

Loss of parental responsibility – a new legal instrument between need of protection of the best interest of the child and respect of parent fundamental rights

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Abstract

The new Albanian Family Code provides an additional measure reading the protection of the child, namely, the “loss of parental responsibility.” Differently from the measure of “removal of the parental responsibility” that is provided in the civil code provisions, this new measure has been introduced for the first time in the Albanian legal framework and is taken by court through a penal process. Thus, according to article 223 of the Family Code, *“the parents of a child may loose the parental responsibility through a penal court decision that has found them guilty of committing themselves or assisting in the commitment of a criminal offense against their child. They may also loose it if they have been convicted for any of the reasons regarding the abandonment of the family and have not fulfilled the related obligations.”*

This paper aims to analyse and interpret the introduction of this new measure which has caused difficulties regarding its practical application by courts. The authors of the paper analyse the legal features of the measure and the controversies of the doctrine in relation to such a measure. They also suggest the categorization of the new measure as a punishment of a penal nature, i.e as a supplementary punishment. The paper also analyses the cases where the measure is likely to be applied and the terms applicable to the individual that will be subjected to this measure.

The paper reviews also the time frame of the application of the new measure. The current legal framework does not contain a specific provision regarding this issue. In light of the evolution of the concept of the parental responsibility as well as the perspective of human rights protection the authors support the idea of the regulation of the time limits of the measure. The authors argue that in the determination of the time limits of the application of the measure (including the possible return of the parental rights), it is important the courts maintain a fair balance between the loss of parental responsibility and the respect of rights of the biological parent, in the highest interest of the child, to be raised and educated in the family of origin. At the end of the paper the authors also suggest the need to improve *de lege ferenda* the current provisions in order to ensure that the application of the new measure meets its purposes, i.e the removal of the parental rights is applied only in those cases where the parents are considered unfitted to exercise this right over their children.

Keywords: loss of parental responsibility, supplementary penal punishment, minor, interest of the minor, protection of human rights

I. General considerations on the concept of parental responsibility and legal responsibilities of parents who do not meet parental obligations

The Albanian Family Code has dedicated a special importance to legal relations between parents and their minor children. In this context, it is worth highlighting that the legal reform affecting parental relations reflected changes in form, significantly adding the number of provisions regulating parental responsibility, and in content, reflecting a conceptual change regarding the content of this institute compared to the previous legislation. A significant change marked while one looks at the Code is the different terminology used compared to the legal provisions of the past. This new terminology reflects a contemporary understanding of this relationship.

In the current concept of parental responsibility, the relationship between the parent and child gets even further from the traditional concept of the *power* or *authority* of the parent on the child, giving prevalence to the obligations or *responsibilities* emerging from this relationship.¹

Under these conditions, parental responsibility is considered as the most important legal instrument for the protection of the best interest of the child.

According to Article 215 of the Albanian Family Code “*Parental responsibility includes the unity of rights and obligations aiming at ensuring emotional, social and material welfare of the child, by taking care of the child, and providing the child with proper upbringing, education, legal representation and administration of his/her assets*”.

Different from the previous legislation, the current Family Code defines parental responsibility through its content, thus limiting the possibility for different doctrine interpretations. As any other legal relationship, the relations between parents and children contains rights and obligations, which, as shown from the interpretation of the provisions of the Family Code in general, emerge from the legal fact of reproduction or adoption of a child.

More specifically, parental rights and obligations are similar despite the source of emergence of parental responsibilities, biological connection, or declaration of the will from one side, or despite the legal status of the child who is born from a marriage, or out of a marriage.

¹ The concept of relations between parents and the child has undergone a constant evolution from one period to another. There is a radical change between the concept of *patria potestas* of the Roman law and parental power conceptualized from the modern law. The first represented an institute which mainly protected the interests of *pater familias* -- that is of the family head, who, while exercising tasks in the family needed such authority in service of ensuring an appropriate activity of the family he headed. In the contrary, in the modern concept, this idea is no longer in the heart of parental powers, but this power is conceptualized in the interest of the minor and is grounded in the idea of protection the parents shall provide to their children.

It is worth mentioning at this preliminary stage that more than the legal obligation, fulfillment of parental responsibilities is realized on a voluntary basis, on basis of affection, moral and social norms a family is founded into. While exercising this parental responsibility, its title-holders should respect, apart from moral norms, the legal norms stipulated in the legal order. Content of parental responsibilities and fulfillment of parental responsibilities are governed in ordering provisions in the Albanian legislation. Furthermore, protection of the best interest of the child is considered by many authors as a principle of public order². Consequently, in all the cases when parental responsibility is not exercised as per the manner provided for in these provisions, the lawmaker has defined sanctions which shall be applied against the parents who fail to meet such legal obligations, or against the ones who do not meet such provisions in the manner prescribed in the legal acts. In this context, if parental responsibility is exercised in breach of legal provisions, the parent is sanctioned for the failure to meet such legal obligations.

Legal instruments for sanctioning such persons are classified into sanctions of a criminal nature, governed as a rule in the provisions of the criminal law, and sanctions of a civil nature, which are mainly provided for in the provisions of the civil code, which, at the quality of general provisions, are applied in all cases of civil responsibility. On the other hand, if we concentrate on the criteria of the obligation considered violated, we could make a distinction between sanctions as a consequence of infringement of personal rights of the child and sanctions related with the infringement of the property rights of the child.

Despite these distinctive criteria, a joint peculiarity characterizing legal obligations is their complex character. Therefore, they appear as protective measures for the child, but, at the same time, they appear as retributive instruments vis-a-vis the parent who is considered responsible for the irregular exercising of parental responsibility.

II. Loss of parental responsibility; legal nature of this sanction and debates accompanying definition of loss of parental responsibility

Article 223 of the Family Code introduced for the first time a new measure in the category of instruments aiming at ensuring protection of the child, sanctioning “loss of parental responsibility”. As in the case of the sanction of removing parental responsibility, provided for in Article 228 of this Code, loss of this responsibility aims at depriving those parents considered as not capable of constantly taking care of their children from exercising child-related rights and obligations.

² K. Begeja., *Family Law*, Tirana 1984., p 21; H. Podvorica., *Family Law*, Prishtina 2005., p 19; G. Bonilini., *Manuale di diritto di famiglia*, p 13.

According to this provision *“Parents of the child can lose parental responsibility through a criminal judgment sentencing them as authors or co-authors of a criminal offence against the child, as collaborators in a criminal offence committed by their child, or in case they are sentenced for one of the causes of abandoning of the family, for as long as they have not undertaken obligations on the child”*.

A careful reading of this provision shows that while “removal of parental responsibility”, which has so far been the most severe sanction taken against the child, represents a civil sanction which is adjudicated by the court during a civil process put in motion by the interested persons, “loss of parental responsibility” is ruled by the court through a criminal decision.³ Definition of Article 223 on the kind of the court criminal decision through which this retributive measure shall be taken, on the one hand, and provision of this measure in the civil legislation, on the other hand, have put this new sanction in the center of debates of legal scholars. The legal debate has generally identified definition of the legal nature of this sanction⁴, but there have also been cases of qualifying this sanction as of a civil nature, as well as removal of parental responsibilities during a civil trial.⁵

On the other hand, due to these dilemmas on the legal nature of this conviction, we see from monitoring of court decisions issued after entry of the current Family Code in force that the case law has not applied it even in cases when conditions provided for in the Law for adoption of this measure are met. Reading legislations of other countries, and stemming from the grammatical interpretation of the legal text, in our assessment, the sanction mentioned in Article 223 although being part of provisions of civil legislation, has got the character of a criminal sanction, and more specifically it is part of the category of supplementary sanctions.

As a matter of fact, this provision should be more complete in its regulation in case it contained the kind of sanction aimed at being applied in scenarios like the one given in Article 223 of the Family Code. Apart from this, in the conditions of this formulation, the lawmaker should have referred to relevant provisions of the Criminal Code⁶ to identify the ill interpretation and wrong application of this sanction in the case law.

³ Article 228 of the Family Code: “When the parent abuses with the parental responsibility, or shows a severe carelessness in exercising this responsibility, or, through his actions, has a harmful impact on the education of the child, upon a request of the other parent, relatives of the child, or of the prosecutors, he can lose parental responsibility.”

Removal of parental responsibility is done by a court decision, calling the parent as a defendant on charges of removal of parental responsibility”.

⁴ A.Mandro, Dimensions of the Family Code vis-a-vis parental responsibility; Juridical Life (Jeta Juridike nr 4, 2004, p 23).

⁵ Round table held with the students of the School of Magistrates in Tirana, 2004.

⁶ Article 30 of the Criminal Code.

III. Fundamental conditions for enforcing the sanction of “loss of parental responsibility”

For a more comprehensive understanding of the sanction of “loss of parental responsibility” it would be of interest to treat conditions under which such measure would be taken. A combined reading of provisions of the Family Code and of the Criminal Code leads to the conclusion that:

A. In order to be able to apply loss of parental responsibility in practice, there is a need of the subject to **to be declared guilty** for committing a predicate offence, in one of these alternatives:

- The parent should be sentenced in the quality of the author or co-author in a criminal offence, which victim was his child;

A considerable part of criminal offences can be committed against a child, but the ones mostly identified in practice are: life attempts; murder of the child⁷, stealing of the property of the child, sexual relations with a minor, trafficking in children, exploitation for prostitution, etc.

- In the quality of the co-author of a crime, the parent should have been sentenced for a criminal offence committed by his child;

In real life, there are cases when the ones considered by the law as responsible for taking care of proper education of the child use their children for committing various criminal offences.

- The parent is sentenced for any of the causes of abandoning the family;

According to the Albanian Criminal Code, different from the other criminal legislations, there is not such criminal offence as abandonment of the family. If we refer to section IX of our Criminal Code “criminal offence against children, marriage and family” shall be those criminal offences leading to the consequence of abandonment of the family, which is provided for in Article 124 “abandonment of a minor child”; Article 125 “non-disclosure of means for a living”; Article 126 “failure to notify change of domicile”.

In cases when one of the parents, or both of them are punished for one of the above cited criminal offences, the court can decide to accompany the predicate punishment with a supplementary punishment of the loss of parental responsibility.

Legal literature says that in those cases when the parent is sentenced for one of the causes of abandoning the family, the sentence of loss of parental responsibility happens automatically.⁸ In our judgment, a supplementary penal punishment of loss of parental responsibility can in no case yield an *ipso facto* consequence, which is automatically

⁷ In this case, loss of parental responsibility would be appropriate for the other children of the author of the murder, as parental responsibility ceases in the moment a child dies.

⁸ A..Mandro, *op.cit*, p. 23.

accompanied by one of the punishments set for the criminal offences referred to in Article 223 of the Family Code.⁹ Following a complete and careful investigation, the court, once assessing that the main punishment does not sufficiently serve its functions, issues a supplementary punishment which does not only punish the parent, but does also ensure protection of the rights of the child through its implementation.

As a rule, the supplementary penal punishment of the loss of parental responsibility is accompanied by the main punishment for the criminal offence committed by the parent. Exceptionally, when for a criminal offence the law sets the punishment of a detention in prison for a period of up to 3 years, or a softer punishment, and when the court is of the opinion that a predicate punishment is not necessary, it can suffice itself only with setting of the supplementary penal punishment of the loss of parental responsibility.¹⁰

B. The supplementary penal punishment of the loss of parental responsibility is applied only in cases when the author of the criminal offence is the parent.

If the criminal offences mentioned *ut supra* are committed by other persons who do simultaneously exercise their rights and obligations regarding the child, the punishment of loss of parental responsibility cannot be applied, because Article 223 of the Family Code provides for a ***special quality for the subject*** it is applied against.¹¹

Without having the intention of dealing with the notion of the status of the child, we find it appropriate to synthesize some general consideration with the aim of clarifying the notion of title-holders of parental responsibility in practice. Subjects on who the sanction of “loss of parental responsibility” shall be applied are:

- Parents of the child *born from a marriage*. A child born from a marriage is:
 - A child born from a married mother. One of the fundamental elements for having a marriage is its form, as stipulated in the law. Therefore, a child born before their parents are married before the civil status registration office staff, although parents might have performed religious and traditional rituals, is considered a child born out of the marriage¹².
 - The child inseminated during marriage and born after marriage, but at any case within 300 days from termination of the marriage, or declaration of the marriage null and void from the parents.

⁹ Introducing another interpretation of this provision, later in this article we shall argue that the last part of Article 223, which makes you think that it is a question of enforcement of the supplementary penal punishment as an immediate consequence of the predicate punishment, but in fact it only relates to duration of the supplementary punishment.

¹⁰ See Article 30, paragraph two of the Albanian criminal code.

¹¹ To define the understanding of the concept of the parent, the criminal court shall address itself to the provisions of the Family Code. Such shall be the parents that have a child from a marriage, or outside the marriage, as well as the persons who have ended adoption procedures of a child.

¹² G. Bonilini., *op.cit.*, p 253.

In both these hypotheses, parental responsibility belongs to and is exercised by the mother who has given life to the child and her spouse, or, or in the case of divorce or invalidity of the marriage, the former husband of the mother. Consequently, if such subjects are considered guilty in one of the cases referred to in letter A, they meet the conditions for getting the supplementary penal punishment of “loss of parental responsibility”.

- Parents of the child born out of the marriage. A child *born out of the marriage* is:
 - The child born of a mother who is not married in the conditions set in the Family Code.
 - The child born of a married mother, but her spouse or the mother herself have asked for a “rejection of paternity”. Although the Family Code does not expressly mention this hypothesis, the child is considered of being born out a marriage¹³ as a consequence of acceptance of the lawsuit on rejecting the paternity of the child. An exception is the case when the mother is involved in a second marriage during which she has given birth to a child, but no later than within 300 days from the termination or invalidation of the first marriage.¹⁴ In this hypothesis, if the paternity of the spouse from the second marriage is rejected and the lawsuit is accepted from the court, the child is not considered as being born out of the marriage, but the *ipso iure* presumption, according to which the child’s father is the former spouse of the mother from the first marriage¹⁵, becomes effective.

Pursuant to Article 220 of the Family Code, in the case of the *child born out of a marriage*, dependency and exercising of parental responsibilities on the child is applicable only in those cases when the child is recognized from his parents. Although the provision provides only for the alternative of voluntary recognition, it should be accepted that paternity is defined by a court certificate¹⁶ in the absence of recognition.

Both the voluntary recognition and acceptance of the lawsuit on attesting the child paternity are the legal instruments through which connection of the parent with the child are defined, thus defining parental responsibility of the title-holders, and are, consequently, subjects on whom the sanction of “loss of parental responsibility” can be applicable. In the contrary, if paternity or/and motherhood are not set according to the above-cited alternatives, the child is considered, on a case-by-case basis, as having undefined paternity or/and motherhood, thereof parental responsibility is exercised only to that parent who already have an established connection with the child.

¹³ See page 184 - 186 of the Family Code.

¹⁴ In this hypothesis, recognized as the hypothesis of the conflict of paternity, out of the two possible presumptions the law gives priority to assigning legal parental responsibility to the second spouse of the mother of the child.

¹⁵ See G.Oruci., *op.cit.*, p 117.

¹⁶ See Article 177 and 189 of the Family Code.

It is worth mentioning that we should not leave aside the fact that the rights and obligations vis-à-vis a child born out of a marriage do not emerge after the date of the voluntary recognition, or the date the decision on verifying the mother/father of the child becomes final. Consequences of paternal relations even in these cases start retrospectively from the moment the child is born, and when it is a question of his rights, from the moment of conceiving, on the condition that the child is born alive.¹⁷ Under these circumstances, the sanction of the loss of parental responsibility shall be applied even in those cases when the criminal offence referred to in Article 223 of the Family Code is committed before voluntary recognition, or, as appropriate, when the court decision on verifying the mother/father of the child has become final.

- Although Article 220 of the Family Code does expressly refer only to the biologic parents as title holders of parental responsibility, spouses or persons who co-exist, who have adopted a minor, are entitled to the same status. From the date the decision on adoption becomes final, the rights and obligations between the adopting persons and the adopted child are the same as rights and responsibilities of biologic parents to their children. In the implementation of the Albanian legislation, adopting parents are the ones who have adopted a child compliant to the procedures referred to in the Family Code and Law no 9695 "On Adoption Procedures and the Albanian Adoption Committee". On the contrary, two persons who might keep the child from his birth, but failing to follow the administrative and adoption procedure, are not considered as parents in the understanding of the provisions of the Family Code, and, consequently, do not exercise parental responsibilities on the child. That said, it is understandable that the adopting parent committing one of the criminal offences provided for in Article 223 of the Family Code after the date of approval of adoption by the court is liable to the sanction of loss of parental responsibility on the adopted child. On the country, pursuant to the fact that adoption has brought about the consequence of extinction of a family relationship between the child and the biological parent, the later cannot be subject to loss of parental responsibility even in case one of the hypotheses referred to in Article 223 of the Family Code is identified.
- Lastly, subject of loss of parental responsibility cannot be the foster parent assigned from the court to care about the minor who is not subject of parental responsibility. Even though this foster parent is assigned with a part of the parent functions, in the case of failure to exercise them in the appropriate manner, the foster parent shall be punished according to other civil or criminal provisions, as the case appears, which shall consequently lead to ceasing of the foster relationship on the child, but in no case in the loss of parental responsibility.

¹⁷ G.Bonilini, *op.cit.*, fq 270; D.Cassone, "Il nuovo diritto di famiglia" Comentato ed annotato con la giurisprudenza., fq 260.

IV. Duration of “loss of parental responsibility”

“Loss of parental responsibility” should last for as long as mentioned in the court judgment, taking account of the criminal activity exercised on the child, as a coauthor of an offence together with the child or due to other causes of abandoning the family.

It is easily understandable that the court, while defining duration of the supplementary punishment, shall take a special account into the seriousness of the criminal offence committed by the parent. Hence, depending on the causes leading to taking of such judgments and assessment of the future of the child, the court can decide on a longer or shorter duration of loss of parental responsibilities, or the permanent loss of parental responsibility.

Different from removal of parental responsibilities, on which a change might be sought after issuance of the court judgment, which is a final judgment in the procedure perspective, but does not receive a final shape in the substantial meaning, the court judgment on “loss of parental responsibility” cannot be subject of any change.

Nonetheless, according to the opinion of legal scholars, in those hypotheses attesting that the behaviors of the parent have improved and if so required from the best interest of the child, the court can examine the right of the parent to meet with the child.¹⁸

V. Perspective of legal improvements aimed at establishing a balance between protection of the best interest of the child and safeguarding of the rights of the parent

Different from removal of parental responsibility, the lawmaker has kept silent regarding term of implementation of this measure. Legal scholars have recently voiced that this measure “should be irrevocable vis-à-vis regaining of parental responsibility by the parent whose parental responsibility is removed “.¹⁹

We are of the opinion that, in the conditions when this provision creates a gap requiring interpretation, we should keep in consideration not only the general principles referred to in the Criminal Code when it comes to assigning of supplementary criminal punishments and their time span, but even the fundamental rights of the parent while taking such a measure.

As a consequence, we are of the opinion that regarding criminal offences that have seriously put at risk the life, health or psychotic status of the child, and when the court holds that restitution of parental responsibility would seriously harm the best interest of the child, the loss of parental responsibility can be ruled by the court as being a

¹⁸ K.Begeja. *op.cit.*, p 222.

¹⁹ A.Mandro, *op.cit.*, p 23.

permanent and irrevocable measure.²⁰ Stemming from the same perspective, even in those cases when the parent commits criminal offences together with the child, and this has become a modus of behaviors -- that is when continuity of the criminal offence is proven -- or when the criminal offence is considered serious, the court might rule that the loss of also irrevocable.

But, in our opinion, the court should not hold the same stance while adjudicating some criminal offences, which are considered of a less serious consequence. Analyzing the manner of organization of criminal offences in our criminal laws, we see that they are divided into crimes and contraventions. The provision of Article 223 of the Family Code sets as a preliminary condition for the punishment of the loss of parental responsibilities the conviction for a certain criminal offence, without having a distinction between crimes and contraventions, including them both at the category of criminal sanctions. Continuing the logics of such interpretation, it would be superfluous and not in the best interest of the child to end in the loss of parental responsibility in the case of some criminal contraventions where the punishment the law provides for is imprisonment of up to two years, starting with penalties, or crimes that are punishable with up to 2 or 3 years of imprisonment. In our opinion, when the court thinks it is reasonable, it can rule on the duration of implementation of the supplementary penal punishment of loss of parental responsibility. In such a scenario, once this deadline is met, the parent shall regain his parental rights and obligations.

It is only in the last hypothesis referred to in Article 223 -- that is punishment of the parent for one of the reasons of abandoning the family, that the lawmaker has indirectly oriented the court on the term/duration of implementation of the supplementary penal sanction of loss of parental responsibility. In this case, parental responsibility shall be deprived of the parent "..., for as long as they have not assumed the obligations on the child". Interpretation of the three criminal offences sanctioning abandonment of the family according to the current legislation shows that their objective element is represented by actions and omissions focused on fulfillment of obligations of parents on their children in general, and in providing the necessary living means in particular.²¹ If during criminal judgment the parent is pled guilty on failure to fulfill such obligations, the court shall punish the author of the crime with a predicate punishment, and, if appropriate, with a supplementary punishment of loss of parental responsibilities. But, in case the parent, in the conditions of repentance or civil awareness-raising, shows behaviors that are different from the ones the ruling is taken, voluntarily meeting the obligation for a material support of the family, or fulfillment of other obligations, continuation of enforcement of the loss of parental responsibilities would have no sense. Stemming from this perspective, the lawmaker

²⁰ Criminal offences of life attempts, sexual relations with minors, etc. Would be considered as such, because, they, according to the professional expertise, put at a high risk to the life, health and psychology of the child.

²¹ These criminal offences are governed in the Article 124; 125;126 of the criminal code.

has decided to correlate duration of the punishment of loss of parental responsibilities with the completion of obligations as a parent.

Of course, regaining of parental responsibilities might happen when the child, found in the conditions of abandonment *ex* referred to in Article 250 of the Family Code, is not adopted according to procedures set in the law. In such hypothesis, we cannot talk about resumption of parental responsibilities, because parental responsibilities are ceased for this parent because of the adoption decision, entitling adopting parents to parental responsibilities.

When the parent meets obligations on his/her family on a constant manner, in practice we can ask which is the legal road to reconstitute parental responsibilities lost due to enforcement of a court judgment. Different from removal of parental responsibilities, the lawmaker has not expressly described the way in which this right is reconstituted for cases of loss of parental responsibility. In such circumstances, the follow-up question would be: where should the interested parent go – to the criminal court, or to the civil court in order for him/her to regain his/her parental responsibility?

Applying Article 23 of the Family Code *mutatis mutandis*, we are of the opinion that the parent seeking restitution of loss of parental responsibilities, attesting constant fulfillment of obligations deriving from it, should start of new court proceeding, sending the parent exercising parental responsibilities, or, on a case-by-case basis, the foster parent assigned for taking care of the child, as the defendant in the case.

To sum up what said above, it is easily understandable that this new sanction provided for in the Albanian legislation have led to various interpretations in practice.

Under these circumstances, we are of the opinion that more than a wide doctrine treatment, or the expectation of establishing a unique legal case law, *de lege ferenda*, the most efficient way to treat this issue would be completion of this provision, or of the criminal legislation dealing with supplementary sanctions. These amendments would help a lot in understanding and in effectively applying this criminal sanction against parents found in one the situations referred to in Article 223 of the Family Code.²²

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