

## THE PATERNITY SUIT IN THE NEW PROJECT OF THE TURKISH CIVIL CODE

Dr. Bülent KÖPRÜLÜ

Professor of Civil Law  
İstanbul University  
Law Faculty

Dr. Selim KANETİ

Professor of Civil Law  
İstanbul University  
Law Faculty

### I. INTRODUCTION.

The present Turkish Civil Code, has regulated the paternity suit, as a legal mean having the purpose to determine the father of the child born out of the wedlock (Turkish Civil Code 295). The Turkish Civil Code provides two kinds of paternity suit: the paternity suit with pecuniary effects, which does not create a legal filiation link between the father and the child; the paternity suit with personal effects which creates a legal filiation link between the father and the child.

This distinction between the two kinds of the paternity suit has been criticized. In fact, the Federal Law dated June 25, 1976 which has entered into force on January 1, 1978 has abolished in Switzerland the paternity suit with pecuniary effects, keeping one kind of paternity suit, the paternity suit with personal effects.

The Turkish Civil Code Project of 1984, following the Swiss precedent, has suppressed the paternity suit with pecuniary effects, preserving the paternity suit with personal effects which aims the establishment of a legal filiation link between the father and child born out of the wedlock.

In our paper, we shall try first to remind the general frame of the paternity suit in the present Code, than to stress out the amendments contemplated by the new project of the Turkish Civil Code.

## **II. The general frame of the paternity suit in the present Civil Code.**

### **1. The parties of the suit.**

The right to open the paternity suit has been recognized to the mother and to the child (Turkish Civil Code 295). Each of them can open the said lawsuit independently from the other. The two rights of suit are independent from each other. In case the child is deceased, the right of suit is transmitted to his heirs. The child uses his right of suit through a curator to be commissioned by the judge of peace, as soon as he has been informed of the birth of the child out of the wedlock. This curator can be appointed from the moment of the conception; it is why this curator is called a «belly curator». The task of the curator is to initiate the lawsuit on the name of the child within the legal time limit.

The defendant in the paternity suit, is the father of the child or his heirs (Turkish Civil Code 295).

### **2. Time limit for the opening of the suit.**

Under article 296 of the Turkish Civil Code, the paternity lawsuit must be opened, before the birth of the child or within one year starting from the date of birth. If this time limit is not respected, the right to open a lawsuit is forfeited.

The lawsuit of the child has an important particularity in regard of the time limit. In its decision of the unification of the jurisprudence dated May 2, 1960 no. 5/8, the Court of Cassation has ruled that the delay of forfeiture runs from the date of the appointment of the special curator. The Court

of Cassation has also decided that in case the defendant has caused the elapse of the forfeiture delay by his fraudulent conduct, a reasonable supplementary delay must be granted to the plaintiff according to the rule of good faith, as expressed by the article 2 of the Turkish Civil Code<sup>1</sup>.

In case the mother was married at the time of the conception with another man, the paternity suit can be opened if the husband rejects the paternity of the child born to his wife. In such case the forfeiture delay starts from the date at which the rejection decision become conclusive (Turkish Civil Code 303).

### 3. The proof of the paternity.

Under the understanding of the law, the paternity cannot be proved through a direct evidence. It is why article 301 of the Turkish Civil Code has provided the «presumption of paternity». Under this presumption, if the defendant has had a sexual relation with the mother of the child during the critical period, i.e. the period starting three hundred days before the birth and ending one hundred and eighty days before the same date, he is considered as being the father of the child.

The defendant can reverse this presumption by proving that the birth is not linked to his sexual relation. In case, the plaintiff proves with scientific evidence that he cannot be the father of the child, he can avoid the effects of the presumption. The defendant can also reverse the presumption by proving that serious doubts exist in regard of his paternity. For example, the defendant can defend himself by the *exceptio plurium*, i.e. by proving that the mother has had sexual relation with many men, during the critical period.

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1) Yargıtay Hukuk Genel Kurulu, 12.12.1980, 2 - 2518/2762; Yargıtay Hukuk Genel Kurulunun On Yıllık Emsal Kararları, 1975 - 1984, Ankara 1986, p. 384/385.

The plaintiff can prove also the paternity directly without referring to the presumption of the paternity, by employing scientific methods, such as the serostatistical or the anthropobiologic method. These methods can establish the paternity with the outmost certainty that can be considered as conclusive in regard of the legal application. If the paternity is proved by such evidence, it cannot be reversed by the defendant.

Article 302 of the Turkish Civil Code states that the suit of paternity is rejected in case the woman was leading a licentious life at the critical period. The leading of a licentious life is different from the *exceptio plurium*. The *exceptio plurium* does not involve necessarily an irregular life. If the defendant can prove that the woman has been leading a licentious life, the presumption of paternity is reversed. It is discussed if such proof of licentious life could also provoke the rejection of the suit, in case scientific evidence of the paternity is presented to the court. The Swiss Federal Court has ruled that if the proof of the paternity has been brought through scientific evidence, the defence of irregular life cannot affect the paternity of the defendant. This defence does not aim to penalize the mother and/or the child, but provides the rejection of the action, as it is impossible to determine the father. In case the paternity is proved by scientific methods, like the serostatistical or the anthropobiological method, almost certainly, than the defence of irregular life shall not apply<sup>2</sup>.

#### 4. The effects of the paternity suit.

The paternity suit involves three different objects: the pecuniary prestations in favor the mother, the pecuniary prestations in favor of the child, the ruling of the paternity with its personal effects (Turkish Civil Code 297, 304/305, 306/307, 310). The last two ones of these suits are alternative.

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2) BGE. 89 II 273, 90 II 269.

Both actions cannot be opened; as the father which has been established by the court with personal effects is under the duty to provide full support to his child, it is not necessary to condemn the father to pecuniary prestations in favor of the child. If the lawsuit aims the personal effects and if the special conditions related to such paternity suits, are not fulfilled, than it is transformed to a lawsuit with pecuniary effects, if the paternity can be proved.

The suits relating to pecuniary effects comprise material damages to be paid to the woman, immaterial damages to be compensated by a certain sum of money in case one of the special conditions is fulfilled, the payment of alimonies to the child. However they cannot create a link of legal filiation between the father and the child.

Article 310 of the Turkish Civil Code requests the fulfillment of one of the following conditions in order to condemn the defendant to the paternity with personal effects:

- Promise of marriage of the defendant to the mother of the child;
- Sexual relation which constitutes a crime.
- Sexual relation obtained through the abuse of the authority of the man on the mother of the child.

Article 310, II of the Turkish Civil Code contained another negative condition. Under this paragraph it was not possible for the judge to declare the paternity with personal effects if the father was married at the time of the sexual relation. The Constitutional Court has annulled the paragraph containing this condition on the basis of the legal equality principle and the necessity of the protection of the child, by its ruling dated 21.5.1981, no. 62/73<sup>3</sup>.

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3) Anayasa Mahkemesi Kararlar Dergisi, sayı 19. Ankara 1982, s. 102 vd.

The declaration of the paternity with its personal effects creates a link of legal filiation between the child and the father. The child has the name of the father and earns his citizenship. The decision of paternity with personal effects is retroactive, starting its consequences from the date of birth even from the date of the conception.

### **III. The characteristics of the paternity suit in the new Project of the Turkish Civil Code.**

The most important characteristic of the paternity suit is the suppression of the two kinds of this suit. The Project provides only one paternity suit, which can be opened by the mother and by the child independently (article 287 of the Project). This suit aims the establishment of the legal filiation link between the child and the father. Therefore the suit provided by the project is almost identical with the paternity suit with personal effects of the present code.

The presumption of the paternity has been kept, as it is in the present law (article 288 of the Project). The presumption shall apply also if it is proved that the defendant has had effectively sexual relation with the mother of the child at the time of conception, even if it does not correspond to the computation of the critical period. The defendant can reverse the presumption by proving the impossibility of being the father of the child or the outweighing probability for a third person to be the father.

There is no reference in the Project to the scientific evidence of the paternity. However, this evidence accepted by the jurisprudence and the doctrine is also applicable under the Project. There is also no reference to the licentious life of the mother, as a defense of the defendant and to the special conditions required by the present code for the paternity with personal effects. It can be concluded that the proof of the paternity is sufficient for the declaration of the paternity

with personal effects. This proof can be brought by reference to the paternity presumption or by scientific evidence.

The time limit of one year starting from the date of birth has been kept. However, the Project has expressly adopted the solutions of the jurisprudence in connection with the child to which a curator has not been appointed till the date of the birth. The period of one year is also extended on the basis of legitimate grounds. However, the suit must be opened in this case within one month starting from the date at which the legitimate ground ceases to exist.

The article 291 of the Project has introduced some rules related to the procedure. In the paternity suit, the judge takes into account the facts *ex officio* and appreciates the evidences without restraint. The suit is notified also to the Public Prosecutor, as it is related to the public order. The parties and the third parties, must be cooperative in regard of the examinations to be effected in order to determine the filiation, in case there is no danger for their health.

The mother can request material damages in order to compensate her expenses as provided by article 292 of the Project. There is no reference in the Project to the immaterial damages of the mother. We think that this is an omission which must be rectified.

The Project regulates in article 293, the provisional measures to be taken in favor of the child, at the opening of the suit. It states also in article 294 that the decision of the judge must specify the alimonies to be paid to the child by the father.

The effect of the declaration of the paternity through the paternity suit is to create a legal link of filiation between the father and the child born out of the wedlock, identical with the filiation link of the child born within the wedlock.

The Project has abolished the distinction between the child born out of the wedlock and the child born in the wedlock.

However, a difference remains between the child born in the wedlock and the child born out of the wedlock. The child born within the wedlock is automatically under the parental power of his father and mother. Under article 295 of the Project the judge can grant the parental powers of the child born out of the wedlock, to the father, to the mother or appoint a guardian. The judge decides this point to the best of the interests of the child. The personal relations between the child and the father and/or mother to whom the child has not been entrusted, are regulated by the judge, as well the rights of the father and the mother on the estate of the child.

#### **IV. Conclusion.**

The Project has amended the Code in regard of the paternity suit in a drastic and radical way. The amendments reflect a humanistic approach, the changes occurred in the social order and take into account the decision of the Constitutional Court based on the principle of legal equality. We are on the opinion that these radical changes have to be approved.