

PROBLEME ACTUALE ALE SPAȚIULUI POLITICO-JURIDIC AL UE

CONFERINȚĂ INTERNAȚIONALĂ

EDIȚIA a III-a
27 OCTOMBRIE 2016

Cezar Corneliu MANDA
Cristina Elena NICOLESCU
Crina Ramona RĂDULESCU

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Cezar Corneliu MANDA • Cristina Elena NICOLESCU • Crina Ramona RĂDULESCU

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Theoretical and practical aspects regarding equality of rights and the right to health protection of children

Ramona Lorena PARASCHIV*

Oana ȘARAMEȚ**

ABSTRACT

In the contemporary society, a world broken loose, we own certain fundamental rights laid down in international, regional and national regulations, meant to define our human being status from the legal perspective. Even though sometimes we are not aware of this, every single day is a constant fight for breathing and perpetuation of human race, which is why we must always and constantly pay particular attention to our children. Although they are human beings to the same extent as adults, children are much more vulnerable when facing the current evolutions and changes, whether they are physical, biological, climatic, etc. and, most of the times, less aware of their rights. As a result, it is our responsibility as parents, legal guardians, as well as national authorities to ensure that these rights are being acknowledged, protected and guaranteed. Even more so we must fight for the rights of less healthier children, such as those suffering from type 1 diabetes mellitus, in order for them not to be discriminated and to enjoy a genuine right to health protection.

Keywords: child, equality, rights, health, non-discrimination

Art. 1 of the Convention on child rights¹ of the United Nations defines the concept of "child" as "a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger";

Art. 6 of the Convention acknowledges the fact that all children have the right to live, to survive and to develop, while art. 18 concludes that both governments shall endeavour to ensure the recognition of the principle according to which both parents share responsibility for upbringing their children and providing them guidance and the parents or, as the case may be, their legal representatives are mainly responsible for the child's upbringing and development and must act, first of all, in the child's best interest.

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¹ Convention on the Rights of the Child was adopted by the UN General Assembly on 20.11.1989. Romania has ratified it by Law no. 18/1990, published in the Official Gazette, Part I, no. 314 from June 13th 2001.

Among the rights granted to children, art. 24 of the Convention lays down that children have the right to the best health care possible and that the national authorities undertake to provide good quality health care and help them stay healthy.

The provisions of art. 24 para. (1) thesis I in conjunction with those of para. (2) of the Charter of Fundamental Rights of the European Union acknowledge the right of children to the protection and care required for their well-being and in all actions relating to children, whether undertaken by public authorities or private institutions, the child's best interests must be a primary consideration.

Through art. 2 para. (4), the provisions of Law no. 272/2004 on the protection and promotion of the rights of children, republished, as subsequently amended and supplemented^[2], help establish the principle of the child's best interest, stipulating that it „will prevail in all actions and decisions concerning children undertaken by public authorities and authorised private bodies, as well as in cases settled by courts.” Through art. 4 letter a), the normative act mentioned above defines the child as “a person below the age of 18, who has not acquired full capacity of exercise, according to the law”, by considering the international definition of the concept. Or, the provisions of art. 38 of the Civil code^[3] set the limits for the full capacity of exercise, respectively the fact that it starts once a person reaches the age of majority, namely 18 years old, while art. 41 para. (1) of the same normative act shows that the underage that reached the age of 14 years old has limited capacity of exercise. It seems relevant to highlight all the aspects mentioned above, because the same law, meaning Law no. 272/2004, republished, as subsequently amended and supplemented, stipulates that „every child enjoys the special protection provided by this law until it acquires full capacity of exercise”.

On the other hand, Law no. 272/2004, republished, as subsequently amended and supplemented, acknowledges through art. 46 para. (1) the child's right to have the best health condition possible and to relieve the medical and recovery services required in order to ensure the actual achievement of this right; but also the fact that, according to art. 49 para. (1) and (2), a child with disabilities has the right to education, recovery, compensation, rehabilitation and integration, adjusted to his/her own possibilities that contribute to the development of his/her personality.

According to international and European regulations, the Romanian constituent legislator regulated, through art. 49, the protection of children and youngsters, outlining at the same time „a synthesis-right that capitalises reality in the sense that children and youngsters represent today's and tomorrow's human potential of the society, that they represent both the progression and the future, the human perspective”^[4].

[2] Law no. 272 from 2004 on protection and promotion rights of child was republished in the Official Gazette, Part I, no 159 from March 5th 2014, after that moment it was amended.

[3] Law no. 287 from 2009 on Civil Code was republished in the Official Gazette, Part I, no 505 from July 15th 2011, after that moment it was amended.

[4] I. Muraru, E.S. Tănăsescu, coordinators, *Constituția României. Comentariu pe articole*, C.H. Beck Publishing, Bucharest, 2008, p. 494.

Every state aware of its desire to exist in the future will start by protecting its human potential, including by providing "children and youngsters the conditions required for the balanced development of their physical and intellectual abilities"¹⁰³.

Since its first article, the Universal Declaration of Human Rights¹⁰⁴ states the fact that all human beings are born free and equal in dignity and rights, while art. 2 para. (1) does nothing but to strengthen this principle¹⁰⁵. Through the International Covenant on Civil and Political Rights¹⁰⁶, in the development of the norms included in the Declaration, the equality in rights of children is acknowledged as well, while through the International Covenant on Economic, Social and Cultural Rights, namely through art. 10 para. (3), is stipulated that special measures of protection and assistance should be taken on behalf of all children and youngsters, without any discrimination for reasons of parentage or other conditions¹⁰⁷.

Established by international and regional-European documents, the equality in rights of all human beings is also acknowledged by the Constitution of Romania, republished, the constitutional provisions determining implicitly the existence of the non-discrimination principle and the binding nature of its implementation, which is why the Romanian legislator adopted Emergency Ordinance no. 137/2000, republished, on the prevention and sanctioning of all forms of discrimination¹⁰⁸, normative act which, through art. 2 para. (1), defines discrimination as being "any distinction, exclusion, restriction or preference, based on race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of an unprivileged category, as well as any other criterion with the purpose or the effect of restraining, removing recognition, use or exercise, under equality conditions, of human rights and fundamental freedoms or rights acknowledged by law, in the political, economical, social and cultural field or in any other fields of public life"¹⁰⁹.

¹⁰³ M. Constantinescu, I. Muraru, A. Iorgovan, E.S. Tanasescu, *Constituția României revizuită – comentarii și explicații*, All Beck Publishing, Bucharest, 2004, p. 100.

¹⁰⁴ This Declaration was adopted by the UN General Assembly on 10 December 1948, by its Resolution 2171 A/III. Romania signed the Declaration on the 14 December 1955, when it became member of United Nation Organization, like it is settled by the Resolution R 955 (X) of the UN General Assembly.

¹⁰⁵ In this sense the mentioned article provides everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁰⁶ More than that, by article 24 para. (1), International Covenant on Civil and Political Rights prohibits any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, when we are talking about the right of any child to such measures of protection as are required by his status as a minor, on the part of his family, society and the State, which are required by a minor. In our opinion, the recognition of the prohibition of discrimination against children, by a separate article to the general provision which states that all human beings are born free and equal in dignity and rights, underlines that every child is born free and equal in rights, but also that every state/country has the duty to offer them the same protection measures.

¹⁰⁷ By article 12 para. (1) of the Covenant is recognized the existence of a right to health care, the Covenant providing that the States recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Also, by article 12 para. (2) letter d), the Covenant provides that the steps to be taken by the States to achieve the full realization of this right shall include those necessary even for the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

¹⁰⁸ Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination, was republished in the Official Gazette, Part I, no 166 from March 7th 2014.

¹⁰⁹ Through art. 2 para. (3), the Emergency Ordinance no. 137/2000, republished, highlights the fact that the criteria or practices apparently neutral that disadvantage certain people based on the criteria stipulated in art. 2 para. (1) of the same normative act are discriminatory towards other people, except for the situation in which these provisions, criteria

At the same time, the text of the ordinance restates constitutional provisions in art. 1 para. (2), where it mentions the fact that the principles of equality in rights, elimination of privileges and discrimination are guaranteed even in terms of the right to health, medical health care, social security and social services.

On the other hand, the United Nations Convention on the Rights of Persons with Disabilities^[12], draws attention on the fact that its states parties adopt it by considering including the need of people with disabilities to be guaranteed the right to fully benefit of all rights and fundamental freedoms of humans, without any discrimination whatsoever even from the Preamble, letter c), while later on it states the general principle of non-discrimination of people with disabilities^[13].

Art. 50 of the Constitution of Romania, republished, provides including the obligation of the state to ensure the achievement of a national policy involving the equality of chances^[14], the prevention and treatment of disabilities, so as to make sure that every person with disabilities is able to participate effectively in the life of the community. In order to fulfil this obligation, the constitutional norm requires the state to comply with the rights and responsibilities assigned to parents and legal guardians of people with disabilities, therefore of children as well.

The constitutional provisions mentioned above are developed by Law no. 448/2006 on the protection and promotion of the rights of people with disabilities^[15], which, by art. 3 letter b), expressly regulated the principle of preventing and fighting against discrimination, while by art. 6 letter a) acknowledged the right of these people to health protection – prevention, treatment and recovery.

or practices are objectively justified by a legitimate purpose and the methods used in order to attain that specific purpose are both appropriate and essential, while para. (4) of the same article provides the possibility of contraventional or even criminal liability, as the case may be, in case of any active or passive behaviour which, through the effects that it produces, wrongfully advantages or disadvantages or it subjects to an unfair or humiliating treatment either a person, a group of people or a community towards other people, groups of people or communities.

[12] This Covenant was adopted, in New York, on December 13th 2006 and opened for signature by the United Nations General Assembly on March 30th 2007, and was signed by Romania at September 26th 2007, and was ratified by Law no 211 from November 11th 2010 which was published in the Official Gazette of Romania, Part I, no 792 from November 26th 2010.

[13] By article 4, the Convention on the Rights of Persons with Disabilities provides the general obligation for all States Parties „to undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”, including „taking all appropriate measures, including legislation, to modifying or abolishing existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.

[14] Article 14 from the European Convention of Human Rights, but especially Protocol no. 12 (Romania has ratified this Protocol by Law no. 103 from 2006, which was published in the Official Gazette of Romania, Part I, no 375 from May 2nd 2006) recognizes the equality in rights for persons with disabilities through general prohibition of discrimination. In the same sense are the provisions of article 21 of the Charter of Fundamental Rights of the European Union which prohibit, expressly, including discrimination based on disability, and by article 26 is recognized the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

[15] Law no. 448 from 2006 on the protection and promotion of the rights of persons with disabilities was republished in the Official Gazette, Part I, no 1 from January 3rd 2008, after that moment it was amended.

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Last but not least, it is necessary to mention at least the dispositions of art. 34 para. (1) of the Constitution of Romania, republished, according to which "the right to health protection is guaranteed".¹⁰²

In relation to the normative acts mentioned above, we estimate that, even if from the perspective of general legal norms, the legal situation of children is clear, since their rights are being acknowledged and they are considered to be equal to everybody else, including in relation to each other, some cases in which the authorities circumvented or proved to be rigid when implementing this legal framework have been identified in practice. It is good to know that children are totally dependent on adults in terms of their needs, since they do not have any control whatsoever when it comes to adverse events in relation to their health, nutrition, health system and the environment that suits them best¹⁰³, which is why parents, legal guardians, as well as the state share responsibility when it comes to provide them all the conditions required for a balanced development, without feeling any discrimination whatsoever or becoming the target of such discrimination, as the case may be, by counting on the support of their parents or legal guardians.

Therefore, discrimination situations have been found and just recently¹⁰⁴ the Board of Directors of the National Council for Fighting against Discrimination adopted Decision no. 339 from the 8th June 2016, which has ruled on the discriminatory nature of the content of Order no. 725/12709/2002¹⁰⁵, issued by the Ministry of Health and Family Welfare and the National Authority for Child Protection and Adoption, in order to approve the medical, psychological and social criteria that contribute to the classification of disability levels. We believe that this decision is fair if it were to consider the fact that, the case-law¹⁰⁶ of the European Court of Human Rights revealed two cumulative criteria used in order to define discrimination: inequality of treatment in exercising or benefiting from an acknowledged right, respectively the lack of an objective and reasonable justification¹⁰⁷. Or, the regulations mentioned above, as well as the following ones reveal the fact that there is an inequality of treatment in determining different disability levels

¹⁰² We believe that it is necessary to mention as well Chapter 3 of Recommendation Rec (2006)5 of the Committee of Ministers to member states, adopted on the 5th April 2006, which, in terms of the line of action regarding health care, that needs to be fulfilled by member states, seeks to ensure that all people with disabilities, irrespective of their sex, age or origin, nature or disability level are provided with equal access to all medical services; benefit of equal access to all specialised medical care services that are available, prove to be, as much as possible, deeply involved in the decision-making process in relation to the personal health care plan.

¹⁰³ R.N. Srivastava, *Right to health for children*, article published in *Indian Pediatrics*, volume 52- January 15, 2015. This paper was studied on Site: <http://www.indianpediatrics.net/jan2015/15.pdf>, accessed on 15.09.2016, pp. 15-18.

¹⁰⁴ In this regard, please see the Press Release of the National Council for Fighting against Discrimination, published on its website, which can be accessed at: <http://www.cncd.org.ro/presa/Comunicat-de-presa-referitor-la-hotararile-adoptate-de-colegiul-director-al-CNCD-in-sedinta-din-data-de-08-06-2016-299/>, accessed on 19th September 2016. Please see: R. L. Paraschiv, *Children with diabetes mellitus type 1. Their right to health, their right to life – obligations for the authorities*, article published on the website www.judice.ro/458841/copi-cu-diabet-zaharat-tip-1-dreptul-lor-la-sanatate-dreptul-lor-la-viata-obligatii-pentru-autoritati.html, accessed on 12th September 2016.

¹⁰⁵ Order no. 725/12709/2002, amended, was published in the Official Gazette of Romania, Part I, no 781 from May 28th 2002.

¹⁰⁶ See, for example, *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" V. Belgium (Merits)*, p.31, § 10. This case was studied on Site: <http://hudoc.echr.coe.int/eng?i=001-57525>, accessed on 19.09.2016.

¹⁰⁷ F. Sudre, *Drept european și internațional al drepturilor omului*, Ed. Polrom, Iași, 2006, p. 208, precum și pp. 208-212. A se vedea și J.F. Rencuc, *Tratat de drept european al drepturilor omului*, Ed. Hamangiu, București, 2009, pp. 152-155.

for people belonging to the same category, namely the category of children, as established from legal point of view, discriminatory treatment for which not even the legislation or a simple and objective look of those who are not specialised in the medical field can provide a minimum objective and reasonable justification focused on the child's best interest.

At minimum information level, type I diabetes mellitus represents an affection characterised by the incapacity of the human body to produce insulin (the hormone secreted from the pancreas that allows human body cells to use blood sugar) or to produce enough insulin. Since the sugar cannot be used, the cells register a lack in energy.

In this context, the child that suffers from type I diabetes mellitus requires a special diet and a close supervision of his/her essential daily activities, such as checking the blood sugar concentration, dosing the insulin when administering, effective administration of insulin – insulin injections being absolutely essential for survival. Wrongful dosage may cause high blood sugar on the long term, influencing the proper functioning of the eye, kidneys or it may cause severe hypoglycemia, hypoglycemic comas, while in extreme cases it can even result in the death of the patient. Factors such as chronological age, ability of understanding, children care and their close supervision determine the requirements related to metabolic control. Children suffering from type I diabetes mellitus can be classified based on disability levels by considering the intensity of their individual functional deficit and by correlation to the psychosocial functioning in relation to their age.

In the 1st appendix of Order no. 725/12709/2002 regarding the criteria used in order to determine disability levels in case of children and to apply the corresponding special protection measures, issued by the Ministry of Health and Family Welfare and by the National Authority for Child Protection and Adoption it is stated that in order to achieve the assimilation based on disability levels, it will be considered that the severity of the disability level is not determined by the disease itself, but by the degree of the functional disorders that they influence in relation to the stage of evolution, by the complications in terms of social activity and involvement, by personal factors. The disability levels^[22] that can be assigned, according to the order previously mentioned are: the severe level, the high level, the medium level and the low level.

Or, according to the provision of Chapter V, letter c) – Metabolism and nutrition chronic disorders, included in Appendix no. 2 of Order no. 725/12709/2002, mentioned above, "children diagnosed with diabetes mellitus between the age of 0-7 that prove to have eating disorders and administrate the treatment can be classified under severe disability level, based on medical recommendation".

^[22] In this paper, we will classify as incidental the requirements that need to be fulfilled in order to be classified under the severe, respectively under the high level. Therefore, the severe level can be assigned to children who do not whose capacity for self-care is not yet developed or it completely lacks, meaning they are highly dependent both physically and psychically. In this case the autonomy of the individual is really low as a result of the severe limitation in activity, which leads to multiple restrictions in relation to the child's involvement. Consequently, the child requires special care and needs to be constantly under somebody else's supervision. The high level can be assigned to children whose incapacity of developing activities according to the social role corresponding to their age and development is caused by significant functional limitations from the motor, sensory, neuropsychic or metabolic perspective resulting from severe diseases, in advanced stages, with complications of certain systems. In this situation, the child's social involvement is severely restricted.

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The disability level is assigned by decision of the commissioners for child protection subordinated to county and local councils, as well as to the districts of Bucharest Municipality, whose activity revealed the fact that, usually, children suffering from type 1 diabetes mellitus were classified under the severe disability level after reaching 7 years old.

In our opinion, these classifications are determined by the restrictive interpretation of the provisions of Chapter V, letter c) – Metabolism and nutrition chronic disorders, included in Appendix no. 2 of Order no. 725/12709/2002, judging erroneously the fact that the legislator classified differently the children suffering from type 1 diabetes mellitus, without considering the international and internal regulations, mentioned above, that usually define children as any human being below the age of 18.

The first effect of not assigning the disability level results in the fact that the child suffering from type 1 diabetes mellitus loses his/her right to an attendant. The second effect of the classification under the high disability level, resulting from the loss of the right to an attendant, is represented by the sudden deterioration of the medical condition, that it is likely to cause the child's death. Children suffering from type 1 diabetes mellitus are dependent on insulin and until they reach the proper age and become legally competent, they are not capable of adjusting the doses of insulin and their diet all by themselves. In this regard, the care and the constant supervision of an attendant are essential and, therefore, health repercussions and even the death of children can be prevented.

Moreover, even in the prospect that provides information regarding the administration of insulin addressed to the user it is expressly stated that this medicine must be "kept away from the reach and sight of children". As a result, an attendant should provide constant supervision when insulin is administered – fact brought into attention, directly and expressly, by the insulin producer, while the state is required to provide parents the opportunity of fulfilling their obligations as such, since the state itself is obliged to respect children's right to health and to provide parents and legal guardians the framework required for exercising their right and obligations.

As a result of a petition registered in September 2015, elaborated at the initiative of 37 parents of children suffering from type 1 diabetes mellitus, aged between 0-14, from different areas of Romania, the College of Directors of the National Council for Fighting against Discrimination decided during the meeting for petition solving from the 8th June 2016, that the provisions of Common order no. 725/12709/2002 regarding the criteria used to determine disability levels in case of children and to apply the corresponding special protection measures – appendix no. 2, chapter V, letter c) – Metabolism and nutrition chronic disorders, is considered to be a direct discrimination between children in terms of age and classification of disability levels.

The same decision states the fact that the phrase "diabetic children within the age range 0-7" generates a restrictive interpretation in terms of the their possibilities of benefiting from health services and social services, after the age of 7 and until the age of 18. It was estimated that the age limit required in this case is not justified from the self-care perspective of complying with medical and daily diet requirements in relation to the child suffering from type 1 diabetes mellitus

and to its psychological development, which allows the commissions for child protection to apply practices that have a discriminatory effect²³³.

By the resolution adopted, the National Council for Fighting against Discrimination required the two ministers to change the Commun order no. 725/12709/2002, so as to provide social protection and health services to children within the age range 0-18 suffering from type I diabetes mellitus, who have not yet acquired the full capacity of exercise, according to their psychosocial development, the severity of the disease, the degree of functional disorders that they influence in relation to the stage of evolution, the complications in terms of social activity and involvement, respectively personal factors²³⁴.

Therefore, although there is a legal framework that guarantees the equality in rights, the right to health protection, the right to children and youngsters protection and the right to protection of people with disabilities, the authorities must interpret and apply these norms on a non-discriminatory basis, so as not to deprive children suffering from type I diabetes mellitus of their essential rights, irrespective of their age. By acting as such, the state will be able to provide parents and legal guardians the framework required for exercising their right and obligations, including towards such children. Assigning disability levels to all children suffering from type I diabetes mellitus will allow parents to become attendants and to benefit of allowance meant to ensure them at least a decent standard of living, if not a decent one, together with these children and providing them with constant and appropriate care.

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²³³ In this regard, please see Press Release of the National Council for Fighting against Discrimination, published on its website, which can be accessed at: <http://www.cncd.org.ro/presa/Comunicate-de-presa/Comunicat-de-presa-referitor-la-hotararile-adoptate-de-Colegiul-director-al-CNCD-in-sedinta-din-data-de-08-06-2016-299/>, accessed on 19th September 2016.

²³⁴ The National Council for Fighting against Discrimination applied even a contraventional penalty of 2000 lei for each of the two issuing authorities.