

# A FEW RELEVANT ASPECTS FROM THE CONSTITUTIONAL COURT'S JURISPRUDENCE REGARDING THE PROTECTION OF CHILDREN

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## Abstract

*Romania's Constitutional Court – in its already long judicial activity<sup>1</sup>, has held on numerous occasions with respect to certain legal texts devoted to child protection. In the present study we only selected a few relevant decisions, the brief summaries of which being intended to illustrate the concern of the constitutional court towards ensuring the undivided respect of the child's superior interest<sup>2</sup>. Given the succession of the laws applicable to the field of child protection, a series of issues have been raised in judicial practice, some decided upon by the courts, others by the Constitutional Court. As described in the title, we will refer only to the Constitutional Court's jurisprudence.*

Key Words: *Romania's Constitutional Court; Superior Interest of Child; European Court of Human Rights' judicial practice.*

JEL Classification: [10, 38]

## 1. Introduction

Thus, regarding the legal issue concerning the applicability or not of the statute of limitations period in respect of the action to establish paternity, in light of new legislation and the European Court of Human Rights' judicial practice, internal jurisprudence set forth the view according to which the immediate application of the new law –namely that the action to establish paternity established by Law no. 288/2007 is imprescriptible – must extend over all future effects of past legal relations. Therefore, the legal status of children born out-of-wedlock wishing to clarify their status by establishing parentage towards a certain man can be regarded as a genuine legal situation sustainable over time, unconsumed under the rule of the old law, context in which the action should be imprescriptible<sup>3</sup>.

Regarding relations between parents and children born out-of-wedlock, the European Court of Human Rights ruled that a mere biological tie, without any

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<sup>1</sup> Romania's Constitutional Court celebrated in 2017 25 years of activity.

<sup>2</sup> For an ample presentation of this topic, please see M. M. Pivniceru, C. Luca, *Superior Interest of Child*, Hamangiu, Bucharest, 2016.

<sup>3</sup> Also see E. Florian, *Family Law. Marriage. Matrimonial Regimes. Filiation*. 5<sup>th</sup> Edition, C.H.Beck Bucharest, 2016, pp. 438 and the following.

other factual evidence pointing to the existence of tight personal relationships between a parent and his child, cannot be considered sufficient for purposes of falling under the protection established by Article 8 of the Convention<sup>4</sup>. However, in its decision of February 25, 2014, entered into the *Ostace case against Romania*, the European Court held that "it is not necessary to examine whether the procedures for dissolution of existing family ties under the law is covered by the plaintiff's family life, given that, in any case, establishing legal relations between a father and his child putative are related to the private life of the person concerned"(paragraph 30). *A fortiori*, the establishment of legal relations between a child and his alleged father falls within the definition of private life, which attract the applicability of Article 8 of the Convention.

The author of the unconstitutionality motion argued that if it were accepted that the substantive right to formulate an action to establish paternity is imprescriptible only in respect of children born after the promulgation of the legal text, thereby excluding those who were born prior to this law changes taking effect, we would be facing discrimination, because both categories are placed in an identical legal situation – a child born out-of-wedlock wishing to establish their parentage – the difference between them being made only by chance regarding their actual time of birth. The argument according to which the law cannot be applied retroactively to children born before its promulgation, cannot be considered an objective and reasonable justification, since it can be contested by evoking the state's obligation to create and adopt legislation to ensure equal respect of legal rights for its constituents and its negative obligation to refrain from any sort of discrimination. Under the previous legal regulations, the action to establish paternity was prescriptible within one year, but in relation to the relevant case law of the European Court of Human Rights, the establishment of the imprescriptible nature for this action represents a legitimate option fully justified, which gives expression to the principle of the superior interest of a child and its right to establish their parentage<sup>5</sup>.

According to the court author of the objection, conditioning certain subjects of law, based on the chance of their birthdates, to abide by certain deadlines, is likely to create a discriminatory situation, contrary to the provisions of Article 8 of the Convention, by failing to ensure a fair balance between the interests of the applicant (respect of its private life, superior interest of the minor)

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<sup>4</sup> Art. 8 from the European Convention of Human Rights- title "Right to respect of privacy and family life"- stipulates: "(1) Any person has the right to respect of its privacy and family life, its domicile and the secret of its correspondence. (2) The interference of a public authority in the exercise of such right is inadmissible unless this is set forth by the law and constitutes, in a democratic society, a measure needed to national security, public safety, economic wellbeing of the country, defense of order and prevention of crime, protection of health, morals, others' rights and liberties."

<sup>5</sup> See Decision No. 697 from November 29<sup>th</sup>, 2016 regarding the unconstitutionality exception of the provisions of art. 60 para. 1, Family Code, in the version prior to their modification via Law No. 288/2007 to complete and modify Law No. 4/1953 – Family Code, published in the Official Monitor No. 138 from 23.02.2017.

and those of society in general (avoid any scandals and blackmails). Also it is noted that recent case law of the European Court of Human Rights (*Case Ostace against Romania*), highlighted the requirement that decisions entered by Romanian courts in matters regarding the determination of legal parentage, should comply with the evolution of Romanian law on the matter, in respect of which the European Court held that "the prevalence appears to be in favour of the biological reality over the legal fictions, letting go, for example, of rigid statute of limitations periods " (paragraph 50).

The exception of unconstitutionality was based on the provisions of Article 60 paragraph (1) of the Family Code<sup>6</sup>, as in force prior to the changes made by Law no. 288/2007 amending Law No 4/1953 – Family Code, whereby the criticized text read as follows: "*The action to establish paternity outside marriage may be initiated within one year after childbirth.*"

Since in this case the issue was to establish filiations towards a father of a child born on May 22, 2002, so before the entry into force of the new Civil Code, the Court found that, although repealed, the criticized legal text is applicable in the case pending the resolution of which the exception of unconstitutionality was raised<sup>7</sup>, exception addressing the provisions of Article 60 paragraph 1 of the Family Code, in its version prior to their amendment by Law no.288/2007, which was admissible and therefore the Court could rule on its merits<sup>8</sup>.

According to the court which raised the unconstitutionality exception, the criticized legal provisions violated the provisions of Article 8 (the right to respect for private and family life) and Article 14 (prohibition of discrimination) of the Convention for the Protection of Human Rights and Fundamental Freedoms, in conjunction with Article 11 paragraph (2) and Article 20 of the Constitution, which set forth the priority of international treaties in respect of fundamental human rights, to which Romania is a party, whenever there is inconsistency between such and domestic laws, save when the Constitution or local laws comprise more favorable provisions. Therefore, the Court proceeded to analyze the constitutionality of the legal text under scrutiny by reference to the corresponding provisions of the Constitution, contained in Article 16 (equality rights) and Article 26 (Intimate, family and private life) with due consideration to the requirements

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<sup>6</sup> The Family Code was expressly repealed through art. 230 letter m) contained in chapter X from Law No. 71/2011 to implement Law No. 287/2009 regarding the Civil Code, published in the Official Monitor of Romania, Part I, no. 409 from June 10<sup>th</sup>, 2011. Pursuant to the provisions of art. 47 from Law No. 71/2011, "the establishment of filiations, denial of paternity or any other action regarding filiations is governed by the Civil Code and produces the effects set forth by such only in the case of children born after its enactment."

<sup>7</sup> Pursuant to Decision no. 766/2011, published in the Romanian Official Monitor, Part I, no. 549 from August 3<sup>rd</sup>, 2011, when the Constitutional Court determined that the wording "in effect" from art. 29 para (1) and art. 31 para (1) from Law no. 47/1992 is constitutional to the extent it is being interpreted to include under the constitutional review the laws and ordinances or legal dispositions from such, the effects of which continue to apply even after their expiration.

<sup>8</sup> For details, see T. Bodoasca, *Family Law*, 3<sup>rd</sup> Edition revised and amended per the New Civil Code, Judicial Universe, Bucharest, para. 424 and the following.

set by the European Court of Human Rights in interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms.

Examining the unconstitutionality exception, the Court noted that it was invoked in a case covering the resolution of an action for establishing paternity of a minor outside the marriage, brought on its behalf by his mother, after the expiry of one year from childbirth.

The Court noted that the main criticism of unconstitutionality is formulated from the perspective of a different legal regime that would result from the succession of legal regulations in time, pertaining to the term during which such action for establishing paternity outside marriage can be introduced. By this action, the child whose father is unknown at birth, as well as the one who has lost its capacity as child in marriage by virtue of the admission of a judgment following an action to disclaim paternity, aims at establishing the identity of the natural father and its inclusion as such in its birth certificate. In this regard, the Constitutional Court held that the European Court of Human Rights has decided that the respect for private life requires that everyone must be able to establish the details of their identity, such information being essential given its influence on the formation of a character<sup>9</sup> and the identity of the parents is an important aspect of personal identity<sup>10</sup>.

The criticized legal text is the one that has initially been established by the Family Code, text, which although repealed, is applicable in this case given the birth date of child who is the beneficiary of the paternity action. The legal provisions in question provide that the statute of limitations for this action is one year after childbirth.

Law no. 288/2007 amending Law no. 4/1953 – Family Code<sup>11</sup> – institutes the imprescriptibility of the action belonging to the child (Article I point 5) and also establishes that the changes concerning the paternity action for the child out-of-wedlock are also applicable to children born before its entry into force, even if the resolution of the action is still pending (Article II)<sup>12</sup>.

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<sup>9</sup> See Decision from February 7<sup>th</sup>, 2002 entered into in Case *Mikulic against Croatia* (paragraphs 53-54) and Decision from July 7<sup>th</sup>, 1989, entered into in Case *Gaskin against the United Kingdom* (paragraphs 36-37 and 39).

<sup>10</sup> See: Decision from July 7<sup>th</sup>, 1989, entered into in Case *Jaggi against Switzerland* (paragraph 25) and Decision from July 6<sup>th</sup>, 2010, entered into in Case *Backlund against Finland* (paragraph 37).

<sup>11</sup> Published in the Romanian Official Monitor, Part I, no. 749 from November 5<sup>th</sup>, 2007.

<sup>12</sup> Through Decision no. 1.345 from December 9<sup>th</sup>, 2008, published in the Romanian Official Monitor, Part I, no. 873 from December 23<sup>rd</sup>, 2008, the Constitutional Court admitted the unconstitutionality motion of the provisions of art. II from Law No. 288/2007 according to which “The dispositions of the present law regarding (...) the action for establishing paternity for the child born out-of-wedlock apply also to children born before its enactment, even if the resolution of the claim is still pending”, holding that the criticized legal text violates the provisions of art. 15 para.2 from the Constitution which enshrines the principle of non-retroactivity in respect of civil law, because this new law also applies to children born before its enactment. Following such decision, the imprescriptibility of the action in establishing paternity was maintained only for children born after the enactment of Law no. 288/2007, namely November 8<sup>th</sup>, 2007. The current Civil Code which abrogated the Family Code instituted also the imprescriptibility for the action for

According to the contested legal text, the statute of limitations period in respect of the action establishing paternity outside of marriage is one year and starts at different times, depending on possible situations: either the child's birth date (Article 60 paragraph 1 of the Family Code), or the date on which the child lost the quality of child from a marriage following a court decision (Article 60 paragraph 2 of the Family Code), or the date on which cohabitation or maintenance ceases to the extent the mother cohabited with the alleged father or if the latter has provided child support. However, Article 59 paragraph 1 of the Family Code states that an action for establishing paternity outside the marriage belongs to the child and starts on its behalf by the mother, even she is a minor or by its legal representative.

The Constitutional Court found that the provisions under criticism, stating that the term of one year, during which an action for establishing paternity outside the marriage may be introduced, start to run from the date of birth of the child, violate the child's right to a private life, because it deprives him of the opportunity to act consciously and voluntarily, after acquiring full legal capacity, in order to establish his filiations to the father. The fact that said legal provisions leave the action for paternity exclusively at the discretion of the mother or the child's legal representative, make this dependent on the conduct of a third party. This is because within the period prescribed by the legal text criticized, within one year of its birth, the child is, by definition, unable biologically to act. However, establishing parentage to the father, as an attribute of the person, as an element that shapes its identity, cannot be left at the discretion of someone else. If in the case of negligence, ignorance or even wilful misconduct, or in the event of objective circumstances that may constitute an insurmountable obstacle, the mother or the legal representative have not filed within a year of birth an action for establishing paternity, any possibility for the child to later request clarification of their personal situation by formulating an action to establish paternity out-of-wedlock is effectively blocked.

The Court held that the text of the law subject to the constitutional control essentially implies that the actual beneficiaries of an action to establish paternity will never have the opportunity to personally formulate such action, since after the expiry of one year from their birth the statute of limitations will apply, which will in turn cause the dismissal of their action as having been formulated too late, should the mother or legal representative fail to act within the aforementioned limitations period.

Therefore, provisions under criticism institute an insurmountable obstacle in the interested person's course of action for purposes of establishing essential data relating to their identity, which impacts their right to privacy and family life. The right to know one's origins - in the case at hand, by establishing paternity outside marriage - is rooted in the broad interpretation of the notion of privacy and

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establishing paternity promoted by the child (through art. 427 para. 1), rule applicable to children born after the date of October 1<sup>st</sup>, 2011, namely the effective date of the Civil Code, per art. 47 from Law no. 71/2011 for the implementation of Law no. 287/2007 regarding the Civil Code.

the obtaining of information essential to uncovering the truth about an important aspect of personal identity and to dissipating all uncertainty in this respect, is considered a vital interest, protected by the Convention<sup>13</sup>.

Therefore, the Constitutional Court found that the provisions in question violate Article 26 of the fundamental law insofar as the guarantee of a private life goes, since the person who wishes to establish its lineage towards a certain man is unable to personally introduce an action for establishing paternity outside of marriage within the period prescribed by law, because during the one year interval from birth set forth by the text, such individual obviously lacks legal capacity. Blocking any possibility to further such action upon having acquired full legal capacity and conditioning the benefit of an action for establishing paternity outside marriage to the diligence of their mother or their legal representative, seriously affect the right to family life, annihilating any legal possibility for the person concerned to clarify personal status by establishing paternity<sup>14</sup>.

The European Court of Human Rights - finding a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and considering that the gaps identified may also generate justified complaints in the future - recommended that the Romanian state take general measures to ensure the respect for the right to privacy of the persons concerned (paragraph 110). At the same time, the European Court noted the progress made by the Romanian legislation in the field of filiations, favoring the prevalence of biological reality against legal fiction, as evidenced by the fact that the current Civil Code establishes that the action for establishing paternity outside marriage is imprescriptible throughout the child's life.

For all the foregoing arguments, the Constitutional Court admitted the exception of unconstitutionality and held that the provisions of Article 60 paragraph 1 of the Family Code, in the version prior to their amendment by Law no.288/2007 amending Law no. 4/1953 –Family Code, are constitutional as long as they do not pertain to the action establishing the paternity of a child out-of-wedlock, introduced by the child.

In another case, the Constitutional Court has received an objection of

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<sup>13</sup> Please see from the European Court of Human Rights jurisprudence: Decision from February 13<sup>th</sup>, 2003, entered into in *Case Odievre against France*, (paragraph 42), *Case Mikulic against Croatia*, (paragraphs 64 and 65).

<sup>14</sup> See also Decision from July 19<sup>th</sup>, 2016 entered into in *Case Calin and others against Romania*, in which the European Court for Human Rights found the blatant violation of art. 8 of the Convention to defend Human Rights and Fundamental Freedoms, through the impact it had on the claimants' right to respect of private life, as a result of their inability to establish filiations towards their own father, given the limitations period set forth by local law, period during which said claimants did not hold legal capacity to act. For these reasons, the European Court found that, in principle, a period of 1 year, such as it was set forth under the Romanian legislation, is not reasonable. Even so, *dies a quo*, raises issues, since it does not allow the child to counter his mother's or his legal representative's inaction(s) during his minority. Therefore, the Court held that establishing a statute of limitations period, consistent with Romanian law, limited the interested parties' right to initiate an action to establish paternity until the point of extinction of such right (paragraph 98).

unconstitutionality of the provisions of Article 54 (2) of the Family Code, objection raised by a court of law, on its own, in a case pertaining to the resolution of a request to determine the capacity of the plaintiff as the biological father of a minor and the denial of paternity in respect of the minor's mother's husband<sup>15</sup>.

The court, author of the unconstitutionality motion, believes that the criticized legal text is unconstitutional, since it only recognizes the right to commence an action to disclaim paternity for the spouses and the children born in wedlock, without acknowledging this right in favor of the biological father, although the latter holds a legitimate interest in promoting such an action. In this sense, the court shows that the biological father has his own, distinct motivation to rebut the presumption of paternity, aspect recognized presently by the legislature, which - through Article 429 paragraph (1) of the Civil Code – sets forth its legal standing and capacity to sue in respect thereof. However, as a result of the application of the provisions of the Civil Code only to children born after its entry into force, there is an unequal treatment between the biological father of a child born under the rule of the Family Code, which is not recognized *locus standi*, and the biological father a child born after the promulgation of the Civil Code, which was recognized standing in such proceedings<sup>16</sup>. The court considers that there is no justification for the discriminatory regime established by Article 54 paragraph (2) of the Family Code, the only critical aspect pertaining to ensuring the prevalence of reality over fiction, hence the identity of reason requiring identity in solutions. It further states that by enshrining monopoly of married spouses and children in promoting an action to contest the presumed paternity, the legal text does not meet the requirements of Article 26 paragraph (1) of the Constitution to protect the intimate, family and private life, but rather reveals interference in it, restricting drastically the possibility of conferring legal significance to a biological reality, making it exclusively dependent on the will of persons, ignoring the legitimate interests of the biological father, who, while raising its child is not able to align the biological reality with the civil status of the person registered as such in civil records<sup>17</sup>.

The exception of unconstitutionality is based on the provisions of Article 54 paragraph (2) of the Family Code, which have the following wording: "*The action to deny paternity may be initiated by either spouse and the child; it may be*

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<sup>15</sup> See Decision No. 583 from September 13<sup>th</sup>, 2016 regarding the unconstitutionality exception of the dispositions of art. 54 para. 2 from the Family Code, published in the Official Monitor no. 881 from 03.11.2016.

<sup>16</sup> See E. Florian, *op. cit.*, pp. 402-403.

<sup>17</sup> In the above-mentioned context, the Court cites Decision from October 27<sup>th</sup>, 1994, entered in Case *Kroon & others against Holland*, when the European Court for Human Rights held that the interdiction instituted by Dutch law against the married woman to contest the presumed paternity of her husband in respect of the child conceived during marriage violates art. 8 of the Convention. Also, in Decision from September 15<sup>th</sup>, 2011, entered into in the Case *Schneider against Germany*, the Strasbourg Court reiterated the principle according to which the notion of life included in art. 8 of the Convention does not refer exclusively to a legitimate family, but extends over *de facto* family relationships, existing between persons who did not make their relationship official.

*continued by their legal assigns".*

The Court observed that the objection of unconstitutionality was raised during the resolution of a case covering the applicant's request for a declaration of its capacity as the biological father of a minor child, and denial of paternity to the husband of the mother. The child was born on December 21, 2007, so before the entry into force of the Civil Code, but after the entry into force of Law no. 288/2007 amending Law no. 4/1953 – Family Code, which established a 3 years statute of limitations in respect of the action to disclaim paternity calculated from the birth of the child –for the mother and the child, or the date on which he became aware of childbirth –in respect of the mother's husband. The initial complaint was filed in 2015.

Currently, according to Article 432 paragraph (2) of the Civil Code, the action to disclaim paternity by the biological father is imprescriptible during his life. Therefore, current regulations would have been far more advantageous to the author of the objection, who claims to be the biological father of the minor whose paternity it claims; in the new framework of the Romanian legislator expressed by the Civil Code, the biological father being entitled to bring an action to disclaim paternity against the presumed father, right whose exercise is not subject to any statute of limitations. Note also that after the repeal of the Family Code, the Civil Code granted locus standi in promoting an action to disclaim paternity to the persons who previously benefited under Article 54 paragraph (2) of the Family Code from this entitlement, namely the child and either spouse, and, in addition, to the biological father, in favor of which the legislator recognizes, under the current civil Code, such a possibility.

In the initial version, the text only allowed the presumed father the right to challenge paternity of a child born during marriage, thereby excluding the mother and child, equally holding a legitimate interest in promoting such an action. But the Court held that the mother's inability to promote this action constitutes a breach of the principle of equality of rights set out in Article 16 para. (1) of the Constitution, on the one hand and, on the other hand, the constitutional principle of equality between spouses, as one of the underlying principles in the family institution<sup>18</sup>.

With regard to the implied exclusion of the child from being able to take legal action to disclaim paternity, the Court held that Article 54 para. (2) of the Family Code violated, in the then current version, the provisions of Article 26 para. (2) of the Constitution, since it did not recognize the child's right to contest the presumed paternity, circumstances that were likely to impose on the child a certain legal status established by the will of another, which the child was supposed to accept passively, without being able act to amend it; that could only represent a denial of the right recognized in favor of any individual by the aforementioned constitutional article, namely to dispose of its own. The Court

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<sup>18</sup> See Decision no. 349 from December 19<sup>th</sup>, 2001, published in the Romanian Official Monitor, Part I, no. 240 from April 10<sup>th</sup>, 2002.

also held that the non-recognition in respect of the child of the right to establish its own affiliation towards father in accordance with reality, against a fiction, right recognized however in favor of the presumed father, represents an obvious breach of Article 45 paragraph (1) of the Constitution [now Article 49 paragraph (1) following the review in 2003 and republished Constitution], which guarantees in favor of children and young people special protection and assistance in realizing their rights; this can only signify that it is incumbent upon the state to ensure in their favour more legal means and more effective ones than those available to mature individuals, in order to achieve the objective pursued.

It should be noted that the arguments which the Constitutional Court has expressed when it declared as unconstitutional the legislative solution that did not grant both the mother and child locus standi for the action to contest the presumed paternity, cannot be translated and applied to the situation of the person claiming to be the biological father of the child, the reasons considered by the Constitutional Court in its decision being specifically tailored to the status of the mother and child, respectively, their particular position and the context of family ties, in relation to the interest they have with due consideration to their civil status and position in the overall construction of family relations. The same reasons for which the Court found it necessary to include the mother and child among those who can formulate an action to contest paternity, cannot be applied towards the biological father. The fact that at present, the Romanian legislature has opted for such a legislative solution does not result in discrimination, but rather reflects its current view in respect to the manner it deems adequate for purposes of clarifying the relationships in question.

Equally the comparison which the court author of the exception draws when it claims that at present, due to the application of the provisions of the Civil Code only to children born after its entry into force, an unequal treatment is created between the biological father a child born under the rule of the Family Code, which is not recognized locus standi, and the biological father of a child born after the entry into force of the civil Code, which was recognized such proceedings, cannot be accepted. With regard to the principle of equality, the Court consistently held in its jurisprudence, that the different situation in which the citizens may be placed, because of the applicable legislation pursuant to the principle *tempus regitactum* cannot be regarded as a violation of the constitutional provisions that set forth equality before the law and public authorities without any privileges and discrimination<sup>19</sup>. Successive legal regulations may vary

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<sup>19</sup>For such conclusions see Decision no. 20 from February 2<sup>nd</sup>, 2000, published in the Romanian Official Monitor, Part I, no. 72 from February 18<sup>th</sup>, 2000, Decision no. 820 from November 9<sup>th</sup>, 2006, published in the Romanian Official Monitor, Part I, no. 39 from January 18<sup>th</sup>, 2007, Decision no. 1.541 from November 25<sup>th</sup>, 2010, published in the Romanian Official Monitor, Part I, no. 30 from January 13<sup>th</sup>, 2011, or Decision no.1.062 from December 11<sup>th</sup>, 2012, published in the Romanian Official Monitor, Part I, no. 56 from January 24<sup>th</sup>, 2013, where the Constitutional Court held that the respect of rights equality, as well as the obligation to not-discriminate, involves taking into account the treatment that the law provides towards such subjects during the period in which its regulations are in effects and not the effects produced by previous legal rules.

significantly based upon the objective conditions under which they were adopted.

The Court found that the provisions of Article 47 of Law no.71/2011 for the implementation of the Civil Code, which states that establishing parentage, paternity denial or any action regarding parentage is subject to the Civil Code producing the effects set forth by such only in respect of children born after its promulgation, are constitutional in relation to the provisions of Article 16 of the Constitution and Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the prohibition of discrimination<sup>20</sup>. The Court held that the substantive law on contesting filiations in respect of the mother's husband applies according to the legal regulations in force at the time of childbirth, respecting the proper regulatory old codification in family law, without violating the principle of non-retroactivity nor that of equality or anti-discrimination, the criticized rule being applicable to all children born after the entry into force of the civil Code.

Bearing in mind that the legal treatment differentiated between children born before the entry into force of the Civil Code and those born after that date is not discriminatory, the same reasoning applies to the men claiming to be biological parents of children born prior or after the entry into force civil Code. So, for the same reasons, the present case cannot retain any discrimination between the biological father of a child born under the rule of the Family Code – which is not recognized *locus standi* in the denial of paternity – and the biological father of a child born after the entry into force of the civil Code, to which, the current legislative setting recognizes standing in such proceedings.

Finally, in the same reasoning, the Court observed that the subjects of law must use actions regarding the filiations while complying with the principle of applying civil law in time, the court bearing the authority to apply and interpret correctly the civil law both in terms of its application in time as well as its normative content.

For all the foregoing reasons, the Court dismissed as unfounded the plea of unconstitutionality and found that the provisions of Article 54 paragraph (2) of the Family Code are constitutional.

Finally, the Constitutional Court received an objection of unconstitutionality in respect of the provisions of Article 53 paragraph 2, Article 54, Article 55 and Article 58 of the Family Code<sup>21</sup>, in a case "concerning contesting paternity and establishing paternity"<sup>22</sup>.

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<sup>20</sup> See Decision No. 847 from December 10<sup>th</sup>, 2015, published in the Romanian Official Monitor, Part I, no. 128 from February 18<sup>th</sup>, 2016.

<sup>21</sup> The subject matter of the unconstitutionality motion were the dispositions of art. 53 para.2, art. 54, art. 55 and art. 58 from the Family Code having the following wording:

-Art. 53 para. 2: "*The child born after the dissolution, annulment of marriage has as father the mother's former husband, if it was conceived during marriage and its birth took place before the mother remarried.*"

-Art. 54: "*The paternity may be denied if it is impossible for the mother's husband to be the father of the child.*"

In motivating the exception of unconstitutionality, its author argued that the Constitutional Court Decision no.349/2001 has found that Article 54 paragraph(2) of the Family Code are unconstitutional since this text only recognizes the right to commence an action to disclaim paternity in favor of the father and not the mother and child born during marriage. For the same reasons retained in this decision, it argued that the provisions of Article 53 paragraph(2), Article 54 and Article 58 of the Family Code are also unconstitutional, since they prohibit the admission of an action for establishing civil status in respect of a child born during marriage, regulations which "seriously harm the rights of a child from marriage compared with one out-of-wedlock, which may establish its normal and fair affiliation towards its biological parent and not to the "mandatory", i.e. mother's husband<sup>23</sup>."

The author of the exception considered that the criticized legal texts violated the constitutional norms enshrined in Article 20 in relation to the provisions of Article 6 and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms while also being in contradiction with the European Court of Human Rights' jurisprudence, which in the case of *Kroon&others against Holland* from 1994 ruled that the ban imposed by national law against the married woman to contest the paternity of its husband is contrary to Article 8 of the Convention, which governs the right to respect for private and family life. He noted that the legal texts criticized are inconsistent with the provisions of Article 2 and following of the Law no.272/2004 on the protection and promotion of children's rights, according to which the child has the right to be raised in conditions that allow for the child's physical and moral development and that all measures concerning children should be subordinate to the principle of the superior interest of the child.

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The action to disclaim paternity may be initiated by either spouse, as well as the child; it can be continued by the legal successors.

The action is introduced by the mother's husband against the child; if it is deceased, the action may be filed against the mother.

The mother or child may file the action against the mother's husband; if he is deceased, the action is filed against his successors.

*If the holder of the right to pursue this claim is placed under interdiction, the action may be filed by its legal guardian. The mother of the child will be subpoenaed in all cases when she doesn't file the action herself."*

-Art. 55: "*The action to disclaim paternity is prescribed within 3 years from the child's birth. For the mother's husband the term starts to run from the date it became aware of the child's birth.*

If the action has not been introduced during the child's minority, the child can file it within 3 years from its' 18 years' old birthday.

*The plaintiff may be reinstated in such term, as provided by the law."*

-Art.58: "*The acknowledgment that does not correspond to the truth may be contested by any interested person. If the acknowledgment is contested by the mother, by the one acknowledged or by its successors, the proof of paternity lies with the author of the acknowledgment or its successors."*

<sup>22</sup> See Decision no. 314 from March 29<sup>th</sup>, 2012 regarding the unconstitutionality of the dispositions of art. 53 para.2, art.54, art.55 and art. 58 from the Family Code published in the Official Monitor no. 393 from June 13<sup>th</sup>, 2012.

<sup>23</sup> See T. Bodoasca, *op. cit.*, pp. 421.

The author of the objection of unconstitutionality argued that the legal provisions in question violated the constitutional provisions contained in Article 16 paragraph (2) concerning equal rights, Article 21 regarding free access to justice, Article 26 paragraph (2) regarding the intimate, family and private life and Article 49 paragraph (1) on the protection of children and young people.

Examining the unconstitutionality exception, the Court observed – first – that, following the notification received, Law no.4/1953 on the Family Code was repealed by Article 230 letter m) of the Law no.71/2011 for the implementation of Law no. 287/2009 on the Civil Code and that the criticized legislative solution was partially taken over in the wording of the new law, in Chapter II entitled "Parentage"<sup>24</sup>. The Court also stated that the provisions of Article 53 of the Family Code are constitutional, emphasizing in its jurisprudence that the principle of equality implies equal treatment for all citizens found in equal situations and that one cannot argue the existence of equality between a mother's husband and other men from the relevant point of view in this case and that the establishment of a paternity presumption in favor of the former does not contradict the provisions of Article 16 of the Constitution. The Court also found that the establishment of this presumption has strong and compelling reasons in the idea of protecting public order and morality, which makes the provisions of Article 53 of the Family Code compliant with the legal dispositions regarding intimate, private family life, those of family in general, or those relating to the protection of children and young people.

The Court also held that the establishment of parentage towards a father differs for the child from marriage to the child born out-of-wedlock. Thus, the paternity of marriage is determined by applying the presumption of paternity, regulated in Article 53 of the Family Code, which states that "*the father of a child born during marriage is the mother's husband*", while paternity out-of-wedlock may be determined either by voluntary recognition of the alleged father or by legal action to establish paternity<sup>25</sup>.

Article 58 of the Family Code refers to the recognition of paternity for the child out-of-wedlock, which can be challenged by any interested person.

The recognition of paternity constitutes both an admission, whereby a man declares that a child is his, as well a legal act which creates the parent-child relationship between a father and child, legal act that can be challenged when

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<sup>24</sup> Through Decision no. 349 from December 19<sup>th</sup>, 2001, published in the Romanian Official Monitor, Part I, no. 240 from April 10<sup>th</sup>, 2002, the Court held that the provisions of art. 54 para. 2 from the Family Code are unconstitutional as they only recognize towards the father and not the mother and the child born during marriage, the right to file an action to disclaim paternity. Following this decision, the text declared as unconstitutional has been modified by the legislature so that the action to disclaim paternity may be initiated by either spouse, as well as the child, it being continued by the legal successors. This regulation is also found in Law no. 287/2009 regarding the Civil Code, within art. 429 according to which "*the action to disclaim paternity may be initiated by the mother's husband, the mother, the biological father and the child. It may be filed or as the case may be, continued by the legal successors, as provided by the law.*"

<sup>25</sup> See Decision no. 1.554 from December 7<sup>th</sup>, 2010, published in the Romanian Official Monitor, Part I, no. 106 from February 10<sup>th</sup>, 2011.

untrue. The legislator gave legal standing to all persons demonstrating a patrimonial and non-patrimonial interest, in order to protect the very interest of the minor to have a civil status consistent with reality.

Therefore, from this point of view, the Court found that there is no discrimination between children born in wedlock and those born out-of-wedlock, because, just as the denial of paternity is regulated specifically, aiming at rebutting the presumption of paternity, it is also necessary to regulate the right to contest paternity outside marriage, both cases having as final goal the establishing of paternity consistent with reality, without any discrimination between children born in wedlock and those born out-of-wedlock.

In this context, the Court consistently held in its case law, that the legislature must consider the sole interest of the child, similar to the scope of the provisions of Article 3 paragraph (1) of the Convention on the Rights of the Child, according to which "*in all actions concerning children, undertaken by social welfare institutions, public or private, by courts, administrative authorities or legislative bodies, the interests of the child shall prevail*"<sup>26</sup>.

For the reasons stated, the Court rejected as unfounded the exception of unconstitutionality raised before it.

## 2. Conclusions

Concluding on the foregoing, we consider as adequately illustrative the consistent motivation – in legal terms – of the decisions entered by the Constitutional Court (although, this time, we only looked at a few issues related to family and children), which is intended to emphasize the Constitutional Court's concern towards ensuring children's rights and enhancing the child's best interest, regardless of the circumstances in which this is required. The abundance of successive legislative changes is certainly an obstacle (surmountable, however!) in the analysis of legal provisions caught in the dynamics of their application, but the constitutionality review and the extraction of the unconstitutional "venom" from the overall framework is and shall remain the only way to act in good faith in the defense of the supremacy of the fundamental rule of law in any democratic society.

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<sup>26</sup> The Convention regarding children's rights has been ratified by Romania by Law no. 18/1990, republished in the Romanian Official Monitor, Part I, no. 314 from June 13<sup>th</sup>, 2001.

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