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# Legal Safeguards for Children without Parental Protection in Romania: A Study of Minors with Parents Serving Prison Sentences

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*'There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.'*

- Kofi Annan

**Abstract.** In the 30 years since the UN Convention on the Rights of the Child was ratified, despite ongoing improvement and change in perspective regarding these rights, we remain in the early stages. This is especially so for vulnerable groups such as children whose parents are serving a custodial sentence. In Romania, the rights of the child have evolved slowly since the communist era, when children were considered an asset to socialism – during this period, the Roman law designation of the 'pater familias' as the father was assumed by the state. Despite Romania's ratification of the Convention on the Rights of the Child as early as 1990, the road ahead was long, and significant steps were taken long after that point. We observe that it took 14 years from the ratification of the convention for the law on the protection of children's rights to be adopted, and another 19 years to admit that the legal instrument itself was insufficient for defending the rights of minors and even for preserving the family, the rights of parents, and their roles in society. This study analyses the situation of children whose parent or parents were incarcerated, with their parental contact limited, consequently affecting their fundamental rights as children. We demonstrate how children's rights have evolved in Romania and how the legislature has come to identify categories of risk, focusing on the situation of children with parents serving a custodial sentence and their protection methods. We consider it important to provide an overview of this category of children, especially with the enforcement of Act No. 156/2023 regarding processes for preventing separation of children from families, which is an integrated instrument in domestic legislation aimed at implementing the

protection that vulnerable children should receive in practice and providing the instruments for social workers to support these children.

**Keywords:** fundamental rights, children's rights, incarcerated parents, parental authority, Romanian law

# 1. Introduction

As an independent framework, the system for the protection of the rights of the child is a relatively recent institution in Romania. The first unitary legal regime on the matter came into force by the adoption of Act No. 272/2004 on the protection and promotion of children's rights. This act was partly adopted so that Romania could align with EU standards, as part of the requirements set forth for accession. Additionally, the legal regime recognised the pressing need to harmonise these rights, acknowledging that up to a point, children in general had not received sufficient protection from the legislature, which had focused solely on children in difficult circumstances.[1]

From a legislative perspective, Romania has faced notable deficiencies in comprehensively protecting children's rights. Until 2004, legislation primarily focused on protective measures for children in institutional care and lacked strategies aimed at preventing institutionalisation (placement of children in foster care or other unrelated home or facility) and preserving familial ties whenever feasible.[2] In this context, many children at risk have been legislatively marginalised, including the category of children with incarcerated parents. However, in 2004, the need to establish a robust, comprehensive legal framework encompassing children's rights was recognised. The rights that are of particular importance to this group, as outlined by international agreements, such as the United Nations Convention on the Rights of the Child (CRC), comprise the principle of the child's best interests (Art. 3 CRC),[3] prohibition of discrimination (Art. 2 CRC),[4] prohibition

1 The explanatory memorandum underlying Bill No. 224/2004, the draft Law on the protection and promotion of children's rights, 'Expenere de Motive'. The legislation prior to 2004 primarily focused on protective measures for children in placement and preventing placement by keeping the child within the family whenever possible. In 2004, the need to provide a legal framework that would regulate children's rights comprehensively was recognised, taking into account Romania's ratification of the United Nations Convention on the Rights of the Child (CRC) as early as 1990 through Act No. 18/1990 for the ratification of the CRC. Similarly, see Marin and Stănculescu, 2019, p. 72.

2 Principally, there were certain provisions in this regard but without alternative measures readily available to institutions in this matter.

3 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

4 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's

of separation from their family unless in their best interest (Art. 9 CRC),[5] and the right to participate in decisions that affect them (Art. 12 CRC).[6]

Empirical research suggests that the rights and requirements of children with incarcerated parents are frequently overlooked, with normative frameworks mainly focusing on the detainees and their rights.[7] A study[8] conducted in Denmark, Poland, Northern Ireland, and Italy revealed that police officers, despite possessing minimal training in this regard, endeavour to minimise collateral damage during arrests conducted in the presence of children. The study concluded that the absence of standardised procedures tailored to address the experiences of bystanders, particularly children, was evident. Consequently, the study underscored the need for detailed regulations governing arrests carried out in the presence of children. For instance, it advocated for the collection of pertinent information prior to arrest, including whether the accused or convicted individual has children, and for implementing procedural protocols aimed at diminishing the adverse effects on such children.[9] This imperative for comprehensive procedural frameworks aligns with jurisprudential considerations, as exemplified by the European Court of Human Rights (ECtHR) in the *Case of A v. Russia*. In this case, the court observed that the failure of state authorities to prevent psychological harm inflicted on individuals witnessing violent incidents, including children, amounted to inhuman and degrading treatment. Thus, the ECtHR's ruling underscores the state's obligation to safeguard the well-being of children and bystanders within the context of law enforcement actions, emphasising the need for robust procedural safeguards tailored to protect vulnerable individuals, particularly children, during arrests. In the aforementioned case, the ECtHR made the following findings:

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or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

5 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. (...) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'

6 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

7 Scharff-Smith and Gampell, 2011, p. 60.

8 Id., p. 226.

9 Ibid.

> That [the procedure of the arrest] had very severely affected her, as she had suffered in particular from a neurological disorder and post-traumatic stress disorder for several years afterwards. In the Court's view, the applicant witnessing such a violent incident had amounted to ill-treatment which the authorities had failed to prevent, in breach of their obligations under Article 3 (prohibition of inhuman or degrading treatment) of the Convention.[10]

Therefore, the case highlights an acute need for law enforcement authorities to exercise caution and pre-assess the conditions and potential collateral consequences of an arrest. To the best of our knowledge, the situation in Romania is no different, as there are no studies or concerns from institutions or private organisations in this regard.

With the entry into force of Act No. 272/2004, the child has become the focal point, regardless of whether they belong to a vulnerable category or not. However, in line with the CRC, certain categories considered vulnerable are identified. The largest category[11] is that of children who are temporarily or permanently deprived of parental care, which generically includes children whose parents are sentenced to custodial sentences, although they are not individually designated as a separate category. Unfortunately, these cases remained in the shadows until 2023,[12] when Act No. 156/2023 came into force. This norm was enacted owing to the requirements imposed by the European Commission on the Romanian state regarding the deinstitutionalisation process of children subject to special protection measures, a process that was previously characteristic of child protection as a whole.[13] With the entry into force of this law, children who have had or currently have at least one parent serving a custodial sentence[14] are recognised as a separate, vulnerable category. In our opinion, vulnerable children also include those whose parents are in pre-trial detention without a final court decision – and we do not treat these children as a standalone category in our study. We recommend that future legislation should reformulate this phrase to include children with parents in pre-trial detention.

10 *Case of A v. Russia*.

11 Primarily, the following are identified: children whose parents are deceased, children who cannot be left in the care of their parents for reasons beyond their control, abused or neglected children, abandoned children, children who have committed a criminal offence, unaccompanied children, and foreign or stateless citizens, including those seeking asylum or benefiting from international protection in Romania. This last category was included in 2022, following the outbreak of the war in Ukraine.

12 Several studies exist alongside compiled statistics and ongoing campaigns; however, they do not seem to garner special interest from the legislature or society.

13 The explanatory memorandum underlying Bill No. 145/2023 on the organization of activities for preventing the separation of the child from the family is rooted in several key considerations.

14 Article 5, paragraph (2), letter h) of Act No. 156/2023.

## 2. An Overview of Legislation

The entry into force of Act No. 156/2023 is based on the requirements formulated by the European Commission through Romania's Recovery and Resilience Plan, which mandates the Romanian state to establish a new legal framework for preventing the separation of children from their families.[15] Act No. 272/2004 did not establish broad alternatives for professionals within social welfare authorities to prevent the institutionalisation of a child deprived of parental care, or prevent the child's separation from the family. Hence, it became necessary to enact a legal framework that would enable the state to identify families in need of specialised assistance and provide social workers with alternative methods to maintain the child within the family environment, to avoid separation, in accordance with the child's fundamental right to grow up in a family setting. The enactment of Act No. 156/2023 is rooted in the fundamental right of the child to grow up in the care of their parents, except where such arrangement is deemed incompatible with the child's best interests.[16] From our perspective, this norm represents a significant step towards reinforcing initiatives that have not been under consideration since the adoption of Act No. 272/2004.

Specifically, the act underscores the imperative of deinstitutionalising the care of vulnerable children and introducing procedures designed to bolster family support networks, thereby ensuring that families are equipped with the necessary resources to nurture their children within the familial environment, rather than resorting to separation. Furthermore, the novelty of the law lies in the implementation of the 'child observer' system, which comprises a set of activities carried out using information technology for the registration by local public administration authorities of children at risk of separation from their families.[17] Indeed, the implementation of this system is intended to facilitate the identification of precarious situations by professionals, enabling the registration of vulnerable children into a centralised database for ongoing monitoring and the initiation of specialised support programmes. However, contentious debates have arisen surrounding this system, notably from certain non-governmental organisations contending that its true purpose is to streamline the monitoring of at-risk children, potentially paving the way for their subsequent separation from familial environments and placement into alternative care arrangements, or even adoption. A significant argument put forward by these critics concerns the expansive scope of the vulnerable categories delineated within the newly enacted legal framework. However, it is essential to note the nuanced circumstances

15 See explanatory memorandum underlying Bill No. 145/2023 on the organisation of activities for preventing the separation of the child from the family.

16 Article 9 of the CRC.

17 Article 16, paragraph (2) of Act No. 156/2023.

surrounding the implementation of the 'child observer' programme. Initially conceived as a pilot initiative under UNICEF's umbrella, named Aurora, the programme operated from 2014 to 2019. This duration allowed for thorough testing by professionals within the social welfare system. Consequently, in select counties, the system had been functional well before the drafting of the legislation. Statistical data suggest that during this operational phase, the programme brought tangible benefits to numerous families.[18]

Act No. 156/2023 individualises a larger spectrum of vulnerable categories than Act No. 272/2004, based on three main criteria:[19]

a. the economic circumstances and substandard living conditions within their familial and/or community environment, encompassing the risk of monetary poverty or extreme privation;
b. the compromised health status of one or more family members, including disability;
c. the presence of an abusive or violent familial atmosphere, alongside behaviours posing risks that may detrimentally impact relationships among adults and among children as well as between adults and children.

Subsequently, the legislature recognised the need to specifically delineate children within each category according to their particular state of vulnerability or risk. Consequently, children who had or currently have one or more family members serving a custodial sentence are identified as constituting a distinct vulnerable category.

## 3. Statistical Data

In accordance with Article 9 of the CRC, a child has the right to be raised within the family, with separation from parents or primary caregivers regarded as a measure of last resort, to be employed solely when deemed essential for the child's best interests. This identical right is mirrored in Article 8 of the European Convention on Human Rights (ECHR). The incarceration of one or both parents distinctly encroaches upon this right.[20]

Research in Romania that specifically targets children with incarcerated parents is limited, and that which exists is often characterised by short observation periods.

18 Evaluarea sumativă a componentei Pachetul Minim de Servicii a proiectului demonstrativ „Incluziune socială prin furnizarea de servicii sociale integrate la nivelul comunității", implementat în România, în perioada 2014–2018

19 Article 4 of Act No. 156/2023.

20 Minson and Flynn, 2021.

While this demographic has garnered increased international attention for being at risk, they remain relatively overlooked at the national level in Romania. One of the earliest studies in this domain was conducted by a non-governmental organisation between 2010 and 2013. As part of its campaign, various projects were implemented, including the creation and furnishing of dedicated rooms within penitentiaries aimed at facilitating more natural and meaningful parent–child interactions.[21] The subsequent extensive study on this topic approached the issue from the perspective of incarcerated mothers, examining the repercussions on maternal well-being and the dynamics of their relationships with their children during the period of detention.[22] Regrettably, even within statistical analyses, these children have not been prominently featured, often being subsumed under the category of children left without parental care. This classification typically occurs, especially when both parents are incarcerated, leaving the specifics of these children's situations largely undisclosed.

One of the most recent official datasets is embedded in the National Strategy for the Protection and Promotion of Children's Rights, termed 'Protected Children, Safe Romania' for the period of 2022–2027.[23] According to this report's statistical extrapolations, 42,920 children are separated from their incarcerated fathers, and 1,656 children are separated from their incarcerated mothers;[24] additionally, 39% of those incarcerated are parents to at least one child, with over two-thirds (68%) of them having two or more children.[25] Furthermore, the report underscores significant deficiencies in safeguarding the rights of these children, as they lack access to tailored support measures addressing their specific challenges. The report notes that children with incarcerated parents are three times more vulnerable to developing mental health issues and antisocial behaviours. They are also more susceptible to stigma and discrimination, including the risk of being perpetrators or victims of bullying in the school environment. Moreover, the likelihood of engaging in criminal behaviour increases among these children. They are at an elevated risk of poverty, as the income previously provided by the incarcerated parent is typically lost. Furthermore, additional expenses arise from supporting the incarcerated parent or maintaining a relationship with them during detention, along with other associated risks such as school dropout.[26] It should be noted that these data – and even minimal attention – now directed

21 Asociația Alternative Sociale, 2015.
22 Atena, 2012.
23 Government of Romania, 2022.
24 The report notes that these figures lack precision, as they are derived from the correlation of other statistical datasets and juxtaposed with the information collected by the Social Alternatives Association previously referenced. Consequently, it underscores the insufficient attention given to this particular group of children experiencing vulnerability.
25 Id., p. 37.
26 Ibid.

towards these children are because the EU Strategy on the Rights of the Child has been adopted,[27] according to which Member States are encouraged to implement the Council of Europe Recommendation on Children of Imprisoned Parents.[28]

According to studies conducted at the European Union level, Romania currently has 26,993 fathers and 1,313 mothers incarcerated, resulting in a total of 28,306 children separated from at least one parent in this situation.[29] Consequently, there is a substantial population of children who do not receive state assistance, as they were not officially recognised as a category requiring intervention until 2023. This delay has resulted in a lack of systematic measures to address their specific needs and vulnerabilities. Furthermore, the scarcity of court judgments addressing the situation indicates a gap in legal protection and support for these children, leaving them largely reliant on family members for care and support during their parents' incarceration.

## 4. Legal Perspectives for Children with One or Both Parents Incarcerated

As mentioned in Section 2, Act No. 156/2023 is in effect. This act marks the first formal recognition of the vulnerable category of children with one or both parents incarcerated. However, it offers only limited guidelines to assist professionals in social services in supporting the affected families. As the act is relatively recent and the regulations regarding its implementation are still to be adopted, it remains more an aspiration than an effective means of support for the time being. To identify particular measures that can be adopted currently, attention should be directed towards the general legal framework concerning children's rights, namely, Act No. 272/2004, the provisions of which need to be correlated with the Civil Code.

Article 5 of the CRC states as follows:

> Governments must respect the rights and responsibilities of parents and carers to provide guidance and direction to their child as they grow up, so that they fully enjoy their rights. This must be done in a way that recognises the child's increasing capacity to make their own choices.

In the same spirit, Article 14 states:

> States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise

27 European Commission, 2021.
28 Council of Europe, 2018.
29 Statistics about Romania.

of his or her right in a manner consistent with the evolving capacities of the child.

Additionally, the fact that these rights and obligations fundamentally belong to the parents is further compounded by the principle that a child has the right to grow up within the family, and separation should be an exception only when in the best interests of the child. This right is provided for in Article 9 of the aforementioned convention: children must not be separated from their parents against their will unless it is in their best interests (e.g. if a parent is hurting or neglecting a child). Children whose parents have separated have the right to stay in contact with both parents, unless this could cause them harm.

When one or both parents are incarcerated, the child is left without parental care; in domestic legislation, this signals there is no individual to exercise the rights and obligations inherent in parental authority. In national jurisprudence, parental authority denotes the collective rights and responsibilities pertaining to both the welfare and property of the child and is uniformly vested in both parents. The standard entails the joint exercise of parental authority, with delimited exceptions as stipulated by law. In cases in which one parent is incarcerated, the execution of these correlated rights and obligations is impeded. Both domestic legal provisions and the practical circumstances at hand (e.g. restricted resources available to incarcerated individuals for maintaining communication with their children) are constrained by existing financial allocations.[30]

We consider it important to differentiate between situations in which both parents are incarcerated and cases in which only one parent is incarcerated. Our analysis regarding the measures that can be taken concerning these children focuses on the aforementioned scenarios, as the interventions that can be implemented vary accordingly.

### 4.1. Situation in Which One Parent Is Incarcerated

The situation becomes simpler to address in practice when one parent can still exercise the rights and obligations associated with parental authority, being physically present with the child. According to Article 36 of Act No. 272/2004,

30 Government of Romania, 2022. Similarly, the aforementioned strategy underscores substantial deficiencies in upholding children's rights when they become entangled in legal proceedings owing to actions perpetrated by their relatives. Consequently, the strategy delineates specific areas for scrutiny and regulation, as advised by the study conducted by the European Union Agency for Fundamental Rights. These areas encompass: the refinement of legal frameworks to educate children about their rights, the development of age-appropriate informational resources for children, the dissemination of information tailored to their understanding and maturity concerning the legal procedures they are involved in, the broadening of informational capacities in civil proceedings, and the adoption of a respectful stance towards children engaged in judicial processes by soliciting their viewpoints and affording due regard in accordance with their level of maturity.

the court is competent to decide on the exclusive exercise of parental authority by one parent when the other is convicted for such offences as human trafficking, drug trafficking, sexual offences, acts of violence, or any other reason. Given that there can be any other reason, the legislator has opened a Pandora's box, leaving it up to the discretion of a judge to determine whether the execution of a custodial sentence for a crime, other than those expressly provided for, may lead to the forfeiture of parental authority. We consider that this domestic regulation is welcome, and in line with international regulations on this matter.[31] Therefore, we contend that, in principle, the mere conviction to a custodial sentence should not automatically lead to the forfeiture of parental authority. This stance is supported by the fact that a criminal sanction, among other purposes, serves as a means of re-education, and the programmes available to those convicted are designed to reintegrate them into society.[32] These assertions are in line with the case law of the ECtHR. In the *Case of Gnahoré v. France*, decided by the ECtHR, it was established that courts must conduct a thorough analysis, on a case-by-case basis, when deciding on the withdrawal of parental rights, taking into account the best interests of the child. Thus, the Court concluded that there must be a compelling social need, and it must be proportional to the desired outcome. We believe that the mere conviction of a person to a custodial sentence is not evidence that they are unfit to exercise their parental prerogatives. Furthermore, through the interpretation of Article 8 of the ECHR, Member States are obliged to take positive action to make all efforts and provide sufficient procedures to maintain parent–child relationships in case of incarceration.

Additionally, in such circumstances, the legislation outlines specific measures aimed at preserving relationships with the incarcerated parent. Under Act No. 254/2013 concerning the enforcement of sentences and restrictive measures imposed by judicial authorities during criminal proceedings, provisions are made for the rights of children and incarcerated individuals to receive visits. Furthermore, it is stipulated that, to the extent feasible, specialised visiting areas may be established within penitentiaries to facilitate uninterrupted parent–child interactions under conditions as normal and natural as possible.[33]

31 The ECtHR holds that national courts must have a wide margin of appreciation regarding the need for state intervention in the parent–child relationship, as they are primarily the ones in direct contact with those involved. However, this discretion must remain within the boundaries of the principles set forth by Article 8 of the ECHR. *Case of Jansen v. Norway*.

32 In this regard, we find information indicating that there are programmes aimed at helping convicted individuals acquire skills in raising and educating children. https://anp.gov.ro/wp-content/uploads/2017/04/Oferta-de-programe-%C8%99i-activit%C4%83%C8%9Bi-educative-de-asisten%C8%9B%C4%83-psihologic%C4%83-%C8%99i-....pdf.

33 From the research conducted for the preparation of this study, no official data regarding the existence of such specially equipped rooms were found, apart from the acknowledgment of the existence of only three such rooms nationwide. Moreover, it is noteworthy that these rooms were established through the contribution of specialised non-governmental organisations.

Crucially, when the incarcerated parent is the mother, domestic legislation provides specific measures. Act No. 254/2013 stipulates that mothers or pregnant women serving a custodial sentence benefit from special measures. Accordingly, measures exist to enable pregnant women to give birth outside the penitentiary, in specialised medical facilities. Additionally, they are allowed to care for their newborn child within the penitentiary until the child is placed in a family environment outside the custodial setting – no later than the child's first birthday. When no suitable family members are available to assume the rights and responsibilities related to the child's care after the child turns one year old, placement in a specialised institution becomes necessary. Furthermore, according to Article 589 of the Criminal Procedure Code, an individual sentenced to imprisonment may ask a court to defer the execution of the sentence when they are responsible for a child under the age of 1 year. Until 2019, domestic case law indicated that this privilege was granted exclusively to the child's mother. The relevant case law was reinforced by the ECtHR ruling in the *Case of Alexandru Enache v. Romania* in 2017, in which the applicant sought the freedom to care for his 7-month-old child, but national courts outlined that this right primarily benefits the mother, considering the maternal relationship and its specificities, particularly in the child's first year of life. Through the aforementioned judgement, the court found that there had been no infringement on the applicant's rights, nor was there any basis for alleging discrimination under Article 14 in conjunction with Article 8 of the convention. Contrary to this ruling, the Constitutional Court of Romania, in Decision No. 535/2019 regarding the admission of the objection of unconstitutionality of the provisions of Article 589 para. (1) letter b) first sentence, second paragraph of the Criminal Procedure Code, acknowledged that the legal provision was unconstitutional, as it granted the right to care only to convicted women.[34] Additionally, the Implementation Regulation of Act No. 254/2013 stipulates that women in prison with their child be provided with special food, in accordance with the nutritional requirements of their condition, and visits, if permitted, should take place without separation devices.[35]

In conclusion, the particular provisions concerning incarcerated mothers align with the principles of the ECHR and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).[36] Both emphasise the need for a mother to remain with her child if the child is born during her imprisonment, as such separation is highly undesirable and contrary to the child's best interests.[37]

34 In this regard, the legal text was amended in 2023 to provide for this right for both women and men who are convicted.

35 United Nations, 2010.

36 United Nations, 2015.

37 European Court of Human Rights, 2021, p. 55.

### 4.2. Situation in Which Both Parents Are Incarcerated

Incarceration of both parents is an uncommon scenario that necessitates more complex and potentially more drastic interventions affecting a child's life. Pursuant to Article 44 and Article 54 of Act No. 272/2004, any child who is temporarily or permanently deprived of parental care is entitled to alternative protection. Such measures encompass special protection measures (placement, emergency placement) as well as guardianship or adoption, with adoption serving as a measure of last resort – when other options that do not entail separating the child from their extended family are unavailable. Principally, by aligning Act No. 272/2004 with the principles outlined by the ECtHR and the provisions of the CRC, it is imperative to prioritise the implementation of emergency placement measures within the extended family, resorting to guardianship or adoption only under exceptional circumstances. Moreover, this objective gains further prominence when juxtaposing the provisions of Act No. 272/2004 with those of Act 156/2023, which aims to provide families with supportive procedures to prevent the separation of a child from the family, even if it is an extended family.

As outlined in the study, the mere imposition of a custodial sentence on parents should not, and must not, *ipso facto* result in the forfeiture of their parental rights. When parents continue to maintain these prerogatives, it is incumbent on state institutions and judicial entities to legislatively establish mechanisms for sustaining communication with them. Concurrently, arrangements must be made regarding the delegation of these rights on behalf of the parents until their release.

#### *4.2.1. Emergency Placement*

Upon notification or self-notification by institutions regarding a child deprived of parental care owing to the imprisonment of the parents, prompt action is needed to remedy the situation. Authorities must implement the measure of emergency placement, as stipulated in Article 68 of Act No. 272/2004. Emergency placement is a temporary special protection measure expressly provided for by law and can be ordered for a minor whose parents have been arrested. It can be invoked by state authorities to promptly address situations endangering the child, correlating with the suspension of parental rights.[38] Given the urgency of the circumstance, the decision rests with the director of the local social assistance and child protection authority, who must promptly notify the court within a maximum of 5 days. Subsequently, the court determines the modalities for exercising parental rights. Although not explicitly stipulated, provisions concerning emergency placement should be complemented by those governing regular placement, as delineated in Articles 62 and subsequent provisions of Act No. 272/2004.

38 Domocoş, 2021.

Regarding the principles to be observed when determining emergency placement, the following considerations are paramount: prioritising placement with the extended family or a foster family,[39] avoiding separation of siblings, facilitating parental visitation, and ensuring ongoing connections with the child.[40] Additionally, children under the age of 7 years may be placed only with extended family, foster families, or a foster caregiver, with placement in residential care facilities prohibited, except in specific circumstances.[41] These principles are in line with the provisions of the CRC, ECHR, and established case law. It is important to note that in this case a suspension of parental authority occurs.[42] In our view, in cases in which parents are sentenced to incarceration, the court may delegate parental authority to the person caring for the child. However, applying these legal provisions to children whose parents are incarcerated presents challenges, as the only relevant legal text referring to them is found in Article 68 para. (2) of Act No. 272/2004 concerning emergency placement.

Therefore, the judicious question arises as to whether the court can order placement after being notified by the social assistance authority under Article 70 of Act No. 272/2004. The only situation to which this hypothesis may be circumscribed is that provided for by Article 60, letter b): when the child, for the protection of their interests, cannot be left in the care of the parents for reasons not attributable to them. However, is a custodial sentence a reason not attributable to the parents, especially when it should logically result from a

39 A foster family is defined as individuals, other than those belonging to the extended family, including relatives up to the third degree, with whom the child or their family has maintained personal relationships and direct contacts, as well as the person, family, or foster caregiver responsible for the upbringing and care of the child, in accordance with the law. Article 4, letter d) of Act No. 272/2004.

40 Article 64 of Act No. 272/2004.

41 Placement in a residential care facility may be ordered for a child between the ages of 3 and 7 years who cannot be accommodated for habilitation/rehabilitation in other types of services, if the child exhibits both complete functional impairment and complete activity limitations and participation restrictions, as confirmed by the comprehensive assessment service within the general department of social assistance and child protection (Article 64, paragraph (2) of Act No. 272/2004).

42 In the case of emergency placement, there is a legal suspension of parental rights pursuant to Article 68, paragraph (5) of Act No. 272/2004. Provisions regarding emergency placement, compared to those concerning regular placement and the child's reintegration into the family, do not entail the imminent forfeiture of parental authority. We believe that if this sanction is not expressly provided for by law, we cannot add it ourselves, with exceptions being strictly interpreted. Accordingly, in pursuant to Article 73, paragraph (4) and Article 74, parental rights and obligations are resumed by the parents, who will continue to be supervised by specialised workers from the General Directorate for Social Assistance and Child Protection. Furthermore, we relate these legal provisions to Article 508 of the Civil Code, which stipulates the situations in which parental authority may be forfeited, with emergency placement not being among them. Therefore, we consider that if the law has not expressly provided for this situation to lead to the loss of these rights and obligations, we cannot extend their interpretation ourselves. Domocoş, 2021, p. 128.

criminal conviction? From the analysis of the few court decisions in this matter, we conclude that the situation in which both parents are incarcerated can be circumscribed to the aforementioned hypothesis. In our view, this interpretation has arisen owing to the existing *lacuna* in the law on this matter. Considering that, as outlined at the outset of this study, the circumstances of these children seldom come before the competent courts, the legislator has not provided for this specific situation in Act No. 272/2004, leaving it to domestic courts to address this omission. Consequently, the situation of serving a custodial sentence has been construed as a reason not attributable to the parent, despite presenting at the very least a peculiar scenario, given that the commission of an offence leading to subsequent conviction cannot be deemed – in civil or family law contexts – as an unattributable consequence. Therefore, we contend that *de lege ferenda*, a revision of the circumstances to which placement measures apply is warranted, particularly in the light of the provisions outlined in Act 156/2023 addressing children in situations of risk.

During emergency placement, children are closely monitored, and every 4 months their placement is assessed by the general directorate for social assistance and child protection. The periodic verification of placement is necessary, considering its temporary nature, with the aim of keeping it as short as possible. This principle has also been enforced through ECtHR case law. In this regard, we mention the *Case of I.G.D. v. Bulgaria*, in which the Court considered that if the placement measure does not allow for periodic review, it is akin to deprivation of liberty (Article 5, paragraph 4 of the Convention) and, evidently, violates the right to private and family life (Article 8 of the Convention). Therefore, although there is no specified term for the application of this measure, we note that it can be changed at any time at the request of the parties concerned, including the child's parents or the child.

The procedure for implementing this measure is underpinned by various safeguards aimed at protecting the rights of the child and ensuring urgency in the ruling of the case. Specifically, it includes provisions for hearing from children aged 10 years and above and mandates swift resolution of such requests, with court deadlines not exceeding 10 days. Moreover, courts are obliged to deliver a verdict on the same day as the conclusion of the hearings, with a maximum extension of 2 days allowed in exceptional circumstances.

We believe that a legislative change is warranted in this regard, specifically to establish the requirement for hearing from children who have reached the age of 7 years. This recommendation stems from the fact that children aged 7 years and above are potentially subject to emergency placement in a residential care facility. In our opinion, it is unjustifiable for children between the ages of 7 and 10 years to be exposed to the possibility of such measures being ordered without their input. According to Article 12 of the CRC, children have the right

to be heard and for their views to be given due consideration. By the age of 7 years, children have reached a level of development at which they can coherently express their perspectives. It would then be the responsibility of the court or social workers to assess their opinions in relation to their level of maturity and exact age. Additionally, this approach aligns with the Guidelines on Alternative Care for Children.[43]

It is crucial to note that the emergency placement measure is initiated by the authorities. However, parents sentenced to a custodial sentence can also notify the competent authorities to arrange temporary placement until they are released. Pursuant to Article 111 of the Civil Code, individuals who are obligated to act upon learning of a child in need of parental care include, first and foremost, close relatives of the child, but we can see that anyone who knows a child deprived of parental authority has the obligation to notify the competent institutions. We believe this provision does not exclude notification by a parent after their incarceration.[44] In such a case, the basis for placement falls under Article 60 letter b) of Act No. 272/2004 concerning a child unable to be left in the care of the parents for reasons beyond their control.

Indeed, as previously indicated, this constitutes a provisional measure. In this regard, Article 72 of Act No. 272/2004 stipulates that during the quarterly evaluation, it is imperative for the court to be informed whether there have been any alterations in the circumstances prompting the enactment of the special protective measure. This entitlement to notification extends to both parents, legal guardians, and even the child.[45] The stipulations outlined in Article 73 para. (4) of Act No. 272/2004 mandate parental participation in counselling sessions aimed at fostering parental skills, thereby ensuring the effective reintegration of the family unit.[46] We consider that these provisions necessitate supplementation with those delineated in Act No. 156/2023, specifically under Article 5 para. (2) letter f), which designates a family as vulnerable if any of its children are subject to special protection measures.

43 Liniile directoare privind îngrijirea alternativă a copiilor. In the legal context, the principles enshrined in Article 24 of the Charter of Fundamental Rights of the European Union are pertinent. A study published by UNICEF (Analiza demersurilor pe care le poate întreprinde Uniunea Europeană pentru promovarea şi sprijinirea participării copiilor la luarea deciziilor) highlights the need for Member States, including Romania, to make concerted efforts to consider and respect the opinions of children in judicial procedures.

44 We believe this interpretation is supported by the fact that under Article 104 of Act No. 272/2004, a parent intending to work abroad is required to notify the authorities accordingly. Through a judicial procedure, the person who will ultimately exercise the full range of rights and obligations temporarily until their return to the country is established. This process entails a delegation of rights and obligations. We see no reason why the same course of action cannot be adopted by parents incarcerated as a result of a conviction.

45 This provision can be regarded as an application of the right for the minor to be heard.

46 In the case of convicted parents, such provisions are not only welcome but also essential.

Consequently, the aforementioned act dictates that upon identification of such vulnerability, a service plan must be devised, with its execution overseen by competent authorities. Concurrently, Article 74 of Act No. 272/2004 mandates that upon the cessation of the special protection measure, personnel specialised in the field, from state institutions, are obligated to periodically verify compliance with the requisite obligations.

#### *4.2.2. Guardianship*

Guardianship is a legal measure that can be implemented by the judiciary when a minor is bereft of parental care. The definition of guardianship is delineated in Article 110 of the Civil Code, stipulating the following circumstances: guardianship of a minor is established when both parents are, as applicable, deceased, unknown, deprived of parental rights, subject to a criminal penalty resulting in the prohibition of parental rights, receiving judicial counselling or special guardianship, missing, or judicially declared dead. Additionally, guardianship may be instituted in cases in which, following the termination of adoption, the court determines that it is in the minor's best interest to appoint a guardian. In our perspective, guardianship represents a subsidiary measure to placement, given that it entails the relinquishment of parental authority by the parents.[47] Essentially, for guardianship to be instituted, it is imperative for the court to have previously decreed the termination of parental rights. Although the Civil Code allows for the reinstatement of parental rights to parents upon demonstrating changes in circumstances since the termination of parental rights was mandated, this process entails a considerable amount of time until a final judgement is reached, time that is lost at the expense of the parent–child relationship.

### 4.3. The Right to Maintain Relationships between Children and Parents Serving a Custodial Sentence

In accordance with Act No. 254/2013, incarcerated parents have the right to visits from their own children, if possible, in specially designated spaces for this purpose. In support of this legal provision, the Implementation Regulation of Act No. 254/2013 regulates the conditions under which these visits can take place. Thus, where specially designated rooms exist, these visits take place without

47 In legal doctrine, an opposing view has been advocated (see Ghiță, 2021), suggesting that guardianship is imposed to the detriment of the special protection measures provided by law. We disagree with this perspective, considering that the state is obligated to keep the family together, and as we show, the mere incarceration of a parent does not lead to the loss of parental rights and obligations. Our thesis is further supported by the fact that legal provisions regarding guardianship are clear and limited, stipulating that this measure can be implemented only when parents are deprived of their rights and responsibilities associated with parental authority.

separation devices, considering that the very purpose of the space is to create an environment as close as possible to that of the family home.

For the situation of children who are in the child welfare system (i.e. they are subject to one of the special protection measures provided for by Act No. 272/2004) and whose parents are serving a custodial sentence, a collaboration protocol[48] was concluded in 2020. The purpose of this protocol, among other things, is to maintain personal relationships between children and incarcerated parents. Through this protocol, the National Administration of Penitentiaries and its subordinate units have undertaken several initiatives to respect the right to family life, including arranging child-friendly spaces; accompanying the child during visits to the penitentiary by a social worker; and facilitating the maintenance of family relationships, including through electronic and remote communication means. These measures are necessary for maintaining family relationships. In this regard, a study has shown the following:

> [r]esearch indicates that parent–child visits are most beneficial when they allow for physical contact, are offered in a child-friendly setting, are part of a family strengthening programme, and provide proper emotional preparation and debriefing before and after. Experts also find that physical contact and privacy during visits benefit both children and parents and help them cope emotionally and reconnect with each other.[49]

Similarly, the adverse effects[50] on the child resulting from the incarceration of a parent, such as anxiety, behavioural changes, and mental health issues, must be duly considered. The study referenced, conducted during the COVID-19 pandemic, concluded that the lack of direct contact between the child and the incarcerated parent had enduring negative consequences, which were likely to result in difficulties upon family reintegration, even though specific data are currently unavailable. To prevent these disruptions to family life, it is crucial for penitentiaries to facilitate both direct, in-person contact and indirect contact through video conferencing.[51]

To facilitate this direct contact and maintain closeness between children and parents, national legislation includes the principle that proximity to the place of residence at the time of deciding where a convicted individual will be incarcerated must be taken into account.[52] In this regard, case law from the ECtHR is relevant. For example, in the *Case of Voynov v. Russia*, the ECtHR condemned

48 Protocol de colaborare.

49 Cranmer *et al.*, cited in Minson and Flynn, 2021.

50 Ibid.

51 The same issues are also mandated by UNICEF through the Guidelines for the Alternative Care of Children.

52 Article 11 paragraph (5) of Act No. 254/2013.

Russia for sentencing the individual to a prison located 4,200 km away from his residence. It was concluded that proximity was necessary both to create a circle of safety and support for the detainee and to maintain family unity, and the court found that Article 8 of the convention had been violated. This issue was already addressed in the 1990s when, in the *Case of Marincola and Sestito v. Italy*, Italy was condemned for repeatedly transferring convicts to distant locations from their place of residence, thus violating Article 8 of the convention.[53]

## 5. Conclusions

Based on our analysis, we conclude that Romania has made significant progress on children's rights in the past 30 years, but there is still much room for improvement. While legislative frameworks have been established to protect families and prevent their separation, there remains a long road ahead to ensure that these laws are effectively implemented in practice.

Romanian legislation is capable of providing adequate protection for children with incarcerated parents, especially since the enactment of Act No. 156/2023, which clearly identifies these children as a vulnerable category. Although practical implementation of this law is currently lacking owing to the absence of implementing regulations, its provisions will be harmonised with those of Act No. 272/2004, as well as with the principles outlined in the CRC and ECHR, to ensure that institutions are equipped to defend and preserve the rights of these children. Romania has been consistently urged to focus on these children at the international level, and as such, the state will need to align with these expectations.

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