



## Few Considerations on the Maintenance Obligation in the Romanian Civil Law

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**Abstract: Objectives:** Recently entered into force, the Romanian Civil Code, systematized on the stable and steady values of the former civil law, reforms the matter of the maintenance obligation, regardless of the source and the legal nature of this obligation. **Prior Work:** This is the reason why we have chosen this topic and the analysis of the typology to which such an obligation adapts and, of course, the correlative right to which it gives birth. **Approach:** In our current system of law there are provided different forms of exercising this obligation, preserving, improving, but also innovating, in some aspects, the previous regulation. Specifically, we will relate in this study to a brief analysis of all types of maintenance obligations, generated by two distinct sources: the law and the will of the parties (contract), in this case we are speaking of an obligation based on the law or a contractual obligation. The angle from which we are analyzing this type of obligational relationship between the maintenance creditor and the maintenance debtor also allows us to recall both the passive or active patrimonial side, and also the analysis of the legal characters that it presupposes each of the two above-mentioned generic types of maintenance obligations. **Value:** Starting from the conceptualization of the maintenance obligation, the present study will be oriented towards the analysis in the current legal context of the doctrinal points of view expressed in the specialized literature, using as a method the documentary research, the interpretative method and the comparative method.

**Keywords:** the maintenance obligation; contractual obligation; creditor; debtor; resolution

### 1. Introduction

Regardless of its nature and its source, the maintenance obligation claims a privileged place in all civil law, with the declared purpose: to provide protection for a certain category of persons, the binding relationships being established either by law or by an act of will, in general, by a contract. Thus, by assuming the status of

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debtor, the legal or contractual legal nature of the created relationship gives him the right to certain benefits imposed or assumed, for the benefit of one or more persons determined, in most cases, by family circumstances.

The present study aims at a radiographic mapping of the bona fide phenomenon which has in its content the idea of “maintenance” in the sense and dimensions provided by the law, on the one hand, but also in a discretionary manner, at the reach of the parties, according to the principle of contractual freedom, on the other hand. At the confluence of two areas with distinct implications and legal natures, *law vs. agreement of will*, we will highlight the essential features of this type of obligation, the foundation that differentiates it from the wide range of generic civil obligations and, starting from the legal characters, we will identify the traits that generated the need for regulation, referring to the idea of protection, support, and mutual help.

It is interesting to deepen such an obligatory typology, because when we talk about family, we do not only think about children, well-being, happiness, balance, security, but also forms of social protection. The core of the discussions on this subject is based on the following text of the Civil Code: “*The family has the right to protection from society and the state. The state is obliged to support, through economic and social measures .... the development and consolidation of the family*” (article 258, paragraphs 2 and 3, Civil Code). In the context of this normative text, at least one observation justifies its exposure: the State, through its coherent mechanisms, owes to defend and protect via viable means the current family phenomenon, so that the legal form of the obligation to maintain family members should be only an alternative to many other protections and “state’s” maintenance.

Therefore, from the point of view of legal regulation, the maintenance obligation claims its content under the provisions of the Civil Code, either in the field of family law, Title V of Book II, art. 513-534 or other articles separated in the corpus of family law (article 389 - Maintenance obligation between former spouses, article 402 - Contribution of divorced parents to the raising, education and professional training of children resulting from marriage, article 499 - Maintenance obligation between parents and their minor children), but also novelty in the maintenance contract regulation, thus covering the gap of the old civil legislation in the matter, regulating in 10 articles (2254-2263 of the Civil Code) a new contractual instrument for the stakeholders.

## 2. The Basics of Maintenance Obligation

To a large extent, this type of obligation relation is based on a natural rule, empathy and family duty, which gives rise to the obligation of solidarity, moral and financial support. Here we mention the relationships between parents and children, the legal obligation to maintain spouses, relatives in a straight line, i.e. brothers and sisters.

There is also a special category of relationships that give birth to legal maintenance relationships to some people with special qualities in a certain context (Avram, 2016, p. 510), assimilated relationships in some aspects of law with family relationships, such as the relationship of affinity between a child and his or her natural parent's husband.

And last but not least, the obligatory nature can also emerge from a contract between persons alien to the concept of family in the broad sense of the word, even though there are often relations of kinship between the contracting parties.

## 3. The Notion and the Legal Nature of the Maintenance Obligation

Due to the unlimited numerical nature of debt rights, which have content and a correlated duty, the maintenance obligation is a separate category and it can be easily distinguished from other legal typologies. In order to sketch a definition, it is necessary to distinguish the dual legal nature of this type of obligation, a legal one, which has as source the text of law and a *conventional* one, based on an agreement of the contracting parties.

A comprehensive and generic definition of the maintenance obligation must include in its content both the idea of a legal relationship under which the creditor is entitled to claim from a debtor the performance of a positive benefit, but also the notion of coercion as a variant of enforcement, which exceeds the voluntary one. Thus, from a first point of view, the maintenance obligation is that “*duty imposed by the law to a person in order to provide the other the necessary means of living, both financially and spiritually*”. (Avram, 2016, p. 510)

From the point of view of the second source, the one of a conventional nature, the maintenance obligation arises under a contract with the same name, whereby a party, called the maintained, transmits one or more individualized goods or a sum of money (capital), or also goods and money to another party, called maintainer, who instead undertakes to provide maintenance in nature, either to his contractor or to another

person called the maintenance beneficiary, for a specified period or, as a rule, on the rest of his/her life, and after his/her death to bury him/her. (Ioan & Iorga, 2014, pp. 133-137)

A remark is required in connection with the dual analysis of its legal nature: while the legal maintenance obligation is imposed by law to a particular category of persons, well defined within the content of the express legal rules, the obligation deriving from the contract has as a free source of will of any person to become a party to the contract, including also the categories of persons between whom there is such a legal duty. The mere fact that between two persons there is both a legal duty of maintenance and one born of their will, on the basis of the principle of contractual freedom it does not justify a cause of exemption or non-performance of one of them or an advantageous position of the legal one at the expense of the conventional one, but is the combined effect of a legal obligation with one born in the contract.

#### **4. Legal Characteristics of the Legal Maintenance Obligation**

Although we will not carry out an exhaustive analysis of these legal characters, it is needed a minimal evaluation, as they are the point of differentiation of the two types of maintenance obligation.

Thus, the legal inherent features of the legal maintenance obligation are the following: its *legal nature*, from its express provision, identifying both the debtor of the obligation and the direct beneficiary of the correlative debt; *public order feature* is justified by the unavailability of the law, in the sense that no one can give up for the future to his right to maintenance; directly related to this is also the personal character of the legal maintenance obligation - the maintenance claim being inaudible, and in principle, insensible; the maintenance obligation cannot be passed on to the heirs apart from the maintenance obligation owed to the minor who may pass on to the debtor's heirs under the conditions of art. 518 Civil Code; *the character, in principle, reciprocity* of maintenance, in which case the parties may, in turn, have the status of debtor or creditor, and that was without the existence of the obligation to be conditioned by the reciprocal fulfillment of it (Florian, 2011, p. 312); *the successive feature* of the legal maintenance obligation refers to the actual way of execution, either in kind, such as generic parenting for their minor children, but also in the form of payment of a sum of money, in cases and amount set by law; we also mention the *divisible nature* of the legal obligation to maintain, both in active

terms, that is to say, of maintenance creditors and passive ones, of debtors of the obligation. (art. 523 Civil Code)

### **5. Forms of the Legal Maintenance Obligation**

According to article 513 of the Civil Code, the legal maintenance obligation exists only among certain categories of persons, considering the law, therefore the execution of these tasks is closely related to the attributions and the status conferred by law on the following persons: between husband and wife; between parents and children, without distinguishing between natural or adoptive filiation; between grandparents and grandchildren; between great-grandparents and great-grandchildren; between brothers and sisters, indiscriminately as their relationship is natural or adoptive (Florian, 2011, p. 317) and among other persons specifically provided by the law. Regarding the last category, there are assimilated the following situations, having the debtor quality the following:

- a. maintenance attributable to former spouses from an open marriage, under conditions defined by law (article 389 Civil Code);
- b. between former husbands in the abolished marriage; the maintenance obligation is based on the good or bad faith of the spouses at the date of termination of the marriage annulled or canceled, each of them may claim the benefit of the putative marriage, including the right to maintenance of the former spouse (article 304, par. 2 of the Civil Code (Lupșan 2011, p. 130);
- c. between the spouse who has contributed to the maintenance of the natural child of the other spouse is obliged to continue to provide maintenance to the child during his / her minority, but only if the natural parents are deceased, missing or in need (article 517 of the Civil Code);
- d. the child who has been in the care of the natural parent's spouse for at least 10 years (i.e. the stepfather) may also be required to provide maintenance to the spouse of the natural parent (article 517, par. 2 Civil Code);
- e. the heirs of the maintenance obligation of the child and the heirs of the person who, although not legally obliged to provide maintenance to a child, are obliged to continue their maintenance, each to the extent of the property inherited, but only during the child's minority, and subsidiary, to the parents of the child, so only if the parents, first obliged, died, are missing or in need (article 518 Civil Code);

- f. who takes a child (found or left by parents) to care for or temporarily care until a protective measure is established, has the obligation to maintain it (article 16, par. 2 of Law No 272/2004)<sup>1</sup>. This obligation has a temporary feature, transitory nature, being effectively executed until the body notified within 48 hours establishes a legal protection measure.

The law establishes *the imperative order of providing legal maintenance*, establishing a hierarchy of those who are bound, depending on the quality or the proximity of the relation of kinship to the one entitled to maintenance (Lupșan, 2011, p. 130). Currently art. 519 of the Civil Code establishes this order, the creditor of the maintenance being able to use his right to claim the law only after he has identified his position as prescribed by the law, as follows: the husbands owe their maintenance before the obligated others; the descendant is obliged to maintain before the ascendant, and if there are more descendants or more ascendants, the nearest one is bound before the farthest one; brothers and sisters owe maintenance to their parents, but before grandparents. It does not matter in establishing the preferred legal rank if straight or collateral relatives have as their source a natural, blood or adoptive relationship.

## **6. General Landmarks on the Conventional Nature of the Maintenance Obligation**

In the following, we undertake a brief review of the maintenance contract, a conventional way of generating an obligation discussed in the present study, an analysis that allows us to quantify the different legal nature, its complex content and the legal effects that arise as a result of the execution of such a contract.

The Old Civil Code did not regulate this contract, it was in the scope of unnamed contracts, being one left to the parties' appreciation, having as a contract of sale a maintenance clause. In the current regulation, born out of a social need, grounded in practice and defined by doctrine, the maintenance contract is an ever more common instrument, legally highlighted in the provisions of ten articles, art. 2254 – 2263 of the Civil Code.

Under the maintenance contract, a party undertakes to provide for the benefit of the other party or a particular third party the benefits necessary for maintenance and care

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<sup>1</sup> Legea nr. 272/2004 privind protecția și promovarea drepturilor copilului/ Law no. 272/2004 on the Protection and Promotion of the Rights of the Child.

for certain duration. Contractually, the notion of maintenance implies a complex obligation, which concerns, on the one hand, the means of living (including food, clothing, housing, health care, etc.) and, on the other hand, the necessary means for the satisfaction of the creditor's spiritual needs (including cultural, artistic, scientific, informational needs, etc.) (Costache, 2013, p. 91). As a rule, the parties provide for strictly required maintenance obligations on food, clothing, housing, medical assistance, funeral expenses, etc., and sometimes use the general formula "all necessary for living". In all cases where the courts are called upon to assess the extent of the obligation of the maintainer, they will have to take into account not only what the parties have provided for in the contract but also the specifics of the maintenance obligation (article 2257 of the Civil Code).

If by contract it was not stipulated the duration of the maintenance or it was provided only the life annuity feature of it, then the maintenance is due for the lifetime of maintenance creditor.

## **7. Legal Characteristics of the Maintenance Obligation Derived from the Contract**

As a legal nature, the maintenance contract retains the legal features conferred by doctrine and jurisprudence. Thus, it was necessary to conclude it in a *solemn* form, under the sanction of absolute nullity (article 2255 of the Civil Code), for reasons that are probably related to the "protective role of contractual formalism" (Baiaş et al., 2012, p. 1712)

The maintenance contract is *sinalagmatic*, but it can also be unilateral when it is constituted by donation, that is why it keeps either onerous or free feature, in which case it is a liberality. As a defining feature, the maintenance contract is a random contract that generates an *inappropriate and insignificant claim*, as well as an *obligation to do*, which is likely to be converted into an obligation to give (Deak, 2007). The maintenance contract is an *intuitu personae contract*, as it contains an obligation to do, strictly personal and non-transferable, which is extinguished by the death of the beneficiary.

In the case of maintenance, the specific rules of the lifetime contract are applicable, namely, the contract which stipulates lifetime maintenance of a person who was deceased on the day of conclusion of the contract is punished by absolute nullity. There is also no effect on the contract by which a lifetime maintenance obligation

was constituted for the life of a person who, at the time of the conclusion of the contract, suffered from a disease in which he died within no more than 30 days from this date. If the maintenance contract has been concluded for a specified period, it will still retain its random character.

### **8. The Content of the Maintenance Obligation**

Although they have a different legal nature, which also outlines the content of services legally or contractually assumed, some convergence points can be identified in the sense that the human living needs are the same, the natural ones strictly related to the quality of the beneficiary (child), the difference of gender, age (minor or adult) and personal needs (sick people), etc.

Under its legal basis, the maintenance obligation is intended to protect a category of persons who, because of a specific reason, are unable to sustain themselves by personal means and effort. So there is a real need, either because of the impossibility of earning income from work, or it does not have the goods that it could use to secure its usual living. The state of need is appreciated in concrete terms, according to many circumstances, food, natural food needs, housing, clothing, medicines, as well as spiritual needs, assimilated to educational, cultural, etc. ones. We also refer to its variable nature as the amount of benefits, depending on the actual identified needs, but also on the existence of time limits imposed by law or specific circumstances. If the relationship between the parents and the children is not covered by the law, it is necessary to specify that the beneficiary of this duty has the maximum age of 26 years. Instead, the spouses owe each other maintenance during the marital phenomenon, which varies according to their will to preserve their quality of spouses, as by divorce it automatically extinguishes the legal duty of maintenance obligation.

On the other hand, in matters relating to a contract, the maintenance obligation does not constitute time barriers, in the sense that it may, in most cases be life-altering or whether the parties choose to have maintenance for a certain period of time, that is the result of their will, not of the legislator. However, in spite of the arbitrary feature of the contractual nature, the legislator, with the intention of protecting, has imposed a minimum 30-day maintenance service limit when the recipient is affected by a lethal illness and dies within that period of time compared to when the contract was concluded.



In terms of content, according to art. 2257 of the Civil Code, the main duty of the maintainer is to provide maintenance to the caretaker who, due to its food character, must be executed in nature, day by day. The requirement for successive benefits must also cover the two plans of the maintenance obligation: financial and spiritual. The place of maintenance is the one provided by the parties, and in the absence of express stipulation, maintenance is carried out at the home of the maintained. In particular, the debtor is required to provide the creditor with food, clothing, footwear, housekeeping and the use of appropriate housing. Maintenance also includes the necessary care and costs in case of illness. If the maintenance is life-enhancing or when the creditor dies during the term of the contract, the debtor has the obligation to bury him/her. This enumeration is not exhaustive, as the parties may change or limit the kind of owed benefits.

The debtor's death does not lead to the extinction of the obligation, but it is passed on to the heirs, which is not the case with the legal obligation.

## 9. Conclusions

As noted, the legal maintenance obligation retains its special character from that resulting from a maintenance contract, due to the purpose pursued by the legislator in editing the rules. The basis of the legal obligation is, as we have mentioned, feelings of solidarity, in-kindness, affection. Located in the other area, the contractual nature imprinting to the obligation the role of law for the parties has the will source of the latter, outwardly expressed by a valid, freely and unvarnished consent. Likewise, the same will may also end the termination of the contractual nature of the obligation. Consequently, in this respect, the legal obligation is imperative, and the conventional obligation preserves the legal nature of any contractual obligation, with binding force between the parties. (Drăghici & Dumnică, 2014, p. 40)

The comparative nature is also reflected in the modalities of execution. While it is impossible for legal maintenance subjects to conclude an understanding of the content of the maintenance obligation, the parties themselves set important milestones in the implementation of the binding legal relationship: period, content, amount, beneficiary, even conventional extinction mode, with the agreement of both contracting parties.

The variable nature of the statutory maintenance obligation is another factor that creates differences. While in the case of a legal obligation, the content varies depending on the creditor's need or the debtor's ability to pay, in the case of a maintenance contract that plays the role of law, once it has been formulated in the contract, the scope of the obligation will be enforced as such, no matter how difficult it could become for the debtor, and there is no possibility to release from the obligation to execute the daily benefits by returning the capital or the goods received in exchange. Moreover, given the assumed random nature, the debtor will not be able to claim total or partial non-execution due to the fact that the value of the maintenance provided has far exceeded the value of the right passed by the creditor of the obligation.

As a common element of these two types of obligations, we refer, first of all, to the character of *intuitu personae* that target both categories of creditors and debtors. As a natural consequence, this legal nature imparts to the maintenance obligation an inappropriate and insignificant status. Regarding the possibility of passing on this type of obligation by way of succession, we hold as a rule that the legal one cannot be the subject of a transmission, except in the strict conditions of the provisions of art. 518 of the Civil Code. The contractual nature of the obligation, when the original debtor has ceased to exist, leads to the transfer to the heirs of the obligation, with the possibility for the legislator to make changes, the obligation to make (periodic benefits in kind) to be substituted only by judicial means in an obligation to give a sum of money. But nothing can prevent the parties from doing so, to agree the termination of the contractual nature and, implicitly, of any obligation.

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