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"CHILDREN'S RIGHTS"

REPORT BY

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I. Introduction

Promotion of the rights of children and young people represents an evolution in safeguarding human rights, in general, evolution that outlines a vision subsumed under the "*best interests of the child*" concept. This vision is based essentially on the idea that the child has different rights and needs in relation to those of the parents, so his interest may be different from that of his parents or guardians. In these circumstances, the child's interests should prevail over other interests when taking action in his respect.

The best interests of the child tuned into a structural principle of the child rights-related regulations in Romania. Thus, the new Civil Code[1], which became effective on 1 October 2011, sets it forth as such, under Article 263, stating that "*any measure relating to the child, regardless of its author, must be taken in compliance with the best interests of the child*". The same concept is asserted in previous enactments, respectively Law no.272/2004 on the promotion and protection of child rights[2] and Law no.273/2004 on the adoption procedure[3].
These regulations, as well as the related laws, are the result of constant evolution and the Constitutional Court of Romania has played an important role thereto. Through its decisions, the Constitutional Court acted prescriptively and punitively, determining, on the one hand, the "development" of constitutional concepts, by interpreting the Basic Law of Romania in line with the international instruments and, on the other hand, the "adjustment" of infra-constitutional laws according to provisions of the Constitution as interpreted by the Court.

This process has been sustained and facilitated by the constitutional rules that "connect" the Romanian Basic Law to the international system of protection of human rights, in general, and of child rights, in particular. We refer to the constitutional provisions of Article 11 – *International law and domestic law*, Article 20 – *International Human Rights Treaties* and Article 148 – *Integration into the European Union*. In essence, these texts establish that the treaties ratified by the Parliament are part of domestic law; the Human Rights Treaties to which Romania is a party are included into the "constitutional block" and, where inconsistency exists, they shall prevail over domestic laws, except where the Constitution or domestic laws comprise more favourable provisions; the founding treaties of the European Union, as well as other binding regulations under community law shall prevail over any contrary provisions of infra-constitutional domestic laws.

Since Romania is a party to international treaties/conventions containing special provisions on child rights[4], as well as a member of the Council of Europe and of the European Union, resulting in direct applicability by Romanian authorities of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as of the Charter of Fundamental Rights of the European Union, the Constitutional Court of Romania has often invoked as grounds for its decisions the texts of the aforementioned international instruments. The constitutional review conducted in such cases was aimed at examining the law in relation to the provisions of the Constitution, the latter being interpreted in accordance with the relevant international treaties to which Romania is a party, as well as with the practice of the bodies called to implement them. This type of interpretation and, especially, the assimilation of the practice of the European Court of Human Rights resulted in changes of practice, with consequences over the corresponding regulations at infra-constitutional level. The *erga omnes* binding effect of the decisions of the

[1] Law no.287/2009 on the Civil Code, republished on the grounds of Article 218 of Law no.71/2011 implementing Law no.287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no.409 of 10 June 2011
[2] Published in the Official Gazette of Romania, Part I, no.557 of 23June 2004
[3] Republished in the Official Gazette of Romania, Part I, no.259 of 19 April 2012
[4] The Convention on the Rights of the Child was ratified by Law no.18/1990, republished in the Official Gazette of Romania, Part I, no. 314 of 13 June 2001; The Convention on contact concerning children was ratified by Law no. 87/2007, published in Official Gazette of Romania, Part I, no. 257 of 17 April 2007

Constitutional Court facilitated this effect of constitutionalisation of the relevant domestic regulations.
Therefore, although the Constitution of Romania does not specifically enshrine the principle of the best interests of the child - the relevant constitutional text (Article 49) using the phrase "*special protection and assistance*", this principle has been asserted in the case-law of the Constitutional Court and it is currently regulated also in infra-constitutional laws, as shown above. These laws also establish the main coordinates that must be taken into account upon taking decisions relating to the child (*needs for development - physical, psychological, education and health, security, stability and affiliation to a family; child's opinion, according to age and degree of maturity; history of the child, ability of the parents or of the persons entrusted with child-raising and childcare to meet his specific needs),* as well as appropriate safeguards.
The aforementioned jurisprudential benchmarks illustrate the issues examined by the Constitutional Court of Romania in relation to this subject matter, its influence on the legislator and, from this perspective, the importance of constitutional justice, respectively the importance of the cooperation between constitutional courts for the realisation of basic rights, in general, and of the best interests of the child, in particular.

II. Status of the child

1. Child's right to establish filiation to the father

One of the rights that can be subsumed under the concept of best interests of the child is the right to establish identity – which involves the right to a name, the right to acquire a nationality, the right to know who the parents are and the right to be cared for, brought up and educated by the parents.

Therefore, non-acknowledgement of the child's right to establish filiation to the father, against a fiction – the presumption of paternity, is contrary to the best interests of the child. In essence, these were the reasons leading to the decision of unconstitutionality of the provisions of the Family Code establishing that only the presumed father (his heirs) may bring an action to disclaim paternity. The Constitutional Court of Romania found that those provisions were unconstitutional insofar as they entitled only the father, and not also the mother and the child born in wedlock, to bring an action to disclaim paternity[5].

This decision marked a change of practice based on the case-law of the European Court of Human Rights. The Constitutional Court held the following: «*Whereas, following ratification by Romania of the Convention for the Protection of Human Rights and Fundamental Freedoms, pursuant to Articles 11 and 20 of the Constitution, this convention has become part of domestic law, upon examining the exception, the Court must take into account its provisions, as well as the jurisdictional practice of the European Court of Human Rights in the application and interpretation of the aforementioned convention".* The judgement of the European Court of Human Rights relied upon was the judgement delivered in the *Case of Kroon and Others v. the Netherlands* of 27 October 1994 stating that *«respect for "family life" requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, the Court concludes that, even having regard to the margin of appreciation left to the State, the Netherlands has failed to secure to the applicants the "respect" for their family life to which they are entitled under the Convention. There has accordingly been a violation of Article 8. »* In light of this interpretation and application of the Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights, the Constitutional Court held that it is necessary to reconsider its jurisprudence in terms of settlement of the exception of unconstitutionality of the same legal provisions[6].

[5] Decision no.349/2001, published in the Official Gazette of Romania, Part I, no.240 of 10 April 2002
[6] Decision no.78 of 13 September 1995, published in the Official Gazette of Romania, Part I, no. 294 of 20 December

Currently, Article 414 (2) of the Civil Code establishes that "*paternity is subject to disclaimer only where the mother's husband cannot be the child's father*", and Article 429 (2) of the same Code provides that "*the action to disclaim paternity may be initiated by the mother's husband, by the mother, by the biological father, as well as by the child. It may be initiated or continued, as the case may be, also by their heirs, under the terms of the law*". Pursuant to Article 433 (2) of the same Code "*The right to action is not subject to limitations for the duration of the child's life".*

2. The right to a name

The Constitutional Court was called upon to decide on the constitutionality of the provisions regarding the rules for determining the name of the child name out of wedlock. Thus, according to Article 64 of the Family Code, in force at that time[7], "*the child born out of wedlock acquires the last name of the parent in relation to whom filiation was firstly established. If filiation has been subsequently established also in relation to the other parent, the court may allow the child to bear the name of the latter. If the child has been acknowledged by both parents at the same time, the provisions of Article 62 (2) shall be deemed applicable."* The exception of unconstitutionality was based on the claim that, if the disavowal action is successful, the child should be treated as a child born out of wedlock and, therefore, he should lose the right to bear the name of the mother's husband, who is not his real father.

Dismissing the exception of unconstitutionality[8], the Court stated that "*the fact that the child keeps the surname of the presumed father although the disavowal action was successful […] cannot constitute a violation of the right to physical integrity of the person*" (as alleged in the respective case). The Court held that "*the impugned regulation establishes a modality by which public authorities meet their obligations to respect and protect personal, family and private life, and it is, at the same time, a component of the special regime of protection and assistance of children and young persons in the realization of their rights*".

Currently, concerning court actions to establish filiation, Article 438 of the Civil Code provides that "*Within the judgment allowing the action, the court shall decide also on the name and the child [...]*", in accordance with the best interests of the child, which governs the whole matter, in accordance with Article 263 of the same Code.

By another decision[9], the Constitutional Court held that the fact that the child can keep the last name previously bore, although the marital status of the parents may change as result of annulment or dissolution of marriage, gives expression to the best interests of the child, which must prevail. We mention that, in case of divorce, pursuant to Article 4 (3) f) of Government Ordinance no. 41/2003, the application to change the surname is justified *"if the parents divorced, and the children entrusted for care and education to one of the parents, who resumed use of pre-marriage surname, want to bear the latter's surname*."

3. The legal status of the child in case of medically assisted human reproduction

Legal certainty on the status of the child is especially important in situations such as the one created by medically assisted human reproduction, when numerous medical, legal, and ethical issues are brought into question.

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[7] Currently, it is regulated in the Civil Code under Article 449 – *Name of the child born in wedlock* and Article 450- *Name of the child born out of wedlock*

[8] Decision no.60/2004, published in the Official Gazette of Romania, Part I, no. 203 of 9 March 2004

[9] Decision no.1290/2009, published in the Official Gazette of Romania, Part I, no. 788 of 19 November 2009

Being notified, within the *a priori* review, on the provisions of the Law on reproductive health and medically assisted human reproduction, the Constitutional Court found a violation of Article 49 of the Constitution on the special protection of children and youth. The respective law provided that initiation of such procedure was conditional upon a prior referral to the court of law in order to issue a ruling ascertaining the compliance with the binding legal requirements for the initiation of the procedure. In essence, the Court found that, by establishing the formalities for initiation of the procedures for medically assisted human reproduction, the law created the possibility for the court to ascertain failure in terms of compliance with the legal requirements for initiation of the procedure, at a time when the pregnancy had already been confirmed. However, such a situation was likely to entail difficulties in defining the legal status of the child, respectively the birth of children whose legal status was poorly defined and, therefore, uncertain[10].

Currently, the Civil Code contains provisions of principle concerning the medically assisted human reproduction using third-parties (Articles 441 to 447). Pursuant to Article 442 (91) of the Code, "*parents who, in order to have a child, wish to use third party assisted reproduction must give their prior consent, under complete confidentiality, before a public notary who would specifically explain to them the consequences of the act in terms of filiation*". Likewise, pursuant to Article 443 of the same Code, "*no one may challenge a child's filiation for reasons related to medically assisted reproduction; the child born in these conditions cannot challenge his/her filiation either*." The texts of the Civil Code make reference to the provisions of the special law. In this respect, there is a bill under parliamentary debate at the Chamber of Deputies.[11]

4. The status of the married minor

In connection with this subject matter, we mention a case concerning the status of the married minor. The latter acquires, through marriage, full legal capacity (Article 39 of the Civil Code), with significant legal consequences.

The Constitutional Court ruled on differences in legal treatment upon examining the constitutionality of the provisions of the Law on the free movement of citizens abroad[12], impugned for restricting the married minor woman's right to free movement. Thus, for travelling abroad, the minor married woman was subject to the legal regime of minors lacking legal capacity (accompaniment, prior consent of parents or guardians). In essence, that was an omission in the impugned legal text that stipulated the conditions in which Romanian citizens "*who have reached the age of 18*" were allowed to leave the country, ignoring the fact that, pursuant to the law, full legal capacity is obtained not only upon attaining the age of majority, but also as result of marriage. Such a restriction on the exercise of the rights of the married minor woman was considered by the Court as likely to determine an unequal legal status in relation to the husband, which was not objectively and rationally justified. The Court held that, having in view the Constitution's guarantee of equality between husband and wife, it is essential for the wife to enjoy the same legal treatment as the one applicable to her husband, regarding the exercise of the basic right to free movement, laid down by Article 25 (1), and the exercise of the person's right to freely dispose of himself/herself, laid down by Article 26 (2) of the Constitution, and not be treated as a minor upon exercising these rights. Therefore, the impugned legal text declared unconstitutional.

Currently, the provisions of Article 28 (1) of Law no.248/2005 on the free movement of citizens abroad refer also to the category of married minors, stipulating that "*border police bodies shall allow Romanian citizens* ***who have reached the age of 18 and minors married under the terms of the law,*** *holders of valid travel documents, to leave the territory of Romania, if they*

[10] Decision no.418/2005, published in the Official Gazette of Romania, Part I, no. 664 of 26 July 2005
[11] http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=12651, PL-x no.63/2012
[12] Decision no.217/2005, published in the Official Gazette of Romania, Part I, no.417 of 18 May 2005

are not in the one of the situations of limitation on the exercise of the right to free movement abroad".

III. Family life and alternative care

1. Protection of minors in special situations

Children benefit from special protection measures, aimed at their care and development, if they are either temporarily or permanently without parental care. Being notified on the unconstitutionality of the provisions stipulating that: *"Parental rights and obligations in case of the child for whom guardianship could been established and in whose respect the court order placement shall be exercised and respectively fulfilled by the president of the county council, respectively by the mayor of the respective district of Bucharest*.[13]*",* the Constitutional Court declared them constitutional[14]. The Court held that the text is, in fact, aimed at granting special protection to the rights of child without parental care. These provisions may be challenged only in terms of application, such as the excessive extension of temporary measures, but this a matter that falls within the jurisdiction of ordinary courts.

2. Adoption

In this matter, the Constitutional Court of Romania found shortcomings in law, inconsistent from this viewpoint with the relevant international instruments.

For example, that was the case of the Government Emergency Ordinance no.25/1997 on adoption, currently repealed. Thus, the Constitutional Court of Romania ascertained the unconstitutionality of the mentioned piece of legislation insofar it does not provide an obligation to take consent to adoption of any person or body who may be entitled in their place to exercise their parental rights in that respect, pursuant to Article 5 1 a) of the European Convention on the Adoption of Children, signed at Strasbourg on 24 April 1967, to which Romania adhered by Law no. 15/1993. The Court held in this respect that « *omission to stipulate, within the content of the legal provisions subject to review, this requirement expressly provided by the relevant texts of the Convention represents an "inconsistency", in the meaning of Article 20 (2) of the Constitution, between domestic law and a fundamental human rights treaty, in which case the constitutional text enshrines the priority of the international regulation*».

Subsequently, **Law no.272/2004 on the protection and promotion of child rights[15] and Law no.273/2004[16] on the adoption procedure introduced new rules to protect minors, as well as additional safeguards in the adoption procedure[17].**

The Constitutional Court was notified also in relation to the unconstitutionality of certain provisions of the new regulations. Thus, for example, the Court held that[18] omission to stipulate, within the legal provisions subject to review, the natural parents' consent **at the time when the adoptio**n **is granted**, requirement expressly regulated in the European Convention on the Adoption of Children, represents an inconsistency, in the meaning of Article 20 (2) of the Constitution, between the domestic law and a human rights treaty, in which case the constitutional text enshrined the priority of the international regulation.

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[13] Article 62 (2) of Law no. 272/2004 on the protection and promotion of child rights, published in the Official Gazette of Romania, Part I, no. 557 of 23 June 2004

[14] *Decision no. 360 of 2 May 2006, published in the Official Gazette of Romania, Part I, no. 465 of 30 May 2006*

[15] Published in the Official Gazette of Romania, Part I, no**. 557 of 23 June 2004**

[16] Republished in the Official Gazette of Romania, Part I, no**.259 of 19 April 2012**

[17] *ECHR judgments in cases against Romania, 1994-1999, Analysis, consequences, potentially responsible authorities, Universitară* Publishing House, vol. I, p.158

[18] Decision no. 369/2008, published in the Official Gazette of Romania, Part I, no. 238 of 27March 2008

According to the impugned regulations, the court may grant adoption based on the consent expressed upon initiation of the adoption procedure (therefore not at the time when it is granted).

In the case referred to the Court, the author had established filiation to the minor at a time between the initiation of the internal adoption procedure and the granting of the adoption by the court of first instance, without being able to give consent, circumstance determined by the provisions of Article 35 (2) i), challenged for unconstitutionality. Noting the fact that, in the Romanian legal system, "*adoption is equally a legal operation and a measure of protection of the child, i.e. a complex legal act, deemed valid if the substantive requirements are complied with, namely if the natural parents give their consent and if there are no impediments to the adoption, and it is, at the same time, a measure of protection resulting from the relevant international instruments to which Romania is a party*"[19], the Court held that the provisions of Article 35 (2) i) first sentence of Law no. 273/2004 are unconstitutional, being contrary to Article 20 of the Constitution in relation to Article 5 1 a) and Article 9 (1) of the European Convention on the Adoption of Children.

Currently, Article 48 (2) of Law no.273/2004, republished, as subsequently amended, which enumerates the documents that need to be enclosed to the Adoption Application (previously provided by the text that was found partially unconstitutional), stipulates that "*the irrevocable judgment opening the procedure for internal adoption of the child"* shall be enclosed to the Application*.* The current procedure includes safeguards in line with the relevant international instruments covering the situation where the parent was unable to give consent and enabling the latter to contest the adoption.

IV. Special Social Protection of Children

1. State allowance for children

The right to State allowance for children is covered by Article 49 (2) of the Constitution, according to which "*the State shall grant allowances for children, and aids for the care of ill or disabled children*".

Applying the relevant constitutional text, the Constitutional Court declared[20] as unconstitutional the legal provisions[21] that stipulated that the granting of the State allowance for children is conditional upon the attendance of one of the forms of education provided by law. In the respective case, the minor was attending the classes of a private school, and the Ministry of Education and Research did not approve the payment of the State allowance given that the respective education unit was not included in the records of the National Committee for Assessment and Accreditation of Pre-University Education. In this regard, the Court held that the constitutional rule enshrined in Chapter II on basic rights and freedoms "*does not provide and does not allow, in establishing the subjects entitled to State allowances, any conditions besides that the beneficiaries must be children. Enshrining the right of children to special protection, in the form of State allowances, granted without discrimination, corresponds to the general principles of the Romanian State, provided in Article 1 (2) of the Constitution, and to the provisions on the protection of children contained in the Universal Declaration of Human Rights, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in other covenants and treaties to which Romania is a party*".

[19] Decision no. 369/2008, published in the Official Gazette of Romania, Part I, no. 238 of 27 March 2008
[20] Decision no.277/2006, published in the Official Gazette of Romania, Part I, no.348 of 18 April 2006
[21] Article 1 (2) and Article 5 (1) of Law no.61/1993 on State allowance for children

2. Parental allowance

Compared to the monthly allowance, which represents a form of protection of the child and a right enshrined in Article 49 of the Constitution, the child allowance does not have the same legal regime.

In this regard, the Constitutional Court ruled through several decisions, stating that "*the right to parental allowance is not a constitutional right, but a measure of social protection legally established by the State in virtue of its role as social State, without being specifically mentioned in the Constitution. Such right is characterized by the fact that the legislator is free to choose, according to the State policy, the financial resources, the priority of aims pursued and the need to fulfil other constitutionally enshrined State duties, the measures deemed necessary to ensure a decent standard of living of its citizens, as well as to establish the conditions and limits thereof*"[22]"; "*parental allowance is a concrete measure of social protection and the legislator has the exclusive right to establish the granting thereof, notwithstanding the existence of the right itself*"[23]; *parental allowance is a social assistance minimal benefit, of universal nature, which is not subject to the contributory system, but it is a way to support the family or the persons who take in foster children or who adopt them, as to bring about discrimination issues if the amount is reduced for the second and/or the third child born from multiple pregnancies in the same family*.[24] Consequently, Parliament, based on Article 61 (1) of the Constitution, taking into account the socio-economic and demographic realities of the country, is the only entitled to decide whether it grants a different amount as monthly allowance also to children born from twin pregnancies.

Currently, pursuant to Article 5 of Government Emergency Ordinance no.111/2010 on parental leave and parental allowance[25], the level of monthly allowances set forth in the same normative act under Article 2 "*shall be increased by 1,2 IRS* (social reference indicator) *for each child born from twin, triplet and other multiple pregnancies, beginning with the second child born from such a pregnancy".*

However, the Court declared unconstitutional[26] the legal provisions stipulating that a single parental allowance shall be granted where within 2 years' time interval 2 children are successively born, the parental allowance period being adequately prolonged until the date when the second child attains the age of 2.[27] As grounds for its decision, the Court held that "*these provisions create an unjustified disparity between families with children born from twin, triplet and other multiple pregnancies, where the allowance is increased beginning with the second child, and families where, within 2 years' time interval, after the birth of a child, a second one is born, and the allowance for the first child ceases to be paid*". The discriminatory situation was created at the expense of both child and mother.

3. Parental leave

Lastly, we mention a decision[28] of the Constitutional Court of Romania indirectly related to the interests of the child. We refer to the decision of unconstitutionality of the provisions of Article 15 (1) of Law no.80/1995 on the Status of Military Personnel[29], granting parental leave only to women in active-duty military, excluding the other parent, also a military. The Court held that the impugned text must be analysed also in terms of equal legal treatment between men and women, with reference to the case-law of the European Court of Human Rights (Case of

[22] Decision no. 765/2011, published in the Official Gazette of Romania, Part I, no. 476 of 6 July 2011
[23] Decizia nr. 455/2011, publicată în Monitorul Oficial al României, Partea I, nr. 387 din 2 iunie 2011
[24] Decizia nr.171/2013, publicată în Monitorul Oficial al României, Partea I. nr.182 din 2 aprile 2013
[25] Published in the Official Gazette of Romania, Part I, no.830 of 10 December 2010
[26] Decision no.495/2012, published in the Official Gazette of Romania, Part I, no. 411 of 20 June 2012
[27] Article 6 (4) of Government Emergency Ordinance no.148/2005 on support of the family for child-raising
[28] Decision no.90/2005 , published in the Official Gazette of Romania, Part I, no.245 of 24 March 2005
[29] Published in the Official Gazette of Romania, Part I, no. 155 of 20 July 1995

Schuler-Zgraggen v. Switzerland, 1993), stating that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe; this means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention. As concerns the legal text subject to constitutional review, the reasons invoked by the legislator cannot be assessed as strong enough to justify, objectively and rationally, the differential treatment between men and women, active military personnel, upon granting parental leave. Both groups of people have the same professional status, which leads to the conclusion that the only justification for the differential treatment is based on the difference of sex.

Currently, Article 15 (2) of Law no.80/1995 on the Status of Military Personnel[30] provides that: "*Active duty military personnel, men and women, shall be entitled to parental leave and parental allowance until the child attains the age of 2 and, in case of disabled child, until the child attains the age of 7, as provided by the laws in force."*

V. Conclusions

In pursuing the best interests of the child, the role of the Constitutional Court of Romania is particularly important, both in terms of reception of relevant international instruments and case-law of the European Court of Human Rights and in terms of proper amendment of the Romanian laws.

Finally, referring to the case concerning the entitlement of men, in active-duty military, to parental leave and parental allowance until the child attains the age of 2, we recall that this legal issue was addressed in a question submitted not long ago by the liaison office of the Constitutional Court of Moldova, via the Venice forum. It was an opportunity for dialogue between constitutional courts, through their liaison officers, valuable material being gathered on that occasion and subsequently used as grounds for the decision of unconstitutionality delivered by the Constitutional Court of Moldova.

In light of the identical solutions reached by various constitutional courts, whilst examining the same legal issues, mediated also by pertinent dialogue, we deem appropriate to stress the contribution of constitutional courts, in general, as well as of the Venice Commission, as a body that supports the dialogue between these courts, in the realisation of basic rights according to the common standards at the level of the Council of Europe.

[30] Published in the Official Gazette of Romania, Part I, no. 155 of 20July 1995