



Considerations on the Source of the Maintenance Obligation and the Right to Maintenance

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Abstract: *The maintenance obligation may have a legal character or may result from the will of the parties, stating that its source is either the law, a unilateral legal act or a contract. Also, regarding the legal obligation of maintenance, it was argued that this arises from the moment when the subjects of law are established between family relations, affinity or other relations assimilated to family, which is the very basis of the obligation. Our study shows that the law is not the source of such an obligation, which can be a legal act or a fact, and that the legal obligation of maintenance, unlike the conventional one, which arises from the conclusion of the contract, is in its perfect form, effective, only from the moment when all the conditions required by law are fulfilled, until that moment the person indicated by the norms of civil law as being entitled to maintenance having only a vocation to this right.*

Keywords: *maintenance; source; contract; law; legal fact*

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It is obvious that the maintenance obligation may be of a legal nature or may be of a voluntary nature, such an obligation may arise from a unilateral act or contract² the maintenance system being the main instrument giving rise to such an obligation.

I. The maintenance legal relationship is not an innovation of modern law³. However, it is of permanent actuality, which is why the legislator from 2009 dedicated to the legal maintenance obligation Title V (art. 513-534) of Book II ("On the family") of the current Civil Code, to which are added the special rules, such as those regarding the

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² See Aniței, N.C. (2012). *Dreptul familiei*. București: Hamangiu, p. 201; Bodoașcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei*. București: Universul Juridic, p. 398 & 413; Lupașcu, D., Crăciunescu, C.M. (2012). *Dreptul familiei*. București: Universul Juridic, p. 432; Costache, M. (2017). Few Considerations on the Maintenance Obligation in the Romanian Civil Law. *Acta Universitatis Danubius. Juridica*, Vol 13, no. 2, pp. 136-146.

³ Dogaru, I. (1978). *Întreținerea. Drept și obligație legală*. Craiova: Scrisul Românesc, pp. 11-20.

legal obligation between the former spouses (art. 389 Civil Code) and that of the parents towards their minor children and the adult child (art. 499 Civil Code).

Even if in the legislation in force at this time there is no legal definition, based on the existing and previous rules, the idea that the legal obligation to maintain is crystallized in the doctrine *the duty imposed by law, between certain natural persons, established by law, to ensure, in case of need, the means necessary for living*¹ based on existing or previous family relationships, namely those born from marriage, natural or civil kinship relationships, affinity relationships or those assimilated to family relations².

Considering the rather large scope of the persons between whom the law establishes that this obligation exists, but also the general condition that the person who has the right to maintenance is in a state of need as a result of the impossibility (objective) to support himself from his work or property (art. 524 Civil Code), its foundation is, in reality, one of a moral nature³, derived either from the different links between the parties or from the need to protect certain categories of persons.

Thus, one can distinguish between family solidarity⁴.

Specific:

- kinship ties, whether they are persons who descend from each other, or persons who do not descend from each other but have a common author, or that the kinship is natural or civil, as is the case with parents and children (from marriage, out of wedlock or adoption), grandparents and grandchildren, great-grandparents and great-grandchildren, brothers and sisters. Moreover, the existence of the obligation is not dependent on the (complex, for that matter) content of these relationships, it exists even in situations where they have deteriorated, by eliminating, under the law, some of their specific elements. In this respect, according to art. 510 Civil Code "disqualification from the exercise of parental rights does not relieve the parent of his obligation to provide maintenance to the child";

- relations between spouses⁵ born by the conclusion of the legal act of the marriage, which are characterised and substantiated by feelings of affection and mutual support⁶;

¹ See Bodoaşcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei*. Bucureşti: Universul Juridic, p. 400; Lupaşcu, D., Crăciunescu, C.M. (2012). *Dreptul familiei*. Bucureşti: Universul Juridic, p. 432; Aniţei, N.C. (2012). *Dreptul familiei*. Bucureşti: Hamangiu, p. 200.

² Bodoaşcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei*. Bucureşti: Universul Juridic, pp. 398-399; Lupaşcu, D. & Crăciunescu, C.M. (2012). *Dreptul familiei*. Bucureşti: Universul Juridic, p. 432; Avram, M. (2016). *Drept civil. Familia*. Bucureşti: Hamangiu, p. 510.

³ Bodoaşcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei*. Bucureşti: Universul Juridic, p. 432.

⁴ Berindei, M.-G. (2019). *Izvorul contractual sau legal al obligaţiei de întreţinere*. Bucureşti: Hamangiu, pp. 21-23.

⁵ Dogaru, I. (1978). *Întreţinerea. Drept şi obligaţie legală*. Craiova: Scrisul Românesc, p. 24.

⁶ Bacaci, Al., Dumitrache, V.C. & Hageanu, C.C. (2012). *Dreptul familiei*. Bucureşti: C.H. Beck, p. 277.

- continuing of family relations¹ for former spouses, whether it is the dissolution of marriage by divorce [art. 516 para. (3) Civil Code], whether it is persons whose marriage has been dissolved but enjoys the benefit of putativity, in order to preserve the prerogatives specific to the status of former spouse, under certain conditions;
- affinity relations, between the child and the spouse of the parent (natural or adoptive), who contributed to the maintenance of the child [art. 517 para. (1) and (2) Civil Code],

and the minor's best interests which are realised by assimilating ties, from outside the family sphere, in terms of the legal maintenance obligation, to family relations. Thus, even if there are no ties of kinship, affinity or resulting from marriage between the creditor and the debtor, the minor is entitled, under certain conditions, to maintenance from "the heirs of the person who was obliged to maintain a minor or who gave him maintenance without having a legal obligation" (art. 518 Civil Code) or from "the one who took him to care for or protect him temporarily" [art. 16 para. (2) of Law no. ANRE President's Order no. 272/2004 on the protection and promotion of children's rights²].

In the literature³ it has been pointed out that the analysis of legal maintenance must be carried out both in the light of the right of claim having as its object the means necessary for maintenance and in that of the debtor's obligation to provide those means, both of which constitute special types of claim rights and of the obligations related to them. However, considering the meanings of the notion of obligation, the structure of the rules of the Civil Code and the analyses undertaken by the doctrine, we consider that the legal obligation of maintenance must be approached in the light of its meanings of a binding legal relationship and, respectively, of the performance of which the debtor is bound.

Thus, art. 1164 Civil Code defines the obligation as "a legal link by virtue of which the debtor is obliged to procure a benefit to the creditor and the creditor is entitled to obtain the benefit due", a definition which highlights the content of the binding legal relationship, which contains the debtor's duty to take an action or to refrain from committing it under the penalty of coercion⁴ its correlative right.

Starting from this point, we note that the legal maintenance obligation is that special type of obligation, a legal link, by virtue of which the debtor is obliged to procure to the creditor the necessary necessities of living, and in the case of minors everything

¹ *Idem*, p. 25.

² Republished in the Official Gazette of Romania, Part I, no. 159 of 5 March 2014, completed and amended.

³ Filipescu, I.P. (1988). *Pensia de întreținere în... 100 de răspunsuri*. București: Editura Științifică și Enciclopedică, p. 6; Dogaru, I. (1978). *Întreținerea. Drept și obligație legală*. Craiova: Scrisul Românesc, p. 14; Bodoașcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei*. București: Universul Juridic, pp. 399-400.

⁴ Popescu, T.R., Anca, P. (1968). *Teoria generală a obligațiilor*. București: Editura Științifică, p. 9; Moise, A.A. (2012). In Baias, F.I.A.; Chelaru, E.; Constantinovici, R.; Macovei, I. (coord.) (Ed.), *Noul Cod civil. Comentariu pe articole*, București: C.H. Beck, p. 1215.

that is necessary for their upbringing, development and education, and the creditor has the right to obtain this benefit, which has a complex content¹.

In the narrow sense of the concept of obligation, the debtor has the duty to take all the necessary actions to provide the creditor with the means of living, the service not being capable of being carried out by inaction, as it is an obligation, par excellence, to "do".

Even if the legislator used the phrase "legal obligation", the legal binding legal relationship of legal maintenance does not have its source in the law, because art. 1165 Civil Code lists the sources of binding legal relationships restrictively, (*excluding the law*²): "the contract, the unilateral act, the business management, the unjust enrichment, the undue payment, the wrongful act, as well as any other act or fact to which the law binds the birth of an obligation". The role of the law is to establish the rules applicable to this special binding relationship, which arises from a complex legal fact. If we analyse only the situation, perhaps the most frequent, that of the obligation of parents to provide maintenance to their children, we note that the fact of birth ("a fact to which the law links the birth of an obligation"), coupled with the establishment of parentage, leads to the acquisition of the child's vocation to maintenance on the part of his parents, the right "activating" and the child can become a creditor only to the extent that all the conditions expressly established by law are met.

The duration of the statutory maintenance obligation is the period during which the creditor is entitled to it and the debtor can be bound by the performance of the services, as a result of fulfilling all the conditions required by law. Outside that period, the persons listed exhaustively³. In the opposite direction⁴, of the law are, in my view, only a vocation to the right to legal maintenance⁵, and not a perfect right or a future right, given its high degree of uncertainty, determined by the very nature of the possible fulfilment of the conditions required by law for the existence of the perfect right to legal maintenance. We also support this in the light of the provisions of art. 524 Civil Code which states that "only the one who is in need is entitled to maintenance, not being able to support himself from his work or from his goods", so the right does not exist before the appearance of the state of need. It was pointed out⁶ moreover, prior to the entry into force of the current Civil Code, that the legal maintenance obligation exists in a latent state, even if the persons between whom it

¹ Bacaci, Al., Dumitrache, V.C. & Hageanu, C.C. (2012). *Dreptul familiei*. București: C.H. Beck, p. 253; Florian, E. (2018). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația*. București: C.H. Beck. 575.

² Against this provision, it was wrongly argued that the source of the legal obligation to maintain is the mandatory regulatory provisions, the law. See Drăghici & Duminiță, 2014, p. 38 and 39; Berindei, 2019, p. 17.

³ Drăghici, A., Duminiță, R. (2014). *Obligația legală de întreținere*, București: Universul Juridic, p. 61.

⁴ Frențiu, G.C. (2012). *Comentariile Codului civil. Familia*. București: Hamangiu, p. 658.

⁵ Florian, E. (2018). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația*. București: C.H. Beck, p. 587.

⁶ Dogaru, I. (1978). *Întreținerea. Drept și obligație legală*. Craiova: Scrisul Românesc, p. 103.

is established are not in a state of need and regardless of the means and incomes of the other persons.

1. The parties to the legal relationship of statutory maintenance being natural persons, the question of the vocation to legal maintenance cannot arise before the moment of birth and after the moment of death of the person entitled to maintenance, a similar situation for the person designated by law as being able to be held by this obligation. Moreover, according to art. 514 para. (2) Civil Code, the legal maintenance obligation, as a rule, "shall be extinguished by the death of the debtor or the creditor of the maintenance obligation". As regards the conceived child, even if the law recognizes his rights from the moment of conception, provided that he is born alive (art. 36 Civil Code), the legal obligation of maintenance cannot be due for the period between the moment of conception and that of birth¹, because the expenses necessary for living, as well as those for his education, teaching and professional training, cannot exist before birth, being a child conceived and not a minor, as the law claims.

2. The right and legal obligation of maintenance cannot exist unless the existence of the relationships established by law as the basis of their establishment. The loss of the status of spouse leads to the extinguishment of the legal obligation of maintenance between the spouses, the non-recognition of the status of spouse to the one of bad faith at the conclusion of the null or annulled marriage attracts the non-existence of the right to maintenance, the adoption leads to the extinguishment of the ties of kinship with the natural family and to the loss of the vocation to legal maintenance on the part of its members, and the dissolution of the adoption leads to the loss of the vocation to maintenance granted by the members of the adopting family etc. Consequently, the maintenance obligation may exist from the moment of the birth of the bonds which constitute its foundation² and up to that of their cessation, regardless of the concrete way of achieving them.

3. The duration of the maintenance obligation is also limited by the fulfilment of the general and special conditions: the state of need of the entitled person, the existence of means to ensure the maintenance of the one called upon to grant it, the order in which it is due, the corresponding behaviour, the state of minority, the continuation of studies, etc.

4. If these limits (conditions) set out above are met, the right to legal maintenance and the correlative obligation become effective.

In conclusion it is not the law that is the source of this binding relationship, but the complex legal fact to which the law links the birth of this legal relationship, until the moment of its realization, the person indicated by the law having only a vocation to legal maintenance, and not a perfect right - a right that sometimes "disappears" definitively, sometimes "becomes" again only a vocation to acquire the right itself, to the disappearance of one (/ some / all) of the elements of the complex legal fact that was its source.

¹ Hunedoara Court, civil section, decision nr. 6/2009, in Terzea, 2014, p. 506.

² Dogaru, I. (1978). *Întreținerea. Drept și obligație legală*. Craiova: Scrisul Românesc, p. 103.

II. The regulation of the maintenance contract was made, for the first time in the legislation of the Romanian, by the current Civil Code, to which it was dedicated to art. 2254-2263 of book V, Title IX "On special contracts", Chapter XVIII, as well as art. 2243- 2247, art. 2249, art. 2251 para. (1) and art. 2252 of Chapter XVII, in the matter of the life annuity contract. Thus, the maintenance contract became an appointed contract, while retaining its the general features that the practice and the literature¹ previous have assigned them to him: random contract what gives rise to an inaccessible and unnoticeable claims as well as a obligations to do, which is capable of being transformed, under certain conditions, into an obligation to give².

Art. 2254 Civil Code defines the maintenance contact: "In the maintenance contract, a party undertakes to perform for the benefit of the other party or of a certain third party the services necessary for the maintenance and care for a certain duration of time" [para. (2)], either provided for by the parties - in the form of a time-limit, or by specifying the life-saving nature of maintenance³ - or, in the absence thereof, throughout the life of the maintenance creditor.

To this definition are added those formulated in the literature, of which we note the one according to which "By maintenance contract, one of the parties undertakes provide the necessary services for maintenance and care the other party, as a rule, on the entire life of his life, in exchange for a capital (an asset or a sum of money)⁴".

The legal definition does not include the obligation to transfer a capital, given that this contract can be both for consideration and free of charge, as it results from the provisions of art. 2256 para. (1) in conjunction with 2243 para. (1) Civil Code.

The essential characteristic of the maintenance contract is the subject of the obligation: *maintenance and care of a person* (food, clothing, housing, healthcare, etc.⁵) the parties to it being the creditor (maintained) and the maintenance debtor (maintainer), with the particularity that maintenance may also be stipulated for the benefit of a third party⁶, in which case the contract acquires the configuration of one stipulation for another ["indirect donation"⁷]. The third-party beneficiary must, according to the common law, be determined or at least determinable at the date of

¹ Macovei, C. Dobrilă, M.C. (2012). În Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (Ed.), *Noul Cod civil. Comentariu pe articole*, București: C.H. Beck, p. 2200.

² Deak, Fr. (2001). *Tratat de drept civil. Contracte speciale*. București: Universul Juridic, pp. 544-547.

³ Berindei, M.-G. (2019). *Izvorul contractual sau legal al obligației de întreținere*. București: Hamangiu, p. 765

⁴ Stănciulescu, L. (2017). *Dreptul contractelor civile. Doctrină și jurisprudență*. București: Hamangiu, p. 518.

⁵ Supreme Court, civil section, decision nr. 482/1989; Târgu-Cărbunești Court, civil sentence nr. 728/2012; Bârlad Court, civil sentence nr. 2804/2011.

⁶ Stănciulescu, L. (2017). *Dreptul contractelor civile. Doctrină și jurisprudență*. București: Hamangiu, p. 518.

⁷ Deak, Fr. (2001). *Tratat de drept civil. Contracte speciale*. București: Universul Juridic, pp. 533-534.

the conclusion of the stipulation and must exist at the moment when the promisor must fulfil his obligation (art.1285 Civil Code). From the grammatical interpretation of the indicated text it results that, by way of exception to the rule established by art.1285 Civil Code, the third party beneficiary of the maintenance must be determined at the time of the conclusion of the contract and must exist at the time of execution of the maintenance obligation.

It should be noted that art. 2257 para. (2) and (3) Civil Code determine the benefits to which the person liable for maintenance is subject ("in particular") to the person liable for maintenance ("food, clothing, footwear, housekeeping, as well as the use of adequate housing", "the care and expenses required in the event of illness", as well as the funeral costs if the maintenance is of a life-saving nature or the creditor "dies during the duration of the contract"), but they are actually determined and their extent and quality shall be determined by the parties, by their will expressed in the terms of the contract¹, and the limits imposed by law are "the value of the capital" and the "previous social condition of the creditor" [art. 2257 para. (1) Civil Code].

Likewise, unless the parties have expressly provided otherwise, it is irrelevant whether the maintenance creditor has the means to ensure that standard of living for himself at the conclusion of the contract or during its performance² and without the maintenance debtor being able to rely in the event of non-performance of his obligation on the lack of necessary means or the reduction in assets caused by that enforcement³.

First, the extent of maintenance is variable over time, the element *those* what influences them not being given only by the duration of the contract, but also by the variations in the creditor's needs and by their concrete value, which is not a fixed one⁴. Thus, at the time of the conclusion of the contract, that extent cannot be determined⁵, which raises questions as to how it can be concluded that these considerations are fair for both parties, a requirement imposed by art. 2257 para. (1) Civil Code, especially since para. (4) establishes that maintenance is due "to the same extent" also where, during the term of the contract, the property transferred to the maintenance debtor perishes or reduces its value "for a reason for which the

¹ Stănciulescu, L. (2017). *Dreptul contractelor civile. Doctrină și jurisprudență*. București: Hamangiu, p. 523.

² Macovei, C. Dobrilă, M.C. (2012). În Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (Ed.), *Noul Cod civil. Comentariu pe articole*, București: C.H. Beck, p. 2204; Marcusohn, V. (2018). *Drept civil. Contacte speciale*. București: Universul Juridic, p. 375. For the view that the creditor's lack of a state of need is tantamount to the absence of a cause or the existence of an unlawful or immoral cause, see Borș, O.-L. (2019). *Contractul de întreținere. Scurte considerații cu privire la caracterile obligației de întreținere*, available at <https://www.ujmag.ro/drept/diverse/conferinta-internationala-a-doctoranzilor-in-drept-studii-si-cercetari-juridice-europene/rasfoire/>, 15-25.

³ Marcusohn, V. (2018). *Drept civil. Contacte speciale*. București: Universul Juridic, p. 375.

⁴ Urs, I. (2014). Considerații referitoare la conținutul și întinderea obligației de întreținere reglementată de noul Cod civil, *Pandectele române*, 10, p. 44.

⁵ Berindei, M.-G. (2019). *Izvorul contractual sau legal al obligației de întreținere*. București: Hamangiu, p. 143.

maintenance creditor is not held liable". In the light of those considerations, we consider that that fairness must be respected when the contract is concluded and that the amount of capital envisaged is that at that time, as is that of the foreseeable services. Subsequently, the performance of the contract may become excessively onerous (for example, the costs imposed by the occurrence of a disease involving expensive treatments that could not be foreseen), but the debtor will be bound by the enforcement.

Secondly, the criterion of the previous social condition of the maintenance creditor appears as a natural element in determining the purpose of the contract, the intention of the maintenance creditor being normally to maintain his standard of living¹, however, in order to comply with the fairness criterion, it must be linked to the amount of the capital passed on.

Thirdly, the question arises of the solution in a situation where the asset constituting the capital transferred diminishes its value or perishes through the fault of the maintenance creditor. In this case, the rules on sale regarding the guarantee for eviction arising from the seller's deed, art. 1695 para. (3) Civil Code establishing that "the guarantee is due against eviction arising from acts attributable to the seller, even if they arose after the sale", because the liability for eviction occurs in the event of total or partial loss of the right to property, or in the event of a disturbance in the exercise of the prerogatives of the right to property. Thus, the maintenance debtor may claim damages for the damage suffered, based on tortious liability for his own deed.

In conclusion, thus, in the presence of a binding legal relationship of a contractual nature in which the rights and obligations of the parties arise from the moment the contract is concluded, unless they have agreed otherwise, the will of the parties being decisive. Also, the duration of their existence is also determined by the agreement of the contracting parties, the maintenance contract being, by essence, one affected by the modalities, in the form of the term, which can be certain (the duration set by the parties) or uncertain (when it is a lifeguard).

Maintenance thus appears to be of a contractual or legal nature, but if in the first case the spring is a contract, in the second case its source is a complex legal fact, to which the law recognizes these valences.

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¹ Macovei, C. Dobrilă, M.C. (2012). În Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (Ed.), *Noul Cod civil. Comentariu pe articole*, București: C.H. Beck, p. 2204.

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Bârlad Court, civil sentence nr. 2804/2011, available at <https://legeaz.net/spete-civil/rezolutiune-contracte-2804-2011>.