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ABOUT REAL INEQUALITIES IN THE EXERCISE OF PARENTAL RIGHTS AND DUTIES TOWARDS THE CHILD

Cristina DOBRE [1]

Abstract

In judicial practice, the issue of real inequality between parents in terms of the exercise of their rights and duties over the child has been raised, causing much discussion in this regard. In this context, we show in this article that the principle of equality does not prohibit certain specific rules. Therefore, we stress that real inequality results from these specific rules, and to the extent that equality is not natural, imposing it would be tantamount to discrimination.

Moreover, we point out that in judicial practice it has been decided that respect for the principle of equality of rights does not mean that the legal rule reflects the full uniformity of social situations, but that, on the contrary, the diversity of social situations can be proportionately adjusted to bring them to a common denominator.

Keywords:

real inequality, formal inequality, rights and duties, parents, minors

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1. Recently, in judicial practice, the issue of real inequality between parents in terms of the exercise of their rights and duties over the child has been raised, causing many discussions in this regard.

We note, first of all, that the most recent civil law textbooks and monographs do not give this issue an important place among the legal institutions of the Civil Code. Secondly, there are no articles or studies on this issue in our legal literature devoted exclusively to it, and in judicial practice there is rarely any reference to the principle of equality between persons (Morand, 1988, p. 7). According to paragraph 1 of Article 16 of the Basic Law, citizens are equal before the law and public authorities, without privileges and without discrimination. Failure to observe the principle of equality of rights results in the unconstitutionality of the privilege or discrimination which, from a normative point of view, led to the violation of the principle. In that regard, the Constitutional Court (1993) notes that, according to its case-law, discrimination is based on the concept of exclusion from a right, and the specific constitutional remedy in the event of a finding of unconstitutional discrimination is the granting of or access to the benefit of the right (Constitutional Court, 2014). Discrimination is the result of different treatment of the same category of persons or of situations which are not objectively and reasonably distinguishable.

In addition, our Constitution establishes, with regard to spouses, a special guarantee of equality in the text of Art. 48 para. 1, which provides that "the family is founded on the marriage freely entered into between the spouses, on their equality...". In the light of these constitutional guarantees, the restriction of the exercise of the rights of women who have married is likely to result in an inequality of legal status in relation to their spouses, which is not objectively and rationally (Constitutional Court, 2005a) justified by Article 53 of the Basic Law, which provides that the restriction of the exercise of certain rights or freedoms is necessary 'for the protection of national security, order, health...'. However, the principle of equality does not prohibit specific rules in the case of certain rules. Formal equality would lead to the same rule despite the difference in situations. Therefore, the real inequality resulting from this difference, and to the extent that equality is not natural, to impose it would be to institute discrimination (Constitutional Court, 1995).

Moreover, it has been decided in judicial practice (Constitutional Court, 2013) that respect for the principle of equality of rights does not mean that the legal norm reflects the full uniformity of social situations; on the contrary, the diversity of social situations can be proportionately adjusted to bring them to a common denominator.

Finally, another reason could be that the text of Article 16 of the Constitution is aimed at equality of rights between citizens as regards the recognition of fundamental rights and freedoms, not at the same legal treatment of the application of measures, regardless of their extent. This justifies not only the admissibility of a different legal regime for certain categories of persons, but also the need for it (Constitutional Court, 2005b).

We believe that the constitutional aspects mentioned are not only of theoretical interest, but also of practical use, because the equality of rights between parents over the child in each individual case has important practical consequences.

2. It follows that, in the light of those texts, the exercise of parental rights and duties is in accordance with the principle of equality of rights between men and women. Relations between parents and children are regulated in accordance with the constitutional principle of equality of rights between men and women in all areas of social life. Consequently, parental rights and duties are - in principle - incumbent on both parents (Art. 1 para. 3 and Art. 488 of the Civil Code; Art. 503 of the Civil Code). According to the first text, men and women have equal rights in the exercise of their rights towards their children, and according to the second, both parents have the same rights and duties towards their children, without distinction as to whether they are married, unmarried or adopted. However, the right to consent to the adoption of a minor child or to request the termination of the adoption is enjoyed only by the natural parents (of the marriage or out of wedlock) and not by the adoptive parents.

The equality of parents as regards parental rights and duties means that measures relating to the person and property of the child are taken by the parents by mutual agreement in principle.

According to Article 483 of the Civil Code, parental authority is the set of rights and duties which concern both the person and the property of the child and belong equally to both parents. It goes on to state that: "whenever there are disagreements between parents regarding the exercise of parental rights or the performance of parental duties, the guardianship court, after hearing the parents and taking into account the conclusions of the psychosocial investigation report, shall decide in the best interests of the child".

The interests in question relate not only to the material possibilities of the parents, but also to the age of the children, the behaviour of the parties before the divorce, the degree of attachment and concern shown for the children, the emotional ties created between the parents and the children, the educational possibilities of each parent, their morality and other such circumstances. However, the fact that one of the child's parents is

cohabiting is not such as to lead to the conclusion that the interests of the child would be prejudiced by entrusting the child to him or her. The same conclusion is required where the parent to whom the minor children have been entrusted has other persons in his care. Moral conditions take precedence over material conditions. As a result, a minor child may be placed in the care of a parent who does not have sufficient material means of support. However, the attachment of the minor to one of the parents cannot be taken in isolation, without taking into account the complexity of the elements that contribute to the definition of the "best interests of the minor".

Therefore, the essential condition for the courts to decide on the custody of minor children is precisely the protection of their interests, by examining the criteria mentioned above. Other times, the interests of the child require that they also take into account related factors, such as the parent's profession or the possibility for the parent to personally take care of the child's education. No matter how affectionate a parent may be towards the child and no matter how good a parent's material situation may be, these factors cannot be taken into account as determining factors if the parent, by the nature of the service he or she provides, is obliged to be constantly away from home and leave the child in the care of other relatives.

The arguments put forward - and, in general, any other argument - are not eo ipso determinant, but are assessed by the court in an absolute manner, so that, in the end, the divorced parent to whom the child is entrusted must provide the child with an appropriate family environment for his or her upbringing and, above all, education. As can be seen from an examination of the content of the reference text of the Civil Code, if there are several children, the court is obliged to take into account the interests of each child and, after examining the situation in depth, it may entrust some children to the mother and others to the father, provided, of course, that the measure is in the best interests of the minors and, in our view, is exceptional.

3. It has been pointed out in legal doctrine (Barasch et al., 1960, p. 47; Ionaşcu, 1958, p. 6) that the consent of the parents must be express with regard to the representation or consent to acts (of material law of the minor).

The question has been raised as to whether the parents' consent to represent or assist the minor in procedural matters can be presumed and not only express.

Thus, in one opinion, (Silvian, 1958, p. 56) it was said that if only one of the parents comes to court, although the other is not in one of the situations of impediment provided for in Art. 486, para. 2 of the Civil Code, the court may consider that the parent present has the consent of the other

parent, unless there is a disagreement between the parents. The text reads as follows: "Whenever there is disagreement between parents regarding the exercise of parental rights or the performance of parental duties, the guardianship court, after hearing the parents and taking into account the conclusions of the report on the psychosocial investigation, shall decide in the best interests of the child. The child's hearing is compulsory, and the provisions of Article 264 of the Civil Code are applicable. Until proven otherwise. If the parents are not married, the court will decide on a case-by-case basis.

In another view, (Anca, 1964, p. 153) the consent of the parents is not presumed until proven otherwise, in the absence of a legal provision providing for such a presumption. The law did not indicate what happens if only one of the parents comes to court, even though the other has the exercise of parental rights, because there was no need, the invalidity of such an act resulting virtually from the failure to fulfil the conditions required, imperatively, for the minor's full capacity. We support this view, because it is based on strong arguments (Barasch, et al., 1960, p. 176; Ghimpu & Grossu, 1960, p. 65) and - as we believe - corresponds to our system on the restoration of legal capacity.

4. Situations may arise where it is not possible for the minor to be protected in relation to his or her person (and of course in relation to property) by both parents, but only by one of them. Article 505 of the Civil Code shows such situations: death of one of the parents. According to this article, guardianship is opened if both parents are dead. The two texts are therefore consistent. The guardianship of the minor falls to the surviving parent.

A court judgment declaring one of the parents dead establishes the presumption that the missing person ceased to live on the date fixed by the judgment as the date of death. In this case, the guardianship of the children was carried out, before the date on which the judgment declaring the death became final, by one of the parents on the basis that the other parent was unable to express his or her will, having disappeared, and after that date the guardianship of the children will be carried out by the same parent on the basis that the other parent is declared dead.

At the same time, it has been stated that children conceived after the date of death, who were presumed to be the father of the child as long as the judgment had not intervened, cease to be deemed to belong to the man declared dead. If the child's mother's husband was declared dead at a date prior to the birth and conception of the child, the child is a child out of wedlock. The guardianship of such children shall be exercised until the date on which the judgment declaring the death becomes final by one parent on

the ground that the other parent has disappeared, and after that date, as long as filiation to the father has not been established, the guardianship shall be exercised by the same parent, assuming that he is in a position to do so, since the child has filiation established only in relation to the father; disqualification of a parent from parental rights. In contrast to the situation (death of one of the parents, when parental rights and duties necessarily devolve on one parent only), in the case of disqualification some clarifications are necessary. According to Article 509 of the Civil Code, the parent is not relieved of his or her duty to support the child by the termination of parental rights.

On the other hand, the guardianship authority may give permission to the parent who has lost parental rights to have personal contact with the child if such contact does not jeopardise the child's upbringing, education, teaching or vocational training. Article 509 para. 2 of the Civil Code does not distinguish between the deprivation of parental rights pronounced by a civil judgment, under the conditions laid down in the same Code, and that pronounced by a criminal judgment, under the conditions laid down in Article 66 para. 1 letter e of the Criminal Code (as an additional penalty) and Article 65 of the same Code (as an accessory penalty).

Therefore, according to one of the fundamental rules of interpretation, we must conclude that the effect of the deprivation of parental rights, whatever the nature of the judgment pronouncing it, is that the minor, with the clarifications made, remains under the protection of the other parent; placing one of the parents under interdiction. Although there is no express wording as in the case of the termination of parental rights, the parent placed under a restraining order is not relieved of the duty to support the child.

But, as has been said, (Ionaşcu, 1963, p. 19) this obligation is incumbent on the person placed under a restraining order only if and to the extent that his means exceed the normal needs of care and cure. Otherwise, the person placed under a restraining order cannot have an obligation of maintenance, since such an obligation - within the meaning of Article 529 of the Civil Code - is not a maintenance obligation. - This obligation is incumbent on the parent who "has sufficient means" to meet the needs of the person entitled to maintenance, and by "sufficient means" is meant those which exceed the minimum needs of the person obliged to provide maintenance, which include the costs of care and speeding up recovery, etc..

The prohibited person becomes incapable of exercising parental rights, so that the exercise of these rights is the responsibility of the other parent. The exercise of parental duties in relation to the child (as well as those relating to the child's property) is also incumbent on the other parent,

with the proviso that they may not be exercised by a person who lacks discernment.

5. In relation to the provisional guardianship of a parent who has been granted a temporary restraining order, is the question whether the parent continues to exercise parental rights with the other parent until the date on which the temporary restraining order takes effect?

It has been pointed out in the legal literature that the effect of appointing such a guardian is to ensure that parental rights are exercised by the other parent, since such a measure, from the point of view of parental protection, "must be regarded as equivalent to a temporary restraining order", in other words, the solution is based on the identity "of the legal figure between the guardian of the prohibited person and the guardian referred to in Article 150(1) of the EC Treaty". (3) and Art. 167 of the Civil Code is made by the guardianship authority and does not require validation by the court (Art. 229 para. (3 2) of Law 71/2011, as amended.

It has also been pointed out that the establishment of a guardianship under the aforementioned article does not give rise to unlawful incapacity, as the guardianship established in the course of the interdict procedure is the guardianship of a legally capable person, while it is considered that the solution to the effect that such a guardianship has the effect that parental rights are exercised only by the other parent could be based on the interests of the protected minor.

According to this text, a guardianship may be established if, due to illness or other reasons, the parent or guardian is prevented from performing a certain act on behalf of the person he represents or whose acts he is authorising. The parent's restricted capacity to act could fall within what the text indicates by the words "other reasons" which may correspond. Thus, "for whatever reason, he is unable to express his will". This means that the guardianship of the minor could be established, in which case the guardianship of the minor in relation to his or her person would be through the parent and in relation to his or her property through the guardian, since in the latter situation and to the same extent, the burden of guardianship of the parent cannot pass to the other parent.

The objection would exist even if it were considered that guardianship is established whenever there is a need to perform a legal act, i.e. the various cases of representation of the minor with regard to his property are each considered to be 'a specific act', to which the text refers. Therefore, we are inclined towards the first solution, i.e. the protection of the minor as regards his property, not as regards his person, by means of guardianship.

We consider that if a guardian is appointed to one parent during the prohibition proceedings, parental rights are exercised only by the other parent. Therefore, the purpose of the provisional curatorship mentioned above excludes the possibility of the exercise of parental rights by that parent.

The purpose of such a guardianship is - according to Article 178 of the Civil Code - to look after the person, represent and administer the property of the person who, having been placed under a restraining order, is in such a situation that immediate protection must be organised. A person who is in need of protection himself cannot provide effective protection to another person. To admit otherwise would be to provide a formal and ineffective solution. The fact that the parent in question no longer has the exercise of parental rights is not incompatible with the thesis that the person to whom provisional guardianship has been granted remains legally capable, since this exclusion is not always based on the idea of incapacity. This is not the only situation in which one parent, who has legal capacity, does not exercise parental rights with the other. The text says so expressly.

Indeed, Article 178 of the Civil Code provides, among other things, that one parent exercises parental rights whenever the other parent is unable, for whatever reason, to express his or her will. The institution of provisional curatorship of a parent whose interdiction has been requested is, in our opinion, such a situation.

One of the parents is unable, for whatever reason, to manifest his will. This situation must be taken very seriously so as not to constitute a pretext for removing a parent from exercising parental rights. The situations in which the text is applicable may be different. It is sufficient if one of the parents is in the situation mentioned. Such situations could be: disappearance of a parent. It should be noted that this does not require a court order. Therefore, disappearance in fact leads to the same result, because in both cases the solution is based on the protection of the child's interests.

Conflict of interests between the minor and one of his parents . Of course, the latter would no longer provide sufficient guarantees that he will exercise his powers solely in the interests of the protected one, since the interests are contrary. Therefore, such a parent, although in fact able to express his or her will, but not in the form of an act of representation or prior consent, is - legally - unable to express his or her will. The minor will be looked after by the other parent, without appointing a special guardian to exercise parental rights together with the minor, as it is not clear what justification there would be for any other solution. It would mean parental rights being exercised jointly with a person who is not a parent; preventing a

parent from performing a certain act in the interests of the minor. This is the situation provided for in Article 178 of the Civil Code, according to which guardianship is established if, because of illness or for other reasons, the parents or guardian are prevented from performing a certain act on behalf of the person they represent or whose acts they are responsible for. As has been pointed out in our legal literature, a guardian shall be appointed to a minor under parental care only if both parents are prevented from representing or consenting to an act in the interest of the minor; the sentencing of a parent to a custodial sentence .

6. There are some situations where, under special legal provisions, parents exercise parental rights and fulfil parental duties unequally. These are:

Dissolution of marriage by divorce. According to Article 402 of the Civil Code, the court is obliged to decide, when pronouncing the divorce, also on the custody of the minor child and on the determination of the contribution of each parent to the expenses of his upbringing, education, teaching and professional training, in compliance with the provisions of this text.

In the first place, the minor child is entrusted to one of the parents and, only if there are good reasons in the child's interest, the child may also be entrusted to a third parent or to care institutions.

The divorced parent to whom the child has been entrusted shall exercise parental rights and fulfil parental duties in respect of the child. Accordingly, this parent has the exercise of the following parental rights and duties in respect of the child: the right and duty to bring up the child; the right to education; the right to ask for the return of the child from any person who is keeping the child without right; the right to consent to the removal of the child as a minor or to ask for the removal of the child as long as the child is a minor; the right to have personal relations with the child; the right to see to the child's upbringing, education, teaching and vocational training; the right to determine the child's place of residence.

The divorced parent who has not been entrusted with the child continues to have the right and the duty to bring up the child. However, the way in which these rights are exercised is different from that prior to the divorce.

Indeed, the measures relating to the child are taken by the parent to whom the child has been entrusted, since he or she exercises parental rights in respect of the child. There is no requirement for an agreement between the parents prior to the measure being taken, as is the case where the parents are not divorced. The measure is taken by a single parent. The parents' agreement, if any, is reached after the measure has been taken.

But what if the parent to whom the child has not been entrusted also disagrees with the measure taken by the other parent?

We consider that in this case there is no disagreement between the parents within the meaning of the above-mentioned article, and consequently the provisions of this text concerning the settlement of disagreements between parents do not apply. To accept the contrary is to disregard the fact that the minor has been entrusted by the court to one of the parents and that he or she is exercising parental rights, unlike before the divorce, when both parents exercised parental rights, provided, of course, that one of them was not in one of the situations referred to above.

The divorced parent who has not been entrusted with the child does not have custody and supervision of the child.

This parent has the right to ensure the upbringing, education, teaching and vocational training of the child. He has the right to have personal contact with the child. He has the right to consent to the child's confinement. Consequently, both parents must consent to the birth.

The divorced parent who has not been entrusted with the child does not have the exercise of the right of correction and the right to determine the child's residence. Nor can he or she demand the return of the child from the parent who is keeping him or her without right.

This parent can request a change in the measures taken concerning the rights and duties between the divorced parents and the children. He or she can bring an action for custody of the child with the other parent. Something more. This right cannot be waived.

The parent to whom the child has not been entrusted can, of course, apply to the guardianship authority to take or request the measures to which he or she is entitled. This parent can therefore ask the guardianship authority to bring legal proceedings to have the child taken away from the parent to whom the child has been entrusted and placed in the care of a third party or a care institution, or to have the parent to whom the child has been entrusted deprived of parental rights.

The parent to whom the child has been entrusted shall also exercise parental rights and duties in respect of the child's property, namely: the right and duty to administer the child's property and the right and duty to represent the child in legal acts or to grant permission for such acts.

The custody of the child to the parent to whom the divorce decree did not grant custody is not always certain, as the divorce court is entitled, for good reasons, not to award the children to one of the parents, but to a third person or a care institution, in which case the parent to whom the divorce decree did not grant custody may have found himself.

Therefore, the best interests of the child require a preventive review by the court in order to assess whether there are any good grounds for entrusting the child to a person other than the parent to whom he or she was not entrusted by the divorce decree. Of course, the existence of such grounds would also justify, at a later stage, i.e. after the parent who was not granted custody of the child by the divorce decree has regained parental rights, the child being placed with another person or a care institution, but the risk of such a delay is borne by the child.

It is preferable to prevent the danger rather than to remove it once it has arisen. Since a certain period of time may pass before the court decides on the person to exercise parental rights, during which no one would have the exercise of parental rights, which would be detrimental to the child's interests, the court may order custody of the child by means of a presidential order. In this way the child's interests are protected. We are inclined towards the second solution.

Dissolution of the marriage. The nullity of the marriage has no effect on the children of the marriage. But after the dissolution of the marriage, the parents will no longer live together. Civil law therefore provides that the provisions on divorce apply by analogy to the rights and duties between parents and children.

Custody of a child outside marriage. Where the parentage of a child outside marriage has been established in relation to both parents, the custody of the child and the contribution of the parents to the costs of his upbringing, education, teaching and vocational training shall be determined in accordance with the above provisions of the same Code, which shall apply by analogy.

Following the annulment of the declaratory judgment of death, the parent who has disappeared shall regain the exercise of parental rights in respect of the children resulting from the broken marriage. However, the law does not deal with how these rights are to be exercised. Given that the parents in question are no longer married to each other, we consider the solution to be well founded in the sense that the provisions governing, in the event of divorce, the custody of children and the exercise of parental rights, with regard to both the person and their property, as well as the parents' contribution to the costs of their upbringing, education, teaching and vocational training, apply by analogy.

7. In some situations, parents exercise only some parental rights, and not equally. Other parental rights are exercised by a third person or by a care institution. Such situations are: dissolution of marriage by divorce. In the event of dissolution of marriage by divorce, the children may be entrusted to a person other than the parents or to a care institution if there are good

grounds. In this case, the person or institution will have only the rights and duties of the parents in relation to the child. What is the parents' situation?

They continue to have the right and duty to bring up the child. However, the arrangements concerning the child are no longer decided by the parents, but by the person or institution concerned. There is no prior agreement between the parents on the one hand and the person or institution to whom the child has been entrusted on the other. Not least, the parents are interested and entitled to know about these measures. They therefore have the right to ensure the upbringing, education, teaching and vocational training of the child. Parents have the right to have personal contact with their child. If the parents or one of them considers that the person to whom the child has been entrusted is not bringing up the child as he or she should, they can ask the court to entrust the child to another person or a care institution.

It should also be noted that the parents are not required to reach an agreement between themselves - which may be settled in accordance with the law - prior to the measure taken in respect of the person of the child by the person or institution to whom the child has been entrusted.

The parents no longer exercise custody and supervision over the child. All rights are exercised by the person or institution to whom the child has been entrusted.

On the contrary, parents continue to have the right to consent to the child's placement as long as they are not in one of the situations provided for in the Civil Code.

With regard to parental rights and duties in respect of the child's property, the legislator provides that the right to administer, represent or entrust the child's affairs is vested in the parent designated by the divorce decree. Consequently, the exercise of any of these rights belongs to one of the parents, without there being any need for a prior agreement in this respect either with the person or institution to whom the child has been entrusted or with the other parent. The other parent may, under the conditions laid down by law, request a modification of the measures relating to the rights and duties concerning the child's property ordered by the divorce decree.

Of course, he can also apply to the guardianship authority for measures for which it has powers (for example, the parent who has been appointed by the court to administer the child's property, wishing to dispose of such property, asks the guardianship authority for prior authorisation, and the other parent can apply to the guardianship authority, indicating his or her point of view).

We consider that there can be no misunderstandings with regard to the measures taken by the person to whom the child has been entrusted or the care institution with regard to the child's person, or with regard to the measures taken with regard to the minor's property by the parent designated by the court to exercise parental rights with regard to the property.

We are also considering the case where the child resulting from a marriage declared null and void is entrusted to a person other than the parent or a care institution and the parents have full capacity to exercise their rights.

But what about parental rights and duties with regard to the child's property that should belong to one of the parents, but which, since they are minors, cannot belong to one of the parents?

According to the above, the guardianship of the minor's property, until the parent reaches the age of 18 and is able to provide for this guardianship himself, should be carried out through a guardian.

If the child's physical, moral or intellectual development is endangered in the parental home, the guardianship authority is obliged to ask the court to entrust the child to another person, with the child's consent.

The effect of this measure is that parental rights and duties in respect of the child's person pass to the person or care institution to whom the child has been entrusted, and parental rights and duties in respect of property remain with both parents. Parents exercise these rights and duties in accordance with the principle of equality between men and women. This is different from the other cases where parental rights and duties are the responsibility of only one parent. This implies, however, that both parents are able to exercise parental rights, which means that one of them is not in one of the situations provided for in Article 508 of the Civil Code. If both parents are in such a situation, which arises after the child has been placed in the care of another person or an institution, we consider that guardianship should be established at least as regards the minor's property. There is no doubt that if both parents are in one of the situations described in Article 508 of the Civil Code, custody of the child cannot be ordered and guardianship must be established.

In the case of custody of the child under Article 157 of the Civil Code, both parents retain the right to have personal ties with the child and the right to ensure the child's upbringing, education, teaching and professional training. They continue to have the right and the duty to bring up the child, but they no longer exercise these rights. Measures concerning the person of the child are taken by the person or institution concerned without the parents' prior consent. If the parents or one of them does not agree with the way the child is brought up, i.e. the measures taken in respect

of the child, they can (use the means provided for by law, for example by applying to the guardianship authority to ask the court to change the person to whom the child has been entrusted (this does not apply to the care institution). If the circumstances which led to the child's placement under Article 508 of the Civil Code have ceased to exist, the child will return to his or her parents. Following the placement of the child in the care of a third person, the parents no longer have the right and duty of care and supervision. They also no longer have the right to request the return of the child and the right to determine the child's place of residence.

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