



Minors Rights Protection Mechanisms in Georgia

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Abstract

Georgia is a Contracting State of the Convention on the Rights of the Child. The Convention is in force since July 2, 1994. This Convention shall instruct the Participant States to recognize the rights of children in the legislative field and to ensure their effective implementation. The principle of protecting the rights and the best interests of the child is the basic, fundamental requirement of the Convention, which is an integral part of protection of the right of the child. In the cases envisaged by the law, it grants the minors the right to defend their rights and legitimate interests against the legitimate representatives through the court. The national legislation of Georgia regulates the above-mentioned possibility of protection of right, however, it is incomplete and partially provides for legal protection of the rights of child. The legislation of Georgia incompletely regulates protection of the minor's right in cases, where the rights of child is violated by a state agency, namely the guardianship and custodianship authority - LEPL Social Service Agency.

The article hereof proposes a systemic discussion and analysis of the Civil Code of Georgia and the Civil Procedure Code of Georgia with respect to the legal standards, that ensure the protection of minor's rights, which is partly carried out by the minor towards the parent, but is unable to carry out absolutely in the case, when his/her legitimate representative is the guardianship and custodianship authority. In addition, the article reviews the issue in relation to the right of access to the court and protection recognized by the Constitution of Georgia. The author has recommended suggestions and mechanisms for legal regulation of the problematic issues.

Keywords: convention on the rights of the child, the best interest of the child, the right to of protection of minor, guardianship and custodianship authority

1. Introduction

The principle of protection of the best interests of the child is the inherent requirement of the principle of the legal state. In the international law of rights of the child, this principle has two fundamental dimensions. It implies the state's obligation to recognize the rights of the child in the legislative field (normative dimension), to ensure their effective realization (execution dimension). Consequently, the principle of protection of the best interests of the child is the major basis for assessment of condition for protection of the rights of child in the state. The right of the child on protection is its integral part, which in exceptional cases grants the minors to protect their rights and lawful interests against the legal representatives through the court (2, 112). The legal system of Georgia provides for this mechanism, however, it is incomplete. The Georgian model of protection of the rights of child can not provide perfect legal protection of the minor. It is indifferent to the cases when violation of the rights of child, abuse of his/her interests is caused by the state, namely the guardianship and custodianship authority - LEPL Social Service Agency.

The main purpose of the article is critical assessment of the mechanism for protection of the rights of child, which will be applied by the minor against a legitimate representative – the guardianship and custodianship authority, if needed. The article deals with the normative provisions of the Civil Procedure Code of Georgia and the Civil Code of Georgia that makes it impossible to effectively protect the rights of child and leaves the minor to the state without absolute protection - without court and independent representative.

The article reviews the individual instruments envisaged by the Convention on the Protection of the Rights of the Child, obliging a Contracting State to establish a pragmatic normative-practical environment for protection of the right of child. It examines the material and procedural norms of Georgia in the context of protection of the rights of child against the legitimate representative and evaluates their effectiveness. In addition, the article hereof discusses such norms in relation to the right of access to the court recognized by the Constitution of Georgia and the right to protection.

The article consists of five chapters. The second chapter of the article discusses the principle of protection of the best interests of the child - as the main international legal mechanism for protection of the rights. The third chapter discusses the standards and grounds of the internal national legislation for protection of the minors rights. The fourth chapter of the article deals with the problem of lack of legislative guarantees for protection of the minors rights against the guardianship and custodianship authority. In the final part, the relevant issues discussed in the article are systemically summarized and provided.

2. The principle of protection of the best interests of the child - the basic international parameter for protection of the right

The Convention on the Rights of the Child is a cornerstone for protection mechanism of the rights of child. In the international space it creates the minimum standards for

protection of the rights of child among the states. For the purposes of this Convention, any person below the age of 18 shall be regarded as a child, unless the national legislation acquires the rights and obligations of adulthood (9, Article 1). Consequently, only these individuals have the conventional rights and freedoms. The system of the Convention is essentially based on the principles of the best interests of the child, which on the one hand, imposes the state the obligation to carry out such administrative and legislative measures that fully ensure the recognition and protection of the rights of child (9, Article 3, Part 2). On the other hand, the legitimate representative is obliged to make such decision regarding the child, that ensures his/her interests most of all (9, Article 18, Part 1).

The principle of the best interests of child has three dimensions, 1. Substantial right; 2. Method of explanation of the norm; 3. Procedural effect (1, 4). According to the best interests of child as a substantive right, the child has the right that his /her interests are regarded as priority and the decision related directly or indirectly with him/her is made only to the genuine interests of child. It is important to say that it is given in the Article 3 of the Convention, which qualitatively belongs to the category of self-implementation norms and does not require transformation into the national law. The method of explanation of the norms in accordance with the best interests of the child requires that if there are several versions of the norm, only the normative option should be applied to the child that is best for the child's interests. According to the procedural effect of the best interests of the child, in case of making a decision regarding a child, the decision-making process shall include the assessment of its impact on the child and the procedural guarantees for protection of the rights of child.

Due to the above, the national legislation of Georgia shall create the perfect mechanisms for protection of the rights of child in all areas, in particular for protection of the rights and legitimate interests against the legal representative.

3. Fundamentals of internal national legislation for protection of minors rights

Acting in accordance with the best interests of the child, the prevailed obligation to care for the child is given to his/her legal representative. It contributes to personal development of the child and takes liability for protection of its rights in relation to third parties. The child always has a legal representative. Existence of such a person is uncompromising demand for protection of the best interests of the child. The legal representative of a child is a parent or an adopter, and in the case provided for by the law, guardian, custodian or the guardianship and custodianship authority - LEPL Social Service Agency.

On parity basics, the parents are entitled and obliged to take care of their children, to care for their physical, mental, spiritual and social development, to raise them as dignified members of the community, taking the advantage of their interests into account. They are bound to take care of the child's dignity in the process of raising and not to use such methods of raising, that will cause physical and / or mental suffering of the child. In addition, parents have a liability to support the child. Parents are obliged to protect the rights and interests of children, including management and use of children's property. In addition, parents are entitled to the right, as well as the obligation to have a relationship with their children, to determine the right of relation of the third

parties with their children. Notwithstanding the fact, that the parents are divorced or separated, they have equal rights and obligations towards their children. It is important to say that parents, as lawful representatives of minor children, may appear without special mandates to protect their rights and interests in relations with third parties, including the court (6, Article 1198). In addition, in the case provided by the law, the parents, the individuals responsible for supervision, are liable for damages inflicted by illegal action by a person under the age of 10, as well as damages inflicted by the minor, without sufficient property or income for compensation of the damages inflicted (6, Article 994). However, existence of a legitimate representative, including the parental institution, does not constitute an absolute presumption of honest and perfect fulfillment of the rights assigned, which would exclude violation of the rights of child, the breach of the legitimate interests, improper fulfillment of the imposed obligations by them. Consequently, the legislation of Georgia provides for the normative possibility of protection of the rights against a legitimate representative, namely the parents. However, there is no such mechanism in relation to other legal representatives, namely – the guardianship and custodianship authority - LEPL Social Service Agency. This part of the article discusses the right of protection against a parent, and the instrument of protection of right against the guardianship and custodianship authority - LEPL Social Service Agency will be discussed in the following part.

The Civil Code of Georgia grants the child the right to protection against abuse by the parents (other legal representatives). The Quebec Civil Code contains the similar provision (8, Article 159). If the minor's rights and legitimate interests are violated, either both or one of the parents fail or are not performing duties related to proper upbringing and education of the child, or the parent abuses the duties, the minor has the right to address the guardianship and custodianship authority independently. In addition, if he/she is 14 years old, he/she has the right to appeal to the court independently (6, Article 1198) ^[1]. In case of appealing to the court, the judge shall appoint a procedural representative. Minor plaintiff has the right to disagree with his/her procedural representative, and to defend himself/herself, the court is required to involve the guardianship and custodianship authorities in such cases (7, Article 81) ^[1]. In addition, the Administrative Procedure Code of Georgia provides for protection of the right of child in case of violence of the parent / other legal representatives. However, the guardianship and custodianship authority - LEPL Social Service Agency has the right to apply the court (5, Article 21, Part 1) ^[12].

The Civil Code of Georgia establishes the grounds for limitation, suspension and seizure of the parental rights. Parental rights and obligations may be restricted only by a court decision. The court decision may limit one or more rights of the parent independently from other rights and obligations of the parent. It is noteworthy that, in case when that rights or obligations of the both parents are restricted, the guardianship or custody is established and responsibility of care for the child is imposed to the guardianship and custodianship authority - LEPL Social Service Agency. Also, the parent retains the obligation to support the child, when the parental right is restricted according to alimony obligations (6, Article 205). Due to the contents of the said norm, there is no definite legislative regulation on the

grounds for restriction of the parental rights. Restriction of parental rights can be determined by the court in each particular individual case. The Chamber of Civil Cases of the Tbilisi Court of Appeals explained who may be the subject of appeal with the demand to restrict the parental rights, as the Civil Code of Georgia does not provide specific regulation. Consequently, the Court pointed out that the right to initiate such claim is awarded only to parents, adopters or guardians, in accordance with Article 1205 of the Civil Code, this may not apply to the claims regarding limitation of parental rights. Taking the best interests of the child into account, the court must be guided by the general rule, which means that according to the Article 2, Part 1 of the Civil Procedure Code, everyone is guaranteed with the right to protection by the court and the court will start hearing of the case on the basis of application of the person, who applies it to for protection of his/her rights or legitimate interests. Due to the mentioned justifications, the Chamber of Civil Cases of the Court of Appeal satisfied a private claim based on the factual circumstances (the child had been abandoned for 3 years by the mother and the father was serving a prison sentence), the child's grandmother was considered as the legitimate representative and the authorized person to appeal the court regarding restriction of the right of both parents and the place of residence of the grandparents was defined as the place of residence of the child, where the child has the proper conditions for the normal education (10, 5-6).

In case of disagreement on individual issues of childcare or determination of the place of residence of the minor child, upon divorce of parents, the court may suspend the parental right to be the child's representatives in the court proceedings until the dispute is settled. In such case, the guardianship and custodianship authority appoints a representative of a child, who represents the child's interests during the hearing of the case in the court. In addition, if a child is found, whose identity or origin is unknown, the rights and obligations of his/her parent (parents) shall be deemed suspended without the court's decision until: a) The child or his/her parent(s) is(are) identified and he/she will be returned to own family; b) The child parent(s) is(are) identified, but they avoid fulfillment of the parental duties and rights and the court will restrict their parental rights and duties or recognize the child as abandoned. In this case, the court will make a decision to seize the parental rights together with recognition of the child as abandoned; c) The child will be recognized as abandoned. Parental rights and duties will be deemed to be suspended upon abandonment of the child by own act or omission of the parent(s), when the child is in the 24-hour state care. In this case suspension of the parental rights and duties shall prevail on the grounds of suspension. Also, the important grounds for deprivation of the parental rights is, in case of a domestic violence, existence of restraining or protective order against a parent. Upon making a decision on separation of the child from the parent by the social worker, the representative right of the parent and/or the right of the parent to determine with whom and where should the child live, shall be considered as suspended for the period of validity of restraining or protective order or the decision of the social worker on separation of the child from the parents (6, Article 1205¹).

As for deprivation of parental rights and obligations – this is the final measure. Such decision is made by the court at the initiative of the guardianship and custodianship authority or

a 14-year-old child. The parental right shall be deprived when the parent systematically avoid fulfillment of his / her duties or improperly fulfills the parental rights, in particular mistreats the child, has a negative influence with immoral behavior, or if he/she is chronic alcoholic or drug addicted person. Parental rights and duties shall also be deprived when he/she involves the child in an anti-social activities (e.g. begging, vagrancy (6, Article 1206). It is important that the person deprived of parental rights and duties will lose all the kinship-based rights in the relationship with the child, to whom he/she has been deprived of parental rights and duties. However, the child keeps the kinship-based property rights towards this parent, including the right of inherit (6, Article 1207).

Thus, the legislation of Georgia envisages the instrument of protection of the right of child towards parent. Below the age of 14, he/she is authorized to apply to the guardianship and custodianship authority, and after the age of 14, to apply to either the guardianship and custodianship authority or the court and to request protection of the rights and legitimate interests.

4. Absence of legislative guarantees for protection of minors rights against the guardianship and custodianship authority

The child shall also have the right to protect his/her rights and legitimate interests against the legal representative - the guardianship and custodianship authority, when it fails or does not perform the functions or duties properly. It is noteworthy that the Georgian legislation does not clearly provide such mechanism and is based on the presumption of protection of the rights of child by the guardianship and custodianship authority in good faith.

It is important to say that the guardianship and custodianship is imposed for the child when: a) The court informs the guardianship and custodianship authority about restriction or deprivation of parental rights and duties of both parents of the child; b) Parental rights and obligations are suspended; c) Both parents of the child die; d) The guardian appointed to the child died or has been deprived of his/her functions; e) The court recognizes the child as abandoned; f) The parent has been recognized as missing (6, Article 1279). Guardianship and custody is imposed to all minors, with whom the parent fails to perform the assigned rights and duties, despite the parental objective or subjective reasoning (3, 356).

4.1. Absence of the right of a minor to apply to the court against the guardianship and custodianship authority

As noted above, in accordance with Article 81¹ of the Civil Procedure Code of Georgia, minors from the age of 14 may apply to a court in order to protect their rights and legitimate interests. In that case, a court shall assign a procedural representative and hear the case. A minor plaintiff shall have the right to disagree with his/her procedural representative and defend himself/herself on his/her own. The court shall be obliged to engage the guardianship and custodianship authorities in such cases. However, this article does not guarantee the full protection of the rights of child, because on the one hand it determines the minimum age for applying to the court, and on the other hand, considers participation of the guardianship and custodianship authority itself in the proceeding as mandatory. It is important to mention, that there are two versions of

interpretation of this norm. If it is literally interpreted, it may be considered that the child has the right to apply to the court for protection of his/her rights and legitimate interests only in case, when the legislation of Georgia directly grants the child such a possibility. However, if interpretation of the above article is carried out systemically, in harmony with the international treaty ratified by Georgia - Articles 3 and 19 of the Convention on the Rights of the Child, the child has the right to initiate any prosecution proceedings under the legislation of Georgia. It is possible to protect and realize the best interest of the child only in terms of the second version of definition of the norm. In other cases, the scope of protection of the own rights by minors will be dramatically reduced.

Definition of minimum limit – 14 years in the context of appeal to the court may be considered as an important gap of the legislation of Georgia, as the child under 14 is deprived of an opportunity to protect the right against the legal representative - guardianship and custodianship authority. The right to appeal to the courts protected by the Constitution of Georgia is violated through establishment of such limit (4, Article 42, Paragraph 1). According to the Constitutional Court of Georgia “the right of access to the court is the most important constitutional guarantee for protection of the rights and freedoms of the individual, the legal state and the authority separation principle” (11, Paragraph II-1). It “envisages all the legal mechanisms that ensure complete and effective protection of the rights and legitimate interests through judicial order” (12, Paragraph II-9). The right to fair trial consists of several legal components, unity of which, on the one hand, ensures that the real possibility of the people to fully and adequately protect, recover their rights and, on the other hand, to protect people from the state’s arbitrariness in case of interference of the state with human rights and freedoms. Consequently, as a formal and material content of each legal component of the right to fair trial, a sufficient procedural provision is a constitutional obligation of the state (13, Paragraph II-59).

The right to appeal to the court provides the perfect, effective protection of all persons, including the minors under 14 years of age. Under this right, children under 14 shall also have an opportunity to appeal to the court independently, personally, without a legal representative, when he/she thinks that a lawful / legitimate representative violates / will violate his/her rights, freedoms, infringes the legitimate interests, does not act in accordance with his/her best interests. However, since the child has not reached the age of 14, he is not entitled to appeal to the court without a legal representative - guardianship and custodianship authority. In such circumstances, while the guardianship and custodianship authority may infringe the rights of the child itself, protection of the right of child in judicial order is unaccepted. Thus, children under 14 have no procedural and legal facilities for protection of own rights. He/she remains without any protection, fair trial and the right protection mechanism.

4.2. Absence of the right to appoint a representative by a minor against guardianship and custodianship authority

According to Article 1293 of the Civil Code of Georgia, the guardian and custodian has the competence to enter into a transaction in the name and on behalf of the child. Consequently, when the child is willing to assign protection

of his/her interests against the legal representative - guardianship and custodianship authority to the other person, he/she will need the consent of such legal representative (14, Paragraph 73-80). On the other hand, such a normative condition for the appointment of a representative excludes assignment of independent person acting in the best interests of the child with the representative right of the child. It is noteworthy that according to Article 42 (3) of the Constitution of Georgia, the right to defence is guaranteed. It shall ensure the person with relevant material and procedural mechanism of protection of own rights and interests, which in turn, means appointment of reliable, desired defender, representative, development of the defense strategy, freedom of relation with the representative, the freedom to act on behalf of the principal with the third parties, representation at the court of the principal, administrative bodies, private organizations, etc. It also protects the right of the child to choose a representative at the court or with any third party, including with the guardianship and custodianship authority to act on his/her behalf, for protection of the interests of the child when, at the discretion of the child, his/her right is infringed by the legitimate representative - guardianship and custodianship authority - LEPL Social Service Agency. It can be said that when legality of action of the guardianship and custodianship authority, protection of the best interests of the child is doubtful, there is no neutral, effective legal mechanism for protecting the right of child. Absolute presumption that the state authority, including the guardianship and custodianship authority, acts only in the best interests of the child, qualitatively contradicts the purpose and content of the fundamental rights. The child should have the opportunity to prove the opposite, for which he/she needs a neutral representative, not being in conflict of interests. In such emergency situations the child under the age of 14 should have the competence of giving legally valid, authentic power to third parties. It is noteworthy that the child under the age of 14, in the best interests of the child, must be heard by the court, if his/her age and the physical and mental state gives such opportunity. And the child shall be heard through mandatory participation of the expert and / or social worker in accordance with the legislation of Georgia (7, Article 351) ^[13].

5. Conclusion

The child should have the right to protect himself/herself from unlawful interference (infringement) of his /her own legal representative, namely the parents, as well as guardianship and custodianship authority.

According to the principle of the best interests of the child, the child has a right that his / her interests are considered primarily and the decision related directly or indirectly to him/her is taken for only best interests of the child. According to the best interests of the child, the method of explanation of the norm requires that if there are several versions of the interpretation of the norm, only the normative option, being in best interests of the child, must be applied to the child. And, according to the procedural effect of the best interests of the child, in the case of making a decision regarding child, the decision-making process should include assessment of its impact on the child and the procedural guarantees for the rights of the child. The best interests of the child should be determined on the basis of individual assessment.

The legislation of Georgia directly provides for the rules and conditions for protection of the rights of the child from parents and establishes the rule of restriction, as well as suspension and deprivation of rights and obligations for failure or improper fulfillment of the parental duties. In this process a special role is given to guardianship and custodianship authority and the court. However, there is no definite legislative regulation regarding the grounds for restricting the parental rights. Restriction of parental rights can be determined by the court in each particular case.

The legislation of Georgia provides for the normative possibility of protecting the rights of the child from a legal representative, namely the parents. However, such a mechanism does not exist regarding other legal representative, in particular – guardianship and custodianship authority - LEPL Social Service Agency. A child must also have the possibility of protection of his/her own rights and legal interests against legal representative - guardianship and custodianship authority in the case when it fails or improperly performs the rights and duties. On the basis of the above-mentioned, it is recommended that children under the age of 14 should take part in the processes started against guardian or/and custodian, in accordance with the best interests of the child, and he/she must have the authority of issue of the legally valid, authentic power of attorney to the third persons.

The child under the age of 14 must be heard by the court if his age, physical and mental state permits it. Hearing of the child should be carried out through mandatory participation of the expert and / or social worker in accordance with the rules established by the legislation of Georgia. It is noteworthy that the legislation of Georgia provides for such mechanism in only one case – in the Article 351^[13] of the Civil Procedure Code of Georgia and is based on the presumption of protection of the rights of the child by the guardianship and custodianship authority in good faith. Furthermore, it should be noted that this wording of the Civil Procedure Code of Georgia applies only to return of unlawfully displaced or unlawfully detained child or discussion of the cases related to use of the right of relation with the child. However, according to the analogy, the Article 351^[13] can be applied in case of examination of all other cases, in which the child under 14 participates.

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