Abstract
The XX-th century distinguishes itself, maybe more than by anything else, through the consecration of a new social and political philosophy, that of the founding of the international relations on the recognition and protection of the rights and basic liberties of the human being. In that century, marked by the most terrible wars in the history of mankind, the nations worldwide understood, more than ever before, that the main basis for peace, justice and liberty in the world is the consecration and the respect of the human being in all his aspects – physical, moral, social, spiritual, political – with no discriminations or privileges of any kind.

At the international juridical level, the child’s problems received a particular care even from the beginning. So, in the Universal Declaration of the Human Rights, adopted in the General Assembly of the United Nations, at December, 10, 1948, the article 25, second paragraph states as follows: “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”.

In the year 2004 has been adopted by the Parliament of Romania the legal body that regulates the domains of adoptions, protection and promotion of the child’s rights: Law 272/2004 concerning the protection and promotion of the child’s rights; Law 273/2004 regarding the adoption’s juridical regime; Law 274/2004 for the establishment, organization and functions of the Romanian Office for Adoptions; Law 275/2004 for the modification of the Government Ordinance of Urgency no. 12/2001 for the establishment of the National Authority for Child’s Protection and Adoption.

One of the fundamental principles stated in this regulations, and perhaps the most important, is that of the superior interest of the child. Romanian legislation in this matter fails to offer sufficient and explicit criteria, which might allow a clear delimitation for the juridical meaning of syntagmas such as “child in difficulty” or “superior interest of the child”.

The following article aims to identify such criteria, through the juridical interpretation, starting from the legal provisions as well as from certain official interpretations done by the court of law when ruling one of the measures of special protection for the child established in Law 272/2004. The author also considers needful to make a few comments over certain solutions given by the jurisprudence, as well as the motivation of those judicial solutions.

The principle of the superior interest of the child is stated, for the first time in the Romanian legislation, in the article 2 of the Law 272/2004 concerning the protection and promotion of the child’s rights, among other fundamental principles in this matter. The mentioned legal provision states that “this law, as well as any legal provisions adopted in the matter of protection and promotion of the child’s rights, and any legal act emanated in this matter subdues primarily to the rule of the superior interest of the child. The rule of the superior interest of the child is imposed even in relation with the rights and obligations given by the law to the parents, or to any other person to which the child was given in legal custody. The rule of the superior interest of the child will prevail in all legal actions and decisions taken by the public authorities and private empowered organizations concerning children, and also in the cases resolved in the court of law.”.

The most significant regulation at the international level, seen through the object of this article, regulation which Romania ratified through Law no.18 of September 28, 1990, almost immediately after it had been adopted by the General Assembly of the Organization of the United Nation, at November, the 20, 1989, in force from September, 2, 1990, is, indubitable, the Convention on the Rights of the Child. This convention represented the foundation for all the regulations of the Romanian law in force concerning the protection and the promotion of the child’s
rights, including, if not foremost, the consecration of the principle of the superior and prevalent interest of the child (stated in the article 3 of the Convention). The Convention also uses the formula “supreme interest of the child”.

Unfortunately, The Constitution of Romania, although it recognizes, along with all the international regulations in the matter, the particularity of the juvenile category, and it states, in the articles 32 and 49 (45 in the former numbering), some principles regarding the protection offered by the law for the child in difficulty, it sill refers little and poor to the extended domain of the child, especially to the one in difficulty and, for this reason, is, in our opinion, lacunar. In more specific terms, the only provision contained in the Romania’s fundamental law and having direct relevance in the matter is found in the third paragraph of the article 49, which forbids the exploitation of the juveniles, as the usage of them in any form of activity that can “harm their health, morality or put their lives or normal development in danger”.

The legal definition of the juridical situation of the child in difficulty was given, instead, by the Government Ordinance no. 26/1997. According to the article 1 of this ordinance the child “is in difficulty, when his development or physical integrity is endangered”.

At January, 1, 2005, has become effectual the referred law 272/2004, which abrogated, among other legislative acts, the G.O. no. 26/1997. This law doesn’t contain any definition for the syntagm “child in difficulty”, although it states all the situations that can be included in such general designation.

In a literal interpretation of the legal provision, we may consider as child in difficulty that abused, the child’s abuse being defined in the law as “any kind of voluntary action, from a person that is in a relation of responsibility, reliability or authority towards the child, through which his life, his physical, mental, spiritual, moral or social development or his physical integrity, physical or psychological health of the child is endangered”. Also, child’s neglect, stated by the Law, in the article 89, as representing “voluntary or involuntary omission, from a person that has the responsibility of raising, caring for, educating the child, to take any measure required by this responsibility, fact which endangers the life, the physical, mental, spiritual, moral or social development, the physical integrity, physical or psychological health of the child”, may be included, through the same form of interpretation, in the juridical situation of “child in difficulty”.

Law 272/2004 contains a whole chapter, the third, for the provision of the special protection of the child that is, temporarily or permanently deprived of parental care. The Law states for this hypothesis the initiation of an individualised plan of protection (article 54 of the Law) that has the foremost purpose to reintegrate the child within his family, and only whether this purpose is not doable or it doesn’t respect the superior interest of the child, one of the measures for the special protection consecrated in the Law will be taken: placement, emergency placement and specialized supervision. The child’s placement within the extended family or in an residential service will be decided only if tutory or placement to a foster parent (maternal assistant) couldn’t be instituted. The emergency placement is established only for the abused or neglected child, aswell as if he/she was found abandoned in a health care institution (article 64 of the Law).

As for the measure of specialized supervision, it can be instituted, according to the article 67 of the Law, towards the child that committed a criminal act and cannot be hold penaly responsible due to his/her age, and consists in maintaining the child within his/her family, with the obligation for the child to attend school, to use certain day-care services, to follow medical treatments, counseling or psychotherapy, not to frequent certain places and not to have any contact with certain persons (article 81 of the Law).

The ensemble of individualised measures for the reestablishment of the rights of the child in difficulty is designated in the Law by the syntagm individualised plan of protection. According to the article 4 letter e) of the Law, this plan represents “the document through which the planning of the services, labors and measures of special protection for the child are attained, based on the psycho-social evaluation of the child and his/her family, in order to integrate that child, separated from his/her family, in a stable permanent homely medium, as soon as possible”.

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That is how, based on succinct legal provisions and unsufficient defined and delimited terminology *de lege lata*, once invested with the ruling on a measure of special protection for a child in difficulty, the judge is demanded to fill the lack of official interpretation of the law, so that the judicial solution would be the absolute response to the superior interest of the child.

The jurisprudential review in the matter allows the abstraction of certain criteria that the courts of law are taking in the view in their judgement act, criteria that justify the application of the measures of special protection on the child:

I. **The criterion of the child abused in the family.** Starting from the legal definition of the abuse, refered in the above, the courts may consider as being acts of abuse towards the child both the action aimed directly to the child (*exempli gratia* the resort to physical violence or threats towards the child, often done by the father, economic exploitation of the child) and the action that, indirectly, affects the child, by the simple fact that he/she witnesses such acts of violence – the standard example is that of the child witnessing violent disputes occuring between his/her parents – *ubi lex non distinguat, nec nos distinguere debemus*. Being an objective criterion, the proof of the abuse is, in general, easy to do, by hearing the abused child in the court and, often, by a forensic medical examination, although the law requires the cumulative proof of the existence of the *intention to abuse*, as an additional subjective element. Still, in order for the court to retain this criterion in the act of judgement concerning the abused child, we consider that, in the spirit of the legal provisions, it is relevant the proof of a certain repeatability, a continuity of the abuse. The judge also has to become certain of the fact that, without ruling a measure of special protection, the abuse will continue. For this goal, a significant role has the social inquiry, the evaluation done by the General Directorate for Social Assistance and Child’s Protection;

II. **The criterion of the child neglected by the family.** Through the analysis of the provision contained in the article 89 of the Law 272/2004, reproduced in the above, it results that the application of this criterion isn’t conditioned by the proof of the existence of the psychological attitude of the person responsible for the raise and education of the child in case, nor by the nature of the attitude, once this person fails to carry out his/her legal obligations towards that child. We are, in other words, in the presence of a strictly objective criterion, but, unlike the abuse, for the court to retain this in the evaluation of the superior interest of the child it is necessary to prove the following factual elements:

- the *state of passivity* of the legal protector of the child in relation with his/her legal obligations to raise, educate, supervise and care for the child, that is the act of neglect in itself;
- the *harmful consequence* for the life, development, integrity or, depending on the case, health of the child. This may consist in a malefic result, or even endangering, judging by the formulation of the analized legal provision;
- the *causal link* between the fact of omission which constitutes the act of neglect and the refered harmful consequence that follows the omission;

III. **The criterion of the material means for the child’s raise, care and education.** This criterion is strictly objective and it regards the real level of material resources – incomes of any kind, distribution of the incomes between the family members, physical capabilities of the family upkeeper – that the legal protector engages in the execution of his legal obligations towards the child. In the evaluation of this criterion the court must also take under consideration the number of persons to whom the upkeeper is legally obliged and, further more, the court has to assess, on the basis of the evidence presented, the actual level of the child’s material needs, according to the current state of his/her development.

IV. **The criterion of the affective bond between the child and his/her legal protector.** It is important that, when ruling, the judge captures the status of the affective bond between the family members, in general, taking under consideration the imperative of assuring a proper climate for the child’s development. Sadly, there are situations, rare but still, in which the parent doesn’t express love and affection towards his/her child, as well as other situations in which the child himself develops, due to various reasons, negative feelings towards his/her parent.
The selection and the evaluation of the referred criteria must be done with the observation, by
the judge, of the incidence and, by consequence, of the compliance, with pre-emption, of the
following principles consecrated, explicit or implicit, in the Convention on the Rights of the Child
and in Law 272/2004:

- recognition and ensurance of the right to life and the right to a personal identity for any
child, as well as his/her development. In the general formulation “the right to an identity” are
included the following elements: the right from birth to a name, the right to acquire a nationality
and citizenship, the right to have personal relations with his/her family and also with the extended
community in which he/she belongs (article 6-8 of the Convention);

- the principle of the prevenient consultation of all interested parties when ruling a measure
regarding the raising, the supervision or the place for the child’s residence when he is in difficulty
due to causes such as maltreatment, neglect or separation of his/her parents (article 9 of the
Convention). This principle should be corroborated specially with the child’s right to freely express
his/her own views in all judicial and administrative cases that concerns, directly or not, his/her
rights (article 12 of the Convention) – in accordance with the Law, it is mandatory the hearing of
the child which has reached the age of ten years but also with the child’s right to freely express
his/her own views in all judicial and administrative cases that concerns, directly or not, his/her
rights (article 12 of the Convention) – in accordance with the Law, it is mandatory the hearing of
the child which has reached the age of ten years; and also with the child’s right to file petitions in
relation with the violation of his/her fundamental rights (article 29 of the Law). Nevertheless, the
child has the right to decide on his/her own free will the form and the kind of cultural and
educational activities that he/she wants to pursue whether he/she has passed fourteen years of age,
with the right to demand the court’s approval, if his/her parents or the legal protector don’t agree on
this matter (article 47 of the Law);

- recognition of the child’s right to have personal relations with his/her parents in the
situation of his/her separation from them, according to the law (article 9-10 of the Convention),
including the child’s possibility to have private contacts and personal connections with either one of
his/her parents, with no jeopardy to his/her rights;

- child’s protection against economic exploitation and also against his/her constraint to
perform any form of activity or labor that causes any potential risk or it is likely to compromise
his/her education, or harm his/her health, physical, mental, spiritual, moral or social development
(article 32 of the Convention);

- child’s protection against any kind of sexual exploitation and sexual violence through
measures intended to avoid or to stop the incitement or the constraint of the child to perform sexual
activities, child’s exploitation for the purpose of prostitution or other illegal sexual activities, child’s
exploitation for the purpose of making shows or materials with pornographic content (article 34 of
the Convention);

- the principle of the application of the more favorable domestic or international law in the
field of recognition and protection of the child’s rights (article 41 of the Convention);

- the principle of subsidiarity in the protection of the child’s rights, so that, if the parents fail
to ensure a proper protection for their child, the responsibility for this falls, ope legis, on the local
community to whom the child belongs, and specially on the local authorities for the public
administration, that have, first and foremost, the obligation to give all their support to the parents or
to the legal protector of the child, by providing diverse attainable services to this purpose. In the
light of this principle, the state itself has, finally, the obligation to ensure the protection of the
child’s rights, through specialized institutions of the national public administration;

- the principle of complementarity in the activities undertaken for the accomplishment of the
superior interest of the child, that is the actions of all competent factors, in accordance with the law,
in the protection of the child, must be concerted and complete as well;

- the responsibilization of the parents regarding the exercise of their parental rights and the
fulfillment of their obligations towards the child;

- the ensurance of the stability and the continuity in caring, raising and educating the child,
taking under consideration his/her religious, cultural and linguistic origin, when ruling a measure of
special protection.
In the spirit of the regulations presented here, we can divide the enunciated criteria into main criteria and subordinate criteria (or secondary criteria). So, in the category of the main criteria are included the criterion of the abused child and that of the neglected child. By the systematic interpretation of the referred legal provisions results that the abuse, of any form, direct or not, towards the child or his/her neglect, according to the law, constitutes each and either one sufficient reasons for ruling a measure of special protection, regardless to the other criteria. Exempli gratia, we believe that the judicial solution of maintaining the measure of the emergency placement towards the child mentally abused by her mother and her mother’s concubine, is correct, due to the frequent scandals between those, occurring mostly when the concubines were under the influence of alcohol, in the presence of the child, this indirect abuse inducing her a neurotical-depressive state of mind, being also proved, in the case, that the minor’s rights to scholar education, health and mental development were damaged (District Court of Justice for Minors and Family Braşov, civil sentence no. 4 of February, 14, 2005, modified in the sense of the reintegration of the minor in her family by the decision of the judiciary control court, namely Court for Appeal Braşov, Section for minors and family, civil decision no. 39 of April, 1, 2005). Also, in the case of the child placed, several times, in a center for the emergency placement, as a consequence of her persistent spotting at the local railway station, inhaling aurolac, deprived from supervision and care of her parents, we believe as being legal and justified the solution ruled by the court of law, in the sense of taking the measure of placement in a residential unit, based upon the motive of neglect from the parents in the accomplishment of their legal obligations towards the child, even though she ran from the residential service back to her family, declaring that she wants to spend the winter holiday with her parents, which demanded themselves the reintegration of their daughter in the family (District Court of Justice for Minors and Family Braşov, civil sentence no.136 of June, 27, 2005, irrevocable). If the abuse or neglect takes severe forms, the court may rule, according to the law, permanent solutions, such as the tutory or the adoption (national – which is the rule - or international adoption).

On the other hand, the criterion of the material means and that of the affective bond are subordinate criteria, because those criteria may be retained by the judge in the motivation of his ruling only in corroboration with at least one of the main criteria, as determined and proved during the trial. We cannot accept, for instance, the solution given by the court that denied the petition of the mother of four children, to move those children to a center for the placement near the place where she lives, in order for her to visit them, keeping this way personal contacts with her children, in the perspective and wish to be, in the future, reintegrated, only based on the precarity of the material means that the mother can provide to her children (District Court Hunedoara, Civil section, sentence no. 245 of February, 15, 2006). Also, in other case, we consider that the court wrongfully decided the reintegration of the minor with her mother, only on the base of the strong affective bond, although it had been proved that the child lived in inhuman conditions (specifically, inside a trailer, with no water or other utilities, in the proximity of a waste collector), she wasn’t following any scholar education, meanwhile her mother didn’t have a regular job, surviving exclusively with small sums of money obtained from collecting and selling cardboard (Court for Appeal Braşov, Section for minors and family, civil decision no. 67 of June, 17, 2005).

We may conclude that either one of the referred criteria can lead, alone or by corroboration, to the identification of the concrete content of the superior interest of the child in difficulty. This prevalent interest may consist, depending on the case, in: the physical development; the scholar or professional preparation; a safe and stable climate; the physical or mental health; a medium of material sufficiency; an affective medium that is morally adequate; a real and beneficial authority on the child.

In other words, we cannot approve the attempts of some courts to give a general definition of the superior interest of the child, in the absence of a legal one, that, apparently, should facilitate the interpretation and the application of the legislation in the matter, because, as shown in supra, the concrete content of this principle must be identified, as being specific to the case on trial, and given
by the evidence presented to the court, by the actual momentary level of the child’s development, as well as by the wisdom of the judge.

The establishment *in concreto* of the superior interest of the child through the act of justice represents the basis for the just sentence of the case, in the sense of the provisional separation of the child from the family, or in that of the reintegration of the child in the family.

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