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PHD THESIS

THEORETICAL AND PRACTICAL ANALYSIS OF THE LEGAL OBLIGATION OF MAINTENANCE IN THE ROMANIAN LEGAL SYSTEM

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PHD THESIS PLAN

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INTRODUCTION

Throughout the history, whether we talk about a family, where one of the members exercise on others the power in a discretionary manner[1], or we talk about a family governed by equality in exercising the family rights and duties[2], the family justifies the reason of being in spiritual connection, bonds of affection, that emerges between its members, connections which argue and constitutes at the same time the reason of mutual material and moral support.

Also, the family, as social reality, represents the result of the need of human beings to be protected, to feel safely along with other people, with whom they develop family or affinity relationships, arising from a natural human and namely from feelings, respect and affection.

On the basis of this form of social organization - *the family*, is set a legal institution, to whom the legislator, over time, consecrated in terms of its importance,

[1] Legally, at Romans the family was ruled and governed by the will of the *pater familias.* In this regard see: C.Ciorăscu, C. Gălățanu, *Drept roman, Partea generală*, Editura Tiparg, Pitești, 2001, p. 97; D. Iancu, C. Gălățanu, *Drept privat roman*, Editura Universității din Pitești, Pitești, 2009, pp.90-96; în A. Drăghici, R. Duminică, *Obligația legală de întreținere,* Editura Universul Juridic, București, 2014, pp. 7-9;

[2] In the current Romanian law, the equality of spouses in all matters concerning the marriage is raised at principle rank, through its legal basis in the fundamental law of the state. Thus, art. 48 paragraph (1) of the Romanian Constitution provides that *"the family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children"*

many regulations, as an additional guarantee of security, protection, welfare and balance that should characterize it.

As the existence and evolution of family relationships is an integral part of social life, the legislator has seen fit to expressly regulate the personal relationships and also the patrimonial relationships between family members, demonstrating the care of the state in protecting these social relationships.[3]

As I stated previously, the source of these relations is the attachment of family members, which is why these specific obligations are met mainly voluntarily, without coercive involvement of the state authorities, from a natural sense of duty, without a pragmatic calculation of proportionality of advantages or disadvantages, that may result.[4]

Legally regulated, the legal maintenance obligation constitutes a guarantee of the fair application of legal provisions and a mean of removing the obstacles that could lead to family breakdown, due to the fact that in this way it is made voluntarily, and not by constraint or through some other form of coercion.

Even if, expressly, as distinct legal entity, it was regulated for the first time in the Civil Code of 1864, being subsequently assumed in the Family Code and currently in the content of Civil Code[5] in force, and in the old Romanian law, were included details

[3] For more details see: F. Ciorăscu, A. Drăghici, I. Olah, *Dreptul familiei și actele de stare civilă,* Editura Paralela 45, Pitești, 2005, p. 17;

[4]Al. Lesviodax, *Obligația legală de întreținere*, Editura Științifică, București, 1971, p. 8;

[5] Adopted by Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 511 of 24 July 24 2009 and entered into force on 1st October 2011 according to Article 220 para. 1 of Law no. 71/2011;

regarding the legal obligation of maintenance,[6] on which we will return, precisely in order to present the evolution of this legal institution throughout the history.

The topic of the thesis is of present interest, and brings into discussion an area that interests, more than ever, the Romanian society, especially the legal obligation of maintenance with foreign elements, in the context of migration, especially of temporary migration, in work abroad.

The opportunity of this scientific approach is proven by the fact that on 1st of October 2011 came into force the new Civil Code, Law no. 287/2009 supplemented and amended by Law No.71 / 2011, and on 15 February 2013 came into force the new Code of Civil Procedure, Law no.134 / 2010[7], including subsequent amendments and additions.

In terms of the current Civil Code, it regulates in Articles 513-534 "the legal maintenance obligation"[8], and the Articles 508-512 are intended to regulate "the parental authority", continuing the tradition begun with the regulations contained in the old Family Code[9] (repealed by the new Civil Code).

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[6] *Caragea Enactment of 1818 from Wallachia foreseen "after the separation of marriage, the father to be obliged to care for the children's food, and if the father doesn't have the condition, the mother shall be obliged"*

Also from the Code of Calimach of Moldova from 1817: *"the father is especially obliged to care for the children's food until they reach the age to feed themselves, and the mother is obliged to take care of their body and health. "*

[7] Law no. 134/2010 on the Code of Civil Procedure was republished under art. 80 of Law 76/2012 on the implementation of Law no. 134/2010 published in the Official Gazette of Romania, Part I, no.365 of 30 May 2012;

[8] See for example Art.l 513, Art. 514, Art. 516 and Art 518 of the new Civil Code.

[9] The Family Code regulated the legal obligation of maintenance in Art. 86-96.

We exemplify, with generic title, some of the provisions having novelty character: express consecration of legal (Art.513) and personal character (Art.514) of the maintenance obligation, inadmissibility of waiver in the future to the right of maintenance (Art.515),the maintenance in case of dissolution of adoption (Art. 520), misconduct (Art. 526), proof of needy status (Art. 528), date on which the maintenance is due (Art. 532) and the return of not due maintenance (Art. 534).

Along with the quantitative aspect, it is remarkable the effort for legal consecration of various doctrinal solutions, founded under the old Family Code and for the "modernization" of some legal rules established to the legal obligation of maintenance.

However, we intend to identify those legislative solutions for regulations identified as logical-legal insufficiently processed, with real potential for various interpretations and which, *de lege ferenda*, should be subject to some changes, additions or even repeals.

The work has pursued a series of objectives, listed and argued below, by an interdisciplinary methodology, specific to Civil Law and Civil Procedural Law. The importance of the theme lies from the critical analysis of the procedures of the new Civil Code and of the new Code of Civil Procedure, in the matter of legal obligations of maintenance, and of the special laws incident in the field; their interpretation creating difficulties in bringing into force the Court of Law, this fact has led to an uneven practice. Also, being a scientific research approach, we realized an analysis of various opinions from the doctrine, just to be able to highlight those aspects grounded from legal and logical point of view, relevant and useful for the understanding of this legal institution.

The thesis was divided into five chapters, which we will summarize below:

Chapter one, entitled „*The evolution of the legal obligation of maintenance in Romanian Law"* provides a synthetic accentuation of the notion of „civil obligation", of the elements of "legal report of obligation" and a classification of the civil obligations, before tackling the evolution of the institution of legal obligation in time. Thus, it was done a structure of the legal obligation of maintenance from the Romanian law, written until twentieth century and later in the contemporary period, just for the comparative highlighting of the regulations in this matter.

In this chapter there were analyzed also the legal characters of the legal obligation of maintenance, namely *legal, personal, mutual, successive and divisible*, focusing on doctrinal controversies arising after the entry into force of the new Civil Code.

The second chapter, entitled *"Conditions of the legal obligation of maintenance"*, was intended to debate the conditions which the creditor must meet to request the legal obligation of maintenance, namely: to be in a state of need, he cannot provide the basic needs from work or from his assets, and has a behavior in line with the rules of social coexistence. The second section of this chapter covers the debate of the debtor's requirements of the legal obligation of maintenance, namely the debtor to have the necessary means to be obliged to pay the maintenance to a person.

The third chapter entitled "subjects of the legal report of the legal obligation of maintenance", in which, there were analyzed the categories of persons between which exist the legal obligation of maintenance, the order in which the legal obligation of maintenance is due. The multiple problems encountered in practice, involves thorough analysis of the legal obligation of maintenance, between various categories of persons (eg. maintenance of the child by the husband of his parent and the reciprocity of this obligation, the execution of this obligation after the dissolution of adoption) and the

formulation of *de lege ferenda* proposals to avoid the misinterpretation of the intention of the will of the legislator.

The forth chapter entitled "Establishment, amendment and cessation of the exercise of the legal obligation of maintenance" deals with the content, scope and performance of this obligation, and the return of not due maintenance.

The importance, but especially the novelty of these elements, lies also from the analysis to be made in terms of the new Code of Civil Procedure.[10]

The fifth chapter analyzes the "Regulation of the maintenance obligation, in the International Private Law and comparative law aspects" and identifies legal norms that can create ambiguity and an uneven application in practice, under the regulation of the rules of Private International Law, in the new Civil Code, in Book VII. It will also be analyzed the way of obtaining the maintenance abroad, according to the "New York Convention", paying a special attention, to the regulation of the legal obligation of maintenance in the European law. Also, there were included elements of comparative law on legal obligation of maintenance, being used regulations from the law of USA, Australia, Republic of Moldova and Ireland. .

The work includes a final part, intended for the formulation of *de lege ferenda* conclusions and proposals, we appreciate new, significant, based on logical and legal analysis of the rules in force, of judicial practice in the field, especially the one formed as a result of settlement of disputes, by the courts for guardianship and family, and other alternative forms of settlement of disputes.

[10] It will take into account the provisions of Title II "*Forced tracking of the debtor's assets*" of Book V "*About forced execution"* of the new Code of Civil Procedure;

CONCLUSIONS

1. The analysis of the current text of the Civil Code, highlights the express regulation only of the situations where there are several debtors, bound to pay maintenance to a single creditor, and the assumption of a single debtor who is obliged to pay maintenance to several creditors. It is obvious the absence of any clarification regarding the circumstance of the existence, concurrently of a plurality of debtors and creditors of the maintenance obligation, real factual assumption, in particular, in the case of second degree relatives (grandparents- grandchildren, brothers-sisters). In this regard, *de lege ferenda*, we propose to the legislator, to expressly regulate also this circumstance, namely the simultaneous existence of a plurality of debtors and creditors.

2. Using by the legislator, in the last thesis of the Art. 521 para. (2) of Civil Code, the phrase "for the part of each" is subject to interpretation, the simple reading of the provisions of this article could lead to the idea that in children's case the maintenance due to a parent, is calculated on equal shares. This interpretation is inconsistent with the legislator's will of the current Civil Code, establishing in the text of para. (1) of the same article, the rule according to which, in case of co-debtors, the maintenance is due proportionally with the means owned by each of them. This interpretation is consistent with the common[11] law rule established by art. 1456 of Civil Code., regarding the solidarity of co-debtors, children being obliged to contribute jointly at the maintenance

[11]Art. 1456 of the new Civil Code has the marginal name of "Regress between co-debtors" is part of Chapter II "Joint obligations" Section 2 "Joint obligations between debtors" and provides: joint debtor who performed the obligation may require to its co-debtors on the part of the duty that falls to each of them, even if subrogates in the creditor's rights (para. 1); the Parties incumbent to joint co-debtors are presumed to be equal, if from the convention, law or circumstances does not indicate otherwise (para. 2); "

of the parent, but this contribution will not be calculated in equal shares, but appropriate to the means that they have.

In this respect, to avoid any misinterpretation we propose, *de lege ferenda*, the reformulation of the last thesis of Art. 521 par. (2) of the Civil Code, in the sense that, the one who paid the maintenance may turn against the other co-debtors, each contribution is calculated in proportion to the means they have.

3. Unlike the general rule ,established by art. 524 of Civil Code, for former spouses, the creditor of the maintenance obligation must be *unable to work* and will not be imposed any requirement to *not be able to support from its assets.* Given these legislative inconsistencies or discrepancies, *de lege ferenda,* we propose the proper amendment of the provisions of Art. 389 Civil Code, which should reflect, just like Art. 524 Civil Code, the fulfillment of the same conditions to be a creditor of the maintenance, namely as divorced husband to be in a state of need, unable to maintain from work or his assets, for causes occurred before marriage, during marriage or in the term of one year from the date of divorce.

4. Compared to observations formulated regarding the incorrect use in the content of Art. 389 of Civil Code of the phrase "to the forced one" referring to the forced ex-husband, and the generic expression "net income", without determining the source and period, we believe that, *de lege ferenda*, the provisions of Art. 389 para. (3) of Civil Code, could be reformulated as the due maintenance, according to the provisions of para. (2) shall be set up to a quarter of net monthly income of the obliged former spouse, in relation to his means and his state of need of the former spouse creditor.

5. The text of the Art. 521 para. (2) of the Civil Code could create more ambiguity, for this purpose, we suggest to the legislator, *de lege ferenda*, to repeal because it doubles

unjustified the common law rules of solidarity. In common law, according to Art. 1447 of Civil Code, the creditor may require the payment from any of the joint debtors, without to oppose the benefit of division. The tracking turned against one of the joint debtors, does not prevent the creditor to proceed against the other co-debtors. The debtor may request the introduction of the other co-debtors concerned.

6. The current civil legislation has consecrated to the legal obligation of maintenance more regulations, in the content of chapter for parental authority, ranging from Art. 499 of Civil Code and up to 510 of Civil Code. Furthermore, two articles in this section are marginally called, in identical way even, "maintenance obligation"[12], which shows a lack of accuracy of the legal text and also an escape of the legislator, impermissible at this level, fact for which we propose *de lege ferenda*, or rename Art. 510 of the Civil Code meaning "Continuation of maintenance obligation" or repeal of art. 510 of Civil Code and regulation of its content to be restored in a separate paragraph in the content of Art. 499 of Civil Code currently referred to as "Maintenance obligation" by using a reference standard referring to the conditions of the termination of rights established by Art. 508 para. 1 of Civil Code, so the Art. 499 para. (5) should have the following content *the Maintenance obligation subsists in the situation referred in Art. 508.*

[12] Art. 499 of Civil Code regulates: *"Father and mother are bound jointly to maintain their minor child, ensuring his basic needs and education, teaching and his professional training. (para.1) If the minor has his own income which is not enough, the parents are required to provide the necessary conditions for growth, education and his professional training (para. 2) The parents are obliged to maintain the child that became major and he is engaged for studies, until graduation, but not beyond the age of 26 years (para.3) In case of disagreement, the extent of the maintenance, the way and manner of execution, and contributions of each parents shall be determined by the Guardianship Court, based on the psychosocial investigation report. (para.4)"*

Art. 510 of Civil Code regulates: *"Termination of parental rights does not relieve the parent of its obligation to give the child maintenance. "*

7. We believe that, *de lege ferenda*, the text of Art. 499 of the Civil Code, should be repealed with regard to para. (1), para. (2) and para.(4), which, unnecessarily duplicates the other provisions of the Civil Code, namely: Art. 487, Art. 516 para. (1) and Art. 521, and the reformulation of para. (3) of the same article, to establish the condition of effective continuing of studies by the creditor - major child and thus to eliminate any abuse of law.

8. The legislator did not expressly regulated the possibility that the grandparents and great-grandparents, when they are creditors of the maintenance, in case of emergency, to have the possibility to start the action for obtaining the maintenance only from one of the grandchildren, namely great-grandchildren, because Art. 521 para. (2) of Civil Code gives this possibility exclusively to the parent who may require the maintenance only from one of the children. Because grandparents and great-grandparents, as well as the parents, have the quality of ascendants, for the same reasons, *de lege ferenda*, the provisions of Art. 521 Para. (2) of Civil Code should be extended in their case too.

9. We also suggest to the legislator that, *de lege ferenda*, to align the Art. 520 of the Civil Code with Art. 516 para. (2) and Art. 519 of Civil Code and, consequently, to eliminate from the content of the first article, the reference to the maintenance obligation of the former adopted by her husband, who regardless the situation would be called before the adoptive parent, to pay the maintenance.

10. Comparing the regulation from the Hague Protocol of 23 November 2007 on the Applicable Law of maintenance obligations in the Member States, with nation applicable rule, respectively Art. 1080 para. (1) point 1 of Code of Civil Procedure which recognizes the competence of Romanian Courts in matters relating to

maintenance obligation with foreign element, if the applicant has the domicile in Romania, it is found a major difference in terms. If the Protocol of the criterion for establishing the jurisdiction is the one of "habitual residence", in exchange, in case of Code of Civil Procedure, the determining of the applicable law is based on the applicant's residence. Consistent with this criterion, the content of Art. 107 of Code of Civil Procedure, regarding the general rule of determining the territorial jurisdiction, the Romanian legislator uses the criteria of defendant's domicile, or alternatively, the plaintiff's domicile, as provided by rule regarding the alternative territorial jurisdiction, provided by Art. 113 para. (1) point 2 of Code of Civil Procedure

In this context, we propose to the Romanian legislator, *de lege ferenda,* a standardization of terms, used in the Romanian legislation, with the ones from the European legislation, and in civil matters for the purpose of using the concept *habitual residence,* or at least the explanation of this concept in the domestic law.

11. In matters of jurisdiction, the new Code of Civil Procedure has introduced, in a more developed form, rules of alternative jurisdiction, Art. 113 para. (1) point (2) establishing with regard to the requests concerning the legal obligation of maintenance, attached to the Court from the defendant's domicile, that the Court has also territorial jurisdiction "in whose jurisdiction resides the plaintiff creditor." Although commendable the legislator's effort to create easier access to the litigant to justice, and thus a settlement is trying to be ensured with expeditious disputes by establishing rules of alternative jurisdiction, this challenge was only partially achieved. The legislator expressly refers to the content of the previous article stated in the Court from the residence of "plaintiff creditor", which means that he excludes from the application of these rules of alternative jurisdiction the debtor of the legal obligation of maintenance, which also may be a plaintiff in the case of disputes concerning the modification, termination or restitution of not due maintenance.

For the reasons mentioned above, we propose, *de lege ferenda*, that the Romanian legislator to modify the content of Art. 113 para. (1) pt. 2 of Code of Civil Procedure, by replacing the term "plaintiff creditor" with "plaintiff" in order to broaden the possibility of any plaintiff, creditor or debtor of the legal obligation of maintenance to benefit from the territorial alternative jurisdiction of the district court in whose jurisdiction the plaintiff resides.

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