thus, it is considered that, *lato sensu*, the term *child* refers to an individual, regardless of his/her age and capacity of exercise, who is a first-degree relative in a straight descending line of another person. In this respect, the provisions of Art. 406 of the Civil Code are referred to for substantiation. According to this article, "kinship is in a straight line in the case of a person's descent from another person and can be ascendant or descendant" (para. (1)], and "the degree of kinship in a straight line is determined by the number of births, thus *children and parents* are relatives of the first degree" (para. (3) let. b)] (b.c.).

Since Art. 406 of the Civil Code does not distinguish in terms of age and capacity of exercise, *lato sensu* any natural person is a child, whether minor or major, without capacity of exercise, with limited capacity or exercise or full capacity of exercise. Thus, according to this doctrinal thesis, *lato sensu*, the quality of a physical person as a *child* is exclusively dependent

on his or her “first-degree kinship in a straight descending line with another person”, and not on age and/or capacity of exercise.

It has also been appreciated that “the first -degree kinship in a straight descending line” is the objective criterion according to which it can be judged whether or not a particular legal text uses the term *child* in this sense. Thus, the provisions of Art. 975 para. (1) of the Civil Code, according to which “descendants are the children of the deceased and their descendants in a straight line”. Indeed, by reference to the provisions of Art. 406 of the Civil Code, the term *descendant* has the meaning of a relative in a straight line, and the expression *the deceased’s children* evokes the existence of *first-degree kinship* between the deceased and his descendants.

The term *child*, analysed *lato sensu*, is also used by other texts of the Civil Code, as well as other laws. Instead, in the literature, is considered that *stricto sensu* the term *child* “designates a minor person without full capacity of exercise, when the first-degree kinship in a straight descending line to another person does not necessarily have legal relevance”.

The *stricto sensu* meaning of the term *child* is established by Art. 263 para. (5) of the Civil Code and, in the same way, by Art. 4 let. a) of Law no. 272/2004. Based on these texts, “a child is the person who has not reached the age of 18 and has not acquired full capacity of exercise, according to the law”. The law to which these texts refer is the Civil Code. Indeed, according to art. 38 para. (2) of the Civil Code, interpreted *per a contrario*, a minor is a natural person who has not reached the age of 18 years. Also, Art. 38 para. (1) and Art. 39 para. (1) in conjunction with Art. 40, Art. 41 and Art. 43 of the Civil Code state that the unmarried minor persons shall not have full capacity of exercise, with the exception of those who have reached the age of 16 years and who, for good reason, have had their full capacity of exercise recognised by the guardianship court.

In agreement with those expressed in doctrine, as long as the *minority* is a legal requirement for the individual to be considered a *child*, the expression *minor child* is pleonastic. Thus, within this expression, the term *minor* is provided both expressly and implicitly by using the term *child*. In a legal, correct, strict sense, the term *child* should be used on its own, without attaching the *minor* appellation.

Also, the use of the term *minor* in legal texts, as a synonym for the term *child* analyzed *stricto sensu*, generates interpretation difficulties and may even lead to non-uniform practical solutions. Thus, the use of the term *minor* without distinction in legal texts can support the conclusion that it takes into consideration both the minor without full capacity of exercise and the one with full capacity of exercise.

Until an eventual intervention by the legislator in the aspect discussed, in order to avoid any practical inconveniences, it was proposed that the interpretation of legal norms using the term *minor* as a synonym for the term *child* analysed *stricto sensu*, should be achieved by taking into account the criterion of *protecting and promoting the rights of the child*. This criterion, being explicitly provided in the name and in many texts of Law no. 272/2004, and implicitly in some texts of the Constitution, the Civil Code, as well as other normative acts, can be considered objective.

Finally, regardless of whether it is analysed *stricto sensu* or *lato sensu*, with the possible exceptions provided by law, the term *child* refers to both female and male persons.

Also, the notion of *child* includes the child born both in and out of wedlock, as well as the adopted child.

## SECTION 1.3.

### PRINCIPLES AND DURATION OF PARENTAL AUTHORITY

#### 1.3.1. Principles of parental authority

##### 1.3.1.1. Preliminary remarks

1.3.1.2. The principle of exercising parental authority on in the best interest of the child

1.3.1.3. The principle of equality between children born in and out of wedlock, as well as adopted children

1.3.1.4. The principle of equality of parents in exercising parental authority

1.3.1.5. The principle of patrimonial independence between parent and child

1.3.1.6. The principle of involving the child in all decisions concerning him

#### 1.3.2. Duration of parental authority

Parental authority is of a temporary nature, being exercised by the parents “until the child acquires full exercise capacity”, according to Art. 484 of the Civil Code. Therefore, in order for a person to be under parental authority, he must have the quality of a child *stricto sensu*, that is, of a minor without full capacity of exercise.

We reiterate that, in principle, an individual acquires full capacity of exercise at the age of 18, when he becomes major (Art. 38 of the Civil Code).

Exceptionally, however, a married minor acquires, through marriage, full capacity of exercise, according to Art. 39 of the Civil Code. Also, for sound reasons, the minor who has

reached the age of 16 may request and the guardianship court may recognize his/her full capacity of exercise in advance, under Art. 40 of the Civil Code.

The second exceptional situation is regulated by Art. 40 of the Civil Code, according to which, “for good reasons, the guardianship court may recognise the full capacity of exercise for a minor who has reached the age of 16” (Thesis I).

At the same time, “the minor who is under the protection of his or her parents shall remain under this protection until he or she becomes major, without having a guardian appointed”, according to art. 176 para. (1) Thesis I of the Civil Code.

### 1.3.3. The duty of respect

Article 485 of the Civil Code, which is placed in the context of the general provisions (Article 483-486), under the title “duty of respect”, states that “the child owes respect to his parents regardless of his age”.

With some exceptions, this duty of the child is ignored in doctrine.

Thus, in doctrine, it has been stated that this duty was introduced into the current Civil Code, perhaps in an attempt to incorporate parental power.

The duty of respect provided in Art. 485 of the Civil Code is more moral than legal, and no sanction is stipulated in the case of non-observance.

It is also rightly believed that this duty of the child is not equivalent to his *duty to obey parents*. Thus, respect has the meaning of an attitude or a sense of esteem, consideration or appreciation of someone or something. Instead, obedience means being under someone’s authority.

We note that Art. 485 of the Civil Code obliges the child, *irrespective of his age*, to respect his parents, even when he has acquired full capacity of exercise, and is no longer under parental authority. Thus, contrary to the topography of Art. 485 of the Civil Code, this duty is not specific to *parental authority*, nor is it likely to contribute to the desired increase in *parental power*.

### 1.3.4. Aspects of comparative law on the principles and duration of parental authority

#### 1.3.4.1. French law

#### 1.3.4.2. Anglo-Saxon law

#### 1.3.4.3. Muslim law

## CHAPTER II

### THE EVOLUTION OF ROMANIA'S DOMESTIC REGULATIONS WITH REGARD TO PARENTAL AUTHORITY

#### SECTION 2.1.

##### PARENTAL POWER IN ROMAN LAW

###### 2.1.1. Preliminary remarks

In Roman law, parental power was known as *patria potestas*. The *patria potestas* was the power that *pater familias* exerted on his descendants, namely sons, daughters and grandchildren of sons. They were part of the *alieni iuris* category.

*Pater familias* could only be a male ascendant, father, grandfather or great-grandfather, and he was considered the *head of the family* and not the father of the family. He was part of the *sui iuris* category, i.e. people who were not under the power of another person. At the same time, in the doctrine, it has been said that a married man without children, a single man, or a young man could also be a *pater familias*.

The power of the head of family was exercised over the wife, children and slaves, but also over possessions and animals. This general power was originally called *manus*, and with time it lost its meaning and became the *patria potestas* designating power over the descendants, or *dominica potestas*, indicating power over slaves, or *dominium* as power over other possessions.

Parental power was perpetual.

Parental power was unlimited in the sense that *pater familias* freely disposed of his son's person and possessions.

In Roman law, parental power could arise naturally, through marriage, and by artificial means, by adoption and by legitimation.

Parental power could be extinguished as follows: at the death of *pater familias*, when family sons became *sui iuris*; by the death of *filius familiae*; by passing the child under another power; through emancipation; by bringing about a situation that led to changing the legal status of the child.

2.1.2. The rights of *pater familias* on person of those under his power

2.1.2.1. Preliminary remarks

2.1.2.2. The right of life and death

2.1.2.3. The right of sale

2.1.2.4. The right of exhibition

2.1.2.5. The right of correction (*ius verberandi*)

2.1.2.6. The right to consent to marriage

2.1.2.7. The right to consent to the adoption of the child

2.1.3. Rights regarding the possessions of those under his power

2.1.3.1. Preliminary remarks

2.1.3.2. *Peculium profectitium*

2.1.3.3. *Peculium castrense*

2.1.3.4. *Peculium quasicastrense* (similar to soldiers)

2.1.3.5. *Bona adventicia*

## SECTION 2.2.

### PARENTAL POWER IN THE OLD ROMANIAN LAW

In the old Romanian law, the parental power was exercised only by the father, as the head of the family. His power was different from that of Roman *pater familias*, in the sense that it was not unlimited. If the father became incapable, the mother did not exercise this power, and a guardian was appointed to exercise parental power in his place.

Among the rights granted to parents with respect to the child was the right of correction, the right to send them away as soldiers, and the right to consent to their marriage. Those relating to property were the right to alienate the children's property and to force pubescent sons and of lawful age (over 12 years old) to share inheritances and other things.

During this time, parental power was regulated in more detail in the Calimach Code, which devoted an entire chapter to parental power. This was Chapter III, titled "For the rights of parents and sons".

The provisions of Art. 182 of the Calimach Code show that the primary duty of the parents was to give their sons a virtuous upbringing. Thus, as stipulated by the said law, "the



fathers are indebted to give to their sons proper upbringing, that is to say they should care for their lives and their health, to give them the necessary nourishment, by guiding their bodily powers and spiritual qualities for good, and establishing their future happiness by first teaching the doctrines of faith and then other useful sciences”.

For parents who did not take the care to provide nourishment and good upbringing to their children, Art. 233 of the Calimach Code stipulated the loss of parental power. Moreover, in such a situation, children even had the opportunity to disown their parents.

The parent’s right of correction was also maintained in the Calimach Code, this being found in Art. 190, which stipulated that parents could “punish, in a proper way and unlikely to cause any harm”, the children with evil morals, those who were insubordinate, or those who disturbed the quiet household. In the absence of the father, as the holder of parental authority, the right to correction of the children was held by the epitropes and the closest relatives (Article 191).

Article 189 of the Calimach Code provided for parents the right to keep the child and to ask for his re-entry into the parent’s home. Thus, parents had the right to seek out their children, “who, without their will, had vanished without knowledge, and to return the fugitives, whether they still be on their way, or that they will be devoured by helplessness, with the aid of judges, or by their own judgement, if it shall be deemed necessary”. The child’s re-entry could only be refused by judges if it were found that the parents exercised ill-treatment on the child.

Regarding the child’s property, Art. 196 of the Calimach Code provided that “all that was gained by sons by any lawful means shall be theirs”, and instituted the right of the parent to administer the wealth of the child. Therefore, the parents had no right to the child’s wealth apart from the expenses incurred for their upbringing (Article 206). Article 198 of the Calimach Code provided that the proceeds of the child’s wealth were used to cover the expenses related to the child’s upbringing. As an administrator of the child’s wealth, the father had to give an annual account, being exempt from it only for low income.

### SECTION 2.3.

#### PARENTAL POWER IN THE REGULATION OF THE 1864 CIVIL CODE

### 2.3.1. Preliminary remarks

Under the influence of the Napoleon Code, the 1864 Civil Code made substantial changes to the situation of the child in the family. Thus, parental power became an institution whose sole purpose was to protect the child.

Considered, therefore, as an institution, it represented an ensemble of rights that the law granted to parents in relation to the person and property of the child, as long as he was minor and unemancipated.

In principle, parental power belonged to both the father and the mother, with the observation that, as stipulated in Art. 327 of the old Civil Code, “during the marriage the father alone exercises this authority”. On the other hand, if during the marriage the father was unable to exercise the parental power, it was exercised by the mother. The circumstances that could prevent the child’s father from exerting parental authority were the following: his disappearance, placement under a ban, or the deprivation of that right as a result of a conviction.

In the case of divorce, parental power was exercised by both parents, as the father could no longer claim a priority as a head of household. However, the father retained the right to supervise the education of his children, irrespective of the person to whom the children were entrusted, and even if the divorce was pronounced against him (Article 283 of the old Civil Code).

The rule inserted in Art. 327 of the old Civil Code also contained an exception provided by the legislator in the case of the father’s call to arms, when the country was at war. Thus, Art. 4 of the Law of 23 December 1916 ordered that “if the one called under arms has a wife and minor children who are not married, born of marriage to that wife, or legitimised by subsequent marriage, the exercise of parental authority shall pass upon the mother. With the father’s return, these prerogatives of the mother ceased.

Parental power ceases upon the majority or emancipation of the child, according to Art. 326 of the old Civil Code. Thus, the one who became a major was no longer under this authority. However, Art. 325 stipulated that “at any age, the child is obliged to honour and obey his father and mother”. This duty was rather moral and had nothing to do with the prerogatives of parental authority.

Parental power was a right reserved by law exclusively for parents. *Per a contrario*, other ascendants of the child (grandparents, great-grandparents) could not exercise parental power in its fullness.

Parents exerted parental authority not only on the child's person, but also on his possessions.

### 2.3.2. Parental rights and obligations regarding the person of a legitimate child

#### 2.3.2.1. Preliminary remarks

#### 2.3.2.2. The right to keep and supervise the child

#### 2.3.2.3. The right of correction

#### 2.3.2.4. The right to consent to the child's marriage

#### 2.3.2.5. The right to consent to the child's adoption

#### 2.3.2.6. The right to emancipate the child

#### 2.3.2.7. The right of the surviving parent to institute a testamentary guardian for the child

#### 2.3.2.8. The obligation to support and educate

### 2.3.3. Parental rights and obligations regarding the possessions of a legitimate child

#### 2.3.3.1. The right of legal use

#### 2.3.3.2. The administration of the child's possessions

## SECTION 2.4.

### PARENTAL PROTECTION IN THE REGULATION OF THE FAMILY CODE

#### 2.4.1. Preliminary remarks

*Parental protection* replaced the institution of the *parental authority* of the old regulation (Articles 325-341 of the old Civil Code). The Family Code did not define parental protection in its provisions (Articles 97-112), and therefore the task of defining it was left with the doctrine.

Thus, in the doctrine, parental protection was defined as “an ensemble of rights and duties of parents with respect to their minor children, valid for children born in and out of wedlock, as well as adopted ones, the exercise of which must be exclusively in the interests of the minor, with due respect for the patrimonial independence in the parents' relations with him, and under the effective guidance and control of the guardianship authority”.

The provisions of art. 97-112 of the Family Code, devoted to parental rights and duties, have been supplemented and amended by those contained in Law no. 272/2004.

#### 2.4.2. The purpose of parental protection

In doctrine, it has been appreciated that parental protection sought both a personal goal, that of raising, educating and preparing the child for life, and a social one, namely to achieve the child's growth, education and preparation for life according to the goals of society.

#### 2.4.3. The duration of parental protection

Under the Family Code, just like today, the child was under parental protection as long as he was a minor and lacking full capacity of exercise. In other words, only the child analysed *stricto sensu* could be under the protection of parents.

The child placed under court prohibition benefitted from parental protection until reaching majority, without a guardian being appointed for him, if at the time of the prohibition he was under this protection, according to art. 150 of the Family Code.

By exception, the minor who had married before reaching the age of 18 was free from parental protection, thus gaining full capacity of exercise, according to Art. 8 para. (3) of Decree no. 31/1954. The full capacity of exercise thus obtained was not lost by divorce or by marriage termination at the death of one of the spouses, but only if it was cancelled for nullity, provided that the spouse was in bad faith at the time of the marriage.

#### 2.4.4. Principles of parental protection

2.4.4.1. The principle of exercising parental protection only in the interests of the child

2.4.4.2. The principle of exercising parental protection only under the supervision and control of the guardianship authority

2.4.4.3. The principle of patrimonial independence between parent and child

2.4.4.4. The principle of equality of parents in the exercise of parental authority

2.4.4.5. The principle of full assimilation of the legal condition of a child born out of wedlock to that of the child born in wedlock, and of the legal condition of the adopted child to that of the natural child

#### 2.4.5. The content of parental protection

2.4.5.1. Preliminary remarks

2.4.5.2. Parental rights and duties regarding the person of the child

A. The right and duty to raise the child

- B. The parents' duty to support the child
  - C. The right to establish the child's home
  - D. The right to demand the return of the child
  - E. The right to have personal ties with the child
- 2.4.5.3. Parental rights and duties regarding the property of the child

- A. The right and duty to administrate the child's possessions
- B. The right and duty to represent the child

2.4.6. The exercise of parental protection

2.4.6.1. Preliminary remarks

2.4.6.2. The exercise of parental protection by both parents

2.4.6.3. The exercise of parental protection by one parent

2.4.6.4. The splitting of parental protection

2.4.7. Disagreements between parents with regard to the exercise of rights and the fulfilment of parental duties

In the event that there were disagreements between the parents regarding the exercise of parental protection, according to Art. 99 of the Family Code, they were settled by the guardianship authority who, after listening to the parents, decided according to the child's interest.

After the entry into force of Law no. 272/2004, this legal provision was repealed by Art. 142 para. (3), being considered contrary to the provisions of Art. 31 para. (3) of Law no. 272/2004, according to which "in the event of disagreements between parents regarding the exercise of rights and the fulfilment of parental obligations, the court, after hearing both parents, shall decide according to the best interests of the child".

In fact, in the new regulation, the child's *best* interests were added, and the resolution of the disagreements between parents was given to the jurisdiction of the court, in this case, the guardianship court (tribunal court).

2.4.8. Parental responsibility

Parental responsibility was different, depending on the nature and severity of the actions. Thus, it could pertain the family law (custody of the minor and termination of parental rights), criminal (prohibition of parental rights for family abandonment, maltreatment of the minor, failure to comply with measures regarding the custody of the

child, endangering the infirm child and fraudulent management), civil (for damages caused by their children), administrative (contraventional).

## SECTION 2.5.

### OVERVIEW ON PARENTAL AUTHORITY IN THE REGULATION OF THE CURRENT CIVIL CODE

The current Civil Code dedicates to the parental authority the Title IV of Book II entitled “On family”, and groups provisions related to this institution into four chapters, as follows: Chapter I - General Provisions (Articles 483-486), Chapter II - Parental rights and duties (Articles 487-502), Chapter III - Exercise of parental authority (Article 503-507), Chapter IV – Termination of the exercise of parental rights. These provisions shall be supplemented by those of Law no. 272/2004.

I recall that, according to Art. 483 para. (1) of the Civil Code, “parental authority is the ensemble of rights and duties that concern both the person and the property of the child and belong equally to both parents”.

As the institution of parental authority is defined in the current Civil Code, I believe that some clarification is required.

Firstly, this represents an ensemble of rights and duties granted, or imposed by law to parents, in the best interests of the child. Parental rights and duties are not correlative, in the sense that the rights conferred on parents do not meet certain correlative obligations to which children are held. In relation to their minor children, parents have practically only obligations, and parental rights exist only in their relations with third parties, being designed as instruments to mediate the fulfilment of obligations towards children.

Secondly, parental authority is equally shared by both parents, regardless of whether the child is born in or out of wedlock, or adopted.

Thirdly, parental authority is exercised only in the best interest of the child and with the respect due to his or her person.

Fourthly, parental rights and duties refer both to the child’s person and to his or her possessions, and make up the content of the parental authority.

## **CHAPTER III**

### **CONTENT OF PARENTAL AUTHORITY**

#### SECTION 3.1.

##### PRELIMINARY REMARKS

Article 487 of the Civil Code, established under the marginal title “the content of parental authority”, states that “parents have the right and duty to raise the child, taking care of his physical and mental health and intellectual development, education, learning, and professional training according to the child’s own beliefs, characteristics and needs” (Thesis I); “They are obliged to give the child guidance and counsel necessary for the proper exercise of the rights that the law recognizes him” (Thesis II).

On the other hand, there is no unity of opinion in the legal literature as to the determination of parental rights and duties.

Indeed, parental rights and duties can be grouped into rights and duties that concern the child’s person and rights and duties that relate to his or her possessions.

The former category includes: specific duties (Article 488); disciplinary measures and physical punishment (Article 489); the rights of the minor parent (Article 490); the religion of the child (Article 491); the child’s name (Article 492); child supervision (Article 493); the social relationships of the child (Article 494); the return of the child from other persons (Article 495); child support obligation (Article 499).

This category must also include the rights and parental responsibilities referred to in Art. 487 of the Civil Code, which are not among those regulated by Art. 488 et seq. of the Civil Code. We are considering the right and duty of parents to take care of the education, learning and professional training of the child. On the other hand, for obvious reasons, the child’s home (Article 496-497 of the Civil Code), or the change of teaching or vocational training (Article 498 of the Civil Code) cannot be considered as rights of the parents.

The latter category includes, according to Art. 501-502 of the Civil Code, the right and duty of the parents to manage the child’s property and the right to represent the child in legal acts.

On the other hand, the provisions of Art. 487-502 of the Civil Code must be correlated with the provisions of Law no. 272/2004. Indeed, from the analysis of the provisions of this

law, we find that a number of parental rights or duties are found in a different or even identical form in both normative acts.

## SECTION 3.2.

### PARENTAL RIGHTS AND DUTIES REGARDING THE PERSON OF THE CHILD

#### 3.2.1. Specific parental duties

As we have previously mentioned, Art. 488 of the Civil Code is established under the marginal name “specific duties”.

According to Art. 488 para. (1) of the Civil Code, “parents have the duty to raise the child under conditions that ensure his physical, mental, spiritual, moral and social development in a harmonious way”.

I reiterate that Art. 487 Thesis I of the Civil Code Also refers to *child rearing* but, unlike Art. 488 para. (1), qualifies it as both a *right* and a *duty* of the parents.

Likewise, unlike Art. 487 para. (1) of the Civil Code, which establishes child rearing as the right and duty of parents to care for the health, physical, mental and intellectual development, the education, learning and professional training of the child, Art. 488 para. (1) of the Civil Code only refers to the physical, mental, spiritual, moral and social development of the child. Thus, education, learning and professional training of the child are ignored. Also, the mental and intellectual development of the first text is replaced by the mental, spiritual, moral and social development of the child in the second text.

In my view, as this is the same phenomenon (*upbringing*), and as the same goal (the proper exercise of the rights of the child) is considered, the legislator should have expressed more concern for normative consistency. For these reasons, I suggest to the legislator that, *de lege ferenda*, Art. 488 of the Civil Code should be repealed, and the norm provided by para. (2) be placed in the context of Art. 487 of the Civil Code, in a distinct line. As a further suggestion, the current text of Art. 487 of the Civil Code, becoming para. (1), could be complemented to cover both the moral and social development of the child.

According to Art. 498 of the Civil Code and Art. 51 para. (3) of the Law no. 272/2004, a child aged 14 may require parents to change his learning and vocational training, or housing requirements for completing their learning or professional training. If the parents



are opposed, the child may refer the custody court that will decide on the basis of the psychosocial inquiry report, and evidently in consensus with the best interests of the child.

In carrying out the duty provided by Art. 488 para. (1) Civil Code, para. (2) of the same article sets out the following specific obligations for parents: “to cooperate with the child and to respect his/her privacy and dignity” (let. a)]; “to present and enable the child to be informed and clarified about all the acts and deeds that might affect him/her and to take into account his/her opinion” (let. b)]; “to take all necessary measures to protect and achieve the rights of the child” (let. c)]; “To cooperate with the natural and legal persons with responsibilities in the field of childcare, education and professional training” (let. d)].

The specific obligations of the parents, provided by Art. 488 para. (2) of the Civil Code, correspond to rights granted to the child by the Constitution, Law no. 272/2004 and the UN Convention on the Rights of the Child.

### 3.2.2. Disciplinary measures and physical punishment

The means of authority made available to the parents by the legislator are necessary not only for the fulfilment by the parents of the duties they have towards the child, but also for the promotion of the superior interest of the child.

In this respect, Art. 489 of the Civil Code regulates the possibility for parents to take some disciplinary measures, namely to apply to the child certain physical punishments.

In particular, Art. 489 Thesis I of the Civil Code stipulates that “disciplinary measures can be taken by parents only with respect for the dignity of the child” (Thesis I). “It is prohibited to take measures, as well as to apply physical punishments that are capable of affecting the physical, mental or emotional development of the child” (Thesis II).

Also, under Art. 489, Thesis II of the Civil Code, provided that the physical, psychological and emotional development is not affected, parents can take disciplinary measures against the child and may apply physical punishment. Moreover, in an interpretation *per a contrario*, this text allows parents to apply moral punishment to the child without any restriction.

In the case of disciplinary sanctions, it is necessary to condition their application on the existence of discernment and guilt of the child regarding the acts of parental disobedience.

Finally, it was considered that disciplinary sanctions could be maintained, provided that the child’s deeds may be attributed to their application, and that those sanctions could be listed, even by way of example only. Thus, it is believed that disciplinary sanctions could be

imposed on the child's actions by which he does obey his parents, and such sanctions could be, for example, reproaching the child and restricting the exercise of rights for a limited period of time.

### 3.2.3. The religion of the child

Article 487 of the Civil Code and Art. 35 para. (2) of the Law no. 272/2004 obliges parents, among other things, to give the child the guidance and counselling necessary for the proper exercise of the rights the law confers on him.

In fulfilling this duty, under Art. 491 of the Civil Code, "the parents have the obligation to guide the child, according to his beliefs, in the choice of a religion, according to the law, taking into account his opinion, age and degree of maturity, without obliging him to join a certain religion or a particular religious cult" (para. (1)]. "The child who has attained the age of 14 has the right to freely choose his religious confession" (para. (2)].

I point out that in the previous regulation, the Family Code did not contain rules on the religion of the child.

In this context, I note that the provisions of Art. 491 para. (1) of the Civil Code, with some insignificant differences of expression, reproduce the provisions of Art. 30 para. (3) of the Law no. 272/2004, a circumstance which constitutes a parallelism, contrary to the technical legislative norms for the elaboration of normative acts.

Firstly, guidance concerns the child's choice of religion.

Thus, the choice belongs to the child, which is why it should take place at a point in his life in which he can make an informed choice. Obviously, there is no question of guiding the newborn or infant child about the choice of a religion or, in general, any other option with respect to his or her rights. In this respect, Art. 491 para. (1) of the Civil Code obliges parents to take into account the child's opinion, age and degree of maturity.

### 3.2.4. The right to establish the child's name

Regarding parents' right to establish the child's name, Art. 492 of the Civil Code orders that "the parents shall choose the first name and, where appropriate, the surname of the child, *according to the law*" (s.n.).

Although it would seem that the choice of the child's *first name* is an exclusive parental right, there are situations where it is established by other people. Thus, for example,

under Art. 14<sup>1</sup> para. (4) of the Law no. 119/1996 (republished) regarding civil status acts, the first name is established by order of the mayor of the territorial-administrative unit where the birth of the child is registered.

According to the regulations in the field, except for administrative or judicial change, the first name is established in all cases by the persons or public authorities indicated by law, or, in other words, this operation does not usually involve a possible decision of the holder.

In principle, according to Art. 449 para. (1), the child shall have the common surname of the parents, if the parents bear a common surname during the marriage (para. (1)].

If the parents do not have a common surname, they may, by mutual consent, set either the name of one of them, or their combined names for the child. In this case, the name of the child shall be determined by the consent of the parents and shall be declared, at birth, to the civil status service. If the parents do not agree on the name of the child, the guardianship court shall decide and immediately communicate the final decision to the civil status service where the birth is recorded.

It can be concluded that, regardless of the way of establishment, the married child may have the surname of one of the parents, or their combined names.

Instead, under Art. 450 para. (1) of the Civil Code, the child born out of wedlock shall have the surname of the same parent towards which filiation was first established. According to para. (2), if the filiation was subsequently established with respect to the other parent, the child may, by the consent of the parents, take the surname of the parent to whom filiation was subsequently established, or their combined names (Thesis I). The child's new surname is declared by the parents together at the civil status service where the birth was recorded. The court will be able to consent to the child's name (Thesis I). In the absence of parental consent, the guardianship court decides and immediately communicates the final decision to the civil status service where the birth is registered (Thesis III).

### 3.2.5. The right and duty to supervise the child

The right and duty to supervise the child is a novelty in our legislation, brought by the provisions of art. 493 of the Civil Code.

According to Art. 493 of the Civil Code, "parents have the right and duty to supervise the minor child".

Thus, supervision implies for parents the right, but also the duty to constantly and carefully observe the behaviour of the child in order to protect him from danger, as well as to prevent him from committing acts that endanger other persons or their assets.

Supervision also requires parents to have constant control over the child. In this respect, Art. 23 para. (3) of the Law no. 272/2004 obliges parents or other persons responsible for child supervision to notify the police that the child is missing from home within 24 hours of the discovery of the disappearance. In order to operationalise the supervision obligation, in principle, the child is domiciled with the parents, according to Art. 92 para. (1) of the Civil Code.

Article 494 provides that “the parents or legal representatives of the child may, for good reasons only, prevent the correspondence and personal ties of the child up to the age of 14” (Thesis I). “Disagreements are settled by the guardianship court, with the child’s hearing, under the conditions of Art. 264” (Thesis IIa).

The right and duty of supervision also implies the obligation of the child to obey his or her parents, an obligation which is not found in the Romanian legal system, although parental authority imposes it by its very nature.

Finally, without detailing this, the right and duty of supervision allow parents to request the return of the child from any person who unfairly holds them, under the conditions of Art. 495 of the Civil Code.

Failure to perform supervision duties may involve civil, administrative or even criminal penalties against parents.

Thus, for serious negligence in the performance of parental duties (including supervision duties) and serious detriment to the best interests of the child, parents may be ordered to step down from the exercise of parental rights, according to Art. 109-112 of the Civil Code. Termination of parental rights acts as a family law sanction.

In civil matters, parental responsibility can be engaged, under the conditions of Art. 1372 of the Civil Code, for the harmful deeds of the child.

Also, according to Art. 2 point 33 of the Law no. 61/1991 for sanctioning the offenses of violation of norms of social cohabitation, public order and tranquillity, “the failure by the parents or by the persons entrusted to raise and educate a minor aged up to 16 years, or to care for a mentally alienated person, of the necessary measures to prevent them from vagabondage, begging, or prostitution” constitutes a contravention and is sanctioned by a fine.

Finally, it is even possible for parents to be held criminally accountable if, due to lack of child supervision, the child's physical integrity, health or life have been endangered or harmed.

### 3.2.6. The right to request the return of the child from other people

Article 495 of the Civil Code regulates the right of parents to request the return of the child from other persons. I recall that in the old regulation this right was provided by Art. 103 of the Family Code.

In particular, Art. 495 para. (1) of the Civil Code orders that "parents may at any time ask the guardianship court to return the child from any person who holds it without right."

I signal the defective wording of the quoted text. In fact, the guardianship court does not return the child, but has him/her returned.

This right is correlated with the right and duty of parental supervision of the child, as well as with the right of the child to live with his or her parents.

### 3.2.7. The child's dwelling

According to Art. 496 para. (1) of the Civil Code, "the minor child shall dwell with his parents".

Although the provisions of Art. 496 of the Civil Code, devoted to the child's dwelling, are placed in the context of parental rights and duties, in fact the child's dwelling is legal, and its establishment cannot be considered as a parental right.

### 3.2.8. The duty to support the child

Article 499 of the Civil Code, being placed in the context of "parental authority", regulates the parents' duty to maintain the minor child and the major child in further education.

The parents' duty to support the child in the context of parental care is a joint obligation, and the extent of the support duty, the manner of execution, as well as the contribution of each parent shall be agreed upon by them. In the event of disagreement between parents, the guardianship court shall decide.

### SECTION 3.3.

#### PARTICULAR PARENTAL RIGHTS AND DUTIES ON CHILDREN'S PROPERTY

##### 3.3.1. The parents' right and duty to administer the child's property

Parents, as well as guardians, are required to administer the child's property in good faith and to provide their simple management. In other words, they are entitled to carry out the necessary acts for the preservation of the child's property, and the documents required for his property to be used for their usual purpose.

##### 3.3.2. The right and duty of parents to represent the child in civil legal acts or to approve such acts, as the case may be

### SECTION 3.4.

#### THE CONTENT OF PARENTAL AUTHORITY IN COMPARATIVE LAW

##### 3.4.1. French law

##### 3.4.2. Anglo-Saxon law

##### 3.4.3. Muslim law

## **CHAPTER IV**

### **THE EXERCISE OF PARENTAL AUTHORITY**

#### **SECTION 4.1**

#### **GENERAL ASPECTS REGARDING THE EXERCISE OF PARENTAL AUTHORITY**

Parental authority is only exercised in the best interest of the child and implies the exercise of rights and the fulfilment of certain duties by parents, with regard to both the child's person and to his/her property.

The beneficiaries of parental authority are the children, without any distinction being made between those born out in or out of wedlock, or adopted.

In principle, parents exercise parental authority jointly and equally, that is, they actually exercise the rights and fulfil the obligations that make up the content of parental authority.

As a matter of absolute novelty in our legislation, the Civil Code established the rule of joint exercise of parental authority after the divorce of parents, and only for grave reasons may the guardianship court, in the best interest of the child, decide that parental authority is to be exercised only by a single parent (in the case of death of one of the parents, whether determined physically or declared by court order; in case one of the parents is placed under a court order; in the event of termination of parental rights; if one of the parents is unable to express his or her will) . The same provisions apply to the child born from a null or annulled marriage, as well as to a child born out of wedlock whose filiation has been established with both parents simultaneously or successively, provided they cohabit.

Other cases in which parental authority is exercised only by one parent concern the splitting up of parental authority in the following situations: divorce, if there are good reasons; the abolition of marriage, when the provisions on divorce apply by analogy; in the case of a child born out of wedlock, when the parents do not cohabit and the divorce provisions apply. Splitting the exercise of parental authority has the effect that one of the parents exercises the rights and duties with respect to the person and the property of the child, whereas the other parent retains the right to oversee the upbringing and education of the child, and the right to consent to his or her adoption.

Exceptionally, the guardianship court may order parental authority to be exercised by persons other than the child's parents, for reasons beyond the best interests of the child. This concerns the relative, family, or the person or institution with which the child is placed in foster care.

## SECTION 4.2.

### THE EXERCISE OF PARENTAL AUTHORITY BY PARENTS

4.2.1. The exercise of parental authority by both parents by mutual agreement and on an equal basis

4.2.2. Presumption of reciprocal tacit mandate between parents

The current Civil Code regulates a presumption of a reciprocal tacit mandate between parents, whereby whenever one parent performs an act alone in exercising rights or performing parental duties, he or she is presumed to have the consent of the other parent.

This legal presumption is a novelty for our legislation and is the capitalisation of some solutions from the previous judicial practice, but is also slightly derived from the provisions of Art. 372-2 of the French Civil Code.

4.2.3. The parents' agreement regarding the exercise of parental authority

Article 506 of the Civil Code provides that, "with the consent of the guardianship court, parents can agree on the exercise of parental authority or the taking of a child protection measure, if the superior interest of the child is respected" (Thesis I). "Hearing the child is mandatory, the provisions of Art. 264 being applicable in this regard" (Thesis II).

This rule of principle is valid when the parental authority is exercised by both parents together and on an equal basis, and they want to change the way of exercise.

4.2.4. Disagreements between parents regarding the exercise of parental authority

According to art. 486 of the Civil Code, whenever there are disagreements between parents regarding the exercise of rights or the fulfilment of parental duties, the guardianship court, once notified about such disagreements, has the obligation to hear the parents and the child (under the conditions of Article 264 of the Civil Code), to order the conduct of a



psychosocial inquiry, and to take into account the report drawn up in this respect. The court is also bound to decide according to the best interests of the child.

4.2.5. The exercise of parental authority by both parents in the case of a child born out of wedlock, if they live together

This situation concerns unmarried parents who live together, that is, they are in a state of concubinage. In this respect, Art. 505 para. (1) of the Civil Code orders that “in the case of a child born out of wedlock, whose filiation has been established concurrently or, as the case may be, successively to both parents, parental authority shall be exercised jointly and equally by the parents, if they live together.”

4.2.6. The exercise of parental authority by both parents in the case of a child born out of wedlock, if they do not live together

According to Art. 505 para. (2) of the Civil Code, “if the parents of the child born out of wedlock do not live together, the exercise of parental authority shall be determined by the guardianship court, being applicable in a manner similar to divorce provisions”.

4.2.7. The exercise of parental authority by both parents in case of divorce

According to art. 504 of the Civil Code, “if the parents are divorced, the parental authority is exercised according to the provisions on the effects of divorce in the relationship between parents and children”. Thus, this text refers to the provisions of Art. 397 (exercise of parental authority by both parents), Art. 398 (exercise of parental authority by a single parent) and Art. 399 (exercise of parental authority by other persons).

As judiciously expressed in the doctrine, one of the welcome news of the current Civil Code is the establishment of the joint exercise of parental rights and duties, as a rule, in the case of divorce.

## SECTION 4.3.

### THE EXERCISE OF PARENTAL AUTHORITY BY ONE PARENT

#### 4.3.1. Preliminary remarks

This way of exercising parental authority is an exception to the rule of joint and equal exercise of parental authority.

#### 4.3.2. The exercise of parental authority by one parent in case of divorce

By way of exception to the rule of joint exercise of parental authority by both parents, provided by Art. 397 of the Civil Code, for sound reasons, given the superior interest of the child, the court may decide that parental authority shall be exercised only by one of the parents, under the conditions of Art. 398 para. (1) of the Civil Code.

In this case, one of the parents shall exercise the rights and duties regarding the person and property of the child, and the other parent shall retain the right to oversee the upbringing and education of the child, as well as the right to consent to his/her adoption, under Article 398 para. (2) of the Civil Code. He also has the right to have personal ties with the child, under Art. 401 para. (1) of the Civil Code, as well as the obligation to support the child.

#### 4.3.3. The exercise of parental authority in the event of death of one of the parents

In the case of death of one of the parents, parental authority shall be exercised by the surviving parent (Article 507 of the Civil Code).

#### 4.3.4. The exercise of parental authority in case one of the parents is placed under a court ban

In the case of one of the parents being placed under a court ban, the parental authority shall be exercised by the remaining parent (Article 507 of the Civil Code).

#### 4.3.5. The exercise of parental authority in the event one of the parents is disqualified from the exercise of parental rights

In the case one of the parents is disqualified from the exercise of parental rights, the parent shall only temporarily loses the exercise of these rights, but shall retain the right to consent to the adoption of the child and the support obligation. However, this parent does not retain the right to have personal ties with the child.

#### 4.3.6. The exercise of parental authority in the case of failure of one of the parents to manifest their will

Although Art. 507 of the Civil Code does not specify the circumstances that could put one of the parents in the impossibility to manifest their will, in the doctrine it has been stated that such circumstances may be the following: the disappearance of one of the parents; the

contradiction of interests between the child and one of the parents; preventing a parent from performing a particular act in the interest of the child; sentencing a parent to a custodial sentence; one of the parents has rendered him or herself unable to exercise his or her parental rights and duties.

#### SECTION 4.4.

#### THE EXERCISE OF PARENTAL AUTHORITY BY OTHER PERSONS

The exercise of parental authority by other persons is a measure which is available to the court, exceptionally, having as legal basis Art. 399 para. (1) of the Civil Code. Thus, when deciding on the divorce of the parents, the nullity or annulment of the marriage, or the application to determine filiation for a child born out of wedlock, the guardianship court can decide the placement of the child with a relative or another family or person, with their consent, or in a child protection institution.

Regarding the exercise of parental authority, Art. 399 para. (1) Thesis II of the Civil Code stipulates that the rights and duties of parents with respect to the child shall be exercised by the person or family with whom the placement was ordered, and the parents shall retain the right to oversee the upbringing and education of the child, and to consent to his/her adoption.

Article 105 (3) of Law no. 272/2004 provides that “the guardianship court shall order the temporary delegation of parental authority with regard to the child’s person, during the absence of the parents but not more than one year, to the person designated according to Art. 104 para. (3)”.

The person who has been appointed to handle the upbringing and support of the child during the absence of the parent or guardian will only exercise parental rights and duties with respect to the child’s person, whereas those relating to the child’s property shall be exercised either jointly by both parents or by one person [Art. 399 para. (2) of the Civil Code].

## SECTION 4.5.

### THE EXERCISE OF PARENTAL AUTHORITY IN THE CASE OF A CHILD CONCEIVED BY MEDICALLY ASSISTED HUMAN REPRODUCTION WITH A THIRD-PARTY DONOR

At present, as a novelty in the field of filiation, medically assisted human reproduction with a third-party donor is expressly regulated in Art. 441-447 of the Civil Code.

From the content of Art. 441 of the Civil Code, it can be inferred that medically assisted human reproduction with a third-party donor establishes exclusive filiation ties between the child and the persons who have consented to the medically assisted human reproduction with a third-party donor. Thus, in this case, the parents will be the people who have had recourse to this method, i.e. either a couple formed between a man and a woman, married to each other or not, or a single woman, according to Art. 441 para. (3) of the Civil Code.

Parental authority shall be exercised, in the case of a child thus conceived, as in the case of a child born by natural conception, i.e. by both parents jointly and equally, whether married or not, provided they cohabit. If the parents of the child born out of wedlock do not live together, the way of exercising parental authority is determined by the guardianship court, and the provisions regarding the divorce are applicable by similarity [Art. 505 para. (2) of the Civil Code].

## SECTION 4.6.

### THE EXERCISE OF PARENTAL AUTHORITY IN THE CASE OF ADOPTION OF THE CHILD

In the matter of parental authority, the primary effect of adoption is the civil kinship and, implicitly, the transfer of parental rights and duties, both those relating to the child's person and those related to his/her property, from the natural parent or parents to the adoptive parent or parents of the child.

## SECTION 4.7.

### THE EXERCISE OF PARENTAL AUTHORITY IN THE EVENT OF TAKING SPECIAL CHILD PROTECTION MEASURES

#### 4.7.1. Preliminary remarks

#### 4.7.2. Emergency placement

Emergency placement is another special protection measure of a temporary nature that is established when the child is abused, neglected or subjected to any form of violence, as well as in the case of a child found or abandoned in a sanitary facility.

This special protection measure may also be available in the case of a child whose sole legal guardian or both legal guardians cannot exercise parental rights and obligations with respect to the child, being detained, arrested, interned, or for any other reason.

During the emergency placement, the exercise of parental rights is suspended by law until the court has decided to maintain or replace this measure and with regard to the exercise of parental rights.

During the period of suspension, parental rights and duties regarding the child's person are exercised and fulfilled by the person, family, maternal assistant, or the head of the residential service that has received the child in emergency placement, and those related to the child's property are exercised and, respectively, performed by the Director of the General Directorate for Social Work and Child Protection.

#### 4.7.3. Specialised supervision

Specialised supervision is a special protection measure provided by Art. 71 of Law no. 272/2004. It is ordered against the child who has committed a criminal offense and who will not be criminally responsible, by the Child Protection Commission or the court.

Given that this special protection measure consists in keeping the child in his/her family, it can be inferred that the parental authority is exercised by his/her parents.

SECTION 4.8.

THE EXERCISE OF PARENTAL AUTHORITY IN COMPARATIVE LAW

4.8.1. French law

4.8.2. Anglo-Saxon law

4.8.3. Muslim law

## CHAPTER V

### DISQUALIFICATION FROM THE EXERCISE OF PARENTAL RIGHTS

#### SECTION 5.1.

##### GENERAL ASPECTS REGARDING THE LEGAL LIABILITY OF THE PARTIES FOR FAILING TO FULFIL OR NON-CONFORM TO THE PARTIES' DUTIES

Parental responsibility is different depending on the nature and severity of the acts committed in the wrongful exercise or non-exercise of the rights, or the failure or inadequate performance of parental duties. Thus, they may be subject to criminal, administrative, civil or family law penalties.

#### SECTION 5.2.

##### PRELIMINARY REMARKS ON DISQUALIFICATION FROM THE EXERCISE OF PARENTAL RIGHTS

The Civil Code does not define the disqualification from the exercise of parental rights, and in the doctrine it has been defined as the sanction imposed on a parent endangering the life, health or development of the child through ill-treatment, use of alcohol or narcotics, abusive behaviour, serious negligence in fulfilling parental obligations, or by seriously harming the child's best interest.

#### SECTION 5.3.

##### THE LEGAL NATURE OF DISQUALIFICATION FROM THE EXERCISE OF PARENTAL RIGHTS

As far as the legal nature of the disqualification from the exercise of parental rights is concerned, the doctrine in the field is unanimous in considering that this is a sanction of family law.

## SECTION 5.4.

### CONDITIONS OF DISQUALIFICATION FROM THE EXERCISE OF PARENTAL RIGHTS

#### 5.4.1. Preliminary remarks

From the analysis of the provisions of Art. 508 para. (1) of the Civil Code, it follows that the disqualification from the exercise of parental rights can be pronounced if only one condition is fulfilled, that the parent has committed deeds of a certain gravity and which, by their effect, endanger life, health or development of the child.

Such deeds are: child abuse, alcohol or drug abuse, abusive behaviour, serious negligence in fulfilling parental obligations, and serious harm to the child's best interests.

In the event that the disqualification from the exercise of parental rights is ordered as an adjudication or complementary criminal penalty, the special conditions provided by criminal law for the existence of the committed crime and the application of these penalties must be fulfilled.

#### 5.4.2. Facts that lead to disqualification from parental rights

#### 5.4.3. The effects of facts that cause disqualification from parental rights

## SECTION 5.5.

### PROCEDURE FOR DISQUALIFICATION FROM THE EXERCISE OF PARENTAL RIGHTS

#### 5.5.1. Preliminary remarks

#### 5.5.2. The court having jurisdiction to order the disqualification from parental rights

*From a material point of view*, according to Art. 508 para. (1) of the Civil Code, the court of guardianship has jurisdiction over such matters.

*Territorially*, claims for the protection of the individual are settled by the court in whose territorial jurisdiction the protected person is domiciled or resided.



- 5.5.3. Request for the revocation of parental rights
- 5.5.4. Judgment of the request for the emergency revocation of parental rights
- 5.5.5. Evidence handling
  - 5.5.5.1. General aspects
  - 5.5.5.2. Summoning parents
  - 5.5.5.3. Psychosocial investigation report
  - 5.5.5.4. Attorney's participation in the trial

## SECTION 5.6.

### THE EFFECTS OF DISQUALIFICATION FROM THE EXERCISE OF PARENTAL RIGHTS

#### 5.6.1. The extent of the effects of disqualification from the exercise of parental rights

In principle, the disqualification is total, both in terms of rights, and with regard to children born at the date of the judgment. Exceptionally, however, the court may order the disqualification only in respect of certain parental rights or certain children, and only if the upbringing, education, teaching and professional training of children is not jeopardised.

#### 5.6.2. Support obligation

Disqualification from the exercise of parental rights has no effect on the child's rights with regard to his or her parents. In particular, according to Article 510 of the Civil Code, disqualification from the exercise of parental rights does not exempt the parent from the obligation to provide support to their child.

#### 5.6.3. The effects of disqualification from parental rights in other matters

#### 5.6.4. Establishment of guardianship

If both parents have been disqualified from the exercise of parental rights, according to Art. 511 of the Civil Code, guardianship is instituted.

## SECTION 5.7.

### REINSTATEMENT OF THE EXERCISE OF PARENTAL RIGHTS

#### 5.7.1. Preliminary remarks

#### 5.7.2. Conditions and procedure for the exercise of parental rights

Under Art. 512 para. (1) Civil Code, if the circumstances that led to the disqualification from the exercise of parental rights ceased, and if the parent no longer endangers the life, health and development of the child, the court shall reinstate the exercise of these rights for the parent.

5.7.3. The right of the parent who has been disqualified from the exercise of parental rights to have personal ties with the child

According to Art. 512 para. (2) of the Civil Code, pending resolution of the request for revocation of parental rights, the court may allow the parent to have personal ties with the child if this is in the best interests of the child.

## CONCLUSIONS AND *DE LEGE FERENDA* PROPOSALS

I believe that, although the current Civil Code has taken over most of the provisions of the Family Code on the protection of the rights of the child, the current regulations are superior in many respects. In my opinion, the most important aspect of legislative progress is that the provisions of the Civil Code are in line with the requirements of the international normative acts on the protection and promotion of children's rights, as well as some internal regulations adopted after 2000, especially with the provisions of the Law no. 272/2004 on the protection and promotion of the rights of the child. From the way in which they were grounded, the provisions of the Civil Code are intended to enforce the fact that, according to the Constitution, children enjoy a special legal protection regime, and the principle of promoting their superior interest is the foundation of any legal regulation concerning them.

Yet, by reference to its purpose, that of promoting the superior interest of the child, the use of the phrase *parental authority* is and remains questionable, both by the idea that the legislator has thus opted for an expression solution used in a disavowed normative past, and by not reflecting the current normative reality. As pointed out in the doctrine, despite this tremendous legal shadow, the authors of the current Civil Code did not provide for the parents' right to make mandatory provisions for the child and, correlatively, their obligation to respect them. Practically, the Civil Code enforces parental authority that is lacking an essential aspect of any legal relationship of authority.

The analysis of the provisions of the Civil Code regarding parental authority highlights the existence of few rules, insufficiently substantiated logically and legally, with particular reference to the requirements of constitutional principles. In this regard, I shall present some of these situations, and the *de lege ferenda* proposals to remedy them:

- article 40 of the Civil Code regulates the conditions under which the guardianship court may recognise in advance the full capacity of exercise for the minor who has reached the age of 16. Even if Art. 40 of the Civil Code does not expressly stipulate this, the right to action in recognising in advance the full capacity of exercise belongs to the child. Given that this is a person with limited capacity, the action may be initiated by the minor who wants to be emancipated, but with the consent of the legal guardian (the parents or guardian, as the case may be), according to Art. 41 para. (2) of the Civil Code, in conjunction with Art. 32 para. (1) let. a) of the Code of Civil Procedure. In the doctrine, without indicating a legal provision, it was considered that if the legal guardian opposes the minor's request, the

guardianship court may appoint a special trustee. However, I note that, according to Art. 109 of the Civil Code, “The protection of a natural person by means of trusteeship shall take place only in the cases and conditions stipulated by the law”, which is not the case in the analysed situation. Practically, we are in the presence of a legal loophole that could affect the right of a 16-year-old child to request emancipation. For these reasons, I consider the intervention of the legislator necessary. This intervention is also due to the fact that, according to art. 40 of the Civil Code, legal protectors (parents or guardians) are heard in this procedure. Eventually, *de lege ferenda*, a new line could be introduced in the Art. 40 of the Civil Code, stipulating that “if the parents or guardians should raise opposition, the guardianship court shall appoint a trustee”;

- according to Art. 488 para. (1) of the Civil Code, “Parents have the duty to raise the child under conditions that ensure his or her physical, mental, spiritual, moral and social development in a harmonious way”. I emphasize that Art. 487, thesis I of the Civil Code also refers to *child-rearing* but, unlike Art. 488 para. (1), it qualifies it as both a *right* and a *duty* of the parents. Also, unlike Art. 487 para. (1) of the Civil Code, which underpins child-rearing to *the right of parents to care for the health and physical, mental and intellectual development, for the education, teaching and professional training of the child*, Art. 488 para. (1) of the Civil Code only refers to the *physical, mental, spiritual, moral and social development of the child*. Thus, the *education, teaching and professional training of the child* are disregarded. Also, the *mental and intellectual development* of the first text is replaced by *mental, spiritual, moral and social development* of the child, in the second text. Concerning the same phenomenon (*child-rearing*) and aiming at the same goal (the proper exercise of the rights of the child), the legislator should have been more concerned with the consistency of regulation. For these reasons, I proposed that, *de lege ferenda*, Art.488 of the Civil Code be repealed, and the norm provided by para. (2) be placed in the context of Art. 487 of the Civil Code, in a distinct line. The current text of Art. 487 of the Civil Code, becoming para. (1) could be supplemented to refer both to the *moral and social development* of the child;

- the doctrine has expressed the view that the provisions of Art. 501 of the Civil Code, on the acts of a minor without the capacity of exercise and of the minor with limited capacity, are unnecessary. Thus, it can be easily observed that they duplicate the provisions of Art. 41 para. (2) and Art. 43 para. (2) of the Civil Code, which also refers to the acts of the minor with limited or no capacity of exercise. In this respect, two parallels were drawn, contrary to the technical legislative norms for the drafting of normative acts. For these reasons, in accordance

with the provisions of Art. 16 of Law no. 24/2000 regarding the technical legislative norms for the drafting of normative acts, I proposed, *de lege ferenda*, to abrogate the provisions of Art. 501 of the Civil Code on the right and duty of the parents to represent the child in legal acts, or to approve them, as the case may be. The removal of these legal provisions would be likely to undermine the doctrinal thesis that only the rights and duties relating to the child's property presuppose the conclusion of legal acts;

- according to art. 503 para. (1) of the Civil Code, "The parents jointly and legally exercise parental authority". The generic reference to the text reproduced in the "exercise of parental authority" is questionable. I underline that, according to Art. 483 para. (1) of the Civil Code, parental authority is a *set of rights and duties* of the parents, both in relation to the child's person and his or her property. Thus, the content of parental authority includes the rights to be exercised and the duties to be fulfilled by the parents. In practice, the expression of *exercise of parental authority* reflects only one side of its content (the active one), the passive one (fulfilment of duties) being omitted. Even though, in terms of scope, the expression of *exercise of rights and fulfilment of parental duties* is much larger than the expression of the *exercise of parental authority*, it more faithfully reflects the content of parental authority. In this regard, in order to avoid possible different interpretations, I consider it desirable, *de lege ferenda*, to abandon the phrase "*exercise of parental authority*" and replace it with the expression "*exercise of rights and fulfilment of parental obligations*";

- the expression of *joint and equal exercise* of the parental authority, also used in the construction of the provisions of Art. 503 para. (1) of the Civil Code is not the best solution for legal expression, as *joint* exercise does not necessarily mean *consensual*. Thus, two subjects of law may participate in the exercise of a right, but only one of them decides how to exercise the right, even if their benefits are equal. From this point of view, the expression *by mutual agreement*, used in the content of Art. 98 para. (1) of the Family Code, albeit incomplete, was superior to the formulation in Art. 503 para. (1) of the Civil Code. Indeed, it is well known that the *joint* expression reflects the legal equality of the subjects of law in civil legal relations. However, legal equality does not necessarily imply equality of benefits. It is possible that, despite the fact that the subjects of law concerned decide on the conclusion of the legal act that generated a specific legal relationship, there is an imbalance between them in the rights and duties that make up the content of that legal relationship. Basically, the term *by mutual agreement* would have added the phrase *on an*

*equal basis*. Regarding these observations, I believe that, *de lege ferenda*, it is necessary to reformulate the provisions of Art. 503 para. (1) of the Civil Code, in the sense that “parents exercise their rights and fulfil their parental duties by mutual agreement and on an equal basis”;

- finally, I point out that although Art. 48 par. (3) of the Constitution provides equality before the law of children born out of wedlock with those born in it, Art. 505 para. (2) of the Civil Code establishes a different legal regime for the exercise of parental authority over children born out of wedlock if their parents do not live together.

Practically, there is the question of the unconstitutionality of the provisions of Art. 505 para. (2) of the Civil Code. Thus, parental authority, even if it is an ensemble of rights and duties of the parents in relation to the person and property of the child, also presupposes the exercise by the child of the rights recognised by the law. The fact that parental authority is exercised only in the best interests of the child denotes this reality.

Moreover, reality shows that there are situations in which parents do not live together although they are married and have children from their marriage. It is the case of spouses separated *de facto* for reasons which are imputable or non-imputable on them (for example, one is going to work or on a mission abroad).

For these aspects, I consider that the legislator should intervene and, *de lege ferenda*, modify the provisions of Art. 505 of the Civil Code accordingly, so that the exercise of parental authority in the situation in which the parents are not living together would not be different in relation to the situation of the children, whether born in or out of wedlock;

- from the interpretation *per a contrario* of the provisions of Art. 508 et seq. of the Civil Code, one can conclude that, after the final ruling on the judgement of termination of *parental rights*, the parent whose parental rights have been terminated shall remain with the duty to *fulfil his or her parental obligations*. From this point of view, it has been stated in the literature that there is a *paradoxical situation* in the case of rights that are, at the same time, parental obligations. In my opinion, even if some *rights and obligations* are traditional, and also found in the old regulation, they represent real *legal anomalies*, contrary to elementary legal logic. Thus, in principle, any right recognised to a subject or category of subjects of law is a corresponding obligation for other subjects or categories of subjects of law. In order to eliminate these situations, I believe that, *de lege ferenda*, the legislator should decide, on a case-by-case basis, whether it is a parental right or obligation;

- art. 510 of the Civil Code, being placed in the context of regulations devoted to the termination of the exercise of parental rights, refers to the support obligation. In particular, according to this article, “the termination of the exercise of parental rights does not exempt the parent from the obligation to provide support to the child”. As long as the termination has the exercise of parental rights as its object, such a rule is not justified in the context of Art. 508-512 of the Civil Code. Furthermore, in common law, the obligation of the parents to support the child is provided by Art. 499 and Art. 516 para. (1) *et seq.* of the Civil Code, without being conditioned in any way by whether the parents have had the exercise of their parental rights terminated. A norm with identical content was also provided by Art. 110 of the Family Code. Most likely, the provisions of Art. 110 of the Family Code were transposed mechanically into the provisions of Art. 510 of the Civil Code. Faced with the obvious uselessness of Art. 510 Of the Civil Code, I propose that, *de lege ferenda* , it should be abrogated. Equally useless are the provisions of Art. 511 of the Civil Code, which provide for the establishment of guardianship in the situation when both parents are unable to exercise parental authority. In this case the provisions of Art. 44 of Law no. 272/2004 and of art. 110 of the Civil Code are duplicated.

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