

Sri Lanka: Launch book Dr. Marasinghe

The Child's Right to Privacy

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1. Introduction

The right to respect for one's privacy or private life is an important and fundamental human right with many implications.

In the very famous case Roe v. Wade the Supreme Court of the USA stated inter alia: "the right of privacy (...) is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (1)

The European Court on Human Rights when interpreting the right to respect for private life as enshrined in art. 8 of the European Convention on Human Rights and Fundamental Freedoms observed that it is "too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life (...). Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings" (2) This Court decided on the basis of this interpretation that the criminalization of homosexual relationships is a violation of art. 8 of the European Convention (3)

The right to privacy is recognized as a fundamental human right in article 17 ICCPR and is made explicitly applicable to children in article 16 CRC with a text that is almost literally the same as art. 17 ICCPR. Similar provision can be found e.g. in the American Convention on Human Rights (article 11, par. 2+3), the European Convention on Human Rights (art. 8) and the African Charter on the Rights and Welfare of the child (art. 10).

But in the discussion of children's rights, both in the literature and in the monitoring of the implementation of the CRC, the attention paid to the child's right to privacy is very limited.

I am therefore very pleased that Dr. Marasinghe made this right the object of a very comprehensive and analytical study. Her book is the first all encompassing study of the child's right to privacy. In this book she presents and discusses the many implications of this right based on a rights-based and broad interpretation. It is a very important contribution to a better understanding and implementation of the child's right to privacy. Dr. Marasinghe thank you very much, also on behalf of the UN Committee on the Rights of the Child.

It is impossible for me to discuss in full the richness of this study. In my presentation I will deal with some of the implications of the child's rights to privacy, with special attention to the role of parental responsibilities in the exercise by the child of this right, followed by some discussions on the right to privacy of children in institutions.

But first I want to make some general remarks.

2. General Remarks

Dr. Marasinghe in her book argues in favour of a broad interpretation of the child's right to privacy, which means, in her opinion, that this right comprises the right to pursue the development of her/his personality and the right to protect her/his physical and moral integrity. The first right may be, as Dr. Marasinghe rightly acknowledges, subject to the rights of parents (or other caretakers) to give direction and guidance to the child and is also subject to State regulation (see par.

6.1.1). The second right is particularly important for children, given their greater vulnerability to abuse, violence and exploitation. In practice this means that the right to privacy is not necessary as a legal basis for this protection and the CRC Committee does not link the right to protection to the right to privacy. But I very much concur with Dr. Marasinghe's approach because it also fits in the so-called holistic approach of the CRC by the CRC Committee. In this approach a single article or right is not interpreted/implemented in isolation, but in the wider context of the other articles of the CRC in a dynamic manner.

This means e.g. that the right to privacy should indeed contribute to the full and harmonious development of the child (see preamble to CRC) in order to be fully prepared for and enjoy a full and decent life in society in which he/she participates in an active and constructive manner (see e.g. art. 23, 30, 31 and 40 CRC). It also means that all children, without discrimination of any kind, should be guaranteed full respect for her/his right to privacy and this may require specific measures for children belonging to minorities of indigenous peoples, living in remote/rural areas or in institutions(art.2 CRC).

Further more the exercise of this right to privacy will depend on the child's evolving capacities (maturity and age) (art. 5 and 12 CRC) and may be limited and/or corrected when necessary in the best interests of the child.

Finally a general observation of the text of art. 16 CRC:

- it does not explicitly say that the child has the right to privacy;
- it states: "No child shall be subjected to arbitrary and unlawful interference with his or her privacy (....)" and that the child "has the right to the protection of the law against such interference (....)";

- it means that States that did ratify the CRC (total today: 193) are under the obligation to adopt and enforce legislative and other measures to give effect to the prohibition of arbitrary or unlawful interference with the child's privacy. It means that interference can only take place under conditions and in circumstances spelled out in the law, which itself must comply with the provisions and objectives of the CRC. The term "arbitrary interference" can extend to interference provided under the law, in other words: it is meant to guarantee that even an interference provided by the law must be in accordance with the CRC (if not, it can be considered arbitrary) and should be, in any event, reasonable in the particular circumstances of the case (4).

In short: art. 16 CRC requires that governments of States Parties take measures to protect the child's right to privacy and to allow her/him to enjoy/exercise/benefit from that right.

3. The CRC: children's rights and paternal responsibilities

The CRC is not only a rich but also a complex human rights treaty. One of the key characteristics that distinguish it from other human rights treaties is the fact that the child is a developing individual and that parents (or other caretakers) have the prime responsibility for the upbringing and development of the child. This is fully recognized in, inter alia, articles 5, 18 and 27 CRC and the CRC is the only human rights treaty that fully respects the rights and duties of the parents and the role of the (extended) family. In this context let me summarize the content of these articles: the CRC expects that;

- States respect the responsibilities, rights and duties of parents to provide the child appropriate direction and guidance in the exercise by the child of the rights recognized in the CRC;

- parents should do this in a manner consistent with the child evolving capacities and ensure that the best interests of the child will be their basic concern.

Fine and interesting: but what does it mean more concretely for the child's right to privacy?. Let me explain this by discussing some of the quite sensitive issues that can be raised in relation to this right.

In the home:

. Can a parent open letters addressed to the child and/or can he/she read the child's diary?

Answer: No, unless there is well founded fear that the child is engaged in risky activities. Factor: age/maturity + preference should be given to open communication, discussion of parent's concern instead of secretly violating the child's right to privacy.

. Can a parent take measures to stop or prohibit the relation/friendship of the child with another? With reference to previous remark that right to privacy also comprise to a certain degree the right to establish and develop relationships with other beings.

Answer: a simple no or yes is not possible. Depends again on the reason for such prohibition; and the age and maturity are factors to be taken into account as well as the best interests of the child e.g. fear for engagement in risky activities. But under the CRC such prohibition cannot be justified simply by e.g. the "colour of the relation" or the fact that the other belongs to a minority or for any other reason that is discriminatory in the light of article 2 CRC.

With reference to the best interests of the child: the CRC Committee has repeatedly recommended to prevent early marriages and is of the opinion that the minimum age for marriage should be set at 18 for both boys and girls.

. Can a child receive medical or other treatment or counseling without consent of the parent, including access to contraceptives and termination of pregnancy?

Answer: the CRC does not contain specific answers to these questions. In States Parties to the CRC different rules and regulations do exist for this kind of problems and sometimes they are non-existent. Factors taken into account: age and maturity and evolving capacities. Sometimes left to the doctor to decide whether the child is mature enough to make an independent decision, that is without the involvement/prior consent of the parent(s). Sometimes the law sets specific age limits e.g. only possible if the child has reached age limits e.g. only possible if the child has reached the age of 16.

The CRC Committee is of the opinion that the accessibility of voluntary confidential HIV counselling and testing with due attention to the evolving capacities (which determines whether parental consent is needed) is fundamental for the child's health and development and that government must not impose mandatory HIV/AIDS testing. The confidentiality of HIV test results must be protected, consistent with the obligation to protect the privacy of children, and information on the HIV status of children should not be disclosed to others, including parents, without the child's consent (5).

4. Children in institutions

Based on the reports submitted by governments to the CRC Committee on the implementation of the CRC it can be concluded that there is a serious lack of

respect for the child's right to privacy. In many countries various legislative and other measures are needed to ensure in practice full respect for the child's right to privacy. What is needed can be found e.g. in the UN rules for the Protection of Juveniles Deprived of their Liberty, rules that are applicable to other forms of institutional care. By way of example:

- files, records and other information on the child should be kept confidential and only accessible to authorized persons; the child should have access to the records/files and to contest facts or opinions contained in the files with the right to require rectification of inaccurate, unfounded or unfair statements;
- every child should, in accordance with local and national standards, be provided with separate and sufficient bedding;
- sanitary installations should be so located and of a sufficient standard to comply with the physical needs in privacy;
- the child should be allowed to possess personal goods because it is a basic element of the right to privacy and essential for the psychological well being of the child; this also applies for the right to use their own clothing;
- the child should have the right to receive regular and frequent visit twice a week at least with the person of her/his choice in circumstances that respect the child's right to privacy; this also applies for the right to communicate in writing or by telephone at least twice a week with the person of her/his choice.

Concluding remarks I could only discuss some aspects of the right to privacy of the child. But it may be clear that this right has many implications and that it concludes some sensitive issues, particularly regarding the relation between the respect for this right and the responsibilities and rights of parents.

If you want to have a full picture of all the aspects and implications of the child's right to privacy I strongly recommend you to read Dr. Marasinghe's book, the best source of information that exists in this regard.

NOTES

1. See about this case e.g. Marian Faux, *Roe v. Wade: Marking the 20th anniversary of the Landmark Supreme Court decision that made abortion legal*. Mentor/Penguin books 2nd edition 1993 New York.
2. See the judgement of 16 December 1992 in *Niemetz v. Germany*, Series A, No 251-B.
3. See the judgement of 22 October 1981 in *Dudgeon v. UK* Series A No 45. The Human Rights Committee came to the conclusion in *Toonen v. Australia* (Communication 488/G2) that the criminalization of homosexual contact in the Tasmanian Criminal Code was a violation of art. 17 ICCPR. Adult consensual sexual activity is covered by the concept of "privacy".
4. See also General Comment No 16 (1988) of the Human Rights Committee on Article 17 ICCPR (Right to privacy).
5. See General Comment No 3 (2003) on HIV/AIDS and the rights of the child (CRC/GC/2003/3).