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Filial Identity And Parenthood And/Or Socio-Affective Filiation

Juan Pablo Cabrera Vélez [(1)]; María Concepción Chacón Abarca [(2)]; Telmo Elías Yánez Olalla [(3)]; Luis Alfonso Bonilla Alarcón [(4)]

[(1)] Universidad Estatal de Bolívar. Campus Académico "Alpachaca" Av. Ernesto Che Guevara s/n y Av. Gabriel Secaria, Guaranda, Ecuador. jcabrera@ueb.edu.ec ORCID: https://orcid.org/0000-0003-4381-164X
[(2)] Universidad Estatal de Bolívar. Campus Académico "Alpachaca" Av. Ernesto Che Guevara s/n y Av. Gabriel Secaria, Guaranda, Ecuador. mchacón@ueb.edu.ec. ORCID: https://orcid.org/0000-0002-2143-5930
[(3)] Universidad Estatal de Bolívar. Campus Académico "Alpachaca" Av. Ernesto Che Guevara s/n y Av. Gabriel Secaria, Guaranda, Ecuador. tyanez@ueb.edu.ec ORCID: https://orcid.org/0000-0003-2588-9101
[(4)] Universidad Estatal de Bolívar. Campus Académico "Alpachaca" Av. Ernesto Che Guevara s/n y Av. Gabriel Secaria, Guaranda, Ecuador. lbonilla@ueb.edu.ec ORCID: https://orcid.org/0000-0003-4186-0739

Abstract: The identity of children is constituted through the voluntary recognition made by the parents of their children, thus establishing the filiation and with it all the legal-family rights that are generated. For this reason, there is a doctrinal, jurisprudential and normative position that proposes to guarantee the identity to safeguard the rights of the group of priority attention and even provides for the integral reparation of the right, when it has been violated, starting with the challenge of paternity and the correct establishment of filiation. Within a second doctrinal position, there is Ecuador, a Constitutional State of Rights where there is no legal mechanism that guarantees the veracity of the constitution of the filiation identity. On the contrary, by Resolution No. 05-2014 the National Court of Justice of Ecuador determined that paternity cannot be challenged although the biological mismatch can be demonstrated, thus preventing the recovery of the identity when it has been violated. The main argument of the second position is the possibility that between the recognizer and the recognized a parentality and/or socio-affective filiation is formed which, despite not having been proven, if there is one, safeguards the integral development of the minor. Methodologically, the approach is qualitative, being a bibliographic type of research, based on the saturation of sources: primary and secondary, and the processing of the information. Finally, the conclusions of the work were arrived at, which was only possible through the support of the position taken

Keywords: Identity, filiation, parentality and/or socio-affective filiation, children's rights, origin, etc.

Resumen: La identidad de los niños y niñas, se constituye mediante el reconocimiento voluntario que hacen los padres sobre los hijos, estableciendo de esta forma la filiación y con ella todos los derechos jurídico-familiares que se generan. En esta razón, existe una postura doctrinal, jurisprudencial y normativa que, plantea garantizar la identidad con el fin de precautelar los derechos del grupo de atención prioritaria e incluso prevé la reparación integral del derecho, cuando este ha sido vulnerado, empezando por la impugnación de la paternidad y el correcto

establecimiento de la filiación. Dentro de una segunda posición doctrinal, se presenta Ecuador, Estado Constitucional de Derechos donde no existe mecanismo legal alguno que garantice la veracidad de la constitución de la identidad filiatoria, por el contrario, mediante Resolución No.05-2014 la Corte Nacional de Justicia del Ecuador determinó que, no se puede impugnar la paternidad a pesar de que pueda demostrarse la no concordancia biológica, con lo cual se impide recobrar la identidad cuando ha sido vulnerada. El principal argumento de la segunda postura, es la posibilidad de que entre el reconociente y el reconocido se conforme una parentalidad y/o filiación socioafectiva que, a pesar de no haberse probado, de haberla salvaguarda el desarrollo integral del menor. Metodológicamente, el enfoque es cualitativo, siendo una investigación de tipo bibliográfica, basada en la saturación de fuentes: principal y secundaria, y el procesamiento de la información. Finalmente, se arribó a las conclusiones del trabajo, lo cual únicamente fue posible mediante una sustentación de la toma de postura.

Palabras Clave: Identidad, filiación, parentalidad y/o filiación socioafectiva, derechos del niño, niña y adolescente, origen.

I. INTRODUCTION

The problem covered by this paper is the doctrinal discussion that to date has not been resolved in the legal world, as to whether filial identity -being a fundamental and constitutionalized right- should be weighted over the parentality and/or socio-affective filiation -although in Ecuador it should not be proven-, with which the effective integral development of the child or adolescent would have been demonstrated. In cases in which the identity of the minor has been altered, substituted or deprived -in short, violated-, through the recognition of a third party, who without being the -biological- parent, appears as the "legal" parent.

On the one hand, there is a majority of doctrinarians who propose the weighting of identity, in the protection of the rights of children and adolescents, who depend on their filiation to establish their legal-family ties and in this way, consolidate the full range of minority rights, such as custody, food, visits, etc. Within this position, the Colombian and Venezuelan jurisprudence and regulations have determined the proof of biological truth as an indispensable requirement for the identity of the child.

Despite the obviousness, it should be mentioned the existence of a minority part of the doctrine that sustains that the act that constitutes the identity should not be revoked or challenged, even when the violation of the right to identity is determined due to the biological non-concordance. Within this context, Ecuadorian jurisprudence and regulations have determined that the voluntary recognition of children is irrevocable, although it can be scientifically proven that there is no biological concordance.

This position is based on the possibility that between the recognizer and the recognized -non-biological-, a parentality and/or socio-affective filiation has been created, equating the recognizer to a social and not merely legal father; as well as, equating the recognized as a true child. This undoubtedly benefits the integral development of the child, who would have been integrated into a compound family.

Against this position, it should be noted that it is true that parenthood and/or socio-affective filiation contributes to the integral development of the child or adolescent when it has been duly proven in the terms established by law; that is, the concurrence of a period of 10 years, the use of the name and the fame that provides the recognized and, most importantly, the treatment that exists between the subjects, which equates them to a real family.

However, according to the Ecuadorian Civil Code, in all cases in which the identity has been violated due to a biological mismatch -through a complacent recognition- it will be considered as a certain fact that a parentality and/or socio-affective filiation has been consolidated, without the existence of proceedings or evidence to prove such family status, according to domestic law.

Such an approach is dangerous because without proving the consolidation of parenthood and/or socio-affective filiation, the filiation of a child or adolescent is conferred to a third party who, in the absence of the requirement to prove paternity, can in practice recognized as his own a child that does not belong to him, thus violating his identity and suppressing the natural legal-familial rights. And because the recognition of children is irrevocable and unchallengeable according to Ecuadorian law, it causes the continued deprivation of the rights of children and adolescents.

The objective of this paper is to support a position under the doctrinal, jurisprudential and normative support - although there is a low development on the subject- that allows guaranteeing the application of the principle of the best interest of the child, for benefit of the rights of children and adolescents; highlighting that the right to identity is one of the most important in the first years of the human being because it safeguards the integral development of the child within his natural family, which is the ultimate goal of the child's development.

The present study hypothesizes that the fundamental and constitutionalized right to identity must be safeguarded, which cannot be done in the case in which the alteration, substitution or deprivation of the right is determined. Therefore, the main approach is that the identity must be guaranteed, unless it is proven - as required by law - the existence of a parentality and/or socio-affective filiation, which is an isolated case in which a third party takes in a child as a son or daughter who has no previous recognition of the parent.

However, the problem of this situation is that the Ecuadorian jurisprudence and the regulations of the Civil Code -article 250- simply assume that these rare cases are a rule, without any type of proof -time, name, fame, treatment- to constitute the family status, as provided by the same Civil Code. Consequently, what is done in practice is to prevent the recovery of a fundamental and constitutionalized right that has been violated.

For these reasons, the position of the present work analyzed both doctrinal, jurisprudential and normative positions, tending to guarantee the filial identity and its reestablishment before a possible alteration, substitution or deprivation. Unless, the consolidation of a parentality and/or socio-affective filiation is proved, through the fulfillment of the following legal requirements: time, name, fame and treatment. To provide stability to the integral development of the minor.

II. MATERIALS AND METHODS

The materials and the method obey the following delimitation. The methodology used for the development of this work has a qualitative approach since it is rich in arguments subject to interpretation, but it does not have hard data that can be incorporated in the analysis, since they do not exist according to what has been found. The research is of a bibliographic type since it has been used as a basis for the universal doctrine, national and comparative jurisprudence, as well as foreign and Ecuadorian regulations.

Therefore, primary sources that directly support the topic in the Ecuadorian environment have been used as reference material, but also secondary sources such as books, book chapters, and scientific articles, especially of a reflexive nature, have been used. Additionally, documents obtained from

repositories and databases have been analyzed, such as EBSCO, Google Scholar, Scopus, and Web of Science.

The terms that facilitated the search were the keywords: identity, filiation, parentality and/or socio-affective filiation, children's rights, and origin. Under this determination, the following information was used: Total: 35 documents. Jurisprudence: 6 documents. Regulations: 7 documents. Doctrinal sources: 22 documents. Therefore, there is variety in terms of the inclusion criteria -whether or not they were considered for taking a position- on study topics that addressed the proposed topic in an exclusive, related or opposite way. All works of editorial review, congresses and communications to congresses were excluded from the basis of the study.

During the process of organizing the information, the most relevant information was preferred - by saturation method - when several publications dealing with the same topic were found. For this, it was necessary to organize the documentation systematically by using the Mendeley management program, which specialized in bibliographic processing. The following indicators were considered: author, year, title, and subject.

III. RESULTS

3.1 Theory that proposes the protection of the fundamental and constitutionalized right to the identity of children

The right to identity has been recognized as a specialized fundamental right of the human group composed of children and adolescents, as determined by the Convention on the Rights of the Child, in its Article 7: "...shall have the right from birth to a name..." (United Nations General Assembly, 1989). In the same sense, other International Instruments are pronounced such as the Inter-American Convention on Human Rights -Article 7- (Organization of American States, 1969) and the International Covenant on Civil and Political Rights -Article 24, No. 2 (United Nations General Assembly, 1966). Likewise, the right is constitutionalized in Ecuador, as determined by the Constitution in Article 45, Paragraph 2: "Children and adolescents have the right to...their identity..." (National Assembly of Ecuador, 2008).

For the identity to be regularly constituted, it is necessary that the parent recognizes his or her child before the Civil Registry, thus becoming known as the "legal parent", which may or may not agree with biology. Consequently, it can be argued that in the minority group, identity is initially of a filiation nature: "The right to identity, especially for children...is linked to the rights derived from filiation" (González, 2011, p. 10)

The filial identity allows the achievement of so many other rights of children and adolescents, such as custody, food and representation, as well as others of a civil nature such as inheritance. That is to say, filial identity allows the achievement of legal-familial relations, for which reason, the importance of guaranteeing its constitution is emphasized, ensuring biological veracity as a presupposition; to provide the human being with the characteristics "...to differentiate him from the rest, whether in the physical, biological, social or legal order" (López & Kala, 2018, p. 69).

However, in reality, the law has not been able to implement biotechnology in this practice, to verify the quality of the progenitor and the procreated, noting that a simple DNA test would establish the biological truth, understood as "...the investigation without the restriction of paternity and maternity" (Espejo and Lathrop, 2020, p. 104). Quite the contrary, in the current forensic practice, the recognition of paternity is only based on the word of the person who claims to be the father even though he is not, according to the provisions of the Organic Law on Identity and Civil Data Management (Asamblea Nacional del Ecuador, 2016)

It could even happen that the recognizer constitutes the legal act in good faith; that is to say, convinced that the paternity belongs to him -when it does not-, this, in the total absence of any legal requirement -DNA test- to prove the veracity of the filiation or, in other words, the total absence of preventive state protection. Therefore, it is worth questioning whether Ecuador guarantees the human right that, moreover, is constitutionalized in its Magna Carta. "It is unimaginable to leave a person defenseless against an aggression of the magnitude it acquires, one that denies or denaturalizes its historical truth" (Álvarez, 2016, p. 117)

Additionally, it must be categorically stated that Ecuador calls itself a Constitutional State of Rights, as determined by the (Constitution of the Republic of Ecuador, 2008) "...the Constitutions...contain high levels of material or substantive norms that condition the action of the State..." (Carbonell, 2007, p. 10). Consequently, it is conceived as a material State of rights, which is false in terms of guaranteeing identity, since it does not exercise sufficient preventive protection to verify the veracity of a fundamental and constitutionalized right.

In another aspect, the constitutional State of rights by definition should exercise sanctioning protection, when it verifies that the right to identity has been violated, sanctioning the violation, but also ordering the integral reparation of the right to an identity that creates the legal-familial relations of the minors.

However, despite its State model, Ecuador does not exercise any type of preventive or even punitive protection of the right to identity. "Its interrelation with justice is the essence that distinguishes the material State of Law from the only formalist State..." (Von Münch, 1999, p. 291).

On the contrary, of the obligation of any State to provide effective guardianship -regardless of its model-, the Ecuadorian reality poses implausible situations, such as what is sustained by the highest body of administration of justice, which determines in its Resolution No. 05-2014: "...the absence of a consanguineous link with the person recognized through the practice of the DNA test, does not constitute proof..." (National Court of Justice of Ecuador, 2014, p. 19). A decision that was used as a textual source of the reform to the Ecuadorian general law, article 250 (Civil Code, 2005). Thus, it is clear that in addition to not providing effective protection in terms of guaranteeing biological veracity, the Ecuadorian law prevents recovering the right when this has been violated.

Since identity is a complex unit, it is composed of a static and a dynamic dimension. The static dimension comprises the human being's identification data, which in theory should not change - therefore, they must be based on biological truth - because they individualize him/her before the State, society and his/her family. "The knowledge of the biological origin of the person is of utmost importance within the data of personal identity; it must be emphasized the importance that the biological data is the static identity..." (Zenere & Belforte, 2001, p. 147)

Within what concerns the dynamic dimension, this is built daily based on the free development of the personality (Savaria, 2018, p. 196). However, it should be pointed out that, in the case of children and adolescents, the static dimension plays a fundamental role that conditions the dynamic dimension, since, the development of the human being in the first years of the primary age, depends on the family, both nuclear as extended.

> The biological datum -static identity- of the individual is integrated with connotations acquired by the individual as a social being -dynamic identity, which is why identity is a complex unit and is what must be preserved in law in its two aspects (Zenere & Belforte, 2001, p. 143).

For the above reasons, a large part of the doctrine proposes the protection of the fundamental and constitutionalized right to identity, so that the constitution of the static dimension is guaranteed - through the proof of biological concordance - and on it, the dynamic dimension of identity is built, recognizing the importance of the family for children and adolescents - and human beings of all ages - not only in the legal framework but also in the affective aspect.

For a better study, the ruling of the most important jurisdictional body in Venezuela is cited, which, through Resolution No. 05-0062, pronounced the biological truth as a conditioning element of the right to identity, as opposed to a possible "legal identity". The ruling highlights the importance of safeguarding the veracity of identity in its static or identification dimension.

> …it would be incomprehensible to admit that because of the current scientific development that allows knowing with a high degree of certainty the genetic identity of individuals, such scientific progress is not proportional to the direct development of the law and that this ultimately involute towards unbridled positivism, from which certain individuals are denied the quality of persons and their true biological identity (Tribunal de Justicia de la República Bolivariana de Venezuela, 2008, p. 43).

Therefore, if the biological mismatch between the legal father and the legal child is proven, this part of the doctrine holds that the identity must be recovered, so as not to cause a continued deprivation of the right. "The denial of the original identity, hidden in an imposed identity, which is transformed into real identity, entails a situation of permanent violation..." (Epstein, 2009, p. 5).

This has been supported by several judgments of the Inter-American Court of Human Rights, among the main ones are 1. Judgment Series C No. 118, "Case of the Serrano Cruz sisters v. El Salvador" (Inter-American Court of Human Rights, 2004). 2. Judgment Series C No. 211, "Case of Gelman v. Uruguay" (Inter-American Court of Human Rights, 2011). 3. Judgment Series C No. 232, "Case of Contreras et al. v. Republic of El Salvador" (Corte Interamericana de Derechos Humanos, 2011).

The most relevant of these rulings is Series C Judgment No. 242 "Case of Fornerón and daughter vs. Argentina", in which the following pronouncement stands out: "...the biological aspects of the history of a person, particularly of a child, constitute a fundamental part of his or her identity...any action or omission by the State that affects such components is a violation of the right..." (Corte Interamericana de Derechos Humanos, 2012, p.35).

In brief synthesis, this theory proposes the protection of the fundamental and constitutionalized right to the identity of children, through the requirement of the biological proof at the moment of constituting the static dimension of the identity, with the recognition of the father over the child, which also safeguards the construction of the dynamic dimension, within the upbringing in the bosom of the family. Thus, the effectiveness of the preventive protection of the State would be verified.

In addition, if a biological mismatch is determined, this theory holds that any action that allows the recovery of the identity must be initiated, since failure to do so causes the continued deprivation of the right. The recovery of the identity also implies the integral reparation of the right, as well as of the other family-legal rights when they have been violated. Thus, the effectiveness of the

sanctioning protection by the State would be verified.

Taking a position: Concerning the above, the position of the present study is based on the Theory that proposes the protection of the fundamental and constitutionalized right to the identity of children. Because the right to identity is a fundamental right recognized by the international instruments to which Ecuador is a subscriber and is also constitutionalized -in Ecuador- in most of the countries of the world, it is a fundamental right.

In addition, its violation is particularly serious as it is caused on the priority attention group of children and adolescents, so there should be effective preventive protection -biological truthfulness- and sanctioning -comprehensive repair of the violated right-. But above all, any action necessary for the recovery of the altered, substituted, or deprived - violated - identity should be able to be addressed.

3.2 Theory that proposes the protection of parentality and/or socio-affective filiation as part of the integral development of the child

Ecuador has an opposed position, whose purpose is not to guarantee the right to identity under the preventive guardianship of biological veracity and, in addition, it proposes the non-recovery of the right by the minor group when it has been violated -since the legal representative is the mother, who authorized the violation; therefore, there is no legal path to recover the right.

This approach is based on the "Theory that proposes the protection of parenthood and/or socio-affective filiation as part of the integral development of the minor", a position that appears at the national level, from the pronouncement of the National Court of Justice of Ecuador (2014), which through Resolution No.05-2014, determined:

> First. - The voluntary recognition of sons and daughters is irrevocable.
> Second. - The person with standing to challenge the recognition is the child and/or any person who demonstrates a current interest in it, except the recognizer, who can only challenge the recognition by way of nullity of the act, an action that must be successful, as long as he/she can demonstrate that, at the time of granting it, the concurrence of the indispensable requirements for its validity has not been verified; the absence of a blood relationship with the recognized person through the practice of the DNA test, does not constitute proof for the recognition challenge lawsuit... (p. 19)

Noting that Resolution No.05-2014 issued by the National Court of Justice of Ecuador was used as a source -textual- for the Reform to the Civil Code in 2014, therefore, Article 250 currently has the same text, without having added or subtracted anything. In this way, in Ecuador there is no possibility of challenging paternity due to biological non-concordance -except for the child upon reaching majority-, understood in the following terms "...the challenge of paternity is a legal institution created in the face of the eventual doubt regarding the true biological relationship between alleged parent and child..." (Coello, 2016, p. 12).

The regulation of article 250 of the Civil Code, determines that the only possible way is the challenge by way of nullity, which intentionally confuses two procedures that attack different aspects, because "In the language of procedural law the word nullity mentions indistinctly the error (null act as a

synonym and wrong act) and the effects of error..." (Couture, 2014, p. 304) But, if the legal requirements have been fulfilled in the act of voluntary recognition of children -such as doing it before the Civil Registry-, there is no reason to invoke the action; that is, it is not possible to raise the challenge or the nullity.

Although a more incoherent provision is the constant in the final part of the text "...the absence of a consanguineous link with the person recognized through the practice of the DNA test, does not constitute evidence for the recognition challenge trial..." (Corte Nacional de Justicia de Ecuador, 2014, p.19) with which, all possibility of challenging paternity in the face of biological non concordance is closed, because if the DNA test is not valid evidence for that, then the Minister's Judges who issued Resolution No.05-2014 should be asked, which evidence they consider would be valid.

Once the jurisdictional and subsequent normative framework has been established, it is necessary to indicate what was the original motivation. Before 2014, all "legal" parents who had caused a complacent voluntary recognition, with full awareness of the biological mismatch, could challenge paternity, which caused children and adolescents to be left in a precarious situation since they lost the identity, they had had until then and were limited in terms of their other rights derived from filiation, especially: child support and alimony.

Given this reality, the National Court of Justice of Ecuador found in the parentality and/or socio-affective filiation, the support to prevent the challenge of paternity in the terms indicated, arguing that such a family status could have been configured, therefore if it occurs, it could contribute to the integral development of the child, incorporate him/her in a family that provides protection.

However, the 2014 Reform of the Civil Code does not provide for any kind of procedure or proof to demonstrate that parentality and/or socio-affective filiation has been effectively consolidated, it simply establishes that in all cases in which the violation of the right to identity is demonstrated, it must be presumed that a family status has been established as a rule, and therefore, the action to recover the right to identity is denied.

Concerning this point, it is worth specifying the procedure foreseen in Ecuador to determine the family status, anticipating its complexity due to the fulfillment of several requirements that must be verified by the administration of justice, to guarantee the physical and psychological integrity of the minor about his upbringing, all this to ensure the integral development of the minor.

Article 339:

> The notorious possession of the status of son consists in the fact that his parents have treated him as such, providing for his education and establishment skillfully, and lending him in that character to his relatives and friends; and that these and the neighborhood of his domicile in general, have reputed and known him as the son of such parents (Código Civil, 2005)

Under article 340: "For the notorious possession of the civil status to be received as proof of such status, it must have lasted for ten continuous years" (Civil Code, 2005). (Civil Code, 2005). Therefore, the rule establishes several requirements to prove the family status, all of them having to be verified for a time exceeding 10 years, being this requirement the most complex, because it is oriented to demonstrate the continuity of the paternal-filial relationship. "...the possession of the status must have an element of continuity...which cannot be less than 10 uninterrupted years" (Caballero, 2010, p.137).

Among the requirements are the name and reputation, which consist of the child or adolescent being considered as part

of the -parental- family and that the society in which he/she develops considers him/her in the same terms. Although the requirement of treatment must be differentiated to prove the family status, since it implies the equalization of family relations, both in the legal aspect - through the exercise of rights such as food-, and in the affective aspect -giving the love provided by a family.

If the fulfillment of these requirements had been proven for 10 years, the consolidation of a parentality and/or socio-affective filiation would have been legally verified, which, by incorporating a father figure within the family environment of the child or adolescent, proves the benefits in the upbringing and guarantees the integral development of the minor. It is for this reason that the doctrine has denominated the figures of such status as social father and social child.

> …the social father is a person who is not a biological father, but is one from the legal point of view and behaves as a real father, takes care of the children as such, assumes all the responsibilities of a father, establishing a beneficial relationship for the son or daughter (Aguilar, 2013, p. 13).

Now, retaking the theoretical position on which Ecuador has a jurisdictional and subsequent normative pronouncement, it must be vigorously insisted that the mere violation of the identity of children and adolescents does not imply in any way the consolidation of a possible parentality and/or socio-affective filiation, which, according to the Civil Code, should be proven for 10 years.

The only thing that Ecuador proposes through its jurisdictional pronouncement and subsequent regulations is to deny the action of impugnation of paternity and to deny the scientific means - DNA test - as judicial evidence. It alleges that a family status could have been consolidated, but since it is not proven, it is not known if it exists or not, in the multiple concrete cases.

IV. DISCUSSION

Since there are two such manifestly contradictory theories, it is evident to anticipate that both raise objections to the rationale of the opposite one; for this reason, the arguments against them are analyzed.

4.1 Discussion of the objections raised on the Theory that raises the protection of the fundamental and constitutionalized right to identity of children

The main ones are the right to family privacy and the social perception that understands as belonging to the parents, those rights that belong to the son or daughter. First, the right to family privacy is founded as one that "...grants its holder the right to oppose third parties to investigate his or her private life and, fundamentally, to prevent certain data that by their nature must be preserved from public indiscretion" (Jurío & Erquiaga, 2013, p. 57). Within this context, it is considered that, disproportionate State interference.

However, it should be pointed out that the right to family privacy subsists as long as the rights of its members are not violated, especially those of children and adolescents who, being determined as a group of priority attention, deserve specialized attention from the justice system. In this sense, "The State should not have any interest in intervening in the privacy of a family as long as the internal regulation functions and does not harm any fundamental rights of its members. But in family crises...it should intervene" (Zenere and Belforte. 2001, pp. 143-144)

In these considerations, the approach that replicates the Theory of the protection of the fundamental and constitutionalized right to the identity of children, under the argument of the right to family privacy lacks support, since guaranteeing the rights of minors is an obligation of the State, in the application of

the principle of the best interest of the child, especially when its violation has been verified, which is particularly serious.

Second, the social perception that understands as belonging to the parents, those rights that belong to the son or daughter, may be an argument that is confused with the right to family privacy, however, it is anticipated that it has a different context, in the times that, in the Ecuadorian case has come to be determined as law -Civil Code-, which used as a source the pronouncement of the National Court of Justice of Ecuador. Therefore, this social perception has become a national understanding translated into law.

However, the theory of integral protection, present in the Convention on the Rights of the Child, an international treaty to which Ecuador is a signatory, states that children and adolescents are holders of their rights, including identity. Therefore, although this perception has become a national understanding, in the legal world the fundamental right must be guaranteed, which in Ecuador is constitutionalized and which, in addition, is constituted on a group of priority attention.

> Thus, in the specific case of the right to know the filiation and origin as part of the right to identity, it must be addressed...in such a way that it can be exercised in the best interest of the child, hearing his or her opinion and considering that the right of the adults, including the social mother or father...can be displaced by the right of the child (González, 2011, p. 123).

Taking a position: For the above, the position of the present study is based on the theory that proposes the protection of the fundamental and constitutionalized right to the identity of children. Because the arguments against the right to family intimacy and social perception cannot be weighted above the fundamental right to identity.

4.2 Discussion of the objections raised on the Theory that proposes the protection of parentality and/or socio-affective filiation as part of the integral development of the child

In the main, it is that: There is no proof that a family status has been secured, to determine parentality and/or socio-affective filiation, it is simply presumed that, due to the violation of the identity of the child and adolescent, he/she has been incorporated into a family, for which, according to this theory, stability must be provided. Consequently, Ecuador does not contemplate regulations that exercise preventive and punitive protection of the right to identity, especially concerning the recovery of the right, when its violation has been confirmed.

The discussion on this position is valid since there is no type of proof or procedure to prove the consolidation of the family status, based on the legal requirements: time, name, fame and treatment. Contradicting in this way, provisions that the Civil Code has kept intact for more than 50 years, to protect composite family relationships. "...parenthood from the psychic point of view, which is always constructed within the framework of the interaction with the children" (Montagna, 2016, p. 230).

Simply, Ecuadorian law presumes that, by the simple fact of the identity violation, a parentality and/or socio-affective filiation could have been constituted, which, in reality, causes the continued deprivation of the child's right to identity. Such a determination is highly irresponsible since it could put the child at risk by granting his or her care to the "legal" father, with whom he or she has no kinship.

V. CONCLUSIONS

Ecuador is a constitutional state of rights that does not guarantee the fundamental and constitutionalized right of identity, in terms of biological veracity at the moment of its constitution -preventive protection- and does not establish full reparation -punitive protection- when the violation of the right is verified.

The theory that proposes the protection of the right to identity of children should prevail, due to the adoption of international commitments and in compliance with the provisions of the Ecuadorian Magna Carta. But especially because it protects the static dimension of identity and with it safeguards the construction of the being through the truth of their legal-family relationships.

If it is determined that the right to identity has been violated, due to the lack of concordance of the biological link between the legal father and the legal child, the State should guarantee its recovery to avoid the continued deprivation of the right of a group of priority attention.

The 2014 Reform to the Ecuadorian Civil Code, does not foresee any procedure or proof of any kind to demonstrate the consolidation of a parentality and/or socio-affective filiation when the violation of identity is verified due to the biological non-concordance. It simply establishes that, in all cases in which such violation is proven, the family status must be presumed as a rule. This is irresponsible since it does not verify the concurrence of the legal requirements: time, name, fame and treatment.

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