



## ORIGINAL PAPER

# Rethinking the Legal Comparative Study on Children's Rights: Rights Protection and Institutional Capacities in Romania and Kuwait

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### Abstract:

The issue of child rights protection is an important aspect of social policy of any modern state. In Romania, infringement of child right to a decent standard of living, reduced access of certain categories of children to health care or quality education, school dropout rate, the situation of children who leave social care homes and need support in finding a employment, homelessness, and lack of effective protection against discrimination were the problems that Romania had to overcome after the 1989 revolution. Even if there are difficulties in practice, most caused by bureaucracy, corruption in the judiciary system and budgetary constraints, Romania managed to build over the last 25 years, a coherent legal system in line with international treaties and conventions in which is a party. In Kuwait, although article 70 of the Constitution stipulates that international treaties ratified by Kuwait have the force of law, the judicial and executive authorities, however, have not taken enough measures to implement this article. In a society dominated by the power of man, with a law of religious origin, based heavily on doctrine and on amendments and interpretations of Sharia Islamic law by judges, violations of fundamental human rights, in particular of women and children, are common. The originality of the author's approach lies in the attempt to make a comparison in terms of child protection between two completely different systems of law, stopping on issues such as parentage, acquisition of citizenship, parental authority, guardianship, child custody after divorce, violence against children, age of majority, the right to education and the employment of minors.

**Keywords:** *age, minor, parent, marriage, divorce, custody*

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### **Introductory remarks**

In any modern state child and youth protection is a fundamental objective of social policy (Avram, Radu, 2006: 7). Infringement of child right to a decent standard of living, reduced access of certain categories of children to health care or quality education, school dropout rate, the situation of children who leave social care homes and need support in finding a employment, homelessness, and lack of effective protection against discrimination were the problems that Romania had to overcome after the 1989 revolution (Avram, Popescu, Radu, 2006: 238). Even if there are difficulties in practice, most caused by bureaucracy, corruption in the judiciary system and budgetary constraints, Romania managed to build over the last 25 years, a coherent legal system in line with international treaties and conventions in which is a party. Even in the first article, the Romanian Constitution stipulates that “children and young people enjoy a special protection and assistance in realizing their rights”. In Kuwait, although Article 70 of the Constitution stipulates that international treaties ratified by Kuwait have the force of law, the judicial and executive authorities, however, have not taken enough measures to implement this article. In a society dominated by the power of man, with a law of religious origin, violations of fundamental human rights, in particular of women and children, are common. It is hard to compare two systems of law so different as the Romanian and the Kuwaiti: first, whose main source of legislation is the law, the doctrine and the jurisprudence being excluded; the second is a traditional system of religious origin, which relies heavily on doctrine and on amendments and interpretations of Sharia Islamic law by judges. While in Romania the first attempts of codification of legal rules date back to the seventeenth century (Avram, Bică, Bitoleanu, et al., 2007: 162), in Kuwait the first projects of the law codes were drawn up in the late 1950s (Lombardi, 2013: 746; Hill, 1988: 182). The system of law in Kuwait is dominated by Civil code adopted in 1981, about which Shaikh Salman said that it was the first integrated civil code, whose provisions are in harmony with schools of Islamic jurisprudence and which does not contain any provision which would not be supported by any of these schools or be in conflict with the spirit of Sharia (Huneidi, 1986: 218). Rights of the child at various ages are covered separately by both the Romanian and the Kuwaiti legislation.

### **Filiation**

Filiation is the relation of descendance linking a child of his parents (Lupaşcu, Pădurariu, 2010: 206). This is a fundamental element of civil status, which produces legal effects of personal (name, parental rights and duties, etc.) and patrimonial nature (inheritance rights, maintenance right etc.). The legal consequences of filiation are different depending on the legal provisions in different branches of law that refer to it; the more different are in the two legal systems analysed: Kuwaiti and Romanian. Filiation from the mother stems from the fact of birth, whereas filiation from the father cannot be proved directly. In situations strictly defined by Romanian law, filiation from the mother may be established by recognizing the child from the mother or, where appropriate, by court.

The child born during the marriage, whether it was conceived during or before its concluding, enjoy a legal presumption that “the child born in wedlock has the mother’s husband as father”. This is a relative presumption of paternity which can be removed through a denial of paternity. Child born after termination of marriage is considered child resulted from marriage if he was born within 300 days from the date of divorce,

termination or cancellation of wedlock. The paternity of the child conceived as a result of relationships outside marriage can be established only by voluntary recognition made by man or by a legal action. Under the Kuwaiti law, a child is legitimate if it is born after at least six months from the conclusion of a marriage (Article 166 of the Personal Status Code). In these circumstances ties of kinship are automatically established between the child and the father and his family even if the marriage is irregular (“fasid”). If the child is born before six months of the conclusion of the marriage, the relationship between the husband and the child is not confirmed unless the husband declares the child to be his and obtains official documents in this regard.

Unlike the Romanian law, according to which children born out of wedlock are equal before the law with those born in wedlock and with those adopted (Article 260 of the New Civil Code), in Kuwait a child born outside a marital relationship is illegitimate and has no legal relationship to his father even if the father declares the child as his. This regulation leads to father’s deprivation of any rights over the child and to the impossibility of the child to receive maintenance or to inherit from the father or the father’s family. Between 1986 and 1988, 42 women were arrested for having given birth to a child out of wedlock. Of these, 11 were closed for more than 2 years, 17 were obliged to marry the father, and 14 were placed under the custody of male family members (Al-Mughni, 1993: 98).

### **Citizenship**

Romanian citizenship is acquired by birth, adoption and application. Children born in Romania, from Romanian citizen parents, are Romanian citizens. There are also Romanian citizens those who were born on the Romanian territory, even if only one parent is a Romanian citizen, and those who were born abroad and both parents or only one of them has Romanian citizenship (Article 5 para. 2 of Law No. 21/1991 on Romanian citizenship). Child found on Romanian territory is considered Romanian citizen, until proven otherwise, if neither parent is known. Kuwaiti citizenship is acquired by birth but only from the father. Thus, a Kuwaiti man automatically transmits his nationality to his children wherever they are born, but a woman cannot transmit her nationality, unless the father is unknown or the mother is divorced or widowed from the nonnational father (Kelly, Breslin, 2010: 4-5). A child born from citizen mother and nonnational father does not inherit citizenship unless the mother is divorced or widowed from the nonnational father. Kuwaiti Nationality Act No. 15/1959 does not recognize dual nationality and stipulates that a Kuwaiti shall forfeit his nationality if he is convicted for a certain felony or chooses to adopt a foreign nationality (Article 11).

Law automatically grants citizenship to orphaned or abandoned infants, including Bedoon infants. Bedoon parents – citizens without citizenship which are considered to have resided in Kuwait lawfully despite the fact that they do not carry valid foreign travel documents or Kuwaiti residence permits (Abu-Hamad, 1995: 76) – are sometimes unable to obtain birth certificates for their Bedoon children because of additional administrative requirements, but since 2013 they can issue a birth certificate, but still they are in impossibility to access other public free of charge services such as education and health care.

### **Parental authority/ Guardianship**

In the Romanian legal system, parental authority is the juridical measure of child protection through which rights and duties with respect to the person and property of

minors have been met by both parents, based on the principle of equality in the exercise of their parental rights and duties (Ungureanu, Munteanu, 2011: 240; Oprescu, 2010: 117-120). In exceptional situations where one parent is unable to exercise his rights and fulfill his parental duties, their fulfillment will return to the other parent (Chelaru, 2003: 105; Pop, 1994: 140). Thus, Article 507 of the New Civil Code (NCC) stipulates: “If one parent is deceased, declared dead by court order, placed under interdiction, deprived of the exercise of parental rights or if, for any reason, is in impossibility to express his will, the other parent exercises parental authority alone”.

According to the established principles of Islamic jurisprudence, father is the natural guardian of the person and property of the minor child while custody is a right of the mother and not of either of the parents, or any other person (Rafiq, 2014: 268). The terms “custody” and “guardianship” have different meanings and implications in law. “Custody” means physical or material possession of the children, training or upbringing of the child while “guardianship” has a larger sense, meaning taking care of the child as well as of his property (Rafiq, 2014: 268). Unlike Romanian law, in Kuwait Article 209 of the Personal Status Law stipulates that the person with the most right to the guardianship of a minor is the father, followed by the father’s father and the male relatives in the order of inheritance. If the father and grandfather are dead or not available to exercise parental authority and no guardian has been appointed through testament the court can appoint a guardian.

### **Child custody after divorce**

In Romania, the Court of guardianship decides, in the divorce proceedings, as regards the relations between divorced parents and their underage children, taking into account the best interests of the child, the conclusions of the report of psychosocial investigation, and the parents agreement (Article 396 NCC). In accordance with article 5 of the Hague Convention of 25 October 1980, respectively with the provisions of Regulation (EC) No. 2201/2003, minor child is entrusted, in general, to his mother, this being considered as the best suited to handle the growth, education, school and professional training of the juvenile (Bistrița-Năsăud County Court, Civil Division, Decision no. 36/2010, unpublished). With regard to parental authority, this is the joint responsibility of both parents (Ghiță, 2015: 306), except where court decides otherwise. Even if one of the parents wants to give up willingly parental authority, Court of guardianship must consider the request in relation to the best interests of the child, being unable to admit it except in cases duly substantiated i.e. abuse, neglect, child exploitation (Ungureanu et al., 2012:572; Dobre, 2015: 292-293).

Under the Kuwaiti personal status law, a divorced woman retains custody of her children until her sons reach puberty and her daughters are married (Al Na’im, 2002: 125). Although law does not fix any age at which custody reverts to father, Shiite family law (customary law), however, grants a divorced mother the custody of her daughter until the age of nine and the son until the age of seven (Al-Awadhi, 1994: 26). We must also emphasize that courts have the power to extend child custody to mothers beyond the age stated in texts, depending upon the circumstances of the case and having in view the welfare of the minor while deciding custody cases (Rafiq, 2014: 273). Child support benefits offered by the state are allocated solely to the father, even when a woman is awarded custody rights. Under Islamic law even if the physical custody of the child is granted to the divorced mother, father continues to be the guardian of the child as he is supposed to support the child financially (Rafiq, 2014: 269). In Islamic schools, the

mother forfeits her right to custody if she remarries. Should a husband divorce his wife on the grounds of her infidelity, the family courts can grant the custody of the children to their father (Rafiq, 2014: 269).

Under Article 196 of the Kuwaiti Personal Status Law, access to a child in custody is guaranteed for both parents and grandparents. If an agreement on contact arrangements cannot be reached the family court decides the day, time and place of contact visits. In the case that the custodian denies the parents or grandparents access to the child they can apply to the court to be awarded visitation rights. The mother custodian is prohibited from traveling with children out of Kuwait without the guardian's or the court's permission. The converse situation is also true because during the period of custody the guardian cannot remove the child from the country of residence without the permission of the custodian.

### **Adoption**

In Romania, the institution of adoption is regulated by the Law on legal status of adoption no. 273/2004, which establishes the principle that adoption can be achieved only in the best interests of the child. Adoption is only possible during the child's minority, unless it was raised by adoptive family or person. In addition to the expression of the natural parents' consent or, where appropriate, of the guardian's approval, it is also required the consent of the child who has reached 10 years (Lupașcu, Pădurariu, 2010: 275-277). Adoptive person or family must meet the moral and material conditions necessary for guaranteeing full and harmonious development of the child's personality. Adoption law limits the possibility of international adoption, which can not be authorized unless the adopter or one of the adoptive husbands is the grandfather of the adopted child (Avram, Popescu, Radu, 2006: 246). In Kuwait adoption is prohibited but the concept of fostering is established in the Family Fostering Act No.82/1977. but this law changed in the beginning of 1980's and they allowed it without inheritance.

### **Violence against children**

In Romania, Law no. 272/2004 on the protection and promotion of children's rights and Law no. 217/2003 on preventing and combatting domestic violence created legal mechanisms to intervene in the case of abuse of children whether physical, psychological, sexual or economic (Albăstroiu, 2015: 366). The child has the right to be protected from all forms of violence, abuse, maltreatment or neglect (Article 85, para. 1). The term "child abuse" means any deliberate action of a person who is in a relationship of responsibility, trust or authority towards it, through which the life, physical, mental, spiritual, moral or social, physical, mental or physical health of the child is put into danger, while "neglect" means the failure, voluntary or involuntary, of a person who is responsible for child care, growth and education, of taking any measure subject to this responsibility, which endanger the life, physical, mental, spiritual, moral or social development, bodily integrity, physical or mental health of the child (Article 89, para. 1 of Law no. 272/2004). The law prohibits corporal punishment in any form, and depriving children of their rights likely to endanger the life, physical, mental, spiritual, moral or social, physical, mental or physical health of the child in the family, as and in any institution which ensures the protection, care and education of children. Any person who, by nature of profession or occupation, works directly with a child and has suspicions related to a situation of abuse or neglect it is obliged to notify the public service of social assistance or general direction

of social assistance and child protection in whose jurisdiction the case was identified (Avram and Radu, 2006: 10-11).

Where, following the checks carried out following a complaint on cases of child abuse and neglect, the representatives of the general direction of social assistance and child protection determine that there are reasonable grounds to support the existence of a situation of imminent danger to the child, due to abuse and neglect, and not encounter opposition from people who provide care or child protection, the direction of social assistance and child protection establishes the emergency placement measure. The Romanian Criminal Code also states that: "Putting in serious jeopardy the physical, mental or moral development of minors by parents or persons in whose care is the minor, through measures or treatment of any kind, shall be punished with imprisonment from 3 to 7 years and deprivation of certain rights" (Article 197).

In Kuwaiti system there is no legal definition of abuse or violence against children although law incriminates certain acts of violence regardless of whether they were incurred to a child or to an adult such as: beating, killing, breach of trust, verbal offense, defamation, sexual assault, rape (assault by penetration). Unlike the Romanian law, the Kuwaiti law does not stipulate as being a crime the disciplinary beating inflicted on children by their guardians, custodians or caretakers (Global Initiative to End All Corporal Punishment of Children, 2015). Article 26 of Law no. 16/1960 on the Criminal Code states that "no crime is committed if the act is executed on the premise of exercising the right to discipline a child by one who is authorized by law to do so with the condition that boundaries are kept and the intention of beating is directed solely towards disciplining". Due to the difficulty of distinguishing between disciplinary beating and physical violence or abuse inflicted on a child by one of his guardians or caretakers, there are many cases in which guardians misuse their right to discipline their children in cases where beatings resulted in extreme physical or psychological harm of a child without incurring any legal consequence. In the case that a child sustains he is a victim of abuse or violence from his guardian and registers a complaint against him, the authorities conducting the investigation is not obliged to carry out the procedure of separating a child from his guardian or to place the minor in care shelters belonging to the Ministry of Social Affairs and Labor.

### **Sexual offences**

Under Romanian law, sexual intercourse, oral or anal intercourse and other acts committed by vaginal or anal penetration with a minor aged between 13 and 15 shall be punished with imprisonment of one to five years. If this act is committed against a minor who has not reached the age of 13 shall be punished with imprisonment from 2 to 7 years and deprivation of certain rights. If the act was committed by a major with a minor aged between 13 and 18, where the major abused their authority or influence over the victim, shall be punished with imprisonment from 2 to 7 years and deprivation of certain rights (Article 220 of the Criminal Code). Production of pornographic materials with persons under the age of 18 years is prohibited by law. The sexual act of any nature committed by a major in the presence of a minor who has not attained the age of 13 shall be punished with imprisonment from 6 months to 2 years or a fine. Determination by a major to a minor who has not attained the age of 13 to attend the commission of acts of flasher or performances within which commit sexual acts of any kind, and making available the material pornography is punishable with imprisonment from 3 months to one year or a fine (Article 221 para. 3 and 4 of the Criminal Code).

In Kuwait, an act is not considered rape or assault by penetration except if the vagina is not penetrated whereas sexual assault is any other act of sexual harassment without any penetration that occurs on females and males or penetrating the anus by the male sexual organ. The law stipulates greater punishments on crimes of rape and assault by penetration but does not fix a minimum age for consensual sexual relations, although premarital sexual relations are illegal. The Kuwaiti Criminal Code states that “having sexual intercourse with a woman against her will, regardless of whether it was through force, threatening or trickery, the perpetrator is punished by execution or lifetime imprisonment. However, if the perpetrator was a relative of the victim or caretaker or a guardian or someone who has an authority over her or a servant who works for her or any of those formerly mentioned, the punishment will be execution” (Article 186). Due to the fact that the sole punishment placed on relatives of a victim and her caretakers is death penalty and to the fear of social stigma. All forms of pornography are illegal but there are no laws specific to child pornography.

### **Age of Maturity**

Age of majority under the Romanian law is 18; full legal capacity is acquired at this age, unless, for good reasons, the Court of guardianship recognizes full legal capacity to the minor who has reached the age of 16 (advance capacity is governed by Article 40 NCC) and where the child acquires by marriage full legal capacity (Article 272 NCC). Romanian legislator considered that, since minor aged between 14 and 18 have developing discernment, must recognize its limited legal capacity (Baiaş, Chelaru, Constantinovici and Macovei: 246; Cercel, Scurtu, 2015: 299). The child who has not attained the age of 14 is not criminally liable. The child who is aged between 14 and 16 is criminally liable only if it is proved that he committed the act with discernment, and the child over 16 years has criminal responsibility (Article 113 of the Criminal Code). The minor who, at the time of the offence, was aged between 14 and 18 years, is sentenced by the court to the enforcement of a non-custodial educational measure (Avram, Popescu and Radu, 2006: 258).

In Sharia law, age is defined or interpreted by the age of maturity: 9 years for women and 15 years for men, with discretion based on physical/mental maturity (Campbell, 2007: 265). Age limit of civil majority, criminal responsibility, marriage, voting, candidacy or emancipation of minors varies. Kuwaiti law does not stipulate a limit of age when a child ceases to be a minor and enters adulthood. According to Civil law no. 67/1980, “Age of majority is upon reaching 21 whole years” (2nd Paragraph of Article 92) whereas Article 18 of the Kuwaiti Penal Code stipulates that anyone who was under seven years of age at the time of committing an offence cannot be held criminally responsible. A person can exercise his electoral right after he has reached 21 years of age as stipulated in article 1 of Law no. 35/1962 concerning Parliament member elections. Romanian citizens are entitled to vote at the age of 18, may be elected to the Chamber of Deputies or to the local governments bodies at the age of at least 23 years, from the age of at least 33 years may be elected to the Senate and of at least 35 years may be elected as President of Romania (Article 36 and 37 of the Constitution).

### **Matrimonial age**

According to Article 272 NCC, marriage may be concluded if the spouses have reached the age of 18. For good reasons, a minor under the age of 16 can marry under medical opinion, with the consent of his parents or, where applicable, of his guardian and

the permission of the Court of guardianship in whose district the child resides. If a parent refuses to give his permission to child's marriage, the court of guardianship decides on this divergence in the best interests of the child. If one parent is deceased or is unable to manifest the will, consent of the other parent is sufficient. If there is no parent or guardian who can approve marriage, it is required the consent of the person or authority entitled to exercise parental rights.

The minimum age stipulated in Kuwaiti law for concluding a marriage is 15 years for females and 17 years for males. In the same time, in order that the marriage contract itself be validated, Law no. 51/1984 regarding Family and Personal Status, includes the following provisions: "for a marriage to be legitimate, parties have to be of age (puberty) and of sound mind" (Article 24) and "the notarization and authentication of a marriage contract is prohibited if a female has not reached 15 years of age and a male 17 years at the time of registering the contract" (Article 26) because there are still some tribal groups in which girls continue to marry at a younger age. This is a situation similar to that of underage marriages concluded within the Roma minority in Romania (Oprea, 2005, 133-144; Andrei, Martinidis and Tkadlecova, 2014: 327-329).

### **Education**

Law no. 272/2004 on the protection and promotion of children's rights includes a number of provisions relating to child education. The child has the right to receive an education enabling the development, in non discriminatory conditions, of his skills and personality. The child's parents have a priority right to choose the kind of education that shall be given to their children and are required to enroll the child in school and ensure regular attendance by the minor of the school courses (Avram, Radu, 2006: 7). The child who has reached the age of 14 years may request permission from the court to change the kind of teaching and training courses (Avram, Popescu, Radu, 2006: 251). According to the National Education Law no. 1/2011, primary education lasts five years, consisting of preparatory class, which becomes mandatory (when the child turns 6 years of age), followed by I-IV grades. Compulsory general education has ten classes (up to the age of 18). The lower secondary education which includes grades V-IX is compulsory, while secondary education is optional, consisting of X-XII / XIII grades. Child over 15 years has the right and duty to continue the courses in order to graduate compulsory general education. Units that have employed children older than 15 years have an obligation to support them to continue compulsory education.

Right to education is guaranteed by Article 40 of the Kuwaiti constitution: "Education is a right for Kuwaitis, guaranteed by the state in accordance with law and within the limits of public policy and morals. Education in its preliminary stages shall be compulsory and free in accordance with law. The law shall lay down the necessary plan to eliminate illiteracy. The State shall devote particular care to the physical, moral and mental development of youth" and by Article 13: "Education is a fundamental requisite for the progress of society, assured and promoted by the State".

According to Law no. 11/1965 on compulsory education, education is compulsory and free for Kuwaitis only: "Education is compulsory and free for all Kuwaiti children, male and female, from primary to intermediate levels. The state is obligated to provide school buildings, textbooks, teachers and all that is necessary to guarantee the success of compulsory education of human and material resources" (Article 1). This express provision of law makes education neither compulsory nor free for non-Kuwaitis. Public schools in Kuwait only admit, and provide free education to Kuwaiti children but



there are some groups of non-Kuwaiti admitted, as an exception, to public schools and provided with free education: children of a Kuwaiti mother married to a non-Kuwaiti, children of citizens of Gulf Cooperation Council countries, children of foreign diplomats, children of non-Kuwaiti prisoners of war and martyrs, children of employees in public schools including science lab technicians and librarians.

### **Legal age for employment**

Until the age of 15 years old children can not be employed even if children's forced labour and exploiting is growing in the last years (Gheorghiuță, Vădăsteanu, 2015: 274-285). Article 13 para. 2 of the Labor Code recognizes that minors who are aged between 15 and 16 years have a limited capacity to engage in work, that their employment is possible only with the consent of both parents or of their legal representatives and only if "their health, development and vocational training are not jeopardized" (Ștefănescu, 2001: 59-63). Parental consent must be prior or simultaneous with the conclusion of the employment contract; special (must refer to the contract of employment); clearly expressed (Radu, 2008: 119). At the conclusion of the contract will be mentioned the existence of the consent and those who gave it (parents or guardians) will sign the contract together with the minor. A natural person acquires full capacity to conclude an employment contract at the age of 16 years because it is presumed that at this age has physical and mental maturity necessary to enter into an employment relationship (Radu, 2015: 445). For reasons of health protection young employees under the age of 18 can not be assigned to jobs with harmful, heavy or dangerous conditions and may not be used to work at night.

In Kuwait, the legal minimum age for employment is 18 years. Employers may obtain permits from the Ministry of Social Affairs and Labor to employ minors between the ages of 15 and 18 in certain jobs that do not present a danger to child's health and development. According to section 20(a) of the Labour Code of 2010, young persons aged from 15 to 18 years shall not be employed in industries or professions that are, by a resolution of the Minister of Labour, classified as hazardous or harmful to their health. Law also prohibits forced labor and employment of a child under the age of 15 years. Minors may work only part-time, with a maximum of 6 hours a day on the condition that they work no more than 4 consecutive hours followed by a one-hour rest period. In the case of minors law prohibits overtime work and work performed between 7:00 p.m. and 6:00 a.m.

According to section 27 of the Labour Code of 2010, anyone who has completed 15 years of age shall be eligible to conclude a work contract, but these provisions of the Labour Code apply only to labour relations between workers and employers in the private sector.

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