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EMPHASIZING JURIDICAL FOUNDATIONS OF CHILDREN’S PROTECTION AGAINST EXPLOITATION THROUGH WORK/SPORT IN A CONSTITUTIONAL STATE- ROMANIA

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Introduction

It is well known that the denomination of constitutional state was introduced into the philosophy of law by Montesquieu. The concept was drawn up and substantiated by the German doctrine in the second half of the 19th century. Generally constitutional state is meant to be the state which is based on law, it functions and exerts its prerogatives according to law. The state uses the power of argument and the law as argument. A constitutional state functions according to the fundamental law, in Romania this is the Constitution. The Constitution substantiates, legalizes, argues, orientates and leads the whole activity of the state and its institutions – there is a large system of civil rights and liberties based on law, on Constitution that guarantees their existence and application.

Constitutional state is a new model of conceiving the rapport and relationship among institutions, between these and citizen, between civil and political society. The Constitution from 1991, modified and completed by the Law on the revision of the Constitution of Romania No. 429/2003 is based on principles and values, which guarantee the existence of the constitutional state in Romania, which is expressly mentioned (Article 1, paragraph 3). In Romania, (Article 1, paragraph 4) „The State shall be organized based on the principle of the separation and balance of powers - legislative, executive, and judicial - within the framework of constitutional democracy”.

In this paper I would like to emphasize the existence of judicial adjustments (substantive law) that ensure, or might ensure, the promotion and guarantee children’s rights (subjective rights) in connection with controlling their exploitation through work/sport – as Giorgio Del Vecchio asserted in “Lessons of juridical philosophy”² the relation of sociability among states, as well as the relation of sociability among individuals must be accepted as a corollary of the fundamental ethical law. Thus, the principle „*pacta sunt servanda*” has to be operational as what regards the activities of physical education, since no one is above the law, neither natural nor legal person, or a certain domain of activity. (Principle sanctioned in article 16 of the Constitution of Romania **Equality of rights** - (1) Citizens are equal before the law and public authorities, without any privilege or discrimination. (2) No one is above the law.

Sport is considered a notable social phenomenon – but as it is well known the social is based on the normative- and all social norms have to be subordinated, at least in a constitutional state, to judicial norms.³ The legitimating of unlawful conduct, the passivity of state organs towards these – lead to the aggravation of the situation or lack of state authority- imminent danger as what regards the existence of democratic values - to the

¹ Prof. Dr. University - Cluj-Napoca. Faculty of Physical Education and Sport.

² Giorgio Del Vecchio, *Lezioni di Filosofia del Diritto*, Citta di Castello, Societa Anonima Tipographica "Leonardo da Vinci", 1930.

³ Voicu, A. V., “The Legal Dimension of Ethics in Sports” published in *The International Sports Law Journal*, Volume 3-4, 2005, The Hague, The Netherlands.

usurpation of fundamental human rights and liberties – including children’s rights. In this respect I consider that the relation between the existence of judicial specialists of promoting and guarantying children’s rights and their application, that is the relation between declaratory and effectiveness of law are reference points of appreciation of the existence of the constitutional state. The Constitution of Romania contains important provisions regarding the protection of children and young people in art. 49. - Art. 49 Protection of children and young people - (1) Children and young people shall enjoy special protection and assistance in the pursuit of their rights. (2) The State shall grant allowances for children and benefits for the care of ill or disabled children. Other forms of social protection for children and young people shall be established by law. (3) The exploitation of minors, their employment in activities that might be harmful to their health, or morals, or might endanger their life and normal development are prohibited. (4) Minors under the age of fifteen may not be employed for any paid labour. (5) The public authorities are bound to contribute to secure the conditions for the free participation of young people in the political, social, economic, cultural and sporting life of the country.

Children’s rights in considering them as fundamental human rights

The beginning of affirmation of an order of right that is characteristic to each human community is lost in time. However, it is clear that such a measure has always had as main and final reason the protection of man – implicit the promotion and guarantee of children’s rights. Human beings’ rights are fundamental of our nature – without them, we cannot live as human beings. We must understand that childhood is not only a period of passing towards the status of adult – it has its own value, a temporal dimension within which it should enjoy the rights and obligations typical of this age. Practising these rights without obstacles, limits can only be achieved in a judicial system of protection, guarantee and implementation of human rights... In *The Preamble of Universal Declaration of Human Rights* (Article 1, paragraph 1) is considered that „All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Human rights must be viewed in their consideration as subjective rights – and can be defined as being prerogatives, faculties or possibilities acknowledged by the objective right of a person, regarded as subject of right to adopt a certain judicial conduct by which he exercises the patrimonial and extra patrimonial rights considered at a certain period of evolution of society as *fundamental liberties*. Being subjective rights, the correlative obligation of state and of public authorities correspond to human rights, of all subjects of right to respect them and not to infringe them. At their establishment a real contribution had those forces that understood the direction of human progress. Human rights can be characterized by the fact that they are acknowledged in a special way – in essence, they are sanctioned by the constitutions of states- the most certain way for their acknowledgement. The acknowledgement of human rights can be achieved by international act as well. If in the legislation of states, parts of these accords, treaties, conventions, etc. the principle of *self-executing* is acknowledged, which consists of direct application of international convention in internal legislation of participating states with a priority of internal legislation, the respective rights are considered *ipso-facto*. However, if the above mentioned principle is not known by the Constitution of a state, the participation to convention or treaty is delivered by the state the obligation of sanctioning in the internal legislation human rights,

acknowledged by the convention or treaty mentioned – considering Romania, already belonging to the European Union, the consideration of primordially of communal law has been imposed confronted by the internal right. The Constitution of Romania regarding the citizens' fundamental rights, liberties and obligations in article 20. International treaties on human rights contain the following: (1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the conventions and other treaties Romania is a party to.

(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.

The notion of child and their rights

Initially, the protection of „children's rights" was the objective of International Organization of Work, concretized by *Convention IOW No. 6/1919 regarding children's night shift in industry* adopted at the general Conference of IOW in Washington by the government of the USA on 25 October, 1919, as well as by *Convention of IOW no. 16/1921 regarding children's and young people's medical examination compulsory on board*, adopted at the general Conference of IOW in Geneva on 25th October, 1921, both ratified by Romania. The beginning or end of childhood were not clearly defined- neither in Declaration of Children's Rights of 1924, nor in the one of 1959. The Preamble of Convention regarding children's rights (1989) justifies the necessity of elaboration of the Convention: „*Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognised in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenants on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children, Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"*.

Article no 1 regarding children's rights The Convention adopted by the General Assembly of United Nations on 29th September, 1989 and coming into effect on 2nd September, 1990 defines child as being: „For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

Romania ratified the Convention by Law No. 109 of 18th September 1990 published in Official Gazette of Romania, Part I, no. 199/28 September 1990, republished in Official Gazette of Romania, Part I, no. 314/13 June 2001. The definition from the Convention was taken over by other normative acts as well, drawn up later than the date of ratification) which aims at child protection - for example the definition contained in *Law no. 272/2004 regarding protection and promotion of children's rights* (published in Official Gazette of Romania, part I, nr. 557/23 June, 2004) – according to this normative act the notion of child has the following significance: Within the meaning of the present law, the

terms and expressions below have the following meanings: a) child - a human being below the age of 18, who has not acquired full capacity of exercise, according to the law (Article 4)

Law no. 272/2004 regulates juridical background regarding the observance, promotion and guarantee of children's rights. - Art. 1 - (1) The present law regulates the legal framework concerning the observance, promotion and guaranteeing child's right; (2) The public authorities, the authorized private institutions, as well as the natural and legal person responsible for child protection must observe, promote and guarantee the child's rights, as stipulated by the Constitution and the law, in accordance with the provisions of the UN Convention on the Rights of the Child, ratified through Law no. 18/1990, republished, and with the other international regulations in this field, to which Romania is a State party. Art. 2 - (1) The present law, any other regulations adopted in the field of observing and promoting child's rights, as well as any legal act, issued or, as the case may be, signed in this field, are subordinated primarily to the child's best interests. (2) The best interests of the child also take priority over the rights and duties of the child's parents, legal guardians, or other persons legally responsible for him or her. (3) In all actions and decisions concerning children, whether undertaken by public authorities and authorized private institutions, as well as courts of law, the best interests of the child shall be a primary consideration.

Until coming of age the person (the child) is in „minority” – that is he is under age because „ The total capability of exercise begins when the person comes of age. The person comes of age at the age of 18. „The person under age who gets married acquires through this the total capability of exercise”. art. 4 of Law no. 31/1954 regarding natural and legal person (published in Official Journal no. 8 of 30th January 1954). According to art. 4 of Romanian Family Code „minimum age for marriage is of 18” – and „only for serious reasons, the under age who is over sixteen may get married on the grounds of a medical notification, with his parents' agreement, or of his tutor and with the permit of territorial, general board of direction of social assistance and protection of child – if one of the parents is dead or is in the impossible situation of exercising his will, the other parent's permit is sufficient. In none of the case, there are no parents, no tutor who can consent to the marriage, the person's permit who was entitled to exercise the parental rights is essential.

As a rule, all natural people have the civil capability of exercise without representation or the assistance of legal protective, excepting those who are declared by law expressly as lacking or being limited in this capability. According to the text of article 949 from Code of Civil law „ Any person can contract who is not declared unable by law”, and in the text of the following article (art. 950) the categories of unable are specified, among which the *under-age*, as well. It is necessary to emphasize the fact that the practical consequences of the steps regarding the definition of the notion of child (under-age) and making evident the lack of discernment of these are in relation with the protection of their subjective rights, including their economic exploitation.

Even if very early ages protection of under-age was a constant of humanities preoccupations, since child is at the mercy of many dangers and needs protection. Being fragile, he cannot resist exterior aggression, and his ability to understand the risks and consequences of his deeds is diminished or it is totally missing. The protection of children under-age is usually exercised in the family, by both parents. Unfortunately, there are cases when the parents show a total lack of interest towards the child, or they are in the impossibility of protecting them. In connection with the under-age child's person, the parent's obligation or/and of other institutions of child protection, regulated by the Code of

family and by Law no. 272/2004 with subsequent modifications, is that of ensuring the child's bio-psycho-social development through adequate forms and methods, in order of evolution and his passing from the state of dependence to self-determination.⁴

Establishing an age for obtaining certain rights or losing protection is a complex problem. The Committee for Children's Rights (with the task of Gazetting of implementation of Convention regarding Children's Rights) have emphasized the fact that when the states define a minimum age in their legislation, they must do this according to fundamental principles of Convention, especially to the principle of non-discrimination, as well as to the principle of child's superior interest, of right to life, to survival and to development. In the frame of „Instructions for the process of reporting” the Committee requests information regarding all minimum ages established by law for different aims, so as the states have been encouraged to revise the definition of childhood, and to rise the minimum ages for protection, especially the minimum age for sexual assent, *engaging in work* and penal responsibility.⁵

The Directive of Council 94/33/CE of 22. VI. 1994 referring to the protection of young people in work makes a distinction between⁶: „child,” - as being any young who is not 15 or who is still studying as imposed by national legislation; „ adolescent” – any young who between ages of 15 and 18 who is not taking part in comprehensive study any more; „ young” – any person until the age of 28 having a contract or a relation of work defined by legislation in force in a constitutional state.

Following the ratification of Treaties of Rome (1957– establishing the European Economic Community, and respectively the European Community of Atomic Energy) the following hierarchy of normative acts was established/sources of law from the Union: regulations, norms, decisions, recommendations and notifications. Even if *norms* produce effects „only as results of their incorporation into internal legislation, obliging the states to adapt itself to certain objectives – but these have the freedom of choosing the means which guarantee the realization”, following the coming into effect of the Treaty of Lisbon the *Directive* will become *Law ...*, legislative act which will oblige the recipient state to conformation „ leaving the competence of choosing forms and means to national authorities”. Regarding norm 94/33/CE the situation of its ability to apply is propitious, to be applied in internal legislations of member states of EU, as a result of the elaboration by the European Parliament and the Council European Union of the „ Norm 2007/30/CE of the European Union and the Council from 20th June, 2007, of modification of the Directive 89/391/CEE of the Council, of its special directives and of Directives 83/477/CEE, 91/383/CEE, 92/29/CEE and 94/33/CE of the Council in order to simplify and ratioanalize the rapport regarding applying it published in the Official Journal of the EU no. L 165/21 from 27.06.2007.

The protection of child against economic exploitation

Article 32 from the Convention of UN regarding Child's Rights protects child against economic exploitation and against work that might be dangerous or noxious for his

⁴ Arcu, C., „Protection of minors in international private law”, Ed. Universităţii Suceava, 2003, p. 5

⁵ Rachel Hodgkin, Peter Newell, „Manual for implementing Convention regarding Child's rights”, revised edititon, Ed. Vanemonde, Bucureşti, 2004. op. cit., pag.1.

⁶ Voicu, A. V., „ Child's rights as man's fundamental rights- certain considerations regarding child's protection in cultural or similar activities”, in the magazine „Child's social protection ” nr. 14-15 2003, p. 65-72; Ţiclea, A., Treaty on law of work”; „Universul Juridic” Publishing House, Bucureşti, 2007.

health or his physical, mental, spiritual, ethical or social development. By the foresight of the above mentioned article states are imposed to adopt legislative, social administrative and educational measures in order to ensure their implementation and above all to specify: minimum age or limits of minimum age for becoming employed; proper regulations concerning working hours and conditions of employment; punishments or other proper sanctions to ensure the effective application of the above mentioned article;

According to Office of Statistics of International Organization of Work there are at least 120 million children, between the ages of 5-14, who work full-time. IOW shows that many children are still in a system of slavery in different parts of the world, and it considers that a priority should be given in this respect to the resources used against the most intolerable forms of children's work, like slavery, compulsion by debt, children's prostitution and work in dangerous professions or sectors, as well as against work executed by very young children. The Convention of IOW no. 138 foresees that „ all necessary measures, including the establishment of proper sanctions” must be taken by competent authorities in order to ensure the effective application of legal dispositions. The Committee have underlined for the states that child's protection against economic exploitation must be reflected in details in national legislation.

In legislation of work in Romania, article 13 from the Code of work foresees that natural person obtains the ability to work at the age of 16. He may enter into a contract of work as salaried and at the age of 15 only with his parents' permit or with his legal representatives for activities proper to his physical growth, his aptitudes and knowledge, if by this his health and professional development and training are not endangered.⁷ In article 13 paragraph 3 from the Code of work it is expressly forbidden to employ children under 15 to a post, and paragraph 5 of the same article specifies that appointment of a person to a difficult, injurious or dangerous post can be done only after reaching the age of 18. At the same time article 15 forbids entering into an individual work contract in order to execute certain works or illicit, immoral activities, under the sanction of absolute nullity.

Paying special attention to children and young people under 18 Law no. 272/2004 – special Law in the protection and guarantee of child's rights – protects children against exploitation. They cannot be obliged to a work which entails a potential risk or which is susceptible to compromise education or to damage their health, or their physical, mental, spiritual, ethical or social growth. Any practice by which a child is given by one or both his parents or his legal representative in exchange of a reward or not, in order to exploit him or his work is forbidden. In cases when school children elude the educational process, executing works not respecting laws, the educational units are obliged to inform the public service of social assistance. In case of such findings the public service of social assistance together with school inspectorate and other competent public institutions are obliged to take measures in order to reintegrate the child to school.

Law no. 272/2004 regulates in art. 99 the protection of child against any form of exploitation. Thus, public institutions and authorities according to their prerogatives, adopt specific regulations and apply proper measures in order to prevent: child's illicit transfer and his not returning; settlement of adoption , national or international, for other reasons than the child's superior interest; sexual exploitation and sexual violence; kidnapping and trading with children for any reason and by any means; children's implication in armed conflicts; *the*

⁷ Voicu, A. V., „Limits of right of practicing sport from the view of promotion and guarantee child's rights”, published in magazine „Palestrica Mileniului III, Cluj-Napoca, March, 2004, p. 56-65.

forced development of children's talent damaging their harmonious physical and mental growth; child's exploitation by mass media; child's exploitation in certain researches or scientific experiments.

The particular issue of „forced development of children talents in the detriment of their harmonious development, physical and mental aspects” can be counteracted threw the Directive of Council 94/33/CE⁸:

Article 4 Prohibition of work by children

1. Member States shall adopt the measures necessary to prohibit work by children.

2. Taking into account the objectives set out in Article 1, Member States may make legislative or regulatory provision for the prohibition of work by children not to apply to: (a) children pursuing the activities set out in Article 5; (b) children of at least 14 years of age working under a combined work/training scheme or an in-plant work-experience scheme, provided that such work is done in accordance with the conditions laid down by the competent authority; (c) children of at least 14 years of age performing light work other than that covered by Article 5; light work other than that covered by Article 5 may, however, be performed by children of 13 years of age for a limited number of hours per week in the case of categories of work determined by national legislation.

3. Member States that make use of the opinion referred to in paragraph 2 (c) shall determine, subject to the provisions of this Directive, the working conditions relating to the light work in question.

Article 5 Cultural or similar activities

1. The employment of children for the purposes of performance in cultural, artistic, sports or advertising activities shall be subject to prior authorization to be given by the competent authority in individual cases.

2. Member States shall by legislative or regulatory provision lay down the working conditions for children in the cases referred to in paragraph 1 and the details of the prior authorization procedure, on condition that the activities:

(i) are not likely to be harmful to the safety, health or development of children, and

(ii) are not such as to be harmful to their attendance at school, their participation in vocational guidance or training programmes approved by the competent authority or their capacity to benefit from the instruction received.

3. By way of derogation from the procedure laid down in paragraph 1, in the case of children of at least 13 years of age, Member States may authorize, by legislative or regulatory provision, in accordance with conditions which they shall determine, the employment of children for the purposes of performance in cultural, artistic, sports or advertising activities.

4. The Member States which have a specific authorization system for modeling agencies with regard to the activities of children may retain that system.

⁸ And which are not found in the Government Decision no. 600/13 June 2007, regarding youth protection at the work place, published in Official Gazette, part I, no. 473/13 July 2007.

SECTION II

Article 6 General obligations on employers

1. Without prejudice to Article 4 (1), the employer shall adopt the measures necessary to protect the safety and health of young people, taking particular account of the specific risks referred to in Article 7 (1).

2. The employer shall implement the measures provided for in paragraph 1 on the basis of an assessment of the hazards to young people in connection with their work.

The assessment must be made before young people begin work and when there is any major change in working conditions and must pay particular attention to the following points: (a) the fitting-out and layout of the workplace and the workstation; (b) the nature, degree and duration of exposure to physical, biological and chemical agents; (c) the form, range and use of work equipment, in particular agents, machines, apparatus and devices, and the way in which they are handled; (d) the arrangement of work processes and operations and the way in which these are combined (organization of work); (e) the level of training and instruction given to young people.

Where this assessment shows that there is a risk to the safety, the physical or mental health or development of young people, an appropriate free assessment and monitoring of their health shall be provided at regular intervals without prejudice to Directive 89/391/EEC.

The free health assessment and monitoring may form part of a national health system.

3. The employer shall inform young people of possible risks and of all measures adopted concerning their safety and health. Furthermore, he shall inform the legal representatives of children of possible risks and of all measures adopted concerning children's safety and health.

4. The employer shall involve the protective and preventive services referred to in Article 7 of Directive 89/391/EEC in the planning, implementation and monitoring of the safety and health conditions applicable to young people.

Conclusion

The under age, his juridical situation, the necessity of his protection have constituted and they still are a preoccupation in the bibliography of several domains, not only in Romania, but at international level as well, emphasizing the urgency of concentrating initiatives for adequate child protection, for composing a set of viable laws, for the development of institutions meant to protect, guarantee and promote children's fundamental rights. As far as children's protection is concerned against economic exploitation through work and similar activities-sport we can refer to several normative acts and not least the ones of UNO Charter of Fundamental Rights, European Charta of Sport, The Ethical Code of Sport, White Charta of Sport and of Resolution of European Parliament of 8th May, 2008 referring to White Charta regarding sport (2007/2261(INI)).

The foresights of norm 94/33/CE from 1994 will have to be introduced (until the year of 2012- according to norm 2007/30/CE of European Parliament and Council from 20th June, 2007) into the Romanian legislation as well, both in the law of Physical Education and Sport, and Law of Education, into normative acts which consider children's protection as well

as into the juridical reglementations of sport structures and of Romanian Olympic and Sport Committee.

I hope that this paper will provoke sufficient and necessary interest to be able to suggest those interested, a partnership regarding research in protection of subjective rights of participants in activities of physical education and sport.

In connection with the discussed – let us not forget that „ bringing up a child is risky; since success depends on much effort and care, but fail exceeds any other pain.” (Democritus).

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