

**PROTECTION OF THE SUPERIOR INTEREST OF THE  
CHILD UNDER THE EUROPEAN CONVENTION OF HUMAN  
RIGHTS.  
CASES AGAINST ROMANIA**

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Abstract

*The article is commenting on several cases that were promoted against Romania to the European Court of Human Rights, where plaintiffs have complained against the violation of rights connected with family life, protected by article 8 of the European Convention of Human Rights. The relations between a child and his or her family have been at the centre of the cases. The analysis shows that Romania has tried to provide good legislation, and improve it. Nevertheless the breach of the rights has occurred both to poor legislation and poor enforcement of the law with respect to what is considered to be “the superior interest of the child”. What the best interest of the child was considered to be in relation with particular situations, even when the effect of the rules regarding children reached their adult life, is underlined.*

Key Words: *child protection; human rights; paternity; adoption.*

JEL Classification: [36, 38]

## **1. Introduction**

In the field of human rights, the superior interest of the child has become an important principle. Among the vulnerable social groups, the status of children is special, as they cannot speak for themselves when they are very young and are at the will of adults from the family or public authorities. It is interesting to observe that the law has diminished the child's capacity to defend itself as it presumed that a child has no reason until he or she reaches a certain age, established by the law. This way, a child cannot decide for him or herself until he or she becomes of age. On the other hand, a child has no physical strength to protect himself or herself against violence, if necessary. This is why the law had to provide the balance that will allow children to benefit of the protection of their rights.

Due to their extensive vulnerability, the rights of the children cover a wide range, such as corporal punishment, deprivation of liberty, rape, participation, juvenile justice, adoption, abduction, street children, child protection and custody (Dohrn, 2006, p. 749).

The need of protection has framed the principle of the “superior interest of the child”. The international legal document that has first referred to this principle is the 1989 Convention on the Rights of the Child, in Article 3, stating that “The

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best interests of the child shall be a primary consideration in all actions affecting children". The principle has incidence in the course of different procedures where decisions concerning children have to be made. The best interest determination "should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option" (UNCHR, 2008, p. 8). The final decision in such procedures are the result of an assessment done by one person, or with the help of persons with different expertise in the field and has to permanently observe the child's best interest. Many of these procedures are related to family relations, like establishing who the natural parents are, adoption, the exercise of parental rights, the custody of the child. Sometimes the judge or the public servant just has to exercise his or her best judgement in the particular situation the child is, other times there are legal rules that have to be observed. Even in the latter situation, the national judge would have to directly apply the European Convention of Human Rights against national legislation that works against the best interest of the child.

Romania has adopted legislation concerning the protection of children. The UN Convention on the Rights of the Child was assumed by Romania by Law no.18/1990. Later on, Law no. 272/2004 on the protection and promotion of children's rights was adopted. Legislation, starting with the Constitution not only provides measures for protecting children, but also establishes and recognizes some independent rights for them, especially the right to be consulted on matters that concern them directly (Simion & Criste, 2017, p. 272). The Constitutional Court of Romania has pronounced a series of decisions in connection with the family relations that involve children, generally intending 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 (Mineia & Georoceanu, 2017, p. 218). Legislation proved a will to improve the protection of the best interest of the child. However, the implementation of the norms was not always successful. The article is discussing several cases brought to the European Court of Human Rights against Romania that prove the shortcomings of the legislation or its enforcement in situations concerning family relations involving children.

## **2. Paternity**

Establishing the legal relation to the natural parents is a matter of particular importance for a child. Legal family relations lead to responsibility of the parents to provide for the minor and educate him or her, gives direction to affections and fulfils the need for identity that every person has. The possibility of the parents to look after their children's interest may sometimes be limited and in such situations authorities should be prepared to step in. Several cases concerning the establishment of filiation were brought against Romania at the European Court of Human Rights.

Article 60 paragraph 1 from the Family Code enforced in 1953 established a time bar of one year for an action in establishing the paternity of the child born outside the marriage, starting from the day the child was born. The action in court had to be exercised by the mother, even if she was a minor, or by the legal representative of the child. If the mother has lived together with the alleged father, the time bar started from the day of separation. In 2007, Law no. 288/2007 amended the Family Code, Article 60, introducing a 4<sup>th</sup> paragraph, according to which the right of the child to a suite for establishing his or her paternity is possible throughout his or her entire life. According to article II of the Law no. 288/2007 the provisions of Article 60 paragraph 4 of the Family Code also applied to children born before the enforcing of Law no. 288/2007, even if they had a case already pending in court. The New Civil Code (Law no. 287/2009) also provided that the right of the child to a suite for establishing his or her paternity is possible throughout his or her entire life.

The case *A.M.M. v. Romania*, presented a situation where both the minor (a 10 years old boy) and the mother had neurological problems that increased their vulnerability. In the year the child was born, the mother brought a paternity suit against the person she claimed was the boy's father. She presented in evidence a written statement of the defendant in which he recognized paternity of the child and promised to pay maintenance. She further requested that the alleged father be questioned, certain witnesses to be heard and that a paternity test be carried out. As the defendant did not turned up to the paternity test ordered by the court, the mother decided to forego the test and the hearing of witnesses. The Bucharest court of First Instance (*Judecătoria București*) applied the principle of litigant-led conduct of litigation, considering it has no right to intervene upon the mother's decision. The judge considered the copy of the written statement of the alleged father inadmissible, as the original has not been provided. Due to lack of evidence the paternity claim was rejected. The sentence of the First Instance Court was upheld by the Bucharest County Court (*Tribunalul București*). In a second appeal, the Bucharest Court of Appeal quashed the decision of the Bucharest County Court, considering it has not exercised its active role, mentioned by the Civil Procedure Code, given the fact that the woman has not been assisted by a lawyer. In a new judgement carried out in front of the County Court, two of the witnesses did not present themselves to the court and could not be presented with the help of the law-enforcement officers as they did not live at the addresses given by the mother. Only the testimony of the child's grandmother could be heard. The alleged father did not submit to the paternity test. Once again the mother of the child stated that she no longer wished to have forensic tests carried out to establish the child's paternity or to have any evidence taken. Although the public prosecutor has been notified about the date of the trial, he did not attend. According to article 43 of the Civil Procedure Code in force at the time, a prosecutor representing the Public Ministry could have participate to the trial in

support of the child's interest, especially when the court found the participation necessary. The representative of the municipal guardianship office did not attend either, although the provisions of article 108 of the Family Code (Law no. 4/1953) made it clear that it had the obligation to supervise the way parents look after the interests of minors. The paternity claim was rejected as unsubstantiated, the court deciding that even if the original statement regarding the paternity would have been presented, it could only be corroborated with the subjective testimony of the child's maternal grandmother. The European Court of Human Rights (referred forward as ECtHR, or the Court) condemned Romania for not observing the best interest of the child. Because the mother had herself neurological problems affecting her discernment and had not been assisted by a lawyer at any time, the ECtHR considered that it was the obligation of responsible authorities to act in the best interest of the child. Or, both the public prosecutor and the representative of the municipal guardianship office failed in performing the duty of protecting the child's interests in justice. The Court also found legislation flaws, as no legal disposition that would oblige a person to undergo a paternity test or other medical examinations existed. Also, the national courts did not take into consideration that one of the parties has sought to prevent certain facts from being established. In the end, the interest of the child was not considered as being superior to the interest of another person in blocking the establishing of truth.

Nevertheless, from the reasoning of the decision of the ECtHR, it could be seen that many Romanian courts took care of the best interest of the child proving a good understanding of the principle. The ECtHR mentioned decisions no. 1280/1957, no. 1077/1989 and no. 74/1990 of the Supreme Court (*Tribunalul Suprem*) that showed the mother cannot renounce to a paternity action, even if the guardianship office would agree to it. The renouncement to hear witnesses equals a renouncement to the petition. Decision no. 1059/1990 of the Supreme Court (*Tribunalul Suprem*) decided that rejecting a petition for establishing paternity as unsubstantiated on the grounds that the witnesses proposed by the plaintiff did not presented themselves before the court was lacking legal support, as the court should have taken the legal measures for finding the witnesses and bring them to court first. In respect to the statements of the maternal grandmother, decision no. 2370/1993 of the Supreme Court of Justice (*Curtea Supremă de Justiție*) and decision no. 3619/1998 of the Craiova Court of Appeal considered that a petition for establishing paternity may be substantiated by the statements of the claimant's relatives. The Court of Appeal Timișoara found in the decision no. 1421/2002 that the unjustified refusal of the alleged father to submit himself to biological testing, corroborated with other evidence, may be regarded as a confirmation that he is the father of the child. All these decisions mentioned by the ECtHR proved the way the national courts generally looked after the interest of children, under the guidance of the supreme instance and the fact that the decisions aforementioned

have been published, to serve as guide for other national courts. We can conclude that the case brought to the ECtHR has been an unfortunate incident.

In the case *Ostace v. Romania*, the Court found that the legal impossibility to reverse a court decision establishing the paternity of a child (based on biological evidence), despite the agreement of all parties involved, represented a violation of Article 8. Generally, a great importance is given to the principle of legal stability (Predescu & Safta, 2009) and the interest of the child in the sense of preserving the protection and family relations formed by a decision that establishes paternity (ECtHR case *Ýyilik v. Turkey*). The ECtHR has evaluated several times situations where children's rights meet parental rights and frequently have affirmed the national holding based on a margin of appreciation (Dohrn, 2006, p. 750). The margin of appreciation is considered differently by the Court, according to the context. In the case of child protection it was considered to be particularly wide, both because of the diversity in national approaches and because of the possibility of national authorities to evaluate every situation (Kilkelly, 2003, pp. 7-8). In the *Ostace* case, the Court observed the changes in the Romanian legislation, namely in the New Civil Code, that set aside the previous time bars for establishing paternity or denying it, proving that a greater importance is given to establishing the biological family relations. The Court also noticed that at the time the presumptive father tried to reverse the court decision that has established his paternity the child was no longer a minor and he contributed to the biological tests that established the truth, tests that were not possible at the time of the first court decision that initially established the paternity. Finally the Court decided that the fact that the wrong paternity was not based on a legal presumption but on a court decision should not prevent a person from establishing the truth about the family relations. It would seem that the interest of the child was balanced against the interest of the father. But in appreciating the equilibrium, the Court finally considered the consent of the child and the fact that he was no longer minor.

The question of time bars in establishing the biological family relations had incidence in the case *Călin v. Romania*. As stated before, under the Romanian Family Code a paternity suite for a child born outside the marriage could be initiated in the name of the child by the mother or the legal guardian of the child, during one year from the birth or, in case the mother was living with the presumed father, during one year since their separation. In 2007, Law no. 288/2007 amended the Family Code, Article 60, introducing a 4<sup>th</sup> paragraph, according to which the right of the child to a suite for establishing his paternity is possible throughout his entire life. According to Article II of the Law no. 288/2007 the provisions of Article 60 paragraph 4 of the Family Code also applied to children born before the enforcing of Law no. 288/2007, even if they had a case already pending in court. The Constitutional Court of Romania has declared the provisions of Law no. 288/2007 Article II unconstitutional as they contravened to

the principle of non-retroactivity of law (Decision 1345/2008). The national courts became bound to the decision of the Constitutional Court, in accordance with Article 11 paragraph 3 of the Law no. 47/1992 regarding the organization and functioning of the Constitutional Court of Romania. Examining several complaints introduced against Romania by persons whose paternity suits have been rejected by the courts as time-barred, the ECtHR has observed that a child has no possibility of exercising by himself such a legal action during the period of one year from his birth, being dependent of the actions of his mother or legal guardian. Examining the legislation of different countries, the Court observed that either there was a long period of time before the right was time barred for the child (30 years), or there was no time bar for the legal action in establishing the paternity of a child. The ECtHR also found that neither the Constitutional Court, nor the national courts, said anything about the interest of the child in establishing his family relations. So, there was no balance between the interest of the child and the public order principle, because the first one was not even being considered. The decision of the ECtHR shows that although, generally, the principles protecting the public order prevail when balanced against the ones protecting a private interest, when considering the interest of a child in establishing his or her family relations, this last one is stronger. This is also the case when the child is no longer a minor, but an adult, as the case *Călin v. Romania* showed. But this is the case because the minor child could not defend his own interest until he was of age, so a reparation for this natural and legal impossibility should be considered by the law, giving the child the possibility to take action when he or she becomes of age.

### 3. Exercising the parental rights

In the preamble of the Convention of the Rights of the Child it is shown that “the child, for a full and harmonious development of his or her personality, should grow up in a family environment”. Being integrated into family environment, into a stable community is important for children, as they need “continuity of upbringing in a steady ethnic, religious, cultural and linguistic background and with love and warmth – because this gives them the security they need for their development” (Safford, n.d., p. 1). The case *B (no. 2) v. Romania* brought to the attention the case of parents suffering of psychiatric disorder and the consequence of their illness upon their children. The mother of two minor children has been repeatedly admitted into psychiatric hospitals, suffering with paranoid schizophrenia. No guardianship was provided for the children during the confinements. Finally, the minors were placed by the competent authorities into a care home. The decision was not contested by the mother. Later on, the Bacău County Court (*Tribunalul Bacău*) decided that the exercise of parental rights was to be delegated to the director of the care home. Neither this, nor other decisions

establishing the transfer of children to other care homes were contested by the mother, who constantly kept in touch with the children. At the complaint of the mother, the ECtHR found a violation of Article 8 of the European Convention of Human Rights because the mother had no possibility to take part in the decisions that were taken regarding her children. The Court also noticed that throughout all the procedures developed between 2000 and 2007, the decisions regarding the two minors of both the administrative authorities and the courts considered only the situation found in 2000, when the children were first placed into a care home. As it was noticed that the applicant was not given any legal protection during her confinements in psychiatric hospitals (e.g. partial guardianship), the Court awarded the applicant (the mother) non-pecuniary damages obliging the responsive state (Romania) to take the initiative in affording her appropriate legal protection meeting the requirements of the Convention. It should be noticed that Romanian legislation has improved. Law no. 129/2012 has added to the Law no. 487/2002 (The Mental Health Act) a new section, 38<sup>1</sup>, which provides that anyone with full legal capacity who is admitted for psychiatric treatment is entitled to appoint an agreed representative free of charge to assist or represent him or her throughout the duration of the treatment. Such representation allows the patients to exercise their parental rights to the benefit of their children.

#### 4. Adoption

The superior interest of the child in a case of adoption, at a time the adopted child was no longer a minor, was discussed in the case *Zaiet v. Romania*. The Romanian courts have annulled an adoption decision at the request of the sister of an adopted person. Both the person whose adoption has been annulled and her sister were adult persons at the time of the annulment. In its decision, the ECtHR observed that at the time the action for annulling the adoption was lodged the Romanian legislation allowed only the adopted child aged over 10 years old or the Commission for Child Protection to have lodged such an action, and only in the best interest of the child. Although Mrs. Zaiet brought this exception before the court of first instance, it was rejected. The Court noticed that although in appeal Mrs. Zaiet did not brought the exception again, the appeal court could have brought it as it was a public order exception. The Court decided that once a family relation has been established, the state has to protect it and may dissolve it only if the superior interest of the child requires it. In the particular situation of Mrs. Zaiet, the family relation has been established for over 31 years and there was no question of a superior interest concerning her.

Another case concerning adoptions was *Pini and Others. v. Romania*. It concerned the complaints of several Italian families who could not enforce adoption decisions issued by Romanian Courts. The opposition to the enforcement of the decisions came from Romanian authorities that were entrusted with child protection and from the adopted children. At the time the adoption decisions were

pronounced by the courts, the children were under the age of 10 years old, the minimum age that obliged the court to hear the minor. When the adoptive parents tried to enforce the court decisions, the minors opposed to it and were sustained by the administrative authorities. The minors also contested the adoption decision. One of the complaints was rejected on the grounds that it is in the superior interest of the child to be adopted. Another complaint was admitted, on the grounds that it was in the superior interest of the child to remain in the CEPSB centre for minors and the adoption was annulled. The situation was widely covered by the press as Baroness Nicholson of Winterbourne, a rapporteur at the European Parliament, although she drew the attention on the poor conditions for institutionalized children in Romania, about this particular case affirmed that children in the care of the CEPSB should not travel abroad to join their adoptive families. The CEPSB's founder, the former tennis player Ioan Țiriac, had said that none of the children at the centre would leave as they had all become members of his family and that it was time to put a halt to the export of Romanian children.

The ECtHR found no violation of Article 8 in response to the complaints of the adopting families. It was clearly apparent to the Court that the minors now preferred to remain in the socio-family environment in which they had been raised at the CEPSB, where they considered themselves to be fully integrated and which was able to afford them physical, emotional, educational and social development rather than the prospect of being transferred to a different environment abroad. Their interest lay in not having imposed upon them against their will new emotional relations with people with whom they had no biological ties and whom they perceived as strangers. The Court also decided that in adoption cases, it was even more important to give the child's interests precedence over those of its parents, as adoption meant "giving a family to a child and not the child to a family". However, the decision pointed out to the flaws in the procedures of adoption in Romania, a major one being the fact that gaps in the relevant national legislation conducted to lack of concrete and effective contact between children and persons who adopt. Also, children did not benefit from psychological support which can prepare them for leaving the environment where they have established social and emotional ties. This is a very important matter especially in the case of children that are at an age that allows them to socialize, to attach to certain environments and people. For such children, the best interest of the child does not only comprise the need to have a family but also the need to ensure the compatibility between the child and the adopters and the preparations that will bring together psychologically the adopted child and the adopting parents. In this respect, the Romanian legislation has improved. Law no. 57/2016, modified Law no. 273/2004 regarding the adoptions, introducing a mandatory step during the adoption process with the purpose of matching the adopted child with the adopting parents. The matching procedure contains a documentary phase and a practical one. The law provides the persons applying for the adoption of a child



with free time necessary for the matching procedures, without diminishing their salary entitlements (now Article 54 of the Law no. 273/2004, republished).

## 5. Domestic violence

A situation of bad enforcement of the law was presented in the case *Bălășan v. Romania*. Mrs. Bălășan and her children were assaulted by her husband a number of times, and sustained injuries recorded in medical reports as requiring between two to a maximum of ten days' medical care. In the period 2007-2008, Mrs. Bălșan asked for assistance by way of emergency calls to the police, petitions to the head of police for protection and formal criminal complaints. At the investigation level and before the national courts, the authorities concluded that she had provoked the domestic violence and that it was not serious enough to come under the scope of the criminal law. Thus, as concerned three incidents which occurred in 2007 the courts ultimately decided to acquit her husband of bodily harm; and as concerned five incidents in 2008, the prosecuting authorities decided not to press charges. Her husband was given an administrative fine following each of these decisions. Mrs. Bălșan continued to bring to the authorities' attention her husband's abuse, during the criminal investigations and the court proceedings, warning them that she feared for her life. No concrete measures were however ever taken and her requests for the courts order protective measures went unanswered. It is clear that in such situations, even if the violence of one of the parents is not directed mainly towards the children, but towards the other parent, the children are subjected at least to an emotional abuse witnessing the harm done to a person they are strongly attached to. Research studies have revealed that the great majority of children are profoundly affected by living in a context of domestic violence and there is no doubt about the risks on short or long term upon their general development (Turliuc, et al., 2009, pp. 115-123). Research has found that the number of children presented for medical examination in the case of domestic violence is not very high (Chiroban, et al., 2017) although domestic violence is a spread habit in Romania and statistic data found the same geographical area (Cluj county) to be among the ones with the highest number of requests for protection orders (CNEPSS, 2015, pp. 11-12). Unfortunately, in spite of legal dispositions, (e.g. art. 199 in the Criminal Code that increases the punishment for violence exercised upon a member of the family, chapter IV regarding the restraining order from the Law no. 217/2003 for fighting against domestic violence, Government Resolution no. 1156/2012 for preventing and fighting against domestic violence) in Romania authorities do not pay attention to such matters, are not prepared with knowledge regarding the psychology of domestic violence and easily dismiss the complaints (Culda, 2016). The ECtHR also concluded that although there was a legal framework in Romania with which to complain about domestic violence and to seek the authorities' protection, which Bălșan had made full use of, the authorities had failed to apply

the relevant legal provisions in her case. In concluding that the victim has provoked the violence and that the violence was not serious enough to enter under the scope of criminal law, Romanian authorities deprived the national legal framework of its purpose and was inconsistent with international standards on domestic violence.

### Conclusions

Analysing the cases brought against Romania to the ECtHR in connection with family relations involving children we can observe that at the legislative level the state is concerned to create mechanisms that are able to implement the principle of the best interest of the child. Legislation is continuously adapted to the interpretations set by the case law of the ECtHR. However, authorities are not fully educated to understand what the principle implies. In paternity cases, the courts generally proved a high concern for the interest of the child and violations were accidental. A problem was the decision no. 1345/2008 of the Constitutional Court that failed to see the prevalence of the best interest of the child over the one of stability of legal relations. This decision bound the national courts until the ECtHR has proved it wrong. The legislation has recently improved in the adoptions field by introducing a matching procedure that will help children and potential parents to accommodate with each-other before the adoption. In protecting the children against domestic violence the legislation tried to compensate the social habits but unfortunately the public authorities have not been educated enough to efficiently apply it.

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