

THE CHILD'S RIGHT TO ESTABLISH AND PRESERVE HIS OR HER IDENTITY. LEGISLATIVE AND CASE-LAW CONSIDERATIONS

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Abstract: In each state there are certain vulnerable categories of population: children, elderly, disabled people, who need special protection in order to realize their rights. Among them, there are children, whose rights are explicitly regulated in Romania by Law nr. 272/2004 on the protection and promotion of children's rights, but also in other related laws. In the following, we intend to analyze: the right of the child to establish and preserve his or her identity in accordance with relevant legislation and case law.

Keywords: child; family; rights; European Court of Human Rights.

1. Introduction

One of the essential topics on the agenda of European and global decision-makers meetings in recent years, but also domestic and international conferences, envisages the protection of individuals, especially disadvantaged categories, such as children, elderly, people with mental problems, disabled people, people at the subsistence limit.

Internationally, the protection of the natural person in general is achieved through various legal instruments, such as conventions, treaties, declarations, compacts, etc., which regulate his rights. In this respect, the so-called "The International Bill of Human Rights" is highlighted, which includes: the Universal Declaration of Human Rights (1948), the [1] International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) and the Optional Protocols.

Among the vulnerable categories that require special care from the state and public institutions in general, children are highlighted.

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Analyzing retrospectively the situation [2] of children as a category of persons in need of special protection measures, it is noticed that until the beginning of the twentieth century children were treated as an extension of parents, without rights per se. Thus, it is noticed that at the end of the eighteenth century children could still be sold by their parents, and a 7-year-old child could be executed for theft [3].

The change in basic assumptions towards awareness of the existence of children's rights, as separate from those of their parents, is recent in the socio-legal mentality, being determined by the discovery, at the beginning of the twentieth century, of the state's responsibility towards children and of the need for its intervention when their life, health, are endangered in the environment of origin.

The individualization of the child in relations with the family, the recognition of his vulnerability and special protection needs, of his rights were enshrined only towards the end of the twentieth century [4] by the adoption of the United Nations Convention on the Rights of the Child on November 20, 1989[5]. This Convention:

- has established the definition of a child as any person under 18 years of age, unless the legislation provides that majority is reached at a younger age;
- established the need to comply with standards established by the competent authorities for all institutions, services and establishments intended for children;
- on the civil rights and liberties of the child The said Convention provides the right of every child to be registered immediately after birth and to have a nationality; their right to know and be cared for by their parents; the right of the child to have elements of the child's identity restored, including name, nationality and family ties, the right to freedom of expression, the right to freedom of thought, conscience and religion, the right to protection against all forms of violence.

2. Brief aspects regarding the international, European and national acquis regulating children's rights

A significant European document on this subject is the Convention on the Exercise of Children's Rights, adopted by the Council of Europe on 25 January 1996. It enshrines significant rights of the child, such as: the right to be the child, to be informed and to express his or her views in court proceedings (Article 3), the right to request the appointment of a special representative in proceedings before a judicial authority concerning the child where national law prevents holders of parental responsibility from representing the child as a result of a conflict of interest with the child (Article 4).

Of particular importance is also the adoption by the Council of Europe on 15 May 2003 of the Convention on Personal Relations Concerning Children [6]. Its objectives include setting out the general principles to be applied to the decision of a judicial authority concerning the child's personal contact with the parent or

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parents/persons with whom the child meets or stays for a limited period, including an agreement on such contact which has been confirmed by a competent court or which has been drawn up or officially registered as an authentic instrument and is enforceable. This Convention enshrined the right of the child and his/her parents to have and maintain regular personal contact with each other, which may be limited, excluded, or monitored only when necessary to ensure the best interests of the child (Article 4).

Another European document enshrining respect for the rights of the child is the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse [7], concluded in Lanzarote on 25 October 2007. It aims to prevent and combat sexual exploitation and sexual abuse of children and to promote cooperation between national and international levels against sexual exploitation and sexual abuse of children.

Among the treaties that emphasize the importance of promoting, but also protecting children's rights, as essential objectives of the European Union, stands out the Treaty of Lisbon [8], amending the Treaty on European Union and the Treaty establishing the European Community [9], signed in the Portuguese capital on December 13, 2007.

Also, in the matter of enshrining the rights of the child, the Charter of Fundamental Rights of the European Union cannot be omitted [10]. It was adopted by the European Commission, the European Parliament and the Council of the European Union on 7 December 2000 at the Nice European Council and covers all the civil, political, economic, social and cultural rights enjoyed by citizens of the Member States, and on the rights of the child states:

- the primacy of the principle of the best interests of the child in all European Union policies directly or indirectly concerns children;
- the right to such protection and care as is necessary to ensure their well-being;
- the right of children to express their opinion freely, which will be assessed in the light of their age and maturity;
- the right to maintain on a regular basis personal relations as well as direct contacts with both his parents, unless this is contrary to his interests;
- the prohibition of employing children, stating that the minimum age for employment must be equal to or higher than the age at which compulsory schooling ends.

It is noticed that the protection systems of the person existing at an international level are only ways of complementing the protection carried out at the domestic level, modalities that are subsidiary and complementary in nature. This character of international regulations requires a continuous improvement of domestic legislation in order to effectively comply with international regulations [11].

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In Romania, children are protected by laws such as: Framework Law no. 287/2009 (Civil Code) [12], Law no. 272/2004 on the protection and promotion of children's rights [13] and Law no. 273/2004 on the legal regime of adoption [14].

In terms of Law nr. 272/2004 child means "the person who has not reached the age of 18 and has not acquired full legal capacity, according to the law" (art. 4 letter a)), definition is also reiterated by the Romanian Civil Code (art. 263 para. (5)).

The Convention on the Rights of the Child establishes that the term child means any human being under the age of 18, except where, under the law applicable to the child, the majority is determined below that age (Article 1).

Children do not have until the age of 14 the necessary discernment to be aware of the consequences of their actions, which is why they lack the capacity to exercise. Minors aged between 14 and 18 years have partial discernment, which led the Romanian legislature to assign them a limited capacity to exercise.

The provisions of the Romanian Civil Code enshrine essential principles and rights for children. Among the principles there are: the principle of equal rights of children (art. 260), the principle of the best interests of the child (art. 263), the principle of mandatory hearing of the child who has reached the age of 10 in administrative or judicial proceedings concerning him (art. 264), and among the rights are highlighted: the right of children to be raised and educated by their parents (art. 258 para. (1)) and the right of children who do not live with their parents or one of them to maintain personal contact with them (Art. 262 para. (2)).

The norms of Law nr. 272/2004 develops some of these principles and rights and regulates, in its first texts, complementary ones, such as: the right of children to be respected, promoted and guaranteed by public authorities, accredited private providers, but also natural and legal persons responsible for child protection, those rights provided by the Constitution and law, in accordance with the international legislation to which Romania is a party, (Art. 1 para. (2)), the right of children to protection and assistance in the full realization and exercise of their rights, under the terms of this law (art. 5 para. (1)). This normative act also legislates in Chapter II the rights of the child distinguishing between the following categories: Civil rights and liberties (Section 1), Family environment and alternative care (Section 2), Child health and welfare (Section 3), Education, recreational and cultural activities (Section 4).

Significant legal texts are also dedicated under this law to children in difficult situations: Special protection of children temporarily or definitively deprived of the protection of their parents (Chapter III), Protection of child asylum seekers and protection of children in case of armed conflict (Chapter IV), Protection of children who have committed a criminal act and are not criminally liable (Chapter V), Protection of children against abuse, neglect, exploitation and any form of violence

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(Chapter VI – within it a special place belongs to the child with parents working abroad).

Another normative act that enshrines children's rights is Law nr. 273/2004. It regulates the conditions and procedure for the adoption of the child and reiterates the principles of child protection mentioned above. It also states the child's right to receive clear and complete information and explanations, according to his/her age and degree of maturity, regarding the stages and duration of the adoption process, its effects, as well as the adopter or adoptive family and their relatives, from the department in whose territorial authority he/she resides, throughout the adoption procedure (art. 5).

3. Aspects regarding the child's right to establish and preserve his/her identity in Romanian legislation and jurisprudence

The Romanian legislator, inspired by European and international documents, regulated children's rights in Law nr. 272/2004. A special place among the children's rights enshrined in Law No. 272/2004 is conferred on civil rights and liberties. In them, the legislature states:

- the child's right to establish and preserve his or her identity;
- his/her right to maintain personal relationships and direct contacts with parents, relatives, but also with other persons to whom he/she has developed attachments;
- the child's right to protection of his or her public image and intimate, private and family life; their right to freedom of expression;
- his right to freedom of thought, conscience and religion;
- the child's right to free association in formal and informal structures, as well as freedom of peaceful assembly, within the limits established by law;
- the right to respect for his personality and individuality and not to be subjected to physical punishment or other humiliating or degrading treatment;
- and the child's right to lodge complaints about violations of their fundamental rights on their own.

Also, Art. 32 of Law nr. Regulation (EC) No 272/2004 also provides for the child's right to his/her own cultural life, to declare his/her ethnic, religious affiliation, to practice his/her own religion, but also his/her right to use his/her own language in common with other members of the minority to which he/she belongs.

One of the most important rights provided by the rules of the special law mentioned (Article 9), which are enshrined in civil rights and liberties, is the child's right to preserve and establish his identity.

This right is also stated by the Romanian Constitution, which, in art. 26 para. (1), proclaims: "Public authorities shall respect and protect intimate, family and private life."

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The special significance of this right has determined its consecration at the European and international levels. At the European level, Article 8 of the European Convention on Human Rights enshrines the child's right to know his or her origins as one component of his or her right to privacy.

At an international level, the United Nations Convention of 20 November 1989 on the Rights[15] of the Child states in Article 8 "the right of the child to preserve his or her identity, including nationality, name and family relations" as provided for by law, without allowing any unlawful interference and establishes for States Parties the obligation of adequate assistance and protection in the event that a child is unlawfully deprived of the constituent elements of his identity, with a view to restoring his identity as soon as possible.

In order to realize the analyzed right in practice, the child must be registered immediately after birth acquiring from the same date the attributes that lead to his identification as a person: the right to a name, the right to acquire citizenship, at home, at residence as well as at a marital status, but also, when possible, the right to know his parents, as well as to be cared for, raised and educated by them (Art. 9 para. (2) of Law nr. 272/2004 in conjunction with art. 59 para. (2) C. civ.]. These identification attributes will be recognized to persons only if they have been acquired according to legal norms.

The norms of the mentioned special law confer on minor individuals the right to retain their citizenship, name, but also family relations, according to the incident legislation, without any interference being allowed.

Regarding the child's right to name, there is a case pronounced by the Bârlad Court [16] on March 24, 2021. Thus, the applicant XXX, according to the application registered at the Bârlad Court on 06.01.2021, requested the summons of defendants XXX and the Local Directorate of Persons Registration T requesting to establish the surname of minor X-X, who was born on Y to Z, to register the birth of the minor in the civil status register and to draw up the birth document of the minor.

In the statement of facts, the applicant stated that she had been married to defendant XXX, but the marriage had been dissolved by divorce.

Minor XX was born at Z and was not the defendant's child.

With regard to the name of minor X-X, the court notes that a person's name constitutes a means of personal identification, but also family, and it is related to the exercise of the right to private and family life.

The court, in order to protect the child's right to privacy, and in view of the fact that the parties do not live together, ruled that the child should bear the name of the alleged father, the mother's husband, respectively that of X, considering the considerations that the minor was conceived and born during the applicant's marriage to the defendant.

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As regards the petitions referring to the registration of the birth of the minor in the civil status register and the drawing up of the birth document of the minor, as evidenced by the address no. X issued by the Directorate of Persons Registration of mun. T, the birth certificate of minor X-X was drawn up under no. 7197 dated 07.12.2020, but without having entered the child's surname. After establishing the name, it is to be entered in the civil status register, and then the birth certificate of the minor is also issued.

Considering all the factual and legal reasons invoked above, the court is to partially grant the application and establish the surname X for minor X-X, born on Y to parents X (formerly X) XX and XX-X, birth which was registered in the Civil Register of the Local Community Public Service for Persons Record T under no. V dated 07.12.2020. Also, the court will order the necessary entries in the birth document no. X dated 07.12.2020 of minor X-X.

The Romanian Civil Code regulated the attributes of human identity, but also the ways of identification, in Chapters II and III, Title II of Book I. Thus, the first text of this legal normative act referring to personality rights is art. 58 CivC., it enshrines in the first paragraph the right of everyone to life, health, physical and mental integrity, dignity, one's image, to respect for private life, but also other such rights recognized by legal norms. This text is supplemented by art. 59 CivC., a text which establishes the attributes that lead to the identification of a person, namely: "the right to a name, to domicile, to residence and to marital status".

Regarding the minor's domicile and the maintenance of his/her family relations, recent jurisprudence [17] mentions a case registered at the Huși Court under no. .../244/2022. In the present case, applicant X, in opposition to defendant Y, asked the court to order:

- dissolution of marriage concluded on ..., through the sole fault of the defendant;
- the applicant's return to her maiden name;
- establishing the domicile of minor Z at the applicant's domicile;
- exercise of parental authority exclusively by the applicant;
- establishing a maintenance obligation for the defendant.

As a statement of reasons, it was alleged that the applicant married the defendant in the year, and during the marriage of the parties two children were born, only Z being still a minor.

The marriage between the parties cannot continue given that the defendant behaves violently, consumes alcohol in excess, and minor Z is happy to have escaped her father.

After analyzing and corroborating the evidence adduced in the case, the court accepted the facts relied on by the applicant and decided to grant the application for a summons and dissolve the marriage through the sole fault of the defendant, who had engaged in conduct incompatible with family life.

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With regard to the surname, pursuant to Art. 383 Civil Code, the court ordered that the applicant's application be granted and that she return to her maiden name, namely ".....".

As regards the residence of the minor, the court notes that she expressly stated, during the hearing, that she wished to remain with her mother and that she was more attached to her. The mother also has all the living conditions, as evidenced by the social survey report. For these reasons, the court will determine the minor's domicile at the mother's home.

With reference to the exercise of parental authority, on the basis of the provisions of art. 483 Civil Code regulating the exercise of parental authority only in the best interests of the child, and the responsibility of both parents for raising their minor children, the norms of art. 503 Civil Code which states that parents exercise parental authority jointly and equally, but also ECHR jurisprudence, in this respect, in *Ignaccolo-Zenide v. Romania*, the Court ruling that the State must establish positive measures for the purpose of ensuring the child's contact with his or her parent, in *Keegan v. Ireland*, recognizing the right of access of the parent who has not been entrusted with the minor, but also the obligation of States to adopt measures regarding the effective exercise of that right, and in *Pini and Bertini, Manera and Atripaldi v. Romania*, the Court proclaiming that "the best interests of the child require finding a family for the minor and not a child for a family or parent", art. 507 Civil Code referring to cases in which the exercise of parental authority by one parent may be ordered, the Huși District Court rules that it is in the best interest of the applicant to exercise parental authority.

As regards the head of claim regarding the establishment of a maintenance obligation for the defendant, following the disposition of the minor's home to the mother, it will decide to order the defendant to pay, monthly, as maintenance allowance in favor of minor Z, 1/4 of the minimum income in the economy, starting with the date of filing the action and until the minor's majority, respectively until the end of his/her studies, if he/she is still in his/her studies, having as limit the age of 26 years.

The unlawful deprivation of a child of the constituent elements of his/her identity or some of them imposes the obligation of public institutions and authorities to adopt, as a matter of urgency, all appropriate measures to restore this identity (Art. 9 para. (5) of Law nr. Regulation (EC) No 272/2004).

To this end, in Art. 10-16 of Law nr. 272/2004 The legislator establishes certain prerogatives for health units that have neonatal and/or pediatric wards in their structure, police bodies and community public services for the registration of persons, competencies, prerogatives among which are highlighted:

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- the prerogative of health units comprising newborn and/or pediatric wards to employ a social worker or, where appropriate, to designate a person with social work duties;
- the power of the competent community police and community public services to register persons to designate one or certain responsible persons, in order to carry out, expeditiously, the necessary steps to register the child's birth and transmit the identification data to the General Directorate of Social work and Child Protection or, depending on the case, to the public social work service;
- the task of fulfilling the medical certificate ascertaining the birth of the child within 24 hours of birth regarding the child born alive, but also regarding the stillborn one falls on the doctor who attended or who ascertained the birth and the chief doctor of the department. If the birth took place outside the health units, that task falls to the family doctor whose practice is registered in the territorial district where the birth took place, it is obliged, at the request of any person, within 24 hours, to ascertain the birth of the child, and then to draw up and issue the medical certificate certifying the child's birth, even if the mother is not listed in her practice;
- the obligation of the medical unit, in case of leaving the child by the mother in the maternity ward, to notify the General Directorate of Social Work and Child Protection, as well as the police bodies, by telephone and in writing, within 24 hours of ascertaining the mother's disappearance;
- the power of the General Directorate of Social Work and Child Protection to adopt, when the child's state of health allows discharge, the measure of emergency placement for the child, based on the report of finding the child's abandonment;
- carrying out checks on the identity of the mother by the police bodies, within 30 days of drawing up the report of finding the child's abandonment, and in case of her identification, counseling and supporting her by the General Directorate of Social Work and Child Protection for the purpose of drawing up the child's birth document;
- if it is impossible to identify the mother, the duty of the public social work service to obtain, within 5 days of receiving the documentation of the General Directorate of Social Work and Child Protection, the order establishing the name and surname of the child, under the norms of Law nr. 119/1996 on civil status documents, republished, with subsequent amendments and completions, and to make the declaration of registration of birth to the competent civil status service;
- the obligation of the public social work service to transmit to the General Directorate of Social Work and Child Protection the act of registration of the child's birth within 24 hours of this operation;
- the duty of the person who takes over a child for the purpose of caring for or protecting him temporarily, until the date of establishing a legal measure of protection, to maintain the minor and to notify, within 48 hours, the local public

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administration authority in whose territorial authority his/her seat or domicile is located.

In practice, the situation is very serious, estimated, according to a study by Save the Children, that over 400,000 children are not included in the education system, one of the most common reasons being the lack of identity documents. What is alarming is that these children, in the absence of a birth certificate, do not enjoy their fundamental rights and do not have access to any other social services[18].

Globally, it is estimated that a third of children under the age of five are not registered at the time of their birth. In Latin America and the Caribbean, 18% of children are not registered, the ratio being about 1 in 6, quite high for some middle-level regions in terms of income value. The situation is even worse if we look at the figures provided by the authorities of Brazil and the Dominican Republic. There it is estimated that the number of unregistered children would be 25%[19].

In Romania, measures to prevent the child from leaving the health unit are regulated in Chapter II of Decision no. 1.103 of 10 December 2014 approving the Methodology for fulfilling the obligations incumbent on local public administration authorities, institutions and professionals involved in prevention and intervention in cases of children at risk of abandonment or abandoned in health units, Updated in 2016[20]. In this regard, the medical staff from the emergency department or, as the case may be, from the emergency reception unit, upon admission of the pregnant woman to the health unit, has the obligation to request her identity card, but also to make a copy of it on the front/back, which is attached to the Observation Sheet. Also, the same obligation subsists in the situation of hospitalization of the child, regarding the identity document of the parent or, as the case may be, the legal guardian/companion, as well as regarding the birth certificate of the child. At the same time, other specific duties are established for the medical staff, the social worker in the health unit, the social worker designated by the General Directorate of Social Work and Child Protection and the competent police body to prevent child abandonment, but also to protect the child left in the health unit.

4. The right of the child to establish and preserve his/her identity in the case law of the European Court of Human Rights (ECHR)

In the jurisprudence of the European Court of Human Rights, several fundamental rights incidental to personal identity have been discussed and interpreted, such as birth registration and the right to a name, the right to personal identity, the right to citizenship.

The European legislation on fundamental rights does not consecrate specifically a child's right to have his or her birth recorded right after being born or his or her right to have a name.

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With regard to the right to names, a relevant case is observed in the case law of the above-mentioned court. Thus, Mr. X and his wife, Mrs. X, chose to give their daughter, born on April 7, 1983, the first name "Fleur de Marie, Armine, Angèle". The birth, death and marriage registration office at Neuilly-sur-Seine, where the birth was declared, refused to register the first of these names on the grounds that it did not appear in any calendar of saints' days, issuing parents with a birth certificate containing only their first names, namely "Armine, Angèle"

After going through all instances in France, the applicants turned to the European Court of Human Rights in 1987. It considered that the name 'as a means of identifying persons within their families and community' fell within the scope of the right to respect for private and family life, as enshrined in Article 8 of the Convention, that the name 'Fleur-Marie' could be accepted but that there was no infringement of Article 8(1), text reads: 'Everyone has the right to respect for his private and family life, home and correspondence'.

At the same time, in other cases, it finds that the first name [21] and surname [22] chosen by the parents for the child form part of their private life.

With regard to the right to personal identity, according to ECHR case law, it is noted the importance of obtaining, for the personal development of the child, "the information necessary to find out the truth about important aspects of personal identity, such as the identity of the parents"[23]. In the present case, the applicant Odièvre was adopted. Upon learning that she had three biological siblings, she requested to be allowed access to information that helped her identify them. The court rejected the application on the grounds that she had been born under a "special procedure", which gave the mother the opportunity to remain anonymous. Moreover, Madame Odièvre could not have been the heiress of her natural mother[24].

In the present case, it was found that neither Article 8 (on the right to respect for private and family life) nor Article 14 (on the prohibition of discrimination) had been violated, since France had struck a fair balance between the public interest (prevention of abortions, especially abandonment of newborns), the child's right to personal development and his right to know his origins, and protecting other members of the various families involved.

Of particular significance in this field is also the issue of confidentiality of birth information, as evidenced by the case above. In this regard, *Godelli v. Italy* stands out[25]. This refers to the confidentiality of birth information and the inability to know one's origins in the case of someone abandoned by one's mother.

In this case, the Court considered that there had been a violation of Article 8 of the European Convention on Human Rights on the right to respect private and family life. Acting as such, it decided that the Italian system did not consider the interests of the child. At the same time, this court considered that a fair balance had been

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maintained between the interests in the case, because the relevant normative acts did not allow the child adopted and not recognized at birth, in cases where the mother decided to keep her anonymity, to request information about her origins, in addition to identification, or disclosure of the identity of the biological mother, if he received the latter's consent.

5. Conclusions

The child's right to establish and preserve his identity is one of the pillars of the child's civil status. This right is included among the civil rights and liberties of the child regulated by internal, European and international norms.

In order to effectively realize this right with all its facets: birth registration, the right to a name, to a home, to a residence, as well as to civil status, the right to citizenship requires concerted and corroborated action of all public authorities involved in the implementation of rights the child: relevant ministries, local public authorities, but also parents or other legal guardians.

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Notes:

- [1] Article 22 of the Universal Declaration of Human Rights proclaims that: "Everyone as a member of society has the right to social security; It is entitled, through national effort and international cooperation, taking into account the organization and resources of each country, to obtain the realization of the economic, social and cultural rights indispensable for its dignity and the free development of its personality."
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