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YEARBOOK

HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHT'S OF THE CHILD

"30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD"

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SCIENTIFIC BOARD

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FOREWORD

Yearbook Human Rights Protection is conceived as an annual publication (to be issued at least once a year), dedicated to topics of importance for the protection of human rights, in particular those that the Provincial Protector of Citizens – Ombudsman recognizes in his work as top-priority.

Child abuse and neglect is a phenomenon that is clearly noticeable throughout human history. Specifics of early social organizations, gender and intergenerational inequality, seeing force as a suitable and permissible means of education and a way to control events within the family, certainly represent factors that can be mentioned in the context of understanding the survival of this phenomenon through the ages.

Nevertheless, with the beginning of the XX and XXI centuries, the development of society, the promotion of the values of democracy, as well as the increasing commitment to respect for the universality of human rights, also carried significant expectations regarding the fuller respect for the rights of the child.

Such expectations have been substantially met by the adoption of UN's Convention on the Rights of the Child, on which peoples of the United Nations agreed in 1989, previously bearing in mind that they reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and recalling that the United Nations has proclaimed that childhood is entitled to special care and assistance, as it is written in it's preamble.

Our country has ratified the Convention, thereby committing itself to taking care of its implementation, that is, to protect the rights of the child and to promote the status of children. However, it is not only the responsibility of the state and its institutions, but also of the individual, who can show that they recognize and respect the rights that children have.

Therefore, this publication is intended not only for the scientific community but also for experts working with children and for children, such as judges, lawyers, health care professionals, teachers, social workers, journalists and many others including

representatives of the civil society whose work in field of children rights should be especially appreciated. And last but not least, it is intended for ombudsman - human rights defenders, regardless of local, national or regional level they operate in.

In this way we also fulfill the obligation assumed by the Convention: *to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.*

Provincial Protector of Citizens – Ombudsman

Mirela Župan*

IDENTITY OF A CHILD IN CROSS-BORDER LEGAL TRANSIT (NAMING LAW AT FOCUS)

A child as an individual is identified in a society, among other, with its name. Naming law was traditionally perceived as a reflection of sovereign powers of the state over its nationals. Contemporary cross-border migrations challenge this static perception of personal status matters. Moreover, they shift the emphasis to another legal disciplines besides personal status of civil and administrative law: human rights law and private international law. This paper explores the motives and the ratio of child naming law and policy in global, regional and national context. It questions if national systems are adapting to contemporary mobile society, particularly due to limitations of sovereign powers of the states in child naming policy imposed by international community. Mosaic of international and European obligations undertaken by the state preserve the right of a child to a personal name, right to its family, right to an identity, right to move and reside freely in the EU. These rights have to be placed to a fair balance with the powers of the states to use the name as an identification tool, a tool to preserve national naming tradition and language. ECtHR and CJEU set guidelines to safeguard and achieve balance among these diverging rights and interests. Analyses of relevant judgements serves to reveal whether the rights of the child in the naming law are perceived in the context of preservation of identity of a child as well.

Keywords: *child, identity, name, nationality.*

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1. Introductory remarks

A child as an individual is identified in a society, among other, with its name. [1] Naming issues are traditionally been perceived as a reflection of sovereign powers of a state over its nationals. Naming law and policy traditionally form part of legal discipline of personal status. Contemporary cross-border migrations challenge this static perception. Moreover, they shift the emphasis to another legal disciplines: human rights law and private international law. Legal domain the child's name becomes more complex due to several factors: increased globalization and migration trends expose the naming law and policy to a multinational context; accepting the concept of the right to a name as a fundamental human right to personal and family life as well as expansion of the European regional integration process and the transnational acquis to the area.

This paper explores the motives and the ratio of child naming law and policy in global, regional and national context. Paper gives a broad overview of mosaic of legal sources in child naming matters. It further elaborates basic typical situations where a child is given a name, or its name has been changed or its name given in one state haven't been recognized abroad. These situations reveal that national naming law and policy may presents an obstacle to achieving full identity of a child that moves across the border. In its substantial part paper questions the relevance of naming issue to a cross-border movement of a child. It also questions if national systems are adapting to contemporary mobile society. Paper speaks of the limitations of sovereign powers of the state in child naming policy. Mosaic of international and European obligations undertaken by the state preserve the right of a child to a personal name, right to its (family) identity, right to move and reside freely in the EU. These rights still have to be placed a fair balance with the powers of the states to use the name as an identification tool, a tool to preserve national naming tradition, language.[2] Safeguard of these diverging rights and interest are the ECtHR and CJEU. Analyses of relevant judgements serves to discover if the legislation and judicature perceive the right of a child to a name as a tool of identification, and/or promote its role in preserving the identity of a child that moves across border.

[1] The word personal name has different meanings in legal science and in onomastics Onomastics consider only a person's first name, not his last name. (Frančić, 2006:76). For the purpose of this paper we refer to a name and surname of a child.

[2] Cultural rights in the case-law of the European Court of Human Rights (2017), Council of Europe / European Court of Human Rights, January 2011 (updated 17 January 2017), pp. 23-24.

2. What's in a name?

The significance of the name in society and, consequently, law is multiple (Bureau, Muir Watt, 2007:27). It is an expression of the identity of an individual, but also a reflection of his or her belonging to a particular family, or to society as a whole. G.W. Allport (1961) notes that "The most important anchorage to our self-identity throughout life remains our own name." (Allport according to Aksholakova 2014:467). Personal name of a child indicates it is a holder of rights and obligations in legal transactions (Hlača, 1996:68, Winkler 2013). In addition to these private aspects, personal naming is under a significant influence of the public interest of the state to use the name as a tool of identifying individuals, but also preserving historical roots, national language and national identity. State is stemming primarily for legal certainty, hence it prescribes the preconditions for determining, using and changing a personal name for the permanent identification of the person using it. Naming law traditions are different. Personal name matters are based on firm rules and are strictly regulated in some countries, particularly of continental Europe. In some other, particularly common law countries, it is a relatively free area (Varennes, Kuzborska, 2015: 978). The stability, or invariability, of a personal name is necessary in order for it to fulfil the function of identifying an individual. Name changes are possible in certain situations and under certain assumptions that vary from state to state. Special status changes in family law, such as marriage or adoption, have as a consequence a change of personal name.

For an individual, the right to a personal name is his or her personal right. The personal name raises legal issues: it is subject to legal regulations, prerequisites for acquiring, changing and protecting the name are determined by compulsory regulations, and the state obliges the individual to use his real name (Sommer, 2009:112).

Name and identity are surely complex interrelated issues seeking for a holistic theoretical and practical approach (Peternai Andrić, 2019:88ff). Personal identity relates to the identity of a person on the basis of special characteristics that set her/him apart from other persons (age, gender, marital status, physical characteristics). Personal identity is determined by public documents (Pravni leksikon, 2007:429).[3] The right to a personal identity is every person's right to be what they are; every person has the right not to be presented differently than he or she is. The name is one of the basic determinants of personal identity.

[3] Pravni leksikon (2007), Leksikografski zavod Miroslav Krleža, Zagreb.

3. Legal sources

The right to persons name is explicitly regulated by national naming legislation. Traditional perception of civil status law (including naming law and policy) as a domain of the sovereign power of the state has been an obstacle to a law unification in this area. This attitude influenced also the private international law unification of names, lacking serious achievement.

Legal protection of the child, and more specifically the right to a personal name and right to the identity of the child, is drawn from several legal sources of international, regional (European) and national level. Given the multi-layered nature of the issues we are dealing with, we are talking about a mosaic of intertwined legal sources. At universal level The *International Commission on Civil Status* has been working on conventions aimed at facilitating international cooperation in civil status matters. Among its 30 conventions only several deal with the name issues. [4] However, their effects are negligible due to the small number of Contracting Parties.

Several international multilateral treaties focus specifically on issues of protection of the right to a personal name. *UN International Covenant on Civil and Political Rights* (ICCPR) of 1966[5] deal in explicit with a right to have a name (Joseph, 2004). Its Article 24(2) states that "Every child shall be registered immediately after birth and shall have a name." *Convention on the Rights of Persons with Disabilities* of 2006[6] indicates with Article 18 that children with disabilities must be registered after birth and must have the right to a name.

Shifting towards universal framework on child related naming issues one has to take into account universal treaties on fundamental rights. Naming issues have in the birth math of human rights been left outside their scope. The reason for disagreement on how to handle the topic of the identity of an individual in the context of early human rights treaties was a very diverse naming policy through the globe (Varennes, Kuzborska, 2015:978-979).

[4] Convention on the issue of a certificate of legal capacity to marry, signed at Munich on 5. September 1980., CIEC Convention no. 20., Convention on changes of surnames and fornames, signed at Istanbul on 4. Semptember 1958., CIEC Convention no. 4., Convention on the recording of surnames and fornames in civil status registers, signed at Berne on 13. September 1973., CIEC Convention no. 14., Convention on the recording of surnames, signed by General Assembly in Antalya on 16. Semptembar 2005., CIEC Convention no. 31., Convention on the recording of surnames, signed by General Assembly in Antalya on 16. Semptembar 2005., CIEC Convention no. 31., URL: www.ciec1.org/CIECenBref-EN-16-1-2009.pdf

[5] G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 24 (2), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

[6] G.A. Res. 61/106, U.N. GAOR, 61th Sess., art. 18, U.N. Doc. A/RES/61/106 (2007)

An important role in protecting the fundamental rights of children, including the right to a personal name and identity, can be found in Article 7 and 8 of the *UN Convention on the Rights of the Child* (hereinafter CRC).[7] CRC in its Article 7 states that "the child shall be registered immediately after birth and shall from the birth have the right to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." Deeper insight in intentions of treaty makers reveals that they had no other intentions beyond the necessity of the registration of a name for identification purposes.[8] The CRC omitted to tackle who should be entitled to determine this name. A new concept of developing parallel rights appeared at global level in late 1980s. The identification purpose of the right to a name was upgraded with the right to an identity! Article 8 of the CRC guarantees "the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference". Article 8 is not directly connected to the right to a name of Article 7, as it refers to a separate children's right to the preservation "of their identity."[9] However, Article 8 became a provision of generally acceptable importance of the individual identity as a core value in international human rights. Right to a name read in conjunction to a rights deriving out of Article 8 of the CRC confirm that the State has an obligation to protect, and if necessary, re-establish basic aspects of the identity of a child, including his or her name.

Although the CRC is celebrating its 30th birthday, some older international treaties have highly influenced children's rights. It happened despite the fact they sometimes lack provisions referring expressly to children. The most prominent example is a general human rights instrument: *The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950* (hereinafter ECHR) (Kilkelly 1999). Article 8 of the ECHR has been mostly used in relation to children (Florescu, Liefaard, Bruning, 2015:451). Under Article 8 the European Court of Human Rights (hereinafter ECtHR) has dealt with diverse aspects of children's rights, including the right to personal identity.[10] ECHR makes no specific reference to the right to one's name. Progressive interpretation of ECtHR has placed the right to a name and identity under the umbrella of Article 8.

[7] G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 8, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3.

[8] General Comment No. 17: Rights of the child (Art. 24), adopted 35th sess., Hum. Rts. Comm. (7 Apr. 1989).

[9] General Comment No. 11: Indigenous Children and Their Rights Under the Convention, U.N. Doc. CRC/C/GC/11 (2009).

[10] Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence (2019) Council of Europe/European Court of Human Rights, p. 7, 45.

Another convention from the framework of the Council of Europe may be important to naming law and policy. Regulation on the spelling of names of national minorities is set by the Council of Europe Framework *Convention for the Protection of National Minorities* (FCNM) (Weller 2005). Its Article 11(1) states that "Every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them". The Explanatory Report of the Framework Convention clarifies that the right in question is regulated according to modalities provided for in the legal system of the contracting state. Hence, states parties to a convention are permitted to "use the alphabet of their official language to write the name(s) of a person belonging to a national minority in its phonetic form".[11]

The European Union has very limited powers to render legislation in matters of personal status (Hlača 2013:110). European Union is not party to any of previously listed international conventions. Despite general EU competence in private international law, in civil justice arena only a regulation providing for free movement of status public documents[12] has been rendered (Župan 2019). Although personal status and naming law has remained outside EU competences, national rules on the spelling of EU citizens' names and recognizing a name rendered in another Member State may constitute an obstacle to exercising their free movement rights. General principles of EU law come to forefront here. Firstly, the Article 6(2) of the Treaty on European Union upgrades the fundamental human rights to a core of the EU. Article 21 of the Treaty of Functioning of the European Union assures that "every citizen of the Union have the right to move and reside freely within the territory of the Member States".[13] Nowadays the Charter of Fundamental Rights[14] with Article 7 (parallel to Article 8 of the ECHR) becomes also relevant. If we look more closely to child naming matter, Article 24(2) serving as a general best interest corrective of any action relating to a child, comes to the arena as well. European child agenda nowadays attribute him an individual status in relation to its primary career (Petrašević, 2018:71ff).

[11] Explanatory Report to the Framework Convention for the Protection of National Minorities, Strasbourg, 1.II.1995, European Treaty Series - No. 157, p. 9.

[12] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, OJ L 200, 26.7.2016, p. 1–136

[13] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390

[14] Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407

4. Child naming policy in cross-border context

Global migrations affect socially acceptable forms of living. An adult and a child are more often mobile across borders then static within the territory of one state. Consequently, the personal status issue often has a cross border element mark. The complexity of the name issue in an internationally characterized situation stems from the substantial diversity of substantive and conflicting national regulations. The rules in the field of personal name in national substantive law differ in several key elements: determining the name of the child where the differences are most pronounced in out-of-wedlock solutions, situations where a change of personal name occurs, such as marriage or adoption, and where, in terms of the admissibility and extent of a voluntary change of name (Sturm, 2000:214).

When personal status of citizens and respective family-law relations are at stake, national states wish to maintain a recognizable legal history and cultural and religious models inherent in its group national identity. As a consequence substantive differences exist between the regulations of individual states, bringing migrant individuals and families into unenviable situations. In a cross-border situation, the personal and property relations of family members are legally inconsistent, and legal uncertainty is also reflected in the rights and obligations towards third parties. Statuses created subject to law of one state do not produce effects in another state automatically. In legal discourse we speak of "limping" status relationships, which are an unintended consequence of contemporary globalization.

In the area of private international law personal name of a child constitutes one of the fundamental questions in the field of personal statute in the strict sense. Although cross-border naming law is long know doctrinal topic (Giesker-Zeller, 1915; Glenn 1975; Scherer, 2004; Heuer 2006; Živković 2016) it has been actualized with contemporary migration, particularly within EU (Gerard-René, 2004). The close relationship of status with the country in whose civil status registry the person is enlisted influences the approach of private international law to this issue. The complexity of the internationally characterized personal name situation is further compounded by the diversity of conflicts of law. In private international law, the question arises as to which of the potential legal orders connected to the person concerned is most appropriate to regulate the matter. By default the nationality law is applied to conflict of law resolution (Živković, 2014; Živković, 2016; Župan, 2012). At the same time, the dilemma arises as to whether states in this domain should also relinquish protectionism and open enrolment in domestic civil registers of a personal name that is not exactly the same as that envisaged for domestic situations. This is particularly relevant for dual or multiple citizenship. Strong

territorialism in this domain is the cause of numerous "limping" legal relationships. Recently the party autonomy is introduced to choice of law, as a possible corrective to it.

Discussion on the issue of personal name can be directed by thinking about the typical situations of assignment or change of a name abroad that are not recognized by the country of origin of the person's nationality. Particular problems arise with dual citizenship, where national private international law tends to apply the exclusivity of domestic nationality. Unless status is regulated and unified in both countries, identity doubts can arise. Identity doubt may appear equally in any types of procedures. Typically, a name registered in one country does not comply with the national regulations of another country and cannot be registered in the civil status registry. Common scenario is the first registration or/and change of the name of a child with dual nationality, the definition of a name in the case of international adoption; the problem of changing the name of a transgender person; identification of persons as potential heirs or decedents in international successions proceedings.[15] All status issues in internationally marked situations are characterized by the potential limping scenario: a person's name is recognized by his or her legal order, but is not recognized by another. Or, more specifically, under one substantive law, the mother and the father may choose to name their child by their both surnames, while under substantive law of a country they wish to obtain a recognition of that status, the parents joint surname is not permitted form of a child surname. Consequently, the same person has two different surnames in two legal orders. Although *comitas gentium* assures international cooperation, national states reserve a right to use the public policy clause as a deliminator of acceptance of foreign legal order. Public policy clause determines the limit on the protection of the rights of individuals and families, the tolerance on foreign substantive solutions, the occasion of exceptional exclusion on the application of foreign law that may violate domestic values, the occasion on exceptional refusal of a recognition of a foreign decision that is contrary the foundations of domestic order. In this context, personal, national and cultural identity will play a role. In European Union context the mutual values enshrined by the *acquis* determine the mutual tolerance threshold among the Member States. Still, migration is not only of a regional scope, it is a worldwide phenomenon. The greater the spatial distances, the more distinct national legal, cultural and religious identities are. Reconciliation of the status acquired in distant states is even more difficult. In this sense, the child and his / her personal identity are exposed (Rossolillo 2009).

[15] See the reasoning of the ECHR in Mennesson v. France, Application no. 65192/11, 26.09.2014., § 98.

5. Personal name of a child in rulings of the ECtHR

As already set, naming law is under the scrutiny of ECtHR in the context of Article 8 of the ECHR. The primary purpose of Article 8 is of a negative kind, aiming to protect a child against arbitrary interferences with private and family life. However there is additionally a positive obligation for a state to ensure that Article 8 rights are respected.[16]

Article 8 guarantees certain rights to an individual, but those rights are not absolute. Public authorities may validly interfere in certain circumstances and limit the individual's Article 8 rights. Interference which is in accordance with the law, necessary in a democratic society to pursuit one or more of the legitimate aims, may be considered to be acceptable. In naming matters certain collective rights might be jeopardized, such as a right to protect national tradition and heritage with family naming, right to protect a language, abolition of nobility titles to ensure full equality of all of the citizens, or even minority rights. Administrative authorities and courts at all levels are faced with numerous situations where individual rights of a child and family naming may be questioned towards states. States employ their sovereign interests desiring to protects their own values. However, state also has an obligation to protect internationally accepted values enshrined in fundamental rights treaties (Varennes, Kuzborska 2015: 981ff). State is afforded a certain degree of discretion - margin of appreciation (Kilkely 2003: 6-7). In event of a complain of an individual that the State has overstepped that margin of appreciation, the final rulings is with the European supervision of the Strasbourg court. The ECtHR has ruled that "where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted".[17]

First application to the ECtHR relating to a personal name dates back to 1990. Despite the lack of provision dealing specifically with the name and the identity, in *Burghartz v Switzerland*[18] the ECtHR places the right to a name under the ambit of ECHR. Moreover, the identification of an individual with his name becomes an element in evaluation of the proportionality of interference of a state. The ECtHR has clearly indicated with the *Stjerna v. Finland*,[19] that the fact that there may exist a public interest in regulating the use of names is not sufficient to remove the question of a person's name from the scope

[16] Guide on Article 8 of the European Convention on Human Rights.

[17] S.H. and Others v. Austria GC, Application no. 57813/00, 3 November 2011, § 94.

[18] Burghartz v Switzerland, Application no. 16213/90, 22 February 1994.

[19] Stjerna v. Finland, application no. 18131/91, 25 November 1994.

of private and family life. ECtHR upheld that names retain a crucial role in a person's identification (§ 39).

European Court of Human Rights had a chance to deal with personal name of a child in several applications. *Guillot v. France*[20] related to a refusal of the French authorities to register the applicant's daughter with the name "Fleur de Marie" as it was not listed in the Saints' Calendar. ECtHR clarified that the choice of a child's forename by parents amounts to a personal, emotional matter and therefore comes within their private sphere. The case of *Johansson v. Finland*[21] related to a refusal of Finnish authorities to enlist to a Population Registration a child born in 1999. Authorities argued that a name chosen by his parents and here applicants "Axl Mick" did not comply with the law, whereas the "naming practice followed in a State was closely linked to the cultural and linguistic history and identity of that State"(§24). The Names Act gives a possibility to depart of traditional names if a person proves it is appropriate due to the nationality, family relations, connection with a foreign name or similar. However, administrative adjudication instances upheld the first instance court opinion that applicants have failed to prove that exception would be justified. On the contrary, applicants found that their fundamental parental rights guaranteed by the ECHR have been violated. ECtHR arguments in relation to a child may be of our interest: although the court does not exactly refer to the "best interest of a child"[22] it conducts an analyses of the given name reaching the conclusion that "The name cannot therefore be deemed unsuitable for a child" (§38). Here the ECHR found that there are already 3 persons enlisted to register with the name Axl, hence the states haven't balanced properly the intervention to private life.

Rights of a child in relation to preservation of its identity concern other specific areas of status issues. Arguments of the Strasbourg court in specific cases of surrogacy,[23] adoption and kafala[24] cases are mostly very carefully structured. Majority of the landmark cases lack any reference to identity aspect of a child. Identity and best interest of a child were

[20] Guillot v France, Application no. 22500/93, 24 October 1993.

[21] Johansson v Finland, Application no. 10163/02, 6 September 2007.

[22] "The name was not ridiculous or whimsical, nor was it likely to prejudice the child, and it appears that it has not done so. It was also pronounceable in the Finnish language and used in some other countries. … The name cannot therefore be deemed unsuitable for a child" (§38).

[23] In Paradiso and Campanelli v. Italy [GC] (Application no. 25358/12, 24 January 2017) it is self evident that a child identity was uncertianf for its first three years, as due to ongoing legal proceedings against intended parents it was not givean a name (§ 51).

[24] In Harroudj v France the ECtHR argued that a state is obliged to establish legal safeguards that enable the child's integration in his family, ones the existence of a family tie has been established. Neither is the identity as such taken into consideration. Harroudj v France, Application no. 43631/09, 4 January 2013.

though much debated in the surrogacy application of *Mennesson*.[25] Court placed identity of a individual and a legal parent-child relationship in direct link, stating that "The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced" (§ 80). Here the legal parent-child relationship of the applicants was established under Californian law, but not recognised under the French legal system. "In other words, although aware that the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society." (§ 96). ECHR further reminds of previously established practice that a nationality is an element of a person's identity. [26] Uncertainty as to the possibility of obtaining recognition of French nationality "is liable to have negative repercussions on the definition of their personal identity." (§ 97). Interestingly the Court strikes a balance among legitimate interest of France wishing to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory, impact of the non-recognition of a legal parent-child relationship status acquired abroad on the identity of a child, and the best interest of a child. Strasbourg court here concluded that a respondent State overstepped the permissible limits of its margin of appreciation, claiming that "a serious question arises as to the compatibility of that situation with the children's best interests, respect for which must guide any decision in their regard" (§99).

6. Personal name of a child in rulings of the CJEU

The jurisprudence of the court relating to a name dates back to 1993 *Konstantinidis* judgement.[27]

Although the judgment does not relate a child, this case reflect the perception of a broader function of a name in contemporary society and law. Reasoning of the Advocate General and the court relies on numerous references to national constitutions in the aspect of dignity, which are interconnected to individuals name. Eventually a right to a name is declared a common constitutional tradition, indistinctly associated to human dignity (Dagilyte, Stasinopoulos, Łazowski, 2015:7-8). *Dafeki*[28] judgement established that

[25] Mennesson v. France, Application no. 65192/11, 26 September 2014.

[26] Genovese v. Malta, Application no. 53124/09, 11 October 2011, § 33.

[27] ECLI:EU:C:1993:115, C-168/91, Christos Konstantinidis v Stadt Altensteig-Standesamt, 30 March 1993.

[28] ECLI:EU:C:1997:579, C-336/94, Eftalia Dafeki and Landesversicherungsanstalt Württemberg, 2 December 1997.

entire personal status of an individual has to be respected on the EU territory (Winkler, 2013: 137-138).

The landmark child personal name judgment of the CJEU is the one in *Garcia Avello* case.[29] A dispute arose in Belgium over the surname borne by children of dual Belgian-Spanish nationality residing in Belgium. Children were registered before Belgian birth registry by fathers surname, and in Spanish Embassy in Brussels by Spanish model of surname consisting of the surname of the father and the mother. The opted for a Spanish model as a unique surname, and requested a modification at Belgian authority. Since in Belgium children bear their father's surname, their request was denied. The Supreme Administrative Court referred to the CJEU seeking for an interpretation of possible violations of primary acquis, more particularly prohibition of discrimination based on nationality. The CJEU argued that Article 12 and 17 TEC [now 20 TFEU] prevent a Member State from imposing exclusively national standards to its nationals, who are at the same time nationals of some other Member State. In such a situation they ought to permit its own nationals to adopt surnames consistent with the laws of the second Member State. The court did recall to the identity aspect, but referring to the objections of the applicants. The Court held that, „every time the surname used in a specific situation does not correspond to that on the document submitted as proof of a person's identity, or the surname in two documents submitted together is not the same, such a difference in surnames is liable to give rise to doubts as to the person's identity and the authenticity of the documents submitted, or the veracity of their content." (§ 28).

Equally interesting child naming judgment came with the *Grunkin Paul*[30] case. The reference to the CJEU was made in the course of proceedings between Mr Grunkin and Ms Paul against the Registry Office of German Niebüll, in relation to a refusal to recognize the surname of their son Leonhard Matthias as determined and registered in Denmark. Both parents and a child were solely German nationals, with habitual residence in Denmark. Commission gave more weight to the perspective problems the child in a limping situation may face. "As the child (..) has only German nationality, the issuing of that document falls within the competence of the German authorities alone. If those authorities refuse to recognize the surname as determined and registered in Denmark, the child will be issued with a passport by those authorities in a name that is different from the name he was given in Denmark (§ 25). Consequently, every time the child concerned has to prove his identity in Denmark, the Member State in which he was born and has

[29] ECLI:EU:C:2003:539, C-148/02, Carlos Garcia Avello v. Belgian State, 2 October 2003.

[30] ECLI:EU:C:2008:559, C‑353/06 Stefan Grunkin, 14 October 2008.

been resident since birth, he risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the surname he has always used on a day-to-day basis, which appears in the registers of the Danish authorities and on all official documents issued in his regard in Denmark, such as, inter alia, his birth certificate, and the name in his German passport. (§ 26) The CJEU acknowledges the ratio of German naming legislation, but finds that seriousness of inconvenience in the case is proved and hence "Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognize a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth." (§ 40).

Several of the CJEU naming law rulings related to nobility title. The applicant of a German noble title *Sayn-Wittgenstein*' was refused its recognition in Austria where nobility titles are prohibited.[31] Although the applicant claimed the nobility title is part of their identity, it was not upheld by the court. The Court reconsidered the situation the applicant is in daylife: "every time the applicant in the main proceedings, holding a passport in the name of 'Sayn-Wittgenstein', is obliged to prove her identity or her family name in Germany, her State of residence, she risks having to dispel suspicion of false declaration caused by the divergence between the corrected name which appears in her Austrian identity documents and the name which she has used for 15 years in her daily life, which was recognized in Austria until the correction in question and which is given in the documents drawn up in her regard in Germany, such as her driving licence." Still, the CJEU upheld that EU is obliged to respect the national identities of the member states, even when they impose derogations from fundamental freedoms in the name of objectively enforcing public policy. Although not explicitly, the court advocates that identity with a family is expressed through the surname, and not through a nobility title.

The CJEU has clearly placed civil status record (internal) situations under EU umbrella, if they are in direct connection to free movement of persons. In *Malgožata Runevič-Vardyn*[32] it has stated that a procedures initiated in order to change the certificates of civil status issued to a person by the competent authorities of her Member State of origin, fall under the ambit of European law, if a person is seeking for those certificates changed in

[31] ECLI:EU:C:2010:806, C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, 22 December 2010.*

[32] ECLI:EU:C:2011:291, C-391/09 Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus, 12 May 2011.

order to facilitate her exercise of the right of freedom of movement and residence conferred on her directly by Article 21 TFEU (§58).

The CJEU added a test on „reason for name change" to the naming mater with *Bogendorff* case.[33] In this case a person of double nationality voluntarily made several changes to the name which contains a number of tokens of nobility, allowed under the national law of one of the Member States. The resulting name was refused recognition in the other, whose nationality he also holds. Court argues that if a change of a name rests on a purely personal choice by the individual, and "the difference in name which follows therefrom cannot be attributed either to the circumstances of his birth, to adoption, or to acquisition of British nationality…" other Member State may not be imposed an obligation of its full recognition (§38). On the contrary CJEU obliges national authority of the Member State of recognition to ascertain if such a refusal of recognition is justified on public policy grounds, in that it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law (§ 85). The CJEU held that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, while its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Consequently, "public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society".[34]

Currently the last naming reference is the *Mircea Florian Freitag*.[35] Proceeding concerned a recognition and the entry in the civil register in Germany of a change of surname to one legally acquired in Romania.[36] CJEU acknowledged "there is a real risk — because he bears two different surnames, namely Pavel and Freitag — of being obliged to dispel doubts as to his identity and the authenticity of the documents submitted, or the veracity of their content, which, as the Court has ruled, is such as to hinder the exercise of the right which flows from Article 21 TFEU" (§ 38). CJEU found a violation of Article 21 TFEU in the act of the registry office which refused to recognize and enter in the civil register the name legally acquired by a national of that Member State in another Member State, of which he is also a national. CJEU adds to the analysis the facts

[33] ECLI:EU:C:2016:401, C-438/14 Nabiel Peter Bogendorff von Wolffersdorff, 2 June 2016.

[34] ECLI:EU:C:2004:614, C 36/02 Omega, 14 October 2004 (§ 30).

[35] ECLI:EU:C:2017:432, C 541/15, Mircea Florian Freitag, 8 June 2017.

[36] ECLI:EU:C:2017:432, C‑541/15, Mircea Florian Freitag, 8 June 2017.

that it was his birth name and that that name must have been acquired during a period of habitual residence in that other Member State (§ 48).

7. Personal name a child – an issue of identification or identity?

There is no universal solution that would allow an individual child automatic continuity and stability of his or her status in all countries of the world, or even throughout the European Union. The reason lies in the diversification of state legislatures, poor unification and limited powers of international organizations. Migrating child however comes under different legal orders, each of which reserves the right to subject his or her actions to their own regulations.

Naming practice must be in accordance with national, European and international law, taken as a mosaic legal package (Dagilyte, Stasinopoulos, Łazowski, 2015:1-45). Sovereign rights of a state over its national may be limited, as European and international law determine the requirements or restrictions that a state may impose on the name of an individual. This paper has inspected the naming matter through the cross-border loupe, meaning it focused on naming issues arising ones a child or a person in general moves across the border. The cross-border naming issues are primarily a private international law matter. In the absence of uniform conflict of law rules, the general principles of European and international law come to forefront. The question remains to what extent national systems are prepared to accept that the state, in the context of sovereign rights, has restrictions that stem from the individual's right to preserve and protect his or her identity stemming from internationally overtaken obligations of mere state. Analysis of the relevant CJEU and ECtHR court decisions conducted here are in a search of the answer if the name and identity are perceived as inseparable category. Although the inspected European courts had an occasion to deal with child naming issues in only several occasions, the rulings concerning name in general, can be used as a valuable source of argumentation. Views of the two European court are however argumented differently, as the legal foundation is partly different (Winkler, 2013:142).

Right to a personal name in general terms triggers the right to private and family life, the right to human dignity, the right to cultural-ethnic identity in conjunction to non-discrimination on the grounds of ethnic origin, freedom of expression. Additionally in respect of a naming of a child, it triggers the protection of the best interest of a child (Župan, 2015:213ff; Medić, 2019:9ff).

Issue of personal name of a child is one of the status issues being affected by contemporary evolution of human rights. The matter became part of human rights agenda ones placed under the umbrella of wide interpretation of Article 8 of the ECHR. ECtHR confirmed that the issues of a name are an issue of identity. Naming issues cannot be limited to the interest of a state in identification. A person identifies with his name, it is a sign of his recognition, part of his person, and denying it violates his fundamental human rights. Rights deriving out of Article 8 fall into a category of qualified fundamental rights: rights that can be limited if they are in conflict with the rights of others. Convention's qualified rights main feature is that their application requires a balancing exercise between the protection of human rights and the Contracting States' margin of appreciation (Roagna, 2012:6).

In EU context, CJEU followed dual pathways: naming matters are part of EU citizenship and fundamental rights agenda. The European Union is investing another trump card in comparison to ECHR: can the national naming practice hinder the free movement of people, a fundamental freedom in terms of which all states have agreed to remove legal obstacles! Garcia Avello case shows how far reaching the implications of EC law can be (Pintens, Dutta, 2016:21ff). Exclusivity of domestic nationality has been abandoned: when a person holds more EU citizenships the effective one would count. What are the implications, what are the benefits for citizens and what is the loss for nation states?

CJEU aims to avoid the limping relationships in the European legal space (Liakopoulos, 2018:263). Judgements before the CJEU in naming matters departure of the aspect of everyday life of a European citizen. … "it must be borne in mind that many daily actions, both in the public and in the private domains, require a person to provide evidence of his or her own identity and also, in the case of a family, evidence of the nature of the links between different family members."[37] As the CJEU found a motive for action, the legal ground aspect emerged. The CJEU repeatedly notes "that a person's forename and surname are a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') and in Article 8 of the… ECHR. Even though Article 7 of the Charter does not refer to it expressly, a person's forename and surname, as a means of personal identification and a link to a family, nonetheless concern his private and family life.[38]

[37] Judgements Runevič-Vardyn, § 73; Bogendorff von Wolffersdorff, § 43, Freitag, §37.

[38] Judgements Sayn-Wittgenstein, § 52; Runevič-Vardyn, § 66.

CJEU tried to bring both aspects of personality and freedom of movement into line. CJEU tried to find a fair balance on multiple nationality as well, giving more credit to the autonomy of the will.

The CJEU uses the test of Article 8 of the ECHR. Refusal to accept a name as it appears on the certificates of civil status issued by the Member State of origin, complying with the rules of that State, may be refused if such a refusal does not give rise to serious inconvenience, for those Union citizens, at administrative, professional and private levels. The margin of discretion in the notion of "risk of serious inconvenience" is a matter for the national court to decide. National authorities refusing the recognition must have clear arguments that national rules that were given primacy are designed to secure and is proportionate to the legitimate aim pursued. AG Jacobs' Opinion in *Konstantinidis* is based on a wider reading of Article 8 of the ECHR, arguing that naming matters are within the scope of EU law. Charter has later introduced additional child related provision (Iglesias Sánchez 2012). As far as the personal scope is concerned, this was enlarged to encompass non-economically active citizens, including minors, who now have non-derivative, express rights. This idea was introduced in Zhu Chen and later re-emerged in Ruiz Zambrano (Petrašević, 2019; Dagilyte, Stasinopoulos, Łazowski, 2015: 29).

The underling motive of the CJEU is that non-recognition of a name given in another member state must be placed under a loupe of general EU principles, particularly prohibition of discrimination based on nationality and employment of free movement. Circumstances in each and particular case must indicate the child would face real risk and serious inconveniences in cross-border movement, as its identity would be questioned. Discrepancy in names leads to doubts as to one's identity, is such as to hinder the exercise of the right which flows from Article 21 TFEU. according to the Court's case-law, in order to constitute a restriction on the freedoms recognized by Article 21 TFEU, the refusal to amend the forenames and surname of a national of a Member State and to recognise the forenames and surname which he has acquired in another Member State must be liable to cause him 'serious inconvenience' at administrative, professional and private levels.[39]

The CJEU added to the analyses several other factors. Firstly the closest connection test - if the person deprived of recognition has substantial connection to the members state of origin (either a nationality, habitual residence). Other aspect relates to behavior of the individual - has the individual caused the situation on its own. While it acknowledged

[39] ECLI:EU:C:2011:291, Runevič -Vardyn and Wardyn, C 391/09, § 76.

that the different spelling of Ms Runevič-Vardyn's name did cause inconveniences related to the proof of identity in her daily life, it stressed that this situation was the result of the conscious behaviour of the applicant herself.

In the sequence of judgments one may read out the CJEU effort to promote and protect one's right to a name, as a means to self-determination and personal identity (Lehman 2008) Despite the fact that right to a name and right to a identity are perceived as rights afforded to a child, they are by EU court not taken in conjunction. Any child related right should be in correlation to the best interest of a child. There is a missing link in relevant child naming judgments: the "best interest" criterion, deriving either of the CRC Article 3 or the Article 24 of the Charter, has not been employed.

Conclusion

This paper imposes a simple standing conclusion: in naming matters the national states had lost the full power over its citizens, despite the fact states refused to negotiate and enter treaties specifically to that effect. Interpretative power of ECtHR and CJEU courts has partly abstracted the naming matter from national to supranational level. To reach that effect, fundamental rights deriving of the ECHR have been used, combined with the fundamental freedom of movement and prohibition of discrimination based on citizenship, in the EU context.

That simple standing conclusion has to be upgraded when it comes to a margin of appreciation left for the state. Name of an individual and possible infringement of his identity by sovereign act of a state would be questioned on a case to case bases. A serious inconvenience caused by identity dilemma has to be proven. The intensity of a name usage signals if intervention of a state is exaggerated. In more specific child naming matters the best interest criterion could have taken more substantial place, as a backup to preservation of a child's status stability and continuity of identity while crossing borders.

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