The Right of Children to Know their Parents – a Constitutive Element of the Child's Identity

Andreea DRĂGHICI[1], **Ionel DIDEA**[2], **Ramona DUMINICĂ**[3]

Abstract: Given that in the last century we have witnessed a substantial development of human rights and children's rights implicitly, and given the progress of international and national regulations in this field, the present study is meant to add to the debate surrounding the right of children to know their parents as a constitutive element of their identity. During the writing of this study, we took into consideration the recent opinions in doctrine and the regulations in this field as well as the practical implications of this field of law. The analysis is not strictly focused on the law, but it has an interdisciplinary quality, combining several methods of research in order to highlight the role that the right of the child to know his/her past and that of his family in his formative year and the development of self-conscience. The importance of this study lies in the results of our research and in the new values attributed to the right of children to know their parents, as well as the arguments made concerning the controversial problem of discordance which may appear between the legal or apparent identity of the child and the real identity in case of adoption and artificial insemination.

Keywords: legal identity; real identity; child; parents

1. Introduction

Legally speaking, any human being is currently a subject of the law, which gives all human beings a legal personality, meaning the ability to obtain rights and obligations at the time of birth. Every person has the ability to take part in the legal life, ability which differs from one individual to another. Valuing these rights and

[1] Senior Lecturer, PhD, Faculty of Juridical and Administrative Sciences, University of Pitesti, Romania, 71 Republicii Blvd., Pitesti, Romania. Tel.: +40745790265, e-mail: andidraghici@yahoo.com.
[2] Professor PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Romania, 71 Republicii Blvd., Pitesti, Romania. Tel.: +40745790265, e-mail: prof.didea@yahoo.com.
[3] Assistant PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Romania, 71 Republicii Blvd., Pitesti, Romania, Tel.: +40745790265, Corresponding author: duminica.ramona@yahoo.com.

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obligations in the juridical reports in which humans may engage may only be possible when possessing a stable legal identity. Therefore, one of the inherent human rights is the right to an identity. It represents the affirmation of a person's own existence in society and also an acknowledgement of their individuality, which allows them to distinguish themselves from other subjects of law.

Article 7 from the International Convention on the Rights of Children sanctions the right of children to be immediately registered after birth, to have a name, a citizenship and within reason, the right to know his parents and to be raised by them.

The current stipulations reflect the content of article 24 of the International Covenant on Civil and Political Rights, and in internal legislation this right is found in a similar regulation in article 8 from Law 274/2004 on the protection and promotion of the rights of the child which states: "The child has the right to establish and maintain his identity. (2) The child is immediately registered after birth and henceforth has the right to a name, to obtain a citizenship and if possible, to know and be cared for, raised and educated by them."

In the light of these regulations, we include in the content of the right to an identity, the right to a name, a citizenship, to know his parents and to be cared for, raised and educated by them (Drăghici & Iancu, 2008, p. 99).

2. The Right of Children to Know Their Parents – a Constitutive Element of the Child's Identity

The right of the child to know his/her parents, also known as "the right to a family life", completes the concept of a child's identity as sanctioned by article 8 from Law nr. 274/2004 and article 7 from the International Convention on the Rights of the Child and appears as a right with particular values and implications.

2.1. The Meaning of the Notion of "Parents"

Given the fact that this right centers on the notion of "parents", we believe we should begin our analysis here. If a few decades ago, the concept was extremely clear, describing both the biological or natural parents as well as the adopted ones, the current context of scientific progress entails a redefinition of this notion. At present, more and more couples resort to artificial insemination and consequently

the term "biological parent" can no longer apply only to the "parent who conceives the child" but acquires a more complex meaning. For example, in the case of artificial insemination with the participation of a third party, which involves donated eggs, poses the problem of who will be considered as a biological parent, the donor or the women carrying the child? As far as we are concerned, the notion of parent includes genetic parents (considering the developments in medical science, knowing their identity is more and more important for the child), the parents that had him (the woman that bore the child and the father that acknowledges the child) as well as the adoptive parents.

2.2. Legal Means of Establishing the Biological Identity of the Child

The right of children to know their parents firstly takes the form of legal means which are used to establish the biological identity of these persons. In this sense, starting from with birth necessary measures must be undertaken to establish the identity of the parents, their names, which are written in the child's birth certificate, but "as far as possible" as Law nr. 274/2004 on the protection and promotion of the rights of the child stipulates. Clearly, it would be preferable to have the name of both parents, however this is not always achieved, since there are situations when one or both parents cannot be identified – for example, the mother does not know the identity of the father, the child was abandoned, the mother refuses to divulge the identity of the father in cases of rape or incest etc.

By means of civil action suits it is possible to establish or modify one or more elements of the child's civil status. Therefore, if at the time of birth the identity of the parents is unknown, or in time their identity is determined to be false, depending on the case, there is the possibility to apply for legal action to claim status or contest filiation. In the case of claiming status, the child enjoys an exclusive right to this action, as stipulated by article 423 of the Romanian Civil Code "the right to demand the establishment of filiation to the mother belongs to the child and is intimated by his/her legal representative or guardian" as well as in the case of establishing paternity outside of wedlock. In this sense, article 425, paragraph 1 of the Romanian Civil Code states that "the action of determining paternity outside of wedlock belongs to the child and can be initiated by the mother, even if she is a minor or the child's legal representative or guardian". Concerning the action of contesting filiation, all persons interested in the case of establishing filiation have this right (article 420 from the Romanian Civil Code) and in the case of contesting filiation against the father through marriage (article

434 form the Romanian Civil Code), since the child is first on the list of "interested persons". The husband of the mother, the mother, the biological father as well as the child, each has the right to contest paternity.

2.3. The Controversial Discordance between the Legal and the Real Identity of the Child in the Case of Artificial Insemination

In order to ensure a child's right to know his parents and in reference to the phrase used by the lawmaker "as far as possible", there is one controversial problem which we must address, namely, the discordance which may exist between the legal or apparent identity of the child and the real identity (Richards, 2003, p. 304; Guţan, 2011, pp. 88-117; Drăghici, 2010, p. 49; Daghie & Iorga, 2010, pp. 82-102). This may arise in the cases of "artificial procreation". Therefore, the child born through artificial insemination by a donor or by extracting an embryo or an egg, receives a name and an identity from the family that rears him, but which do not correspond to the child's true genetic origins.

In principle, knowing the identity of their family helps children to become aware of their own identity and it is in their best interest to know the real identity of the parents. Also, knowing his/her true identity would help the child sort out certain psychological problems and most importantly it would allow him/her through preventative medicine to detect through analyses the hereditary diseases that run in the family.

However, though it is in the child's best interest, it is not always compatible with the interest of the parents or the state. Consequently, it has been stated that if the interest of the child prevails, it might have negative effects, for example the decision of Swedish authorities to communicate the identity of the sperm donor to the children born from artificial insemination, which immediately lead to a drop in the number of donations (Dekeuwer-Défossez, 1991, p. 19). At the same time, it is possible in certain cases that the interests of the child suffer if they become aware of painful information concerning their origin (for example, when finding out that he/she was born as a result of artificial insemination, rape or incest). On the other hand, the age of the child is particularly relevant in assessing the interest of finding out more about his/her origins since the interest of a child of 7 is different from that of a child of 15.

Also, given that the UN Convention uses the same phrase “as far as possible” in regulating the right of the child to know his/her parents, the literature (Hodgkin & Newell, 2004, p. 140) poses certain relevant questions concerning the ways of interpreting the word “possible”, either material or legal? This allows the state to change the law depending on what seems fair or to create the procedures allowing children to find his/her origins?

From the point of view of the Convention on the Rights of Children, the phrase used in article 7 “as far as possible” seems to render a stricter, less subjective meaning than the phrase “the higher interest”, which implies the fact that children have the right to know their parents when possible, even if it is considered against the higher interests of the children. However, the nature of the Convention suggests that a child which would be affected by discovering his/her identity or that of his/her parents could be put off by access to this information. This interpretation is supported by the fact that phrase “as far as possible” also covers the right of the child to be cared for by the parents - and no one could uphold this phrase in the context in which the higher interest of the child is not considered. But it is obvious that the right of children to know their parents cannot be denied for any reason other than those pertaining to the child’s higher interest, in the most extreme or ambiguous circumstances (Hodgkin & Newell, 2004, p. 140).

At the same time, the stipulations “in conformity with article 7 each member state should ensure that information about the genetic parents be kept and divulged to the children, if possible. A strong argument used by other states which keep the secret does not pertain to these rights but to the protection of the child’s mother from extreme forms of social condemnation (marginalization, wounding or death). In these circumstances, there are concurrent rights – the rights of children to know their origin and the right of the mother to confidentiality and protection. Concerning keeping the identity of the sperm or egg donor secret, two arguments are important. The first says that it is not in the child’s best interest to find out that he/she was born as a result of artificial insemination. This argument seems unconvincing, all the more so since the advancements in medicine have shown how important it is for a person to know his/her genetic origins. Secondly, there is also the idea that eliminating anonymity would chase away donors, who will be frightened to be shamed or sued by their biological children for alimony. However, the legislation can protect a donor parent against the danger of being sued for alimony by his/her biological children, and precedents of Sweden or Austria suggest that donors are not intimidated by the possibility of being identified. In

any case, the law on the artificial forms of fertilization must protect the rights and the wellbeing of the child, and in no instance satisfy the interests of childless couples" (Hodgkin & Newell, 2004, pp. 141-142).

Until 2009, artificial human reproduction, although a reality, is possible under our national legislation only on the basis of the Hippocratic Oath and the stipulations of Law nr. 95/2006 concerning health reform, Title VI – which stipulated that this title referring to the extraction or transplanting of human organs, tissues and cells also applies to in vitro fertilization techniques, without any special law regulating all legal problems posed by such a technique. Therefore, Law no. 95/2006 included artificial procreation via in vitro fertilisation expressly among the stipulations of article 142 letter e, however it does not offer any legal framework for all consequences of this technique on the parentage of a child thus conceived. At present, the Civil Code has tried to fill the legal gap in this field, by regulating the general principles of artificial reproduction, by instituting the system of parentage, the responsibility of the father, the conditions of parental secrecy, confidentiality, within the framework of a whole section entitled "Artificial human reproduction with a third party donor" from Title III, "Kinship", chapter II "Filiation" (article 441-446) (Chelaru & Duminică, 2011, pp. 30-38; Ungureanu & Munteanu, 2013, pp. 37-44).

As stated by legal stipulations, our country has opted to make a principle of the confidentiality of information concerning artificial human reproduction (article 445 of the Romanian Civil Code). Concerning this aspect, recent doctrine has shown that "the principle of confidentiality of any information pertaining to artificial human reproduction, especially the identity of the parents, the child born via artificial reproduction as well as the third party donor, is meant to protect the right to privacy as guaranteed by article 8 of the European Convention of Human Rights and article 26 from the Romanian Constitution. Furthermore, the actual consent given by the future parents before the notary public in the case of artificial conception with a third party donor also benefits from this confidentiality [article 442 paragraph (1) of the Romanian Civil Code]" (Florian, 2012, p. 490).

As an exception, and for justified reasons closely related to preventing serious harm to a the state of health of the child or his/her descendents, the court supervising the guardianship may authorize the confidential communication of the information to the doctor or the competent authorities. With respect to the persons entitled to request this information from the court, the lawmaker makes no special mention, however by interpreting articles 445, paragraph (2) and (3) from the

Romanian Civil Code we understand that only a person thus conceived and his/her descendents have this right.

2.4. The Right of Adopted Children to Know their Biological Parents

A similar problem arises in the case of adopted children, except that the solution given by the lawmaker in this instance differs. The right to an identity is guaranteed by certain stipulations from Law no. 273/2004 concerning the legal conditions of adoption stating the obligation of the adopter to inform the child of the adoption once he/she is mature enough for this. More precisely, according to article 66 from the aforementioned Law concerning the legal conditions of the adoption "adopted persons have the right to know their origins and their own past and benefit from support in their goal to connect with their biological parents and relatives". However, the exercise of this right must be done within certain limits. Thus, revealing the identity of the biological parents in an adoption may be done only in the case of persons in full capacity of their rights. As an exception, the identity of the biological parents of the adoptee may be revealed before the latter is in full capacity of his/her rights only for medical reasons, by the Romanian Office of Adoptions, at the request of either one of the adopter, the adoptee, the spouse, the descendents or the representative of a medical institution or a hospital.

After acquiring the full capacity of rights, the adoptee may ask the court in the jurisdiction of which the natural parents live, or if they reside outside Romania, the adoptee may ask the Court of Bucharest to allow for their identity to be divulged. The court may approve the request, based on the proofs submitted and if it establishes that revealing this information will not cause any psychological or emotional harm to the applicant. In order to approve the request, the court will call on the association of social services and child protection, also called the Office, in the jurisdiction of which the adoptee lives, and any other person whose contribution may be useful. The adoptees who already know the identity of their biological parents may directly ask the Office for Adoptions to help in contacting their biological parents or relatives.

The lawmaker also stipulates the obligation of the adopters to gradually inform the adoptee, from an early age and with the assistance of adoption and post-adoption specialists who work in social services and child protection associations.

Lastly, there is also the obligation to protect the relevant information referring to the adoption, the child's origins and especially the identity of the biological parents, as well as information on the medical history of the child and his/her family 50 years back from the date when adoption procedures end.

3. Conclusions

Relating to the right of the child to know his/her biological parents, the Romanian lawmaker has opted like the French, English and Greek ones for the anonymity of the donor in the case of artificial human reproduction, placing the interest of the child to know his/her origins in second place, and in our opinion thus undermining the right of the child to freely develop his/her personality. The legal model offered by Austria, Switzerland or Germany, which favours the right of the child to know his/her origins, would have been more appropriate (Guţan, 2011, pp. 128-166). The legislation concerning the artificial forms of fertilisation must prioritise the protection of the rights and wellbeing of the child and does not meet the interests of childless couples.

The solution offered by the lawmaker in the case of adopted children is relatively different, thought their right to know their biological parents is uncontestable. The adoptive parents have the obligation to inform the child once mature enough that he/she is adopted, and as we have shown in this paper, any adoption is in the child's best interest, because it ensures a protective environment which allows for normal development.

In conclusion, if children have knowledge of their past and that of their family it could help them shape their identity. For this reason, we consider that they have the right and it is in their interest to know the real identity of the parents and to have access to information about their origins and linage.

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