

## **HISTORICAL REVIEW OF THE REGULATION OF THE DESCENT FROM THE FATHER UNDER THE BULGARIAN FAMILY LAW (FROM 1949 UNTIL DECEMBER 2020)**

In Bulgarian family law several relatively independent periods can be differentiated in the development of the regulation of the descent from the father.

Alongside with the special legal regulation, the descent from the father is also regulated by a number of more recent acts – mostly of the *acquis communautaire*, as well as from the numerous legal and secondary legal internal sources.

After the adoption of Bulgaria's second constitution – the Constitution of the People's Republic of Bulgaria from 1947 (abrogated), there have been several relatively independent periods in the development of the regulation of the descent from the father that could be differentiated in Bulgarian family law: first period – from 1949 until 1968, second – from 1968 until 2009, with two sub-periods (from 22 May 1968 until 1 July 1985, and from 1 July 1985 until 1 October 2009), and third one – from 1 October 2009 until December 2020.

### **First period – from 1949 until 1968**

Typical for that period is that the foundations of the codification of Bulgarian Family Law<sup>1</sup> are laid for the first time in the development of the legal regulation, and, hence, the questions about the descent as well.

The adoption of the *Persons and Family Act*<sup>2</sup> revoked the Persons Act from 1907, the Illegitimate Children and Adoption Act, the Alimony Ordinance-Act, the Guardianship Act and the Marriage Ordinance-Act. Thus, since 1949, the questions about the descent have been resolved entirely according to the regulations of the Persons and Family Act (PFA).

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<sup>1</sup>The Persons and Family Act sets the beginning of the codification of the Bulgarian Family Law, nevertheless, the first Family Code of the Republic of Bulgaria from 1968 was adopted only nineteen years later (author's note).

<sup>2</sup>Promulgated in the State Gazette, issue 182 of 9 September 1949, in force as of 10 September 1949, with latest amendment in the State Gazette, issue 120 of 29 December 2002.

That was the first comprehensive, systematized legal act in the field of Family Law, which has been very important for the institution of the descent.

More important for the descent among the amendments of the PFA are those adopted with the Act for Amendment of the PFA of 8 September 1953. This act broadens the application of the presumption for paternity. Acknowledged is the right of establishing and challenging the descent both from the mother, and from the father of the child. The novelty here is that the child was also able to challenge the presumption for paternity of his/her mother's husband, which right was dropped out in the family codes for years on – until 1 October 2009 with the enforcement of the Family Code of 2009. And it was recognized again only there.

The codification of Bulgarian law started with the PFA, and was further elaborated in the three codes following that act: the Family Code of 1968 (revoked), the Family Code of 1985 (revoked), and the currently operating Family Code of 2009. Within the matter of the descent, the legal regulation is generally settled in one and the same way, however with some exceptions<sup>3</sup>.

### **Second period – from 1968 until 2009**

#### *First sub-period – from 22 May 1968 until 1 July 1985*

This sub-period starts with the enforcement of the Family Code of 1968 (revoked) on 22 May 1968, whereby all the texts concerning the regulation of the descent are repealed, as well as the entire family regulation under Section II of the PFA.

The Family Code (FC) 1968 abandons the restriction in the presumption for paternity, envisaged in Art. 63, par. 2 (revoked) of the PFA through the possibility for the husband to challenge the paternity by filing a claim for that with no obligation to prove any other circumstances, when the child was born prior to the expiry of 180 days as of concluding the marriage<sup>4</sup>. The burden of proof is distributed in respect to who the plaintiff

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<sup>3</sup>For example, in the currently operating Family Code, the third interested parties could not challenge the recognition until December 2020, as it was possible under Art. 38 of the FC of 1985, the child may challenge the presumption for paternity pursuant to Art. 62, par. 4 of the FC, while such a possibility was not envisaged in the previous family codes, etc. (author's note).

<sup>4</sup> It should be pointed out that this change occurred at an earlier stage, prior to the adoption of the FC of 1968, with the revocation of Art. 63 of the PFA, promulgated in the State Gazette, issue 89 of 1953. However, in its initial edition from 1949, the burden of proof under the revoked text from the PFA fell on the opposite party, which had to prove that the husband was the father. An exception from that right of claim of the husband was envisaged

is. It falls upon the mother's husband, when he has filed the claim, where he has to prove that the child could not have been conceived by him, while observing the preclusive period of time „until the expiry of one year as of learning about the childbirth“ (Art. 32, par. 1 of the FC of 1968). Or upon the mother, when she has filed the claim, where, in such a case, she has to prove that the child could not have been conceived by her husband, while observing the time period „until the expiry of one year as of the childbirth“ (Art. 32, par. 2 of the FC of 1968). It should be pointed out that the mother did not have such a right before that regulation. In any case, however, the prohibition to challenge the paternity is valid when the mother has been artificially inseminated with her husband's consent (Art. 32, par. 3 of the FC of 1968).

The obligatory judicial practice for the strictly personal nature of filing the claim has also remained permanent, as well as the restricted circle of the legitimate participants in the process of challenging the presumption for paternity<sup>5</sup>.

Concerning the deadlines for submitting the claim challenging the paternity: pursuant to the FC of 1968, the deadline was extended to one year as of learning about the childbirth, while under the revoked Art. 64 of the PFA, the deadline for filing the claim is no later than 6 months since the husband learned about the childbirth.

Furthermore, in case of the husband's death, the FC of 1968 did not reproduce the possibility for his heirs to file the claim for challenging the paternity, however, they could further pursue the lawsuit under the claim submitted by their legator. And when the father or the mother has died, the claim for establishing or challenging the descent could be filed against their heirs (Art. 41, par. 2 of the FC of 1968). Unlike the revoked back in 1953 Art. 64 of the PFA, whereby, in case of the husband's death, prior to the expiry of the 6-month period as of learning about the childbirth, the claim

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for the cases when the husband knew about the pregnancy of his wife when concluding the marriage, or if he had declared the child as his own in the birth certificate. The husband also had the right of claim for challenging the paternity when the child was born 180 days as of concluding the marriage, by establishing that he could not have been the father of the child (author's note).

<sup>5</sup> See Interpretative Decision No 46 of 8 April 1960 of the General Meeting of the Civil College of the Supreme Court of Cassation with rapporteur Dimitar Zlatinov. According to it, the claim for challenging the paternity *“is inherent only to those persons, who are acknowledged the right by the law to file such a claim, and it shall be taken into consideration as long as any of those persons makes use of that right and files a claim“*, as well as *“From its nature it should be developed only between the person filing the claim and the defendant legitimized thereon. Therefore, no third parties may be involved or may intervene in such court proceedings in order to help one or the other party“*.

could be submitted by his heirs, but no later than 6 months after his death, or after the childbirth, if that took place later.

The FC of 1968 did not preserve either the initial edition of Art. 65 of the PFA, revoked back in 1953, according to which, the child born during the marriage, or no later than 300 days after its termination, could file a claim for challenging the paternity up to three years as of coming of age, „*when the mother's husband could not have been his father*“. This possibility was restored only with the adoption of the FC of 2009 (Art. 62, par. 4), although within a shorter time period: up to one year as of coming of age, and the Interpretative Decision No 2/2014 of the General Meeting of the Civil College of the Supreme Court of Cassation determined the initial point of time for filing the claim – as of the time the child has come of age<sup>6</sup>.

The enforcement of the FC of 1968 (repealed) led to losing the possibility for the unlimited in time filing of the claim for paternity by the child, which right the child had before that for establishing his/her descent of the marriage – under Art. 66 (repealed) from the PFA, or for establishing his/her descent out of the marriage – under Art. 71 (repealed) from the PFA. There was a preclusive time period introduced instead – until the expiry of three years as of coming of age (Art. 39, sentence 1, hypothesis 1 of the FC of 1968), where the mother was summoned as a party under both legal acts.

Under Art. 71, par. 2 (repealed in 1953) of the PFA, the claim for establishing paternity out of the marriage could be also filed by the mother „*until the expiry of three years after the birth*“, where the decision under such a claim could not be opposed to the child, and under Art. 39, sentence 1, hypothesis 2 of the FC of 1968 (repealed) – until the expiry of three years after the birth, while there is no restriction on the effect of the decision on the claim.

Art. 40 of the Code defines also the obstacles for establishing the descent: the currently determined descent, established with a birth certificate, with the assumption under Art. 31 or with recognition. It is acknowledged that both claims can be joined together. Whereas Art. 68 (repealed) of the PFA did not elaborate further the restriction for recognizing a child, whose descent has been established with the act of birth<sup>7</sup>.

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<sup>6</sup> Unlike the claim under Art. 65 (repealed) from the PFA, where the claim could have been filed also before the child had come of age – by its legal representative (the mother or the guardian), while the child was still under-age or by the under-age child with the consent of his/her legal representative (author's note).

<sup>7</sup> Since recognition as a general method for establishing the descent is not subject of the present study, there are no rules compared here, regulating the issues of recognition. For

Pursuant to Art. 61, par. 1 (repealed) of the PFA, the descent by blood is stated as a prerequisite for the mutual rights and obligations of the children and the parents. Furthermore, the children born out of wedlock, whose descent has been established, are given the same rights as those born of marriage (Art. 61, par. 2 of the PFA). This principle is also set in our third constitution – the Constitution of the People’s Republic of Bulgaria of 1971 (revoked)<sup>8</sup>. It proclaimed the principles of citizens’ equality (under Art. 35, par. 1), of not allowing any privileges or restrictions of the rights on the basis of the descent (Art. 35, par. 2), of safeguarding marriage and family by the state (Art. 38, par. 1), of the equality of the rights of the children born out of wedlock and born of marriage (Art. 38, par. 4).

In the FC of 1968 (repealed), the descent is not anymore differentiated into marital and extramarital one. The children with marital and extramarital descent are equal in searching and challenging the descent from the father. Preclusive deadlines are introduced for seeking and impugning the paternity, whereby setting the beginning of applying the principle of stability of the descent. Moreover, there is prohibition introduced for suspending and terminating the periods of time, which are applied ex officio (Art. 42 of the FC of 1968).

The Code introduces some new points in the regulation of the descent with several norms. Thus, Art. 31, par. 2 further elaborates the regulation of the presumption for the paternity of the second husband: *„If the child was born before the expiry of 300 days as of the termination of the marriage, but after the mother has concluded a new marriage, the father of the child is considered to be the mother’s husband from the new marriage“*. Pursuant to par. 3 of Art. 31, it is envisaged that in case of declared absence or death of the husband, the assumptions for the paternity are not applied *„when the child was born after the expiry of three hundred days as of the date of the last notice – in case of declared absence of the husband, or from the date of the presumed death – in case of declared death“*.

In case of sustaining the challenging of the paternity by the second husband, *„the father of the child is considered to be the first husband“*, who *„may file a claim for challenging the paternity until the expiry of one year as of getting informed about the decision, but no later than three years as of its entering into force“* (Art. 33, par. 1 of the FC of 1968).

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more details, see and compare Art. 35, 36 and 37 of the FC of 1968 (repealed) and Art. 69 (repealed) and Art. 70 (repealed) of the PFA (author’s note).

<sup>8</sup> It was also called the *Zhivkov’s Constitution*. Promulgated in the State Gazette, issue 39 of 18 May 1971, in force as of 22 May 1971, revoked with State Gazette, issue 56 of 13 July 1991, in force as of 13 July 1991.

The Code also prohibits the challenging of the paternity, „*when the mother was artificially inseminated with the consent of her husband*“ (Art. 32, par. 3).

Challenging the paternity in any case envisages the participation of the mother, the child and the husband, while challenging the paternity by the second husband – of the first husband as well (Art. 33, par. 2 of the FC of 1968).

*Second sub-period – from 1 July 1985 until 1 October 2009*

This sub-period starts with entering into force of the Family Code of 1985 (on 1 July 1985) and lasts until entering into force of the currently operating Family Code of 2009 (on 1 October 2009).

Typical for the FC of 1985 is that it preserves and almost completely reproduces the legal regulation of the descent, including the descent from the father.

Some norms concerning the descent from the father have been further elaborated. Thus, Art. 33, par. 4 of the FC of 1985<sup>9</sup> introduces some additional requirements for recognizing paternity by presumption, when the mother has given birth to a child under the conditions of assisted reproduction, respectively – so that the prohibition for challenging the paternity should be applicable in this case. The husband's consent should already be provided in writing before the manager of the respective establishment. Furthermore, the possibilities for artificial insemination should also be explicitly stated: the mother should have been artificially inseminated or should have given birth to a child, conceived with genetic material from another woman.

Another important aspect is that it preserved the regulation for establishing the paternity through the claim under Art. 69, par. 2, sentence 2 (repealed) of the PFA – for the father who has made the recognition, in case the recognition is challenged<sup>10</sup>, which claim was similarly regulated later in Art. 35, par. 2 of the FC of 1968 (repealed), in Art. 37, par. 2 of the FC of 1985 (repealed), and, respectively – in Art. 66, par. 2 of the FC of 2009.

Concerning the claim for establishing paternity, regulated consecutively in Art. 71 (repealed) of the PFA, Art. 39 of the FC of 1968 (repealed), Art. 41 of the FC of 1985 (repealed) and later set in Art. 69 of the FC of 2009 – only the PFA did not restrict its submission with a time

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<sup>9</sup> Compare with Art. 32, par. 3 of the FC of 1968.

<sup>10</sup> „*Within a period of three months as of the notification the parent or his/her heirs may file a claim for establishing the paternity or maternity*“.

period. This time period is preclusive in the three codes and is restricted to three years after the birth, when it is submitted by the mother, and to three years as of coming of age, when it is submitted by the child. The PFA, as well as the three codes grant the right to the child and to the mother to file a claim for establishing the paternity.

Challenging the recognition also provides the possibility to submit a claim for establishing the paternity. This possibility was determined over the years also by the right of the third interested parties, who were acknowledged their right to challenge the recognition: under Art. 70 (repealed) of the PFA – within a period of one year as of learning about the recognition, by everyone interested; under Art. 36 of the FC of 1968 (repealed) – also within a period of one year as of learning about the recognition, by any person, who has a legal interest; under Art. 38 of the FC of 1985 (repealed) – within the same time period by any person, who has a legal interest, as well as by the Social Assistance Agency, and by the public prosecutor. Only the FC of 2009 does not allow the possibility for the third parties with a legal interest to challenge the recognition, whereby, however, restricting the right of the biological father to establish his paternity, in view of the prohibition of Art. 71 of the same Code.

During that period of development of the legal regulation of the descent was adopted also the fourth consecutive constitution – the Constitution of the Republic of Bulgaria of 1991, Art. 6 of which reproduces permanently the principle of equality of the rights of the children born in and out of marriage (par. 3) and the other principles of the Family Law for the protection of the family and the children.

### **Third period – from 1 October 2009 until December 2020**

The beginning of this period in the development of the regulation of the descent is set by the currently operating Family Code with its enforcement on 1 October 2009. It has already been applied for more than ten years and there are almost no amendments or supplements in the matter of the descent, and more specifically, in the descent from the father, except for the recognition<sup>11</sup>, there were almost no amendments or supplements until December 2020 when the lawmaker introduced new changes in the regulation, which are subject of a separate research. Another major change is the introduction of a possibility for the child to challenge the presumption for paternity of the mother's husband, recognized by force of the marriage. With the previous two family codes (of 1968 and of 1985), the child did not have the right to challenge the presumption for paternity.

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<sup>11</sup> See Art. 65 and 66 of the FC of 2009.

And although this regulation is not alien within the development of our Family Law (compare Art. 62, par. 4 of the FC of 2009 with Art. 65 of the PFA), it could be claimed that it has been cautiously revived only 56 years after the revocation of Art. 65 (repealed) of the PFA<sup>12</sup>.

On the one hand, this sustainability in the legislation is a result of experience accumulated over decades, which has proven the efficiency of that regulation. On the other hand, there is certain lagging behind in the legislation to be noted with some contemporary hypotheses, which should be taken into account and should be regulated by introducing new norms, and amending and supplementing the already adopted ones<sup>13</sup>.

Alongside with the special legal regulation, the descent from the father is also regulated by a number of more recent acts – mostly of the *acquis communautaire*, as well as from the numerous legal and secondary legal internal sources.

Very important for the descent from the father is also the judicial practice, including the obligatory one, as well as the decisions of the European Court of Human Rights under cases against the Republic of Bulgaria.

And the alignment of the Bulgarian legislation with the law of the European Union, and of the member-states of the Union, is committing to carry out research and analysis of the sources from other countries and legal systems, as well as from the foreign judicial practice, requiring also careful application of the borrowed norms in view of improving the legal regulation of the issues related to the descent from the father.

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<sup>12</sup> Repealed – The News Journal, issue 89 of 1953.

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