

Child's Right to Privacy: Directions of Application of International Norms to National Practice

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Abstract

A characteristic feature of the exercise of the rights of a child under the care of his parents is that there is a dual aspect in the protection of these rights: On the one hand, due to the child's incapacity, the protection of his rights and interests is carried out by his parents. This right of the parents is also related to the parents' obligation to take care of the child's physical, spiritual and moral development because the violation of the child's rights can affect his development. On the other hand, in order to prevent parents from abusing the aforementioned powers, state control is considered essential in the protection of children's rights.

Problems in national legal regulation stem from the fact that the protection of children's rights is not based on a paternalistic approach. An example of this is the fact that parents are given more priority than the child's opinion in most cases. Therefore, the article presents fundamental proposals regarding the protection mechanisms of rights such as the right to privacy, the recognition of the child's identity, in accordance with international norms.

Keywords: child, right to privacy, national-legal regulation, international norms, right to know

Право дитини на приватність: напрями застосування міжнародних норм до національної практики

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Анотація

Характерною особливістю реалізації прав дитини, яка перебуває під опікою батьків, є подвійний аспект захисту цих прав: з одного боку, у зв'язку з недієздатністю дитини, захист її прав та інтересів, здійснюється його батьками. Це право батьків також пов'язане з обов'язком батьків піклуватися про фізичний, духовний і моральний розвиток дитини, оскільки порушення прав дитини може вплинути на її розвиток. З іншого боку, щоб запобігти зловживанню батьками зазначеними повноваженнями, необхідним є державний контроль у сфері захисту прав дитини.

Проблеми національного правового регулювання пов'язані з тим, що захист прав дитини не базується на патерналістському підході. Прикладом цього є те, що батькам у більшості випадків надають більший пріоритет, ніж думці дитини. Тому в статті наводяться принципові пропозиції щодо механізмів захисту таких прав, як право на приватне життя, визнання особистості дитини, відповідно до міжнародних норм.

Ключові слова: дитина, право на приватне життя, національно-правове регулювання, міжнародні норми, право знати

Introduction.

In a process that begins with assessing the child as an individual, the rights of the child regarding his / her identity came to the fore and there is a need for recognition, protection and use of these rights by the state and, in a narrower sense, by parents. Let us interpret separately the civil and political rights and freedoms of children. At the same time, based on the interpretation of the Committee, we can mainly include the following rights and freedoms:

Right or freedom	Determination at the Convention on the Rights of the Child (CRC)	Regulation in the Law on "Child's rights"	Remark
The child's right to a name and citizenship	Article 7 of the CRC	Article 10 of the Law	Article 7 and Article 10 of the Law are different in content. Article 7 has a broader character.
The right to integrity	Articles 8 and 16 of the CRC	Article 12 of the Law	In the CRC, the protection of the child's individuality is defined in a separate article (article 8), while private life, family life, housing inviolability or confidentiality of correspondence are defined in separate article (article 16). In fact, since the protection of identity (individuality) itself is interpreted in the context of private life, we see national regulation as more appropriate. Simply, the right to freedom should be reflected in an independent article, not within the framework of Article 12.
The right to protect the honour and dignity	Article 16 of the CRC	Article 27 of the Law	If the CRC connects the protection of honour and dignity with the inviolability of personality, the Law also provides as a norm.
Freedom of expression	Article 13 of the CRC	There is no regulation in the law. Only Article 14.2 provides a general approach.	The approach of the convention is more correct. (It will be analysed in detail during the research).
Freedom of opinion, conscience and religion	Article 14 of the CRC	Article 14 of the Law	The grounds for limitations are not reflected in the law.
Freedom of information	Article 17 of the CRC	Article 15 of the Law	The Convention provided a broader interpretation.
The right to a fair trial	Article 40 of the CRC	Article 42 of the Law	Regarding the right to a fair trial, both the Law and procedural norms provide regulation in accordance with the CRC and other international documents.
Freedom of association and peaceful assembly	Article 17 of the CRC	Article 26 of the Law	The grounds for limitations are not reflected in the law.

International regulatory and judicial practice related to the child's right to privacy.

The main difference between the CRC and AR Law on child's rights regarding personal integrity is that the Convention regulates the identity of the child in two articles: Article 8 regulates the protection of identity, Article 16 regulates the inadmissibility of interference with private life, family life and confidentiality of correspondence, as well as, housing inviolability. The law does not provide for issues related to the protection of identity.

According to the reports submitted to the committee, the protection of identity in our republic means the records of children's registered civil status acts, as well as the corresponding registration in paper form of any changes made to them, and the electronic registration of civil status acts in the automated registration system and legislation provides the right to access this information when the child reaches the age of majority. However, in the experience of the world states, the child identity

protection has a wider content. Possible interpretations of identity can be divided into four categories: family, community, biological, and political. Family identity includes natural parents, family and ancestors, as well as surname. Community identity is meant to encompass ethnic, cultural and religious identity. Biological identity includes medical-genetic information about the person himself, his / her ancestors and blood relatives, as well as historical information such as place and time of birth, records of events important to a person. Political identity includes nationality.

Family identity refers to the recognition of the child's specific rights to be with his / her family. In fact, the Law "On Child's Rights" establishes the right of a child to live in a family (article 17). Here the main question arises in connection with the upbringing of a child by his / her own parents. Back in 1924, the US Supreme Court recognized the right of a child to be raised by his / her own parents in the case of *Pierce v. Society of Sisters* (U.S. Supreme Court, 1925). In 1992, *Nguyen Da Yen v. Kissinger* claimed for 2,700 Vietnamese children that, by removing children from this country and keeping them away from their biological parents, the United States Secretary of State and others have violated children's basic mental rights as well as the rights under the United States Constitution (Centre for Constitutional Rights). The remarkable point in the case is that the rights of the children themselves were asserted, not the rights of the children's parents, and the Court of Appeal found these rights to be fundamental enough to justify an individual review of each child's records. This convention and its predecessors meant that the standard for decisions about the placement of children by the state was to be guided by the principle of the best interests of the child (Stewart, 1992, p. 227).

For the community identity, the general recognition of racial, ethnic, cultural and religious identity is reflected in international human rights documents. However, the child's rights to these components of his / her personality are controversial. For example, in intercountry adoption, proper attention to the upbringing of the child, his / her ethnic, religious and cultural background is one of the main requirements of the Hague Convention (United Nations, 1993). However, such consideration does not mean that adoption will not be allowed if it is considered the best situation for the child. Various experiences show that at this time the issue is resolved taking into account the best interests of the child.

A child's rights to biological identity are regulated by advances in medical knowledge and technology. The biological identity interpretation is sure to gain widespread acceptance as countries become more aware of its importance. Moreover, this identity can usually be separated from the family identity so that the state can preserve this part of the identity without revealing the confidential family identity. The biological identity's right to know should not be controversial. This should be

ensured without reference to priority social policy issues related to surrogacy, artificial insemination and in vitro fertilization.

Political identity. A child's right to a nationality must first be distinguished from his / her right to citizenship, which requires implicit recognition of a state-asserted "true" identity and the child's interest in protecting his / her true identity.

According to the approach of the ECHR, interaction between parents and children is one of the main elements of family life. For the relationship between children and parents to be considered as marriage, it is not necessary that they live together under the same roof. This means that even if the marriage between the spouses ends due to divorce, the family life will continue between the children and the parents (Clements, Mole, & Simmons, 1999, p. 177). If we look at the issue from the point of view of children in marriage and out of wedlock, it is accepted that family relations are established between children in marriage and their parents from the moment of birth. So, a child whose parents are married, in other words, a child born in marriage, is within the scope of the family itself (*ipso iure*) (European Court of Human Rights, 1988). From the point of view of family life, parents have the right of guardianship over a child born in wedlock, and this right is mainly used by parents together.

As for children born out of wedlock, the ECHR recognizes that the family bond between an unmarried mother and her child is established by birth (European Court of Human Rights, 1979). As a result of this natural bond, the principle of giving custody of an illegitimate child to the mother has been universally accepted in legal systems throughout the ages. Certain practices of the State which have agreed on the custody of the mother in extramarital relations are not contrary to the principle of respect for family life provided for in Article 8. Because ECHR emphasizes biological and social facts rather than legal assumptions in determining family relationships (European Court of Human Rights, 1996). In addition to recognizing the life of parents living unmarried with their children as a family (European Court of Human Rights, 1997), the court considers the difference in the relationship of a father with children out of wedlock and in marriage to be a violation of Article 14, as well as Article 8 (European Court of Human Rights, 1979).

The court is very sensitive to the relationship between children and their parents. For example, in the case of *Pannullo and Forte v. France* (European Court of Human Rights, 2001), the applicants, who were Italian nationals, were hospitalized in France for treatment of their two-year-old daughter Erica in June 1996, but the child died that month. An investigation was opened based on the applicants' allegations of ill-treatment, and an autopsy was performed on the child in July 1996, and the cause of death was determined to be pneumonia. Although the expert's report was not considered satisfactory, repeated forensic examination was requested, but the efforts of

the Consulate General of Italy in France in this regard were also unsuccessful. The body was handed over to the applicants only on 14 February 1997. The medical malpractice investigation did not result in prosecution. The ECHR considered that since the samples taken at the autopsy were sufficient, there was no reason for the late delivery of the body to the parents. Therefore, the late delivery of the child's body should be considered as a violation of the parents' right to respect for family life, provided for in Article 8 of the Convention.

The child's right to know about his / her origin - Right to Know

In the last decade, the development of reproductive technologies has actualized the problem of the child's "right to know" about his / her origin. Every child has the right to information about his / her origin. Article 7 of the CRC states that a child should be registered immediately after birth and has the right to obtain a name, citizenship and to know and care for his / her parents as much as possible from the moment of birth. Article 8 states that when a child is unlawfully deprived of some or all of the elements of his / her identity, the participating states shall provide appropriate assistance and protection with a view to the speedy restoration of his / her identity. Apparently, the mentioned right is directly related to the "family identity" of the child.

It is not uncommon for adoptees or donor-born children to search for their birth families or biological parents and there are various motives for this: to show interest in one's origin; to increase the sense of identity and improving or restoring psychological balance (for example, by being able to monitor their personal characteristics, physical and psychological characteristics); to look for the blood ties that connect them; to transmit information to their descendants; to help prevent genetically related diseases in adulthood (for example, genetic predisposition to certain addictions), etc. (Nacher, 2020, p. 1725).

The ECHR has determined that the choice of a specific legal mechanism to ensure that a child has access to information about his / her origin remains with the States. However, the choice of any mechanism is limited by the need to achieve a possible consensus that balances the interests of the child (ensuring his / her right to information) and biological parents (exercising the right to anonymity), as well as third parties (social parents, relatives of the child, relatives of biological parents) whose rights and interests may be violated. For example, in *Kautzor v. Germany*, the Court found that states must consider whether maintaining a relationship with the biological parent is in the best interests of the child. Thus, the European Court tries to take into account not only the biological interests, but also, above all, the interests of the child in the determination of paternity (Tetyana, 2020, p. 21).

Most children are born into circumstances that allow them to know their biological family (parents, grandparents and other relatives), to be under the care

of their biological mother and father during childhood and early adolescence, and to maintain close contact with them. Some children are separated from their biological family or one of the part (for example, their biological father). For example, they were adopted as babies by another family, they were born through assisted reproductive technology, etc. In order for these children to at least know who their biological parents are, states have adopted technical measures and regulations that ensure as much as possible information about the identity of the biological parents. For example, in Continental Europe, to obtain complete information on the identity of the donor:

- considered legally permissible in some states. For example, Germany since 2017;
- legal in some states, but limited to parents and donor consent. For example, Denmark since 2012;
- it is illegal and criminalized in many states. For example, in France, the provision of information that allows the tracing of biological origins is punishable by imprisonment for two years and a fine of 30,000 euros (Nacher, 2020, p. 1724).

The interest is manifested in the fact that the child's right to know his / her origin is understood in two ways: In a broad sense, this right includes both the right to receive information about one's biological parents at birth through donation, and to receive information about one's ancestry in other cases (for example, adoption); In a narrow sense, the right to know one's origin is considered only at the moment of donation.

Knowledge of the genetic heritage or background of a person is increasingly seen not only useful for personal assessments of health and illness, but also important for psychological well-being and family relationships. A child's right to receive medical and genetic information is equal to the right to life. For example, a mother gives up her daughter for adoption and later finds out that her daughter has a 50 per cent chance of being a carrier of haemophilia. The adopted child can't get the information because the adoption papers are sealed and the information isn't there anyway because the mother found out after giving up the child. Medical genetics requires accurate genealogy. An adoptee without such information cannot benefit from genetic counselling. A child's health and insurance forms are incomplete and inaccurate if information about their ancestors' medical history is missing (Stewart, 1992, p. 231).

In countries that still support anonymous donations, donor-born children express their concerns and anger about not being able to access the identities of their donors in court cases, academic publications, Internet blogs, support networks, and filings. Although these personal accounts vary, they highlight a number of psychological consequences of not knowing the donor, including feelings of incompleteness, lack of genetic continuity, and lack of understanding of one's place in the family.

After unsuccessful searching for a donor, donor-conceived children often report feelings of sadness and loss. Many people really need information about their family, cultural, and genetic ancestry to help them define who they are.

The weight given to the "right to know" also fits well with current political sensitivities around the values of transparency and openness in decision-making, access to personal information and the importance of children's rights. Therefore, proponents of open identity donation policies believe that the lack of transparency regarding the concept of the donor and the identity of the donor is a great injustice. Given all this, some authors argue that mandatory disclosure mechanisms are necessary to ensure the right to information. Proposals include recording donor conceptions on birth certificates or formally linking such information to birth certificate registries (Ravelingien and Pennings, 2013, p. 34).

Even researchers who argue for the importance of all children being informed about their genetic origins suggest paternity testing of children at birth as a way to facilitate such a universal right to know. According to their approach, given that the test results are recorded in or linked to the birth record, such a measure would reveal the truth of the supposed genetic relationship between father and child and, if the results are negative, force the parents/mothers to reveal the identity of the genetic father. As a result, this will serve to guarantee the right of the child to know his / her origin (Ravelingien and Pennings, 2013, p. 39-40). It is questionable to what extent such a proposal, which seems unrealistic for Azerbaijan experience, can be practical.

Since in our country, artificial insemination is allowed only between husband and wife and there is no legislation on reproductive health, the child's right to get information about his / her origin or to know his / her parents should be interpreted in relation to adoption and growing up outside of parental care. Much of the literature claiming a "right to know" is based on a wealth of experience in the adoption field. For adoptees, knowledge about their genetic parents appears to be beneficial, whereas a lack of such knowledge can lead to psychological problems (Ravelingien and Pennings, 2013, p. 33).

The term "genealogical confusion," coined by Sants (1964), is often used in this sense to describe the difficulties that adoptees may have in developing a coherent sense of identity and belonging. Adoptees who lack information about their genetic parents may have trouble constructing their own unique and coherent personal histories, which require information about "those who came before and after them" (Chestney, 2001, p. 375).

Generally, adoption can be intercountry or intrastate. While the latter has existed throughout history, intercountry adoption is a new concept that began to gain recognition after World War II, when many children were neglected. As wars, natural disasters and diseases left many children homeless, intercountry adoption was

especially important for children to return to a normal family life.

In foreign practice, there are interesting regulations regarding adoptees' right to know. For example, since the first Adoption Act in Scotland in 1930, adopted adults in Scotland are entitled to their original birth certificates. In 1975, representatives of England and Wales passed legislation allowing adopted people to obtain their own birth certificates. As of 2009, open adoption agreements can be formally included in adoption proceedings in 24 US states. However, US adoption records remain sealed in most states. In the continental European Union, progress towards full transparency of adoption processes has been slower, but adopters can now access adoption information, although the administrative process can be difficult

in some countries, particularly for the disadvantaged (Nacher, 2020, p. 1723-1724). In particular, France has been criticized by the Committee on the Rights of the Child "for not taking all the necessary measures to fully guarantee the child's right to know his / her biological parents" (Committee on the Rights of the Child, 2016).

The norm of the criminal legislation of our republic, which determines responsibility for spreading the secret of adoption, does not take into account the interests of the adopted person, which is a wrong approach. Based on the experience of foreign countries, it is more appropriate to make similar changes in our country.

Finally, let's take a look at the provisions of our other sectoral laws regarding the right of children to privacy:

Law "on Media"
It is not allowed to disclose any information about the identity of a juvenile suspect, the accused person, or victim without the consent of these persons and their legal representatives (article 15.1.5).
Criminal-Procedural Code
Unreasonable collection, distribution or use of information related to the personal life of any person and other information of a personal nature intended to be kept confidential is prohibited during the procedural activity. At the request of the investigator, prosecutor or court, the participants of the preliminary investigation and court proceedings are obliged not to disclose such information and must take a written commitment to this effect. Evidence revealing personal or family secrets is heard in court in closed session (articles 16, 27, 199).
Civil Procedural Code
Due to the dissemination of personal and family life secrets during the consideration of civil cases, the court session is held closed due to the expectation of the interest of minors. (article 10).

Scheme 1. Guarantees of child's right to privacy (Scheme presented by the author based on national legal regulation)

In its Commentary on Azerbaijan, the Committee on the Rights of the Child welcomes the progress made in birth registration and the State party's statement that birth registration is almost universal, and the Committee recalls target 16.9 of the Sustainable Development Goals and recommends that the State party: "The birth registration process should be made easier. Such facilitation should provide for the presence of an employee of the civil status act registration body in health institutions, strengthening the integration between the Ministry of Health and civil status act registration bodies, the start of the electronic birth registration system and the provision of timely birth registration free of charge, and the elimination of any administrative or judicial sanctions against parents as a result of late registration (Committee on the Rights of the Child, 2020). Interestingly, the Committee did not make any recommendations on privacy.

Conclusions.

During the research, it was determined that the content of the right to privacy established in Articles 8 and 16 of the CRC does not correspond in any way to Article 12 of our national law. As can be seen, the relevant articles of the CRC are generally based on other international norms

that protect human rights. For example, Article 8 of the European Convention. In this case, the fact that the rights of children, such as protection of private life, family life, confidentiality of correspondence, are not established in the Law "on Child's Rights" proves once again that the stereotypes of the paternalistic approach still continue. In addition, the assessment of personal integrity as purely physical integrity in Article 12 of the Law (paragraphs 4-5 of Article 12) does not meet the requirements of modern times. Therefore, we believe that it would be better if the content of that article is re-edited according to the CRC.

In addition, Article 8 of the Convention regulates issues related to the protection of identity. In our study, we distinguished four categories of identity: family, biological, political (national) and community identity. Surrogacy, artificial insemination, as well as adoption, which emerged as a result of the development of reproductive technologies in the last decade, made it necessary to protect these four categories of identity, including the recognition of the right to obtain such information. In our research, we have substantiated the fundamentality of such a right on the basis of various empirical examples.

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