

**THE CHILD'S RIGHT TO ITS OWN IDENTITY:  
A COMPARATIVE ANALYSIS BASED ON THE  
CONVENTION ON THE RIGHTS OF THE CHILD**

From birth, each individual has the right to have an identity. The identity of an individual is the assertion of his or her existence in a society. It is also a matter of recognition of their individuality and what differentiates them from their peers<sup>1</sup>.

The traditional western legal view of human development assumes that people possess the active tendency toward psychological changes and integration with the society. This tendency is called the self-determination, which is described as the psychological growth and development in unity to fly in the face of everyday behavioural observation. Self – determination in the science of psychology it is the widely known as the inherent tendency towards psychological growth, a unified self, and autonomous, responsible behaviour. These tendencies have two aspects: theoretical and practical.

Article 1 of the International Covenant on Civil and Political Rights states: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. This endogenous tendency is across a variety of inner tendencies such as: growth, self-construction and inner coherence. This inner behaviour in some point will influence the external behaviours and tendencies<sup>2</sup>. Human behaviour is conduct by specific values (personal and socially preferable modes of conduct). These values lead to specific behaviours and experiences that individuals assign to the desirability of special objects or behaviours<sup>3</sup>.

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<sup>1</sup> *Humanium, together for children rights*, <http://www.humanium.org/en/fundamental-rights/identity/> (23.01.2016).

<sup>2</sup> E.L. Deci, R.M. Ryan, *Handbook of self-determination research*, Rochester 2002, p. 3-5.

<sup>3</sup> T. Kasser, *Sketches for a self-determination theory of values*, in: Deci E. L., & Ryan R. M. (eds.), *Handbook of self-determination research*, Rochester 2002, NY: University of Rochester Press, p. 124.

An international system of human rights was created to protect the most important values of the world: the right of the human being to dignity. The right of the each human in the world to have his/her fundamental rights is protected by the international legal systems. One of the most essential principles of the international law is the right to identity. The Universal Declaration of Human Rights adopted in 1948,<sup>4</sup> under the auspice of United Nations states, in Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Further on it reads: Everyone has the right to a nationality (art. 15) and in article 29 we can read that (1) Everyone has duties to the community in which the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations, as are determined by the law, solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order and the general welfare in a democratic society<sup>5</sup>.

### **1. The role of the international law**

International law, for a long time, was not paying much attention to the individuals declaring that it is only a state that has the right to make a resolution over their citizens. International lawyers were recognizing the communities as states who were the solo actors. The individual human being was not in the area of interest of international lawyer. This was generally due to fact that one of the most important element of the state are people who are residing within the boundaries of a state. These individuals can be of different races, languages and religions and such behaviours the national law regulates. International law concern only states, never direct the individuals, but because it effect the national law, through the national law effect indirectly individuals<sup>6</sup>. Since the adoption of the Universal Declaration of Human Rights significant changes in this relation were observed, international law started to be interested in the relation between the state and it citizens. The international law becomes to be considered as part of the national law concerned and applied by the states organs directly. However the international law is only valid to the state if the state agrees on it, and only within the borders of the state approval. At the point when the state recognizes the international law it becomes bound by it<sup>7</sup>. So, it is international law which controls and influences

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<sup>4</sup> Organizacja Narodów Zjednoczonych, *Powszechna Deklaracja Praw Człowieka i Obywatela*, Dz. U. z 1977 r, nr. 38, poz. 167.

<sup>5</sup> Powszechna Deklaracja Praw Człowieka i Obywatela Organizacji Narodów Zjednoczonych, forum ONZ 10 grudnia 1948 w Nowym Jorku, Dz. U. z 1977 r, nr. 38, poz. 167.

<sup>6</sup> H. Kelsen, *Principles of International law*, Clark 2003, p. 230 -239.

<sup>7</sup> H. Kelsen, *Principles of International law*, Clark 2003, p. 433-438.

national law. At certain points international law is above the national law, and when a conflict of norms occurs, international law will override the national norm. This is the main reason why the international law regulates only the most fundamental aspects of individual life, and is forcing states to adopt one and universal regulations, which will be widely recognized. That is the main reason why the Universal Declaration of Human Rights and the Convention of the Rights of the Child were adopted.

## 2. Identity: what it means?

As can be observed the Declaration itself does not define what 'identity' means. Rather, it uses the descriptive method of identifying what identity is. So, what is 'identity'? What does it mean to have an identity, and why should it be protected?

The common understanding of 'identity' is that which decides who we are, what we are and what makes us different from others. Martha Minow in her article "Identities" cited what the Chief Flying Eagle of the Mashpee Wampanoag Indians stated in the course of a trial over their tribal status: "We were different/We knew we were different/We were told we were different."<sup>8</sup> The identity means being different, to possess the feeling of being different, and being seeing as a different. What are the elements of "self" which creates this 'differentness'? Minow: gender, race, ethnic, identity, cultural and self-understanding factors. The identity of the person is created by interpersonal interactions and a comparison between oneself and the others. The law is also an identity-creating factor, because in some cases it is the family court judge who makes the arbitrary decision on who is the mother, who is the father and what is the nationality of the child is<sup>9</sup>. In many other cases, like property ownership, the court sentences are rooted in history and cultural traditions. So, in the end it is court that makes the decision over the identity, and court decides which elements of the individual identity needs to be protected and which not.

The identity of an individual is the assertion of his or her existence in a society. It is also a matter of recognition of their individuality and what differentiates them from their peers. Having an identity is a fundamental human right that allows each individual to be able to enjoy all of his or her rights. Identity encompasses the family name, the surname, and date of birth, gender and nationality of the individual. Through these details, an individual will hold rights and obligations specific to their status. Richard Jenkins established the best definition of an identity<sup>10</sup> by stating

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<sup>8</sup> M. Minow, Identities, "Yale Journal of Law & the Humanities" (1991), vol. 3: iss. 1, Article 6, p. 97.

<sup>9</sup> M. Minow, Identities, "Yale Journal of Law & the Humanities" (1991), vol. 3: iss. 1, Article 6, p. 99, 110–111.

<sup>10</sup> R. Jenkins, *Social Identity*, London, New York 2008, Routledge, p. 5-6.

that: “identity is the human capacity rooted in language to “who’s who”. This must involve understanding who we are, knowing who others are, them knowing who we are, us knowing who they think we are, and so on”. The identity maps the human world, and individual’s place in it as solo being and a member of the collective<sup>11</sup>. Besides language, the other factors, which create identity, is the ethnicity, social life, culture and religion in which the individual grew up<sup>12</sup>. So all these elements decide who I am and who you are. They also differentiate one person from another. Because the identity is so important for human beings, it is essential to protect it by the law<sup>13</sup>. Recognition of the importance of the identity took place when all the factors that are creating the identity were put under the protection in the Universal Declaration of the Human Rights.

### 3. Human rights

Jean Rousseau once wrote that each human being is good inside. What is making him bad is society. That is the reason why he needs to look for the protection. To preserve human life people decided to bind each other by the social agreement. A person’s dignity needs to be protected and because of this. Freedom needs to be preserved and secured. Freedom is the most fundamental human right. It is the source of all other rights. When a state is created, its main aim is to protect the right to freedom of its citizens, and to treat everybody equal<sup>14</sup>. The term ‘right’ is referring to the expectations of the others’ behaviours towards the rights bearers. The expectation is limited by the requirements of the behaviour of others. John Locke was the first one who describes the human rights law, by saying that all humans are natural, free, equal and independent<sup>15</sup>. So, the state may interfere with citizens’ rights, but only in a reasonable situation and with a reasonable aim. The modern concept of human rights was created after the Great War and is still in progress. The events of the World War II proved that world needs a universal regime of human rights protection. One declaration seemed not to be enough, and some groups of the people were separate and put under a regime of special protection. However the states understood that this is declaration is not enough, because there is special group who need additional protection: the weakest and the most vulnerable - children.

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<sup>11</sup> R. Jenkins, *Social Identity*, London, New York 2008, Routledge, p. 6-7.

<sup>12</sup> R. Jenkins, *Social Identity*, London, New York 2008, Routledge, p. 10-13.

<sup>13</sup> S. J. Hekman, *Private selves, public identities: reconsidering identity politics*, Penn State University Press 2004, p. 113.

<sup>14</sup> R. Andrzejczuk, *Prawa człowieka, podstawą prawa narodów do samostanowienia*, Lublin 2004, p. 24-25.

<sup>15</sup> A. Woodwiss, *Human Rights*, London, New York 2005, Routledge 2, p. XI-XII.

#### 4. Convention on the Rights of the Child<sup>16</sup>

The child as a subject of the international law was recognised after the World War I, by the adoption of Geneva Declaration of the Rights of the Child in 1924, and later in 1959, by the adoption of the not binding Declaration of the Rights of the Child<sup>17</sup>. The idea of a Convention on the Rights of the Child was born to Poland. In 1978 the Polish Government sent the draft proposition of such convention to the United Nations. According to the Polish proposition, this legislation was supposed to be binding for states. Taking this into account it became important to the international community, under the leadership of Poland, which decided to protect children's fundamental rights. Thus, the Convention on the Rights of the Child was adopted by the United Nation in New York and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989 and entered into force on the 2 September 1990, in accordance with article 49. The convention was signed by the 140 states and there are 196 parties who accepted make accession to the Convention. There is now only one state, which signed the Convention but has not ratified it. This state is the United States of America<sup>18</sup>.

The preamble of the United Nations Convention on the Rights of the Child states that: all nations united under the United Nations umbrella agreed that everyone is entitled to all the rights and freedoms set forth therein. These should be granted without any distinction such as: race, colour, sex, language, religion, national or social origin or birth<sup>19</sup>. As was said in the beginning of this paper, identity is created by the different factors, all of them having their source in freedom. That is why children have the right to be brought up in the family, which is the fundamental and first group of society necessary for the growth and well-being of each the person. Remembering what Rousseau said that society is the source of the all depravation of good human nature and reading the text of the Convention, it is clearly seen that the authors of the Convention decided to put the onus on parents to protect children's rights. When parents are not acting according to the children's well-being, the state should act. So the state is responsible of protect children from their parents act misappropriate, and the state should act immediately when the children's rights are in dangerous.

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<sup>16</sup> Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., (Dz. U. z dnia 23 grudnia 1991 r. poz. zm.).

<sup>17</sup> Rights of the Child the meaning of the child and the rights of the children, <http://www.humanium.org/en/child-rights/> (23.01.2016).

<sup>18</sup> The Convention on the Rights of the Child: The Beginnings of the Convention, <http://www.humanium.org/en/convention/beginnings/> (01.02.2016).

<sup>19</sup> Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., (Dz. U. z dnia 23 grudnia 1991 r., poz. zm.).

## 5. The child's rights

The roman civil law defines the child as: “the one who does not speak”, actually generally all cultures and ethnic groups recognise children from birth to adulthood. The only one variety exists in the transition age when the child becomes an adult. For Romans it was at 7 years old. Traditionally, a child is defined by the negative definition: individual who is not yet adult. The Declaration on the Rights of the Child, from 1959, defined child by a descriptive definition: “the child by the reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”. According this definition, the child begins at the moment of conception, when it inherits the right to life. However at the end, it is up to the state when the childhood has its beginning and end<sup>20</sup>. In Article one of the Convention child is defined as follows: “child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier”<sup>21</sup>.

Child identity is create through the process of its growing up, when child has contact with the society, is learning to speak, practising with religion, of it parents, is learning the culture and history of it parents. Children's rights are divided into five groups: fundamental rights, collective rights, individual rights, economic, social and cultural rights, and civil and political rights. The right to identity is covert by this last group. There is also other division of children rights on: Guiding principles: non-discrimination; adherence to the best interests of the child; the right to life, survival and development; and the right to participate. Protection rights ensure protection from all forms of child abuse, neglect, exploitation and cruelty, including the right to special protection in times of war and protection from abuse in the criminal justice system. Participation rights include the freedom to express opinions, and to have a say in matters affecting their social, economic, religious, cultural and political life, and the freedom of association<sup>22</sup>.

## 6. The Identity of a Child

In article 8 of the Convention we read: “1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appro-

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<sup>20</sup> G. Van Bueren, *The international law on the rights of the child*, The Hague, New York 1998, p. 34-38.

<sup>21</sup> Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., (Dz. U. z dnia 23 grudnia 1991 r. poz. zm.).

<sup>22</sup> Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., (Dz. U. z dnia 23 grudnia 1991 r. poz. zm.).

priate assistance and protection, with a view to re-establishing speedily his or her identity"<sup>23</sup>. According to the Convention authors, the nationality, name and family relations create the child's identity. This means that each state that adopts the Convention should take all the necessary steps to protect the child's identity. An individual's identity is what makes persons visible to society; it transports the biological entity into a legal being, and confirms the existence of a specific legal personality capable of bearing rights and duties. Identity is what makes the child the subject of the law. According to the Convention its family relations, name and nationality a identified child. Sex, race and religion are also factors that should be taken into account. The Convention creates the obligation on the state's side to protect such an obligation, by preserving its family ties and nationality. State should react in each situation when unlawful inference or illegal deprivation of the child identity occurred<sup>24</sup>. Besides article 8 and article 30 of the Convention should be mentioned. Article 8 it is put obligation on the states to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law. This is general wide norm, article 30 is much more precisely, so we can read that: "... in those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language"<sup>25</sup>. This article specifically protects the identity of the children whose background is of different ethnic origin than the majority of the citizens. It is worth adding that for the United States of America, this particle article is causing the most problems. The analysers suggest making reservation to it and leaving power in this matter to the Supreme Court of United States. This is what creates the unnecessary discrimination between the children living in the same country, with different ethnic origins. In the end they are less protected, when it comes to preserve their identity than their fellow peers coming from the majority<sup>26</sup>. Canada, on the other hand, made the statement of understanding, to article 30, narrowing its essential meaning<sup>27</sup>.

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<sup>23</sup> G. Van Bueren, *The international law on the rights of the child*, The Hague, New York 1998, p. 37-60.

<sup>24</sup> Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r. (Dz. U. z dnia 23 grudnia 1991 r. poz. zm.).

<sup>25</sup> Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r. (Dz. U. z dnia 23 grudnia 1991 r. poz. zm.).

<sup>26</sup> J. Todres, M.E. Wojcik, C. Revaz, *The United Nations Convention on the rights of the child: An Analysis of treaty provisions and implication of U.S. ratification*, Ardsley 2006, p. 160-162.

<sup>27</sup> K. Covell, B.R. Howe, *The Challenge of Children's Rights for Canada*, Wilfrid Laurier University Press 2001, p. 24-29.

## 7. Child's right to have a name and be registered at birth

The first thing, which identifies child, is its name. This is what individualises a child from the others and what makes it exist in society. Geraldine Van Bueren in her book *The international law on the Rights of the child*, describes the incidents in Argentina of disappearing children, quoting at the end, that even the sex of these disappeared children were unknown. Later she recalls other examples of disappearing children in Peru, Netherlands or Australia. These are not poor countries but well development states, where children are supposedly well protected. The fate of some of these children remains unknown, some of them were sold to other countries, others were found working on the street. The problem, which exists, was a simple one: these children never had a birth certificate, so they were not existing in the eyes of the law. They do not have a legally established mother and father, blood relatives and cultural background. In many such cases these children's true identity were established DNA testing<sup>28</sup>. The question, which arose in this situation, was "Is the state obliged to restore the children to his or her blood relations?" The problem has been left to the states to resolve

So, the right to the name and be registered at birth is a fundamental children's right, because this identifies children in a particular family and establishes its legal position in society. As was said above, name is what differentiates one from the other. It is also important to, that children do not have the right to a name of its choice: this is the parent or official's choice, which is exercised at the moment of registration of the child. The right to name and to be registered is also connected with the right of the child to know its parents<sup>29</sup>.

## 8. The Concept of human rights and reality

The child has a right to his/her identity. The human rights idea depended on which book we refer to and whom we consult. We have different sources but one aim: to protect individuals' rights and interests. The government, and its apparatus, are obliged to take all necessary steps to protect human rights. Christian Tommuschat wrote that governments are under the fundamental pressure to change societal patterns possibly even against dominate majorities in the population<sup>30</sup>. This statement is controversial, but it should be true and trustworthy to follow when it comes to the children's rights. There are still such countries in the world where children do not possess rights, when the child even has no

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<sup>28</sup> G. Van Bueren, *The international law on the rights of the child*, The Hague, New York 1998, p. 119–122.

<sup>29</sup> G. Van Bueren, *The international law on the rights of the child*, The Hague, New York 1998, p. 119–122.

<sup>30</sup> Ch. Tomuschat, *Human rights, between idealism and realism*, Oxford University Press 2014, p. 4–7.



name and his/her identity is impossible to trace. In the right to identity is contained the right to be registered at birth, the right to nationality, the right to possess a name and surname, and to have its gender determined. It is only with these elements that a child will be integrated into society and will be eligible for the benefits given to all members of such a society. So the states should take all the necessary measures to protect a child's identity even when it is against the wishes of the majority. The child is vulnerable and cannot protect itself. The best example of such a situation, when the state was obliged to act against the general opinion is the Sierra Leone case, where children were used as soldiers. They were trained like regular army soldiers and used in combat<sup>31</sup>. The other case is India where children are used as cheap factory workers. Some parents even send their children to work in such factories, since such children are the solo money providers for the whole household<sup>32</sup>.

Both countries are signatories of the United Nations Convention on the Rights of the Child. So whilst we hold beautiful theories on one hand, the ideal to which each country should aim, on the other hand the reality is far from the ideal. Children are still abused and their right to an identity is not secure enough. In Europe, too, we have examples where the child is refused the right to be raised according to its father or mother's culture or tradition. Governments even support such behaviour by not helping the vulnerable parts.

## 9. Conclusion

To conclude: the child has the right to its identity and the government and international community is obliging all to protect each child's identity. That is why under the Convention on the Rights of the Child the Committee on the Rights of the Child was established. This Committee is an advisory body, and it is responsible for monitoring the situation of the all children in the world. Also, it is in the power of the Committee to make recommendation and general comments on the situation of children in particular countries<sup>33</sup>. According to general opinion. This Committee should have much more power, because it will be able to better protect children in the world. Recently, the situation in China, which refused to cooperate with the Committee, proved that although the aim is great, the dream of the Polish delegation from 1978 to protect all children in the world, and especially their right to identity is still a dream, not a reality.

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<sup>31</sup> Sierra Leone Rebels Forcefully Recruit Child Soldiers, <https://www.hrw.org/news/2000/05/31/sierra-leone-rebels-forcefully-recruit-child-soldiers> (08.02.2016).

<sup>32</sup> Child Labour in India, <http://www.childlineindia.org.in/child-labour-india.htm> (08.02.2016).

<sup>33</sup> M. Hass, *International Human rights, an comprehensive introduction*, London, New York 2014, Routledge, p. 293.

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