

Rights and Legitimate Interests of a Child Born Using Assisted Reproductive Technologies

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Abstract—The paper presents the analysis of such concepts “right” and “legitimate interest” in relation to a child born using assisted reproductive technologies. The term “interests of a child” is quite often used in the family law of the Republic of Tajikistan. Nevertheless, the content of the given category still remains unsolved. The legislator does not establish compliance criteria of the interests of parents with the interests of children and does not define the term “interests of children”. Based on the analysis of various doctrinal approaches, the author comes to a conclusion that the interest can be both subjective and objective category. One of functions of assisted reproductive technologies is granting the last opportunity for married couples to have their own genetic child. A child born with the use of assisted reproductive technologies shall have the same rights for healthy family education as a child conceived in a natural way.

Keywords—family relations; rights of a child; legitimate interests of a child; legal responsibility; assisted reproductive technologies

I. INTRODUCTION

Today, when family relations became a special object of state protection, it is necessary to make sure that the family law serves an efficient tool able to protect the rights and legitimate interests of children, since, as O.Yu. Ilyina fairly noted, the childcare is not only the responsibility of their parents, but also a field of increased focus of the state [1].

However, it shall be noted that the current legislation requires critical re-evaluation since there are many problems in its implementation. These problems become aggravated against the background of relatively serious socio-economic and cultural transformations thus affecting the idea of a family, parental rights and duties.

At the present stage of social development, the state makes great efforts to increase the level of moral and legal responsibility of parents in relation to their direct duties for education of children, protection of their rights and consideration of their interests. The above is confirmed by the fact that the President of the Republic of Tajikistan (RT) Emomali Rahmon declared 2015 as the year of family, in 2011 the government of the country approved the Law of RT “On Responsibility of Parents for Upbringing and Education of Children” [2] and the Law of RT “On Protection of Children’s Rights” approved on 5 March 2015 [3].

In modern conditions the adoption of such laws may quite often be insufficient. Thus, the adopted law may fail to be executed for years, and its continuous ignorance may lead to necrosis. As O.Yu. Ilyina noted, “one of the disasters of authorities is the belief of its certain representatives that the adoption of a law will change life: everyone will fulfill his duties, will stop abuse, there will be order in a sphere where it was absent over the decades”. Undoubtedly, in this case there is a need for efficient public enforcement apparatus.

A. Literature Review

Despite numerous studies, there is no unity of single opinion of scientists on differentiation between the “right” and the “legitimate interest”. For this reason, currently there is no unambiguous definition. Though, as the doctrine states, “some attempts to define the categories of “interest” were made several times in literature” [4].

The concept of interest is studied within sociology, philosophy, economy, law, etc. [5]. Thus, economists believe that the interest is the direct relation of social subjects concerning the reproduction of a product to satisfy economic requirements or the interest acts as a tool to satisfy material and objective needs [6].

For quite a long time various scholars made an attempt to give an unambiguous definition to the “legitimate interest”. G.F. Shershenevich in his fundamental study “The general theory is right” wrote: “... persons within a single society got used to protect their rights all possible means not contradicting the legislation, to fight even against the slightest violations of their legitimate interests, to be negative towards subjects breaking the legal norms and themselves are trying not to exceed the bounds of their rights” [7]. However, this concept still remains debatable.

E.A. Krashennikov considers legitimate the interest recognized by the law by providing legal civil rights to its owner as means of satisfaction of this interest. In this case the interest represents a mediated legal right. Only some legal civil rights protected by law mediate the satisfaction of interests at the same time reflecting their protection. Through this relation to such rights the corresponding legitimate interests are isolated in a special group of interests protected by law. E.A. Krashennikov considers it expedient to call such interest a legally valid interest [8, pp. 141, 45].

With regard to this issue N.V. Vitruk notes that the “legitimate interest” serves an additional derivative to the “right” [9].

Thus, paying attention to the fact that legitimate interests exist in parallel with legal rights, V.V. Subochev states that the interests significantly supplement the right expanding a range of its impact on public relations [10].

S.N. Bratus says that the interest, being an external moment, is a prerequisite and even a purpose in relation to the legal right [11].

A.I. Ekimov believes that interests serve the basis for the opinion on justice. Besides, to recognize certain actions corresponding to justice postulates, the latter ones shall fit within its interests taking into account their heterogeneous nature [12, pp. 116, 15]. According to A.I. Ekimov, the right shall act as a measure of justice, which, in turn is based on the interests of subjects, supports them thus implementing the latter one.

When differentiating between the “right” and the “legitimate interest” the Soviet processualists said that “there is no need to consider these concepts as the same, it is necessary to reveal when we deal with the legitimate interest even based on the right, however not formulated as the legal right ...”.

N.I. Matuzov considers it wrong to adjust legitimate interests with legal rights since the protection of legal rights is much higher [13]. In turn, Podkorytova O.V. considers the legitimate interest as an integral part of any legal right [14, pp. 63, 25].

Nevertheless, seeing direct relation between the legal right and the legitimate interest E.A. Krashenninikov differentiates them considering that these concepts shall remain external in relation to each other. Such concept is considered the most widespread today, and exists in contradiction to a theory, according to which the legitimate interest shall be considered as an element of any legal right.

Identifying the “right” and “interest” M.S. Malkevich defines the interest of a child as the statutory child’s right and the idea on the best development of a child personal as well as on the development of his moral and ethical qualities based on the organization of its cash security and spiritual development [15].

One can hardly agree with such point of view since despite the fact that the specified categories are closely connected, nevertheless are not identical, moreover there are cases when these two concepts are opposed each other. For example, a child has the right to communicate with both parents if this does not contradict his interests. This example is also the evidence of the fact that quite often in many situations the priority is still given not to the rights but interests. Such cases happen because the legislator cannot capture all life situations with the right. In this case he considers it possible to follow the legitimate interests.

Comparing the above-stated categories V.E. Karnushin came to a conclusion that the legal right acts as means of achieving the interest, in turn a legitimate interest represents

the same means, but not possessing a sufficient context. Thus, a legitimate interest acts as the interest brought to the rules of law, the so-called legal interest. The achievement of a legitimate interest may happen by implementing the legal rights, but it is not the only way [16].

In legal literature there is an opinion, according to which the structure of the “legitimate interest” is presented less legally accurate, unlike the legal right. Thus, this causes the distinction of structural elements .

Unlike the legal right the content of the legitimate interest includes not four but only two structural elements: the use of certain social benefits and in some cases the appeal to competent authorities for protection.

Analyzing the point of view of Yu.G. Dolgov [17] on the definition of the interest protected by the family law, O.V. Podkorytova notes that it is valuable because the specified author was one of the few to make an attempt to define the legitimate interest within the family law. In general, O.V. Podkorytova considers that it does not cover the entire group of interests and therefore is not true. In turn, she believes that it is impossible to give the uniform definition of a legitimate interest within the family law.

In scientific literature reflects the opinion on the need to replace the legally uncertain category the “children’s interests” with a more substantial norm concerning the rights of children. Such approach, according to L.M. Pchelintseva, meets the norms of the international law and gives the chance to establish a certain family legal status of minors [18].

The term “children’s interests” is quite often used in the family law of the Republic of Tajikistan. Nevertheless, the content of the specified category still remains unsolved. The legislator does not establish compliance criteria of the interests of parents with the interests of children and does not define the term “interests of children”.

The legal literature shares the opinion on the need to define the “children’s interests” in the Family and Civil Codes as a condition of a child wellbeing [19].

Recognizing the interests of the child as a core of standard and legal expression of relations between a child, parents and the state, I.A. Dubrovskaya defines them as a subjective need of a child for favorable living conditions, which finds its objective expression in parents implementing their rights and duties stipulated by the family law [20].

In this case the author emphasizes that the interests are formed under the influence of objective and subjective factors. According to her, the objective factors include social and economic conditions, under which the children are reared, orientation of the state policy towards moral education of children, etc. The subjective factors include the views of parents and other persons rearing a child, age of a child, his understanding of personal interests, objectives, forms as well as means of education, etc.

There are three different opinions to the concept of “interest”. According to the first one, the interest represents the objective phenomenon caused by socioeconomic relations [21]. The second one states that the interest represents a

subjective category. According to the third group of scientists, the interest includes both objective and subjective features [22].

It is believed that the interest can act as subjective and objective category. On the one hand the interest has its affiliation and concerns a particular person. As a rule, every adult person, except for the disabled one, is able to define the direction of his interests. Since people who realized the interests are their carriers, the latter one may be considered subjective. Hence, in this case the interest includes both objective and subjective. However, everything is differently concerning a child. Thus, as an example it shall be noted that a juvenile child due to his age and mentality traditionally is not able to make an independent decision satisfying his interests. Therefore, it is thought that in this case the “interest” can hardly act as a subjective category.

The interest represents the need for social motivation to outward appearances such as intentions, aspirations, desires.

The concept “interest” is closely connected with the concept “desire”. However, it would be wrong to unify them. For example, when it concerns a child living in a family where both parents are alcohol or drug addicted and thus do not properly perform their parental duties. In this case the deprivation of parental rights satisfies to the interests of a child, but not always corresponds to his desire.

It shall be noted that the majority of scientists share the same opinion that the category “interest” is closely linked to the category “right”. In this respect the legal literature states that “... in all operating civil law systems all carriers of interest act as subjects of the right, which is in turn regulated and protected by “law”, which is the so-called mutual intention of a dominant class, even if it would not have that psychological will presented as the general rule, prerequisites of the legal will recognized by the law for the carrier of the interest” [23].

Equal rights and freedoms of a person and a citizen guaranteed by the state cannot be achieved by entrusting all citizens with similar rights since the legitimate interests of persons of different age, level of development, education, etc. even when they have equal volumes of rights cannot be called equally secured. A person that attained the majority age, having higher education, large life experience will naturally use the rights granted by the law more efficiently. In case a legislator does not take into account these distinctions and would not provide particular additional legislative guarantees ensuring protection of vulnerability of persons due to some circumstances (for example age, state of health) and not capable to fully and independently protect their legitimate interests, therefore the principle of equality of all before law and court could be considered declarative.

The need to provide the increased protection of the rights and legitimate interests of children is bound to their natural immaturity. Thus, paying attention to physical and intellectual immaturity of a child, the Preamble to the Declaration on the Rights of the Child of 20 November 1959 states that children need certain protection and care, including special legal protection.

In case when we refer to the birth of a child with the use of assisted reproductive technologies in the same-sex couples, first, at least one “parent” will be genetically alien to a child. Secondly, the birth and upbringing in such family fully contradict the legitimate interests of a child.

According to M.L. Kovalyova, the legislator uses the category “legitimate interests” acting as some preemptive right of children to ensure priority protection of their rights and interests. In this case it shall be noted that the rights and legitimate interests of unborn child are subject to protection and security. The state, certainly, shall put its efforts not only to ensure the compliance of rights and legitimate interests of a born child but also to protect the interests of the unborn one[24].

II. RESULTS AND DISCUSSION

It is known that the protection of rights and interests of children is a priority task of the legislation in general and the family law in particular, therefore in general terms the interest protected by law is expressed by the legislator providing such conditions, under which the interests of minors would not suffer.

When the persons willing to have a child put their interests above the interests of a future child, at the same time violating his legitimate rights, it is necessary to stop such behavior, thus defining the legislative framework.

The principle of priority protection of the child’s rights within the RT family law norms covers all relations stipulated by standards of the Family Law of the Republic of Tajikistan. The requirements on the need to pay alimony even in case a parent is recognized unemployed, norm on hereditary portion of minor children, on restriction and deprivation of parental rights serve as an example.

Besides, the right of a child for the family with two parents shall not be neglected. According to the Family Code of the Republic of Tajikistan, a child has rights for information about parents and their care; the right for accommodation and education in a family, except cases when it contradicts personal interests of a child. To a large extent a nuclear family ensures the development of physically and spiritually healthy person.

It is thought that the reproductive rights of citizens cannot be absolute. Thus, according to the conventional principles of the Family Law of the Republic of Tajikistan, the priority is given to rights and interests of a child when defining the importance of the rights.

Besides, in some cases certain international acts imply the possibility to restrict the rights and freedoms of a person. For example, such documents include the following: Universal Declaration of Human Rights (Paragraph 2, Article 29 and Paragraph 3, Article 12), European Convention for the Protection of Human Rights and Fundamental Freedoms (Paragraph 2, Article 10 and Paragraph 2, Article 11),

International Covenant on Civil and Political Rights (Paragraph 3, Article 19).

For this reason, we consider it necessary to introduce amendments to Article 91 of the Healthcare Code of the Republic of Tajikistan by establishing a statutory ban on artificial insemination of women not being officially married, thus allowing this reproduction method to married couples only.

Despite the fact that such statutory ban can serve some restriction of reproductive rights of a single woman, this will not contradict the existing general legal norms since the Constitution of the Republic of Tajikistan provides for the possibility to restrict the rights and freedoms of a person and a citizen in some cases.

We also believe that any possibility of granting the right for artificial reproduction to the same-sex couples shall be excluded since every child has the right for healthy family education satisfying his interests.

Besides, it is necessary to consider the issue of reproductive cell donation used in assisted reproductive technologies by the same-sex couples.

The European Society of Human Reproduction correctly noticed the fact that the genetic relationship is considered of secondary importance with the use of reproductive cell donation, and hence, are the right and the duties related to consanguinity.

It is thought that biological and social parents shall coincide in one person, otherwise the adoption of a child can be an alternative to assisted reproductive technologies. If in case of adoption, the adopting parent voluntarily undertakes all obligations related to education and maintenance of a child, then in case of genetic relationship all above-stated obligations shall arise naturally, irrespective of the desire of parents.

When using reproductive cell donation, a donor is usually not concerned with the destiny of his child. Besides, such practice encourages irresponsible paternity or motherhood, commonly considered as free from any obligations for those who are “flesh of flesh” of anonymous donors. The use of reproductive cells undermines the fundamentals of family relations since it implies that besides “social” parents a child has the so-called biological parents. In our opinion, such relations shall not become the norm in modern society since every child has the right for information on genetic parents and every genetic parent shall bear responsibility for his genetic child.

In order to exclude the possibility of using assisted reproductive technologies by the same-sex couples, we consider it necessary to establish the direct statutory ban on artificial insemination of women not being officially married, having stated Article 91 of the Code of Healthcare of the Republic of Tajikistan in the following edition: “Only married man and woman have the rights for artificial insemination”.

III. CONCLUSIONS

The previously mentioned makes it possible to conclude that the analysis of the correlation of such categories as the “right” and the “interest” in the Republic of Tajikistan showed that these concepts, being closely connected, supplement each other.

We consider it necessary to restrict the rights of persons of non-traditional sexual orientation and lonely persons since we shall not forget that the freedom of one ends where the right of another begins. Artificial insemination of lonely persons and spouses of non-traditional sexual orientation does not satisfy the rights and legitimate interests of a future child, whom a legislator shall take care of prior to his birth. Since in the correlation of the rights of a child and persons willing to become parents, the rights of a child shall be the priority.

The use of reproductive cells undermines the fundamentals of family relations since it implies that besides “social” parents a child has the so-called biological parents. In our opinion, such relations shall not become the norm in modern society since every child has the right for information on genetic parents and every genetic parent shall bear responsibility for his genetic child.

Such ban will restrict the use of assisted reproductive technologies for persons of non-traditional sexual orientation thus protecting the rights and legitimate interests of a child for education in a nuclear family. We shall remember that one of the functions of assisted reproductive technologies is granting the last opportunity for married couples to have their own genetic child. A child born with the use of assisted reproductive technologies shall have the same rights for healthy family education as a child conceived in a natural way.

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