



Corte costituzionale



## **JUDGMENT NO. 266 OF 2006**

*Annibale MARINI, President*

*Alfio FINOCCHIARO, Author of the Judgment*

## JUDGMENT No. 266 YEAR 2006

**In this case the Court considered two references from lower courts in cases involving a disclaimer of paternity, in relation to a provision of the Civil Code, as interpreted by the Court of Cassation, which stipulated that the presumed father of a child may apply to a court requesting a genetic or blood test only when the question of adultery during the relevant period has been established as a preliminary and self-standing question. It was argued that this imposed an unreasonable burden, since adultery was particularly difficult to prove as a preliminary matter, especially if a significant amount of time has passed and witness testimony is no longer available. The state authorities intervened in favour of the provision, arguing that genetic and/or blood test evidence should not be ordered on “a mere suspicion of unfaithfulness”. The Court accepted the application, holding that both advances in the state of medical science as well as the practical difficulties in providing evidence of adultery were relevant considerations, accordingly striking down the provision insofar as challenged.**

### THE CONSTITUTIONAL COURT

composed of: President: Annibale MARINI; Judges: Franco BILE, Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Romano VACCARELLA, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO,  
gives the following

### JUDGMENT

in proceedings concerning the constitutionality of Article 235(1)(3) of the Civil Code, commenced pursuant to the referral orders of 5 June 2004 and of 28 October 2004, respectively of the Court of Cassation and the *Tribunale di Rovigo*, and of Article 235 of the Civil Code, commenced pursuant to the referral order of 30 March 2005 of the Venice Court of Appeal, orders respectively registered as Nos. 737 in the Register of Orders 2004, and 203 and 327 in the Register of Orders 2005, and published in the

*Official Journal of the Republic* No. 39, first special series 2004 and Nos. 16 and 26, first special series 2005.

*Considering* the entry of appearance by T.S., as well as the intervention by the President of the Council of Ministers;

*having heard* in the public hearing of 16 May 2006 and in chambers on 17 May 2006 the Judge Rapporteur Alfio Finocchiaro;

*having heard* Giancarlo Pezzano, barrister, for T.S. and the *Avvocato dello Stato* Gabriella Palmieri for the President of the Council of Ministers.

#### *The facts of the case*

1. - The Court of Cassation, 1<sup>st</sup> Civil Section, by the referral order issued on 5 June 2004 (order No. 737 of 2004) in appeal proceedings against the judgment of the Rome Court of Appeal which had upheld the judgment of the *Tribunale di Roma* rejecting the application for disclaimer of paternity under the terms of Article 235 of the Civil Code – finding that the trial court had correctly found that the evidence brought by witnesses (which aimed to establish a range of night-time liaisons of the appellant's wife, who worked as an “escort for professionals”, with various men in hotel rooms) was not capable of establishing that the wife of the appellant had committed adultery during the period in which the child was conceived, and that the existence of relations at other times could not constitute evidence for claims of adultery during the said period, not even for the purposes of the examination of blood tests, placing on the plaintiff the burden of providing certain proof of actual adultery – raised, pursuant to an application by the appellant, the question of the constitutional legitimacy of Article 235(1)(3) of the Civil Code, “insofar as it allows the husband to prove that the child has genetic characteristics or belongs to a blood group incompatible with that of the presumed father only if the mother committed adultery during the period in which it was conceived”.

The referring court argues that the question is relevant since, in the proceedings before the lower court, the appellant complained that the blood tests which he had requested had not been carried out as the trial court had found that it was not admissible as a supplement to the otherwise insufficient evidence of his wife's adultery. This exclusion was found to be correct by the referring court, as it is based on a precise interpretation

of Article 235(1)(3) of the Civil Code, and is consistent with the case law of the Court of Cassation insofar as, under the terms of the above provision, the examination into the existence of adultery has a preliminary status compared to that concerning the existence or not of a parent-child relationship; this means that even where genetic or blood test evidence is collected at the same time as the evidence of adultery (which moreover, pursuant to Article 235 as amended by the family law reform, not only has the same status as other forms of evidence, but may, as for other preliminary measures or inquiry, be requested by the parties, which need not limit themselves to applications inviting the court to exercise its powers *ex officio*), it may be examined only subject to the demonstration through evidence of adultery, and for the different purpose of establishing that the claim is well-founded on the merits.

As regards the non-manifest groundlessness of the question of constitutionality raised by the appellant – who averred a breach of Articles 3, 24 and 30 of the Constitution by Article 235(1)(3) of the Civil Code, insofar as it permitted actions for disclaimer of paternity exclusively in the limited number of cases provided for therein – the referring court dismissed it with reference to Article 30 of the Constitution and to Article 3 of the Constitution concerning the claim of unequal treatment compared to challenges to the recognition of natural children pursuant to Article 263 of the Civil Code on the grounds that it was substantively inaccurate – which permits the plaintiff to submit any form of evidence – since it involves a situation objectively different from that before the court and in which the requirement to protect legitimate children prevails.

On the other hand, the court finds that the issue raised in connection with Article 3 of the Constitution, concerning the claim of irrationality, and Article 24(2) of the Constitution is not manifestly groundless.

On this matter, the court points out that the provisions which render the exercise of the right to mount a defence extremely difficult may entail the violation of the principle contained in Article 24 of the Constitution. Moreover, even though the assessment of the difficulty in exercising this right cannot take into consideration the particular facts of individual cases, it cannot nevertheless entirely overlook the real nature of society. The referring court finds that the lifestyle changes which have occurred in Italian society have also affected marital relations, which have changed, amongst other reasons, since female employment is more widespread and greater flexibility is required

of workers, as well as the distance of their homes from the workplace. In addition, it is now commonplace for married couples to pass part of their free time separately, including holiday periods. Against this background, the evidence of adultery by the wife – which may consist even in one single act of infidelity, resulting from a casual relationship – may be extremely difficult.

On the other hand, it is doubtful whether a legislative provision may still be considered reasonable where it requires prior evidence of adultery by the wife in actions for disclaimer of paternity, despite scientific progress which makes it possible to exclude paternity with certainty (which constitutes the ultimate goal of the action in question) through technical examinations capable of providing results unanimously recognised as completely reliable – thereby obviating the need for a demonstration of adultery.

Having emphasised the irrelevance of adultery in itself for the purposes of the disclaimer of paternity, the Court of Cassation finds that any other constitutionally informed interpretation of Article 235(1)(3) – which regards adultery as being proven indirectly through the exclusion of paternity in the light of the results of genetic or blood test evidence – could not have been intended by Parliament, it being clear also in the parliamentary *travaux préparatoires* of the family law reform that disclaimers of paternity were not to be permitted solely on the basis of technical findings.

2. - The private party in proceedings before the lower court entered an appearance before this Court, arguing that the contested provision should be declared unconstitutional on the basis of arguments materially identical to those set out in the referral order.

3. - By order issued on 28 October 2004 (order No. 203 of 2005) during the course of proceedings commenced by an individual against his parents, *in absentia*, for disclaimer of paternity, the *Tribunale di Rovigo* raised, with reference to Articles 3 and 24 of the Constitution, the question of the constitutionality of Article 235(1)(3) of the Civil Code, insofar as it allows the husband to prove that the child has genetic characteristics or belongs to a blood group incompatible with that of the presumed father only if the mother committed adultery during the period in which it was conceived.

Having found that the outcome of the testimony heard appeared at the very least doubtful, whilst on the other hand the results of the genetic tests excluding the paternity of the defendant were certain, the lower court – to which the case had been remitted

following the hearing of witness testimony of the mother's adultery, along with genetic evidence and examinations of blood tests – found that the claim could not be allowed on the basis of this certain evidence because, according to the consolidated case law of the Court of Cassation, Article 235(1)(3) of the Civil Code is to be interpreted as requiring that adultery be proven as a preliminary and self-standing matter in order for genetic and blood test evidence to be considered.

According to the referring court however, where the above provision is interpreted in this manner, it breaches Articles 3 and 24 of the Constitution, with reference to the principle of reasonableness and the right to a fair hearing. On this point, the referral order invokes the arguments underlying the referral of a similar question by the Court of Cassation (order No. 737 of 2004), adding the argument, concerning the particular case before it, that whilst proving adultery is already difficult for the husband, it is even more difficult for the child, who is moreover made aware of the mother's adultery years later, when witness testimony would be practically impossible to gather.

4. - During the course of proceedings presumably for disclaimer of paternity (no indications were provided on this point by the court) in which the plaintiff had not submitted evidence of the adultery of the wife, the Venice Court of Appeal raised, by order of 30 March 2005 (order No. 327 of 2005), the question of the constitutionality of Article 235 of the Civil Code insofar as it requires, as a prerequisite for the said action, the prior establishment of adultery, with reference to Articles 3, 11 (sic.: Article 111) and 24 of the Constitution.

It is pointed out in the referral order that, given scientific progress which makes it possible to exclude paternity directly and with certainty, thereby obviating the need for a demonstration of adultery, it does not appear reasonable to require the prior establishment of the wife's adultery, and moreover that adultery in itself, understood as a violation of the duty of loyalty towards the spouse, is irrelevant for the purposes of the disclaimer of paternity; accordingly, a preliminary requirement for the wife's adultery to be established would in the case before the court preclude the exercise of the appellant's right to a defence and a fair trial, even though he had in due time requested that evidence be gathered from blood tests.

5. - In three distinct but materially identical writs, the President of the Council of Ministers intervened in proceedings before this court, represented and advised by the *Avvocatura Generale dello Stato*, arguing that the question was manifestly groundless.

The state authorities argued that, in accordance with Article 235 of the Civil Code, as also interpreted in the consolidated case law of the Court of Cassation, since inquiries into the existence of adultery within the context of actions for disclaimer of paternity have preliminary status, they must be carried out in a free-standing manner. It is therefore not possible to use genetic and/or blood test evidence to that end, which cannot be transformed into an avenue to be pursued or experimented simply on the basis of a mere suspicion of unfaithfulness.

The *Avvocatura Generale dello Stato* also referred to the constitutional case law addressing the compatibility with the Constitution of the provisions governing this matter with reference exclusively to the time limits for bringing an action and not to the coherence of its prerequisites, the specification of which is a matter for Parliament. The assertions of the Constitutional Court aimed at overcoming the priority assigned under the legislation in force prior to the family law reform to the interests of legitimate offspring over the truth should be interpreted against this background. Moreover, a shift towards the latter can never take on an absolute value (see judgment No. 170 of 1999), and will have to be tempered by the interests of the minor, and accordingly the requirement not to cause upheavals in long-standing family relations.

6. - Shortly before the hearing, the state authorities submitted three distinct but practically identical written statements, adding that, under the current state of the art in scientific studies, blood tests and/or genetic evidence make it possible to exclude paternity only in cases of an absolute incompatibility between blood groups and DNA, whilst the judgment cannot be expressed with similar certainty in the event of compatibility.

The intervener asserts that the Constitution does not attribute any pre-eminent or absolute value to biological as opposed to legal truth, but that in providing in Article 30 that “the law shall set out the rules and limits governing the establishment of paternity”, charged Parliament with the duty of privileging through ordinary legislation legal over biological paternity, provided that it respect other constitutional principles, as well as with laying down the conditions and procedures for establishing the latter, thus leaving

to Parliament the general assessment as to the most suitable solution for furthering the interests of the minor.

### *Conclusions of Points of Law*

1. - The Court of Cassation, 1<sup>st</sup> Civil Section, questions the constitutionality of Article 235(1)(3) of the Civil Code, insofar as, in actions for disclaimer of paternity, it allows the husband to prove that the child has genetic characteristics or belongs to a blood group incompatible with that of the presumed father only after having proved that the mother committed adultery during the period in which it was conceived . According to the referring court, the provision violates Article 3 of the Constitution on the grounds of irrationality, given the scientific progress which makes it possible to obtain directly – and therefore without having to establish adultery – certain proof that the person in question is not the father; it is also said to violate Article 24(2) of the Constitution, due to violation of the right to a fair trial, which cannot be fully guaranteed where it is not possible to establish the facts underpinning the arguments submitted to the court and where a party is not allowed to submit evidence of the same facts.
2. - The *Tribunale di Rovigo* questions the constitutionality of Article 235(1)(3) of the Civil Code insofar as it requires, as a prerequisite for actions for disclaimer of paternity, prior proof of the wife's adultery, due to violation of Article 3 of the Constitution, breaching the principle of reasonableness, and of Article 24(2) of the Constitution, which guarantees the right to a fair trial.
3. - The Venice Court of Appeal also questions the constitutionality of Article 235 of the Civil Code, challenging it generically due to violation of Articles 3, 24(2) and 11 (sic.: Article 111) of the Constitution, without however giving any reasons explaining the violation of the last provision.
4. - The referral orders raised questions of the constitutionality of the same legislative provision, on grounds which are in part identical and in part similar, which means that the relevant cases must be joined and be ruled on with a single measure.
5. - The question of constitutionality raised by the Venice Court of Appeal is manifestly inadmissible due to its failure to discuss the facts of the case, as well as due to the incontrovertible assertion of its relevance and non manifest groundlessness, argued on

the basis of a mere reference to order No. 10742/01 (sic.: Article 10742/04) of the Court of Cassation.

6. - The questions raised by the Court of Cassation – in a case in which the action for disclaimer was brought by the father – and by the *Tribunale di Rovigo* – in a case in which the action was brought by the child – are well founded.

6.1. - Article 235(1)(3) of the Civil Code – as amended by Article 93 of law No. 151 of 19 May 1975 reforming family law – provides that adultery committed during the period falling between the three hundredth and the hundred and eightieth day before birth is one of the situations in which an action for disclaimer is permitted, and that in such cases the husband – or any other party which has the right to bring the action – is allowed to prove that the child has genetic characteristics or belongs to a blood group incompatible with those of the presumed father, or any other circumstance capable of establishing that he is not the father.

In a now long-standing judgment (judgment No. 5687 of 1984), the Court of Cassation had held that Article 235(1) of the Civil Code – which made the admissibility of so-called scientific evidence on genetic characteristics or on the blood group subject to a demonstration of adultery by the wife – does not prevent the merits court, where it considers it appropriate, from accepting and presenting such scientific evidence at the same time as that pertaining to adultery, confirming and supplementing its own opinion that adultery occurred with its assessment of the (unjustified) refusal of the other parties to gather blood test evidence and considering the refusal as evidence that the party in question is not the father. This is above all because, due to the scientific progress which has occurred in recent years, such evidence has taken on the value of full proof of the existence or not of a parent-child relationship.

This interpretative approach – which even at the time was doubted (Court of Cassation judgments No. 20 and No. 5419 of 1984) – was subsequently abandoned and the view that inquiries into the question of adultery have preliminary status compared to those concerning the existence or not of a procreative relationship now forms part of the “living law”. This means that, even where genetic or blood test evidence is gathered at the same time as evidence of adultery, it may be examined only where adultery has been confirmed, and for the different goal of establishing the merits of the claim (see, *inter alia*, Court of Cassation judgments No. 2113 of 1992, No. 8087 of 1998, No. 14887 of

2002); an additional consequence of this is that, where adultery cannot be proven, actions for disclaimer of paternity must be dismissed even where it is shown that the child has genetic characteristics or belongs to a blood group incompatible with those of the presumed father.

In the light of this “living law”, it is not open to this court to propose different interpretative solutions (see judgment No. 299 of 2005), and it must limit itself to establishing whether or not this living law is compatible with constitutional principles.

6.2. - In the family law reform of 1975, Parliament granted title to sue in actions for disclaimer of paternity also to the mother and to children who have reached the age of majority in all cases in which the action may be brought by the father (Article 235, last sub-section, of the Civil Code).

In 1983 Parliament subsequently stipulated that such actions could also be brought by a special court-appointed guardian, after having gathered summary information, on application by a minor over the age of sixteen, or by the public prosecutor for minors younger than sixteen (Article 244, last sub-section, of the Civil Code, introduced by Article 81 of law No. 184 of 4 May 1983).

6.3. - In reaching the decision on the present matter before the court, the following issues are significant:

- the increase in the classes of person with title to sue;
- the progress in biomedical science to date which, by way of genetic or blood test evidence, makes it possible to ascertain the existence of a relationship of parentage;
- the practical difficulty, clearly highlighted in the referral order of the Court of Cassation, of submitting full evidence of adultery;
- the inadequacy of such evidence in precluding paternity.

The finding, on the basis of the living law referred to above, that the access to scientific evidence – which alone makes it possible to assert whether the biological father of a child is indeed the person considered to be the legitimate father – is subject to a prior demonstration of adultery is in the first place irrational, given the irrelevance of the latter evidence for the acceptance of the claim on the merits; moreover, this rule constitutes a substantive impediment on the exercise of a right of action guaranteed under Article 24 of the Constitution. Moreover, such an impediment concerns actions

brought in order to uphold fundamental rights pertaining to a person's status and biological identity (judgment No. 50 of 2006).

This means that the contested provision must be declared unconstitutional insofar as, in actions for disclaimer of paternity, it provides that the examination of scientific evidence which indicates “that the child has genetic characteristics or belongs to a blood group incompatible with those of the presumed father” occur subject to a prior demonstration of adultery by the wife.

7. - The court must also reach the same conclusion for claims brought by other persons with title to sue (Article 235(3) of the Civil Code), as is the case in proceedings before the *Tribunale di Rovigo* (order No. 203 of 2003).

on those grounds

THE CONSTITUTIONAL COURT

hereby,

*declares* that Article 235(1)(3) of the Civil Code is unconstitutional insofar as, in actions for disclaimer of paternity, it provides that the examination of the scientific evidence which proves “that the child has genetic characteristics or belongs to a blood group incompatible with those of the presumed father” occur subject to a prior demonstration of adultery by the wife;

*declares* that the question of the constitutionality of Article 235 of the Civil Code raised in the order mentioned in the headnote by the Venice Court of Appeal in relation to Articles 3, 24 and 111 of the Constitution is manifestly groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 21 June 2006.

Signed:

Annibale MARINI, President

Alfio FINOCCHIARO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Deposited in the Court Registry on 6 July 2006.

The Director of the Registry

Signed: DI PAOLA