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TRANSFRONTALITY FILIATION ASPECTS

Călina JUGASTRU¹

Abstract:

Parentage with extraneity is regulated in national legal systems, in various forms and (especially as regards the modalities of the creation of the kinship), sometimes fragmentary. The natural family ties and civil filiation have, as sources, the Civil Code and special legislation for adoption, cases where Romanian law is lex fori.

The provisions of the Seventh Book of the Civil Code are circumscribed to the rules of identification of the applicable law and the area of it for filiation born of marriage, for filiation outside marriage, for substantive conditions, formalities and the nullity of the adoption. The rules used to determine the law are adapted to the recipients (for example, to the child - in the case of the name or to the mother, for the expenses of the birth). Medically assisted procreation is regulated only in substantive law, but these provisions are applicable to cross-border legal relationships.

Keywords:

cross-border relations, filiation, natural family ties, civil filiation, lex causae, field of application

1. Filiation in the context of the legal relations with foreign element

The past and present of a nation has a faithful reflection in the chain of filiation. The broad meaning of the term "filiation" is that of an unbroken line of people among whom the birth act has established the parent-child relationship. *Stricto sensu*, "filiation" means the relationship of descent between a person and each of its parents (Avram, (2013):351; Anitei (2012): 146). It is obvious, from these definitions, the importance of the legal regime of the filiation.

Filiation includes not only the biological link but also the civil kinship. So far, there are two categories of links that give expression to the concept of civil filiation: filiation resulting from adoption (including the subsequent adoption of certain artificial procreation techniques).

The qualifications are relevant in order to determine the conflict norms - strictly "dependent" on the category in question. For example, the filiation of a child born in marriage is reported at connection points specific to the general effects of the spouses' marriage (the common habitual residence, the common citizenship, the place where marriage is celebrated),

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while the filiation outside of marriage is based on the nationality of the child at birth (or on the citizenship that is more favorable to him).

In the context of the international evolution of family relations, the Romanian Civil Code contains detailed regulations of the blood relativity and of the civil kinship. Romanian law does not distinguish between the kinship derived from marriage or from outside marriage ("children in marriage are equal to those outside marriage" - Article 48, paragraph 3 of the Constitution) (Avram, (2013):348; Anitei (2012) :146-147); the private international law contains the distinct legal regime, in terms of the applicable law, for the marriage filiation, and for the filiation outside marriage. From the point of view of the conflicts of laws, there are differences, because *lex causae* has specific criteria for determining each category.

The principle of equal treatment is preserved in the private international law, with respect to the rights and obligations of children or to the obligations (of the persons indicated by law) towards children (Bacaci, Dumitrache, Hageanu, (2012) :180-181; Anitei (2012) :146-191). What is different - without being present any legal treatment inequality - is the applicable law, the criteria of which are distinct for the child born of marriage and for the natural child (Courbe, (2003) : 234-243).

On the other hand, kinship ((Bacaci, Dumitrache, Hageanu, (2012) :180-181)² and affinity generates, alongside the classical situations, issues that are of interest, due to the magnitude of the evolution of medical sciences and bioethics. Artificial filiation and the consequences generated by the procreative tourism are of a stringent novelty and current law.

The right to identify all the genealogical references *versus* the right to secret (or confidentiality from the medical framework) (Romoșan (2014) :358) is an equation that can become insoluble in the absence of a firm legal framework³ (Malaurie, Fulchiron. (2004) :318). International adoption is an expanding phenomenon and the territory, nationality and culture obstacles - are proving to be volatile.

² and the authors indicated at footnote no. 1).

³ „Depuis une vingtaine d'années est défendue l'idée qu'on a le droit de connaître ses origines. Peut-être parce-qu'aujourd'hui notre société perd peu-à-peu ses repères, qu'en outre il y a de plus en plus d'enfants qui ignorent leur origine; non seulement comme autrefois les enfants trouvés ou abandonnés mais des enfants adoptés ou résultant d'une procréation artificielle (PMA). Peut-être aussi parce que la science en donne les moyens. À quoi s'ajoutent des raisons psychologiques ou psychanalytique: la connaissance de ses origines serait, dit-on souvent, nécessaire à la structure et à l'équilibre de la personne. Le contraire est également vrai: il est doux de vivre dans un rêve – le mystère et l'ambiguïté de ses origines méritent dans la mesure du possible d'être respectés”.

2. Overview over the regulation of the filiation in Law no. 105/1992

Similar to the current Civil Code, Law no. 105/1992 concerning the regulation of the private international law relations⁴ has highlighted the applicable law according to the division filiation from marriage-filiation outside of marriage.

The old regulation used a "standard" to determine the law applicable to the family status. The operations for determining the *lex causae* gravitated around the personal and patrimonial effects of marriage. The law applicable to these effects was also applicable to divorce, marriage filiation and in part to adoption matters (the effects of adoption, relations between adopter and adopted). Under these circumstances, the applicable law referred to the significant connection points for Law no. 105/1992 - citizenship and domicile. In subsidiary, the residence and respectively, "the closest connections" completed the "cascade" for determining the applicable law.

Synthetically, the old law of private international law has regulated several essential **aspects** concerning filiation (I.P. Filipescu, A.I. Filipescu (2005) :405-406; Prescure, Savu. (2005) :146-147). (articles 25-29):

- a. *the filiation of the child from marriage was governed by the law which, at the time of birth, ruled the effects of its parents' marriage.* If before the birth of the child, the marriage of its parents ceased or was dissolved, it was applied the law which, at the time of the dissolution or termination, governed its effects.
- b. *the field of the law applicable to the filiation of marriage covered:* the denial of paternity; acquiring the name by the child; parent-child relationships, including the parents' obligation to support the child, to educate and administer his / hers property.
- c. *the subsequent marriage legalization* of the previously born child had to comply with the conditions laid down by the law that was applicable to the effects of marriage.
- d. *the filiation of the child born outside marriage* was established under the national law of the child from the date of birth. For the foreign citizen child, who had another foreign nationality at the time of birth, the more favorable law was taken into consideration.
- e. *the field of the law applicable to non-marriage filiation:* recognizing the filiation and its effects; contesting the recognition of

⁴ Published in The Official Gazette of Romania, Part I, no. 245/1 October 1992.

the filiation; the relationships between the child and parents, including the maintenance, education and administration of the child's property obligations.

- f. *the right of the mother to ask the father from outside the marriage to answer for the expenses* during pregnancy and for those occasioned by the birth of the child, was subjected to the mother's national law (N. Diaconu (2007) :193-196).

3. The filiation of the child from marriage (Hageanu (no. 1/2012) :13-18; Anitei (2012) :146-191)

3.1 *Lex causae*

"The child's filiation from marriage is established according to the law which, at the time of birth, governs the general effects of his parents' marriage" (article 2603, paragraph 1 of the Civil Code). Referring to the law of the general effects of marriage leads to the laws indicated by art. 2589, paragraph 1 of the Civil Code, depending on the connection points regulated in cascade.

Therefore, the child's filiation from marriage is governed, as it follows, by:

- a. *the law of the common habitual residence of the spouses.* The legal qualification of the habitual residence of the individual (when the Romanian law is a *lex fori*) highlights the main dwelling, even if the legal formalities for registration have not been carried out;
- b. in the absence of a common residence of the spouses, *the law of the joint citizenship of the spouses* will be applied. Even if the habitual residence is the main link for establishing filiation, in secondary is taken into account the citizenship. Since the filiation which results from marriage is in question, the requirement imposed is the community of citizenship of the two spouses;
- c. in the absence of a common citizenship of the spouses, *the law of the state in whose territory marriage was celebrated shall apply.* Always determinable, *lex loci celebrationis* is the last cascade variant if the law cannot be identified according to previous rules.

If, prior to the birth of the child, the marriage of the parents has ceased or has been dissolved, it will be applied the law which, at the time of termination or dissolution, governed its effects (article 2603, paragraph 2 of the Civil Code). The child is conceived at the time of termination or

dissolution of the marriage, so that its filiation will be governed by the law applicable to the general effects of marriage, at the time of termination or dissolution of the marriage. (Macovei, (2011) :237).

3.2. Mobile conflicts of laws

Both situations mentioned in art. 2603 of the Civil Code, for the child's marriage filiation are generating mobile law conflicts.

The first mobile law conflict (Anitei (2015) : 108) is about changing the law applicable to the general effects of marriage after the childbirth. Any subsequent change in the connection points does not influence the determination of the law applicable to the marriage filiation. Solving the mobile conflict involves taking into account the old law, meaning the law which governed the general effects of the marriage at the time of the child's birth (paragraph 1, article 2603).

The second mobile law conflict is reserved for the case when the parents' marriage has ceased or been loosened before the birth of the child. The old law is applicable, meaning the law which, at the time of termination or dissolution of marriage, governed its effects (paragraph 2, article 2603). In this situation, the child is only conceived when the marriage is terminated (by the death of one of the spouses or by the death of both spouses), is abolished (nullity) or is ended (by divorce).

3.3. The applicable law domain

It falls within the scope of the law applicable to marriage filiation (**the law of the general effects of marriage**) (Anitei, (nr. 1/2017 :118-124), the aspects relating to the establishment of maternal filiation, the establishment of paternal filiation (Romoșan (2014) : 314-335; Hageanu, (no. 2/2011) :15; I.P. Filipescu, A.I. Filipescu (2006) :298; Anitei (2012) :146-191)⁵, the denial of the child's paternity in marriage, the legitimation of the child and, in some cases, the effects of adoption.

A. *Establishing the filiation towards mother and towards father* , regardless of

whether the filiation is natural or derived from the assisted medical reproduction techniques regulated by the Civil Code. For example, the Romanian law (*lex fori*) provides:

⁵ „Establishing the filiation" and "proof of filiation" are different notions. In order to assume that the filiation has been established, it is necessary first to prove the objective connection between the child and its mother, resulted from the child's birth and identity. The birth certificate and court order cannot be issued in the absence of such prior evidence. It is true, however, that once the birth certificate is issued or the court decision is taken, they also constitute evidence of the filiation connection.

a. **cases** in which maternity recognition occurs (the birth was not recorded in the civil status record, the child was written in the civil status register as being born from unknown parents);

b. **the methods** of determining maternity (the birth act, recognition or court decision) and paternity (towards the father in marriage, by the effect of the paternity presumption) - art. 408 of the Civil Code. Unilateral juridical act, the recognition of the filiation is the manifestation of will made in order to create the relation of kinship between the author and the child. Maternity recognition and, also, paternity recognition are declarative legal acts, as the effects extend until the birth or, as the case may be, until the child's conception;

c. **the forms** of recognition, expressive and limiting. The declaration at the Civil

Status service, regardless of the place where it is made, will be registered at the town hall where the birth took place, as the registers of civil status in which the fact of birth was recorded are kept here. The authentic document which records the recognition is drawn up in front of the public notary. The same regime of authentic act also has the recognition made in the interrogation (Hageanu (no 1(2012) :326).. The recognition of the filiation in the will is irrevocable, even if during the testator's life, the ultimate will is revoked. The confession of parentage is an irrevocable act and, on the other hand, the irreversible character of recognition "is essentially based on the interest of the child that cannot be at the discretion of a person, but also on the general interest of the society for ensuring the stability and reality of the civil status of the persons"((Hageanu (no 1(2012) :326);

d. **the effects** of filiation, above all, over the personal and patrimonial relationships

between the parent and the child. The legal obligation of maintenance is subjected to the rules of the European law for those legal relationships that are carried out under the terms of Regulation no. 4/2009 and the 2007 Hague Protocol. In the relations with third countries - relations institutionalized by bilateral or multilateral treaties, the conventional rules will apply;

e. **acquiring the child's name** from marriage, according to the law applicable to the general effects of his parents' marriage.

The provision in this respect is expressive (Article 2603, paragraph 3 of the Civil Code) and constitutes an exception to the rules established by art. 576, paragraph 1 and 2 of the Civil Code. The latter text stipulates that

the child's name is governed by its national law or, alternatively, by the law of the state of the common citizenship of the parents and the child or by the law of the state where the child was born and has been living since birth. Exceptionally, in the matter of the child's name born in marriage, the law of the general effects of the parents' marriage will be applied, and not the law provided by art. 2576 of the Civil Code.

f. **the denial of paternity** is included, according to art. 2603 par. 3 of the Civil Code,

in the area regulated by the law of the general effects of the spouses' marriage: "The shown law also applies to the denial of the paternity of the child born of marriage [...]" (Oprea, (2013) :202).

The active processual quality may constitute a subject of discussion, as situations differ, at the level of national regulations. For the European countries, the *Kroon's decision against the Netherlands* (1994) clarified the question of the quality of bringing into action the denial of paternity, meaning that the married mother is entitled to prove in court the impossibility of her husband being the father of the child. Rigorously, the European Court ruled that the notion of "family life" to which art. 8 of the European Convention on Human Rights makes reference, is not only limited to marriage-based relationships, but can also include other "family ties", created *de facto*, in the case when the persons live together outside of marriage. Although the cohabitation act cannot, as a general rule, be a condition of the family relationship, however, exceptionally, there are other factors able to demonstrate that a relationship has enough constancy in order to create family ties; in the present case, Mrs. Kroon had four children out of wedlock, since she was separated from her husband, with whom she had completely lost contact, without knowing where he was. The Court stated that the respect towards family life requires that the biological and social reality prevails over a legal presumption that collides with the established facts and with the wishes of the persons concerned, without bringing benefits to anyone. As a consequence of the decision of the Court of Strasbourg, the Romanian constitutional judge ruled that the provisions of article 54, paragraph 2 of the Family Code (the old regulation of the family relations) are unconstitutional inasmuch as they only recognize the father's, and not the mother's or the child's which was born during the marriage, the right to take action in the denial of paternity (Tițian, Constantin, Cîrstea (2007) :163-164). Moreover, the decision of the European Court of Justice would have had direct applicability in the Romanian law, even in the absence of declaring the unconstitutionality of the legal provision mentioned (from the Family Code adopted in 1953). The Romanian doctrine mentioned that, although at first sight, it would seem that the family, within the

meaning of the Constitution of Romania, enjoys protection only if it is founded on marriage; such a restrictive interpretation is likely to distort the meaning of the constitutional texts, since the fundamental law does not contain a definition of the family, but establishes its great principles. Family is usually formed by marriage, but in reality, family relationships can also work outside of marriage. The Romanian Constitution states the equality of legal treatment between the child outside of marriage and the child from marriage. Also, the protection of family life implies the legal protection of this "life" as a state of fact, "including under the vocation of being able to convert this state of fact into a state of law at any time" (Avram, (no. 1/2009) :80; L. Irinescu (2007) :65-67); Anitei (2012) : 163-168).

The paternity conflict (double paternity) (Popescu, (1958) :77-91) is possible at the time when the mother has entered into a new marriage, and the first marriage is nullified, has ceased or has been dissolved within the term that constitutes the legal time of conception. The national material regulations are not unitary in terms of the legal period that places the longest and, respectively, the shortest gestation.

The proof of non-fatherhood is also an important point in the multitude of national regulations. In terms of probation, in the Romanian law applicable as *lex fori*, it is found the frequency of the different kinds of forensic expertise in determining the paternity: the serological expertise, the anthropological expertise⁶, the dermatoglyphic expertise (the hereditary transmission of papillary drawings) and the genetic expertise (Bacaci, Dumitrache, Hageanu, (2012) :208; Tanase (2017) :380-382)⁷.

g. **the legitimization of the child**, when the parents are entitled to do so, through a

marriage subsequent to the previously born child. If the parents proceed to *legitimizing through subsequent marriage of the previously born child*, the same law of the general effects of marriage is applied. The text of the Civil Code takes into consideration only on the legitimization through subsequent marriage, and not the legitimization which takes place through other methods (for example, through recognition or by legal action). At this time, the substantively Romanian right does not regulate legitimacy, but offers the

⁶ Hereditary, certain anatomical characteristics and particularities (hereditary diseases, malformations, face physiognomy etc.) are transmitted, but the expertise can only be performed after the child has reached the age of three.

material available on the website <http://www.juridice.ro/380282/managementul-defectuos-al-impartirii-dreptatii-ep-8-stabilirea-filiatiei-fata-de-presupusul-tata-biologic-pentru-copilul-nascut-din-casatorie-posibila-inaintea-admiterii-tagaduirii-paternitatii.html> (accessed at February 8, 2017).

conflict of laws solution in the private international law⁸. The conditions required for subsequent marriage legitimation of the child born previous are those established by *lex causae* determined for the general effects of marriage. The domain of the law applicable to legitimation includes the conditions and effects of legitimation, contesting the legitimation and the effects of marriage annulment, regarding the situation of the child.

B. Establishing the filiation from outside the marriage

Filiation outside marriage is governed by **the national law of the child's birth date**. The law text mentions that the *lex causae* area includes the recognition of the filiation, its effects, and also the contestation of the filiation recognition:

a. **the ways** of establishing the filiation outside marriage. The father from outside the marriage will resort to recognizing or to establishing filiation by court order.

As for the filiation recognition, it may also belong to an unmarried minor. Positioning the Romanian law as the law of the forum attracts the application of the provisions regarding the possibility of the minor to proceed with recognition. This legal provision, active since 2011, is not found in all national legislations and, it should be noted, it was not even known in the Romanian Family Code, which came into force in 1954. The current Civil Code has capitalized the doctrinal constructions and conditions the recognition made by the unmarried minor, of the existence of his discernment at the time of recognition (Article 417 of the civil code) ((Hageanu (no 1(2012) :18);

b. **the effects of filiation** from outside marriage, in terms of the personal and patrimonial relationships between the child and the parent towards whom the filiation has been established. A special mention for the maintenance obligation, which (in the Union area) will be subjected to the special legislation, according to 2612 of the Civil Code.

4. The filiation of the child from outside marriage

(Rohnean (2012) : 1103-1005)

4.1. *Lex causae*. Mobile conflict of laws

4.1.1. *Methods of determining the applicable law*

The rule consists in applying the national law that the child has at birth. The qualification of the phrase "national law", in the Romanian law,

⁸ Law no. 105/1992 has also regulated the legitimisation by marriage of the child born previous, the law applicable being the law of the effects of his parents' marriage (art. 27).

requires taking into account the citizenship as the main connection point. The situation of statelessness of the child is resolved by applying the law of the state of the child's habitual residence (the same is done when the child is a refugee).

A special rule in the field of filiation outside of marriage establishes the obligation to apply the most favorable law, according to art. 2605 par. 1, the second thesis of the Civil Code. If the child has several citizenships, without any of them being the Romanian citizenship, it is applied the law of the citizenship which is more favorable to him/her. This rule derogates from the common rule of determining the national law, which provides that, if a person has more than one nationality, the law of that state whose nationality it holds and with which it is most closely connected, in particular, through his habitual residence, is applied (Article 2568, paragraph 2 of the Civil Code). The common right to determine the national law, if the person concerned has multiple citizenships, does not distinguish between the situation in which the Romanian citizenship is one of the multiple citizenships and the situation in which the plurality of citizenships does not include the Romanian citizenship.

4.1.2. Solving the mobile conflicts of laws

The law applicable to filiation outside of marriage is determined according to the nationality of the child at birth. Mobile law conflicts may arise with the occasion of identifying the applicable law.

The first situation generating a mobile conflict is the one in which, **after the birth of the child, its citizenship undergoes changes:** "The filiation of the child born outside of marriage is established according to the child's national law from the date of birth." The old law will be applied, which is the law of the nationality of the child at birth (Article 2605, paragraph 1, first thesis).

The second situation that gives rise to the mobile conflict is the one in which, **at the time of birth, the child has several citizenships, other than the Romanian citizenship.** It will be applied the law which is more favorable for the child, which, in the hypothesis in question, is a foreign citizen (Article 2605, paragraph 1, second thesis).

4.2. The domain of the applicable law

The law determined according to the criteria mentioned in paragraph 1 of art. 2605 of the Civil Code applies to the recognition of the filiation (the recognition procedures ((Hageanu (no 1(2012) :17-18), the conditions of validity of the maternity recognition and the paternity recognition, contesting the recognition of the filiation) and also to the effects of the

filiation. The legal enumeration of the aspects subjected to the law of the cause is exemplary, not limitative.

The law applicable to filiation outside of marriage, identified by the rule referred to in article 2605, paragraph 1 of the Civil Code is not in breach of the father's liability for the expenses expressly mentioned in paragraph 2 of that text. The father of the child born from outside the marriage is subjected to the mother's national law, as regards to the expenses from during the pregnancy and the costs of the child's birth. The procedural capacity in action for claims belongs to the mother of the child: "The right of the mother to ask the father of the child from outside the marriage to answer for the expenses [...]".

4.3. Establishing the filiation resulting from homosexual marriage or from civil partnership

The current international normative landscape highlights issues that were not the subject of discussion years ago. Marriage filiation was understood as the connection between the child and the parents, under the conditions that marriage reunited the man and the woman. With the new national laws, marriage is seen as a legal framework within which spouses assume the rights and duties prescribed by law, but procreation is no longer the essence of the institution.

In the case of the states that have opened the legislation to the possibility of same-sex marriage, the content of the notion of public order (of substantive law) and of public order of private international law has changed. For example, the French Court of Cassation has ruled that, it is contrary to an essential principle of French filiation law, the recognition of a foreign decision, as long as the child appears as having two same-sex parents (Hammje (no. 4/2013) :802). Changing the optics of the French substantive law on marriage, starting with the year 2013⁹, has necessarily led to a change in the content of public order. The current French public international law order allows the recognition of foreign decisions that pronounce adoption in favor of homosexual couples.

According to the Romanian law, the filiation from marriage results from the "freely consented union between a man and a woman" (article 25, paragraph 1 of the civil code). The gender difference is a matter of public order, both in the substantive law and in the private international law. Regarding the recognition of same-sex marriage, the Romanian legal norm is imperative-prohibitive: "same-sex marriages concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in

⁹ By French Law no. 2013-404 of May 17, 2013, same-sex marriage was enacted.

Romania" (art. 277, paragraph 2 of the Civil Code). The problem of recognizing the filiation established abroad, when the child's parents are two persons of the same sex, is not regulated.

The solution can be provided by examining the provisions of private international law from the Civil Procedure Code and from the Civil Code." Foreign decisions are fully recognized in Romania, if they refer to the personal status of the citizens of the state where they were pronounced or if they were pronounced in a third state, they were first recognized in the state of citizenship of each party or, in lack of recognition, they were pronounced based on the law determined as applicable under the Romanian private international law, are not contrary to the public order of Romanian private international law and the right to defense has been respected".

When the recognition is conditioned upon respecting the public order of the state concerned, the content of the notion will be examined - of course, in relation to the fundamental values of the forum. The interrogation concerns, this time, the filiation resulting from the marriage of two persons of the same sex.

In the absence of a necessary application norm in the Romanian Civil Code, the solution could be favorable to the child (Oprea 92013) :199-200). At least two arguments support this: there are no necessary application norms¹⁰ prohibiting the establishment of filiation in the working hypothesis (as there is in the case of recognizing same-sex marriages); the attenuated effect of the public order, based on the principle of the best interest of the child. The *sine qua non* condition results from the aforementioned: the marriage of the same-sex parents should have been legally concluded on the territory of the foreign state. Even though the attenuated effect of the public order of international private law is expressly regulated in the Civil Code (article 2567), it can only be invoked when the rights of the parties have been legally constituted abroad. The child's superior interest is also highlighted in the recent decisions of the European Court of Human Rights, in order to legitimize the recognition of filiation if the parents have turned to maternity substitution on the territory of a foreign state, and at least one of them is also the biological parent of the child¹¹. In these situations, the parties resorted to the legal norms of a more favorable foreign law system, in order not to apply their own legal system,

¹⁰ „The mandatory provisions provided by the Romanian law for the regulation of a legal relationship with a foreign element are applied as a priority" (art. 2566 of the Civil Code).

¹¹ *Mennesson c/a Franței* (no. 65192/11) and *Labassé c/a Franței* (no. 65941/11) were pronounced by the Strasbourg Court on 26 June 2014.

restrictive in terms of regulation and recognition of the respective legal situations.

In relation to civil partnerships (registered partnerships), it is obvious that the conflict rule contained in art. 2603 of the Romanian Civil Code is not applicable. It is not about the institution of marriage, but about a form of union (heterosexual or homosexual) between persons who cohabit and who understand that is necessary to formalize the liaison by registering with the competent bodies. The civil partnership is not synonymous with marriage, so the reference made by the mentioned legal text can only be applied to the filiation that has its source from marriage. The provisions relating to non-marriage filiation and the conflict rules mentioned there could be applicable (article 2605 of the Civil Code) (Oprea, (2017)¹².

5. Filiation resulting from adoption and from artificial procreation

5.1. Aspects of the filiation which resulted from adoption

Adoption is the most important way (Bacaci, Dumitrache, Hageanu, (2012) :225-262) of establishing a civilian kinship. The institution of adoption is not known in all legislations, some of them have original regulations regarding the protection of the minor outside the family of origin. The Muslim law, for example, operates with notions that designate protection measures that do not have the ultimate goal of creating a parentage link between the child and the person providing the protection. *Kaffala* is an institution unknown to the Romanian law, which includes the obligation for the persons who take care of a minor, to provide him with physical and mental development, but also the duty to raise and educate him in the spirit of the values of Muslim law.

The legal rules of Book VII of the Romanian Civil Code do not concern such measures, which are devoid of the creation effect of parentage. Of course, there may be international situations where some effects originating from *kaffala* institutions are invoked in our country. The solutions must be sought in relation to the public order of Romanian private international law and require the prior qualification of the notions in question.

What governs the provisions of art. 2607-2610 of the Civil Code is the institution that gives birth to the civil filiation, through the effect of going through the procedures established by the law. Besides the Civil Code, the special legislation (Law No. 273/2004 concerning International Adoption) has provisions for the **international adoption**, in the specific

¹² <http://studia.law.ubbcluj.ro/articol/554> (material accessed at February 20, 2017).

cases mentioned (the adopter or adoptive family and, respectively, the adopted person have their habitual residences in the territories of different states, and following the adoption, will have a common habitual residence).

According to the Romanian Civil Code, the **basic conditions** of adoption are, cumulatively, those imposed by the national law of the person who adopts and the national law of the person to be adopted (it is stipulated that they will also comply with the requirements that are mandatory for both, in each of the national laws shown). For the spouses who adopt together, the conditions governed by the law which governs the general effects of marriage are required (similarly, in the case when one spouse adopts the other spouse's child). **The form** of adoption is governed by *lex loci actus* (depending on the substantive law applicable, the form conditions know variations at national level - for example, the solemn form *ad validitatem*). **The effects of adoption** are on the basis of the national law of the adopter. If the spouses adopt together, *lex causae* is the law which governs the general effects of marriage. This situation enters the scope of the two laws, including the issues relating to the relationships between the adopter and the adoptive parent or adoptive parents, and also the dissolution of adoption. **The nullity of adoption** has as applicable the law which governs the substantive conditions of the adoption (if nullity refers to the substantive conditions) and the law which governs the form requirements of the adoption (whether the nullity, absolute or relative, is related to the form conditions)¹³.

5.2. Filiation resulted from artificial procreation

One of the ways to create the bond of filiation (mediated by the medical techniques and innovations) is the assisted medical reproduction. The substantive right of the states is far from enjoying the homogeneity of regulations, some states being in the situation of only regulating partially the

¹³ As regards to the applicable law to adoption and to artificial procreation, in other legal systems, see: for the Belgian law, F. Rigaux, *Les tendances actuelles du droit international privé belge*, material available at the address <http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201975/RBDI%201975-1/Etudes/RBDI%201975.1%20-%20pp.%201%20%C3%A0%2031%20-%20Francois%20Rigaux.pdf> (consulted at March 18, 201); for the French law: M. Farge, *La filiation des enfants issus d'une GPA à l'étranger: la CEDH se livre à un bon diagnostic des incohérences du droit français, mais prescrit un remède discutable!*, in *Revue des droits et libertés fondamentales*, 2014, chron. n° 21, article available in electronic form on the website: <http://www.revuedlf.com/personnes-famille/la-filiation-des-enfants-issus-dune-gpa-a-letranger-la-cedh-se-livre-a-un-bon-diagnostic-des-incoherences-du-droit-francais-mais-prescrit-un-remede-discutable-commentaire/>, accessed at March 20, 2017.

practical implementation methods of the artificial filiation or is even being characterized by the absence of the provisions in the matter.

The Romanian law has only provisions for the medical assisted reproduction with a third party donor. In the acceptance of the Romanian law, only the man together with a woman can be parents or the woman alone. According to the qualifications of article 441-447 of the Civil Code, **the third party donor** does not become the parent of the child for which it donated genetic material, since artificial procreation does not have the effect of establishing such a link of filiation (E. Florian (2014) :101-103).

When it is required to recognize the legal situations born in the territory of another state, the legal texts relating to marriage filiation or to filiation from outside of marriage, as the case may be, are applicable. At the time of the recognition of the foreign decisions which enshrine the artificial bond of filiation, the mechanism of public order intervenes. The content of public order of private international law will be examined through the light of the legislation of the country concerned, and the content of the public order of European private international law supports the filter of the solutions offered by the European norms.

Bibliography

- NC., Anitei. (2012). *Dreptul familiei (Family Law)* Hamangiu Publishing, Bucharest.
- NC., Anitei. (2015). *Lección de drept internațional privat, (Lessons of Private International Law)* Lumen Publishing, Iasi.
- NC., Anitei. (2017). *Law applicable to the patrimonial effects of marriage* . Acta Universitatis, Universitatea „Lucian Blaga”, Sibiu, nr. 1, Editura Universul Juridic, Bucuresti.
- M., Avram. (2013). *Drept civil. Familia [Civil Law. Family]*, Hamangiu Publishing, Bucharest
- M., Avram. (1999). *Considerații în legătură cu reglementarea actuală a acțiunii în tăgăduirea paternității [Considerations in the current regulation of the action to disclaim paternity]*, în „Dreptul” *Magazine*, no. 2.
- Al., Bacaci.V.-C., Dumitrache. C.C., Hageanu. (2012). *Dreptul familiei, în reglementarea noului Cod civil [Family law, in regulation of the new Civil Code]*, 7th Edition, C.H. Beck Publishing, Bucharest.
- P., Courbe. (2003) *Droit international privé*, 2^e édition, Dalloz, Paris.
- N., Diaconu. (2007). *Drept internațional privat [Private international law]*, University course, Third Edition, Lumina Lex Publishing, Bucharest.
- M., Farge. (2014). *La filiation des enfants issus d'une GPA à l'étranger: la CEDH se livre à un bon diagnostic des incohérences du droit français, mais prescrit un remède*

- discutable*, în *Revue des droits et libertés fondamentales*, chron. n° 21, article available in electronic form on the website: <http://www.revuedlf.com/personnes-famille/la-filiation-des-enfants-issus-dune-gpa-a-letranger-la-cedh-se-livre-a-un-bon-diagnostic-des-incoherences-du-droit-francais-mais-prescrit-un-remede-discutable-commentaire/>, (accessed at March 20, 2017).
- I.P., Filipescu. A.I., Filipescu. (2005). *Tratat de drept internațional privat [Treaty of Private International Law]*, Edition revised and added, Universul Juridic Publishing, Bucharest.
- I.P., Filipescu. A.I., Filipescu. (2006). *Tratat de dreptul familiei [Family Law Treaty]*, Universul Juridic Publishing, Bucharest
- E., Florian. (2014). *Considerații privind reglementarea reproducerii umane asistate medical cu terț donator în dreptul român [Considerations regarding the regulation of the human assisted reproduction with a third party donor in the Romanian law]*, in the volume *In memoriam Mircea Mureșan*, Universul Juridic Publishing, Bucharest.
- CC., Hageanu (2012). *Reglementarea recunoașterii de filiație în Codul civil [Regulating the filiation recognition in the Civil Code]*, in *Acta Universitatis Lucian Blaga*, Jurisprudentia Series, no. 1.
- CC., Hageanu. (2011). *Modalități de stabilire a filiației și dovada acesteia în Codul civil [Methods for establishing filiation and its proof in the Civil Code]*, in *Acta Universitatis Lucian Blaga*, Jurisprudentia Series, no. 2.
- P., Hammje. (2013). «*Mariage pour tous*» et droit international privé, in *Revue critique de droit international privé*, no. 4.
- L., Irinescu. (2007). *Reglementări actuale privind relațiile de familie [Current regulations concerning the family relationships]*, in „*Al.I. Cuza*” *University Annals of Science, Iași*, Tomul LXIII, Legal Sciences.
- Ph., Malaurie. H., Fulchiron. (2004). *La famille*, Defrénois, Paris.
- T., Prescure. C.N., Savu. (2005). *Drept internațional privat [Private international law]*, Lumina Lex Publishing, Bucharest.
- I., Macovei. (2011). *Drept internațional privat. În reglementarea noului Cod civil și de procedură civilă [Private international law. In the regulation of the new Civil and Procedural Code]*, C.H. Beck Publishing, Bucharest.
- A., Oprea,. (2013). *Probleme actuale privind filiația în dreptul internațional privat român [Current problems concerning filiation in the Romanian Private International Law]*, in M.D. Bob (coord.), *Evoluția noțiunii de familie și influența acesteia asupra ordinii succesorale legale. Lucrările colocviului internațional desfășurat la București [The evolution of the family notion and its influence over the legal successional order. The works of the international colloquium held at Bucharest]*, 19-20 April 2013, Official Monitor Publishing House, Bucharest.

- A., Oprea. (2017). *Problèmes de conflit de loi en matière d'établissement de filiation*, in *Studia Universitatis Babeş-Bolyai, Iurisprudentia*, <http://studia.law.ubbcluj.ro/articol/554> (material accessed at February 20, 2017)
- T.R., Popescu. (1958). *Dreptul familiei [Family law]*, Second part, *Rudenia [Kinship]*, Bucharest.
- F., Rigaux. (2011). *Les tendances actuelles du droit international privé belge*, material available at the address <http://rbdi.bruyant.be/public/modele/rbdi/content/files/RBDI%201975/RBDI%201975-1/Etudes/RBDI%201975.1%20-20pp.%201%20%C3%A0%2031%20-%20Francois%20Rigaux.pdf> (consulted at March 18, 2011)
- I.D., Romoşan. (2014). *Dreptul familiei [Family Law]*, Second Edition, revised and added, Universul Juridic Publishing, Bucharest.
- D.-A., Rohnean. (2012) The comment of article 2605 from the Civil Code, in D.M. Gavriş, *Noul Cod civil. Comentarii, doctrină şi jurisprudenţă [The new Civil Code. Comments, doctrine and jurisprudence]*, Vol. III, Art. 1650-2664, Hamangiu Publishing, Bucharest.
- A.-R., Tănase. (2017). *Managementul defectuos al împărţirii dreptăţii. Ep. 8. Stabilirea filiaţiei faţă de presupusul tată biologic pentru copilul născut din căsătorie, posibilă înaintea admiterii tăgăduirii paternităţii? [The faulty management of dividing justice. Ep. 8. Establishing filiation towards the alleged biological father for the child born from marriage, possibly before accepting the denial of paternity?]*, in *Revista de note şi studii juridice [Journal of Legal Notes and Studies]*, material available on the website <http://www.juridice.ro/380282/managementul-defectuos-al-impairarii-dreptatii-ep-8-stabilirea-filiatiei-fata-de-presupusul-tata-biologic-pentru-copilul-nascut-din-casatorie-posibila-inaintea-admiterii-tagaduirii-paternitatii.html> (accessed at February 8, 2017).
- D., Tişian. A., Constantin. M., Cîrstea. (2007). *Codul familiei adnotat [Family code annotated]*, Hamangiu Publishing House, Bucharest.
- L., Ungur. (2009). *Acţiunea în tăgăda paternităţii în lumina efectelor deciziei Curţii Constituţionale şi a jurisprudenţei Curţii Europene a Drepturilor Omului [The action in the denial of paternity in the light of the effects of the Constitutional Court's decision and the jurisprudence of the European Court of Human Rights]*, in *Fiat Justitia*, no. 1.

Decision and law

The decision of the Constitutional Court no. 349 of 19 December 2001, published in Official Gazette no. 240/10 April 2002.

Law no. 105/1992 has also regulated the legitimisation by marriage of the child born previous, the law applicable being the law of the effects of his parents' marriage (art. 27).

By French Law no. 2013-404 of May 17, 2013, same-sex marriage was enacted.

Mennesson c/a Franței (no. 65192/11) and *Labassé c/a Franței* (no. 65941/11) were pronounced by the Strasbourg Court on 26 June 2014.