

## **HISTORICAL AND LEGAL TRADITIONS OF ADOPTION PROCEDURES IN UKRAINE AND THE REPUBLIC OF AZERBAIJAN**

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### ***Abstract***

*The present publication is focused on the comparative analysis of adoption laws in Ukraine and the Republic of Azerbaijan. Particular attention is paid to the history of establishment of the adoption procedure in these counties. The analysis of historical development of adoption laws at different periods of the establishment of Ukraine and the Republic of Azerbaijan as sovereign states, indicates transformation of the adoption procedure and the tendency to the reinforcement of legal regulation of the adoption at the present stage of social development.*

*Characteristics of individual requirements for adoption in Ukraine and the Republic of Azerbaijan, as well as the procedural order of consideration of this type of cases, are analysed. The author admits that processing of adoption cases by the court has been proven over time and provides an opportunity to respect the best child interests.*

*Attention is paid to the fact that the mutual exchange of knowledge and experiences in solving problems arising during processing of adoption cases, will guarantee further development of the legislation of the countries.*

**Keywords:** *adoption, history of adoption law, Republic of Azerbaijan, legislation, Ukraine.*

**Introduction.** The rationale for the chosen topic of this article was determined by the need to research historical standards of jurisprudence and legal framework for adoption in Ukraine and the Republic of Azerbaijan. These countries were chosen for a good reason, since in both these countries the civil procedure laws regulating adoption process are more or less subject to certain amendments and additions. At the same time, the intention of legislative bodies of the two countries to recognize the rights of the man and democratize various procedures aimed at improving the legal status of a person, is entrenched in the Constitutions of both counties. For example, Article 12 of the Constitution of the Republic of Azerbaijan contains a provision, which is generally equivalent to the one stated in Article 3 of the Constitution of Ukraine, according to which the supreme goal of the state is to ensure the rights and freedoms of the man and of the citizen, and to provide a decent standard of living [8; 9].

The adoption procedure as a process of improvement of the social and legal status of a person, requires special attention both in European and in West Asian countries. Scientific interest in the legislation of Azerbaijan stems from the fact that this country, unlike many others where the majority of the population confesses Islam, is declared a secular state by the Constitution. According to Article 7 of the Constitution of the Republic of Azerbaijan, religion there is separated from the state.

As of February 2018, 95% of the population of Azerbaijan are Muslims [3]. The Quran regards the institution of adoption as a falsification of the human nature: "Allah has not made for any man two hearts inside his body. Neither has He made your wives whom you declare to be like your mothers' backs, your real mothers, nor has He made your adopted sons your real sons. That is but your saying with your mouths. But Allah says the truth, and He guides to the (Right) Way "(Quran, 33: 4) [10, p.343]. The above shows that in Muslim countries, such as, for example, Iran and Afghanistan, where religious regulations make an integral part of legal norms, adoption is generally not allowed. The only Muslim country where the institution of adoption

exists, is Tunisia [17; p. 26]. In present-day conditions, according to a number of legal experts, religious doctrine remains the main source of the existing Islamic law in only a few countries, including Saudi Arabia, Oman and Principalities of the Persian Gulf. In most other Muslim countries religious doctrine has already lost this role and was directly substituted by a normative legal act [20].

In this regard, one of the positive aspects in the civil procedure laws of the Republic of Azerbaijan is the adoption procedure set forth by these laws, which is executed by competent authorities, such as law enforcement authorities.

Ukrainian legislation gives a significant consideration to the adoption of children, defining the adoption as a priority way to provide proper conditions to orphans and children deprived of parental care [14]. According to the State Judicial Administration of Ukraine, during the 2013-2016 the courts of civil jurisdiction reviewed 12,543 adoption cases. According to the Unified State Register of Judicial Decisions, since 01.01.2017 up to the time of preparation of the present manuscript, the number of adoption cases that have been examined by the courts of civil jurisdiction has made 1,004 cases [5]. In contrast, in the Republic of Azerbaijan with a population 4 times lower than in Ukraine, 877 children found a new family in 2017 [3]. These statistical data, therefore, indicate a fairly common practice of adoption. This fact makes it necessary to investigate both the institution of law and the legal framework for adoption in these countries.

The aim of the present paper is to analyse historical standards of establishment, development and functioning of the institution of adoption in modern Ukraine and Azerbaijan.

The conceptual framework for the present paper was created by publications of Ukrainian authors, as well as legal academicians and historians from other countries, including specialists in the field of the family law and civil procedure: Ye.A. Buyanova, L.M. Zilkovskaya, I.V. Kovalchuk, V.V. Komarov, N.P. Kosenko, V.V. Kustovaya, A.N. Liovushkina, M.A. Movsumov, G.A. Svetlichnaya, N.F. Sinkevich, T. A. Stoyanova, and others.

One has to agree that the adoption, as a complex social phenomenon, reflects universally recognized, constitutional (general legal) principles, as well as specific principles, such as the principles of the family law in each country, bearing their inherent national features [19, p.35]. Conventional instruments that have made a significant contribution to the development of international concepts of adoption of children include, first of all, the United Nations Convention on the Rights of the Child of November 20, 1989, and the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950. The principles and rules of these documents are usually referred to as "convention law" [2]. Thus, the United Nations Convention on the Rights of the Child which was ratified in Ukraine by Verkhovna Rada Resolution No. 789-XII of February 27, 1991 and which was joined by the Republic of Azerbaijan on August 13, 1992, in Article 20 establishes that a child who is temporarily or permanently deprived of his or her family environment or who, in his own best interests, cannot remain in such an environment, has the right to receive special protection and assistance from the State. Such assistance may include, in particular, foster care, "kafala" under Islamic law, adoption or, if necessary, placement in appropriate childcare facilities [7].

According to Article 116.1 of the Family Code of the Republic of Azerbaijan (approved by the Law of the Republic of Azerbaijan of December 28, 1999, No. 781-IQ), children deprived of parental care can be transferred to a new family (for adoption, custodianship, guardianship by an individual or a family), and in the absence of such an opportunity they should be admitted to social welfare institutions, educational, medical and other similar institutions provided for children deprived of parental care, or orphans [16].

In Ukraine, adoption means the process performed on the basis of a court decision whereby an adoptive parent takes into his / her family a person as a daughter or son [16]. The procedure for such judicial review is regulated by the Civil Procedure Code of Ukraine and, like in the Republic of Azerbaijan, is conducted in compliance with the rules of special proceedings.

The scientific community considers that the court proceedings for adoption shall to the maximum extent ensure the implementation of the adoption procedure in compliance with the legally provided order by establishing the circumstances which the law relates to the occurrence of the relevant legal consequences, by investigation and evaluation of the evidence added in their confirmation, by conclusions of the competent authorities on the appropriateness of adoption and its compliance with the child's interests. All of the above shall make the court proceedings for adoption a guarantee of a legitimate and informed decision, efficient protection of the rights and interests of the child, as well as other persons interested in the judicial examination of the case [6; p.135].

In Ukraine, such attitude and approach to the regulation of the procedure studied, was formed based on analysis of scientific literature and legal and regulatory framework pertaining to various historical periods of the establishment of the institution of adoption in the modern country. In different historical periods, adoption followed different rules depending on the direction of social policy and the level of development of the society.

As was accurately stated by T.A.Stoyanova, an analysis of the historical development of adoption laws demonstrates the existence of various forms of adoption in different periods of human development, transformation of conditions for adoption and tendency to increase the level of legal regulation of adoption at the present stage of social development. The judicial form of adoption is historically justified and well-reasoned and is the one which enables the observance of the best interests of the child during implementation of adoption [18, p.9].

Adoption as a form of life arrangement for orphans and children deprived of parental care, has been known to mankind since ancient times. The emergence of the adoption as a social, and later, legal phenomenon, and understanding of its meaning, were set as far back as at the time of the tribal communities and further developed in the first civilizations of the Ancient Near East and the ancient states.

In Ukraine, the development of the procedural institution of adoption, which presents a legally regulated procedure carried out by competent state authorities, had a number of specific features related to the long history of establishment of the state independence. The fact that in Ukraine people had been living under domination of other states for many centuries, affected the formation of domestic legal and regulatory framework, including the adoption laws. An analysis of historical regulatory documents with were in effect in the territory of Ukraine at different time periods, lets us speculate about the non-independent, receptive nature of Ukrainian legislation.

One of the first regulations of the adoption procedure in the territory of Ukraine is the Civil Code of Austria of 1811, which stipulated the conclusion of an agreement between the parties that must have been approved by the court.

In the territory of Ukraine being at that time the part of the Russian Empire, for each demographic group there were specific judicial and other procedures, provided for by the statutory provisions of the Statute of Civil Procedure (1864) and the Volume X of the Code of Civil Law. The procedures were introduced by the Law of March 12, 1891 "About adopted and legalized children" and the Law of June 3, 1902 "On improving the conditions for illegitimate children". In those days, the judiciary reform of 1864 was in effect also in the territory of Azerbaijan with the "Regulations on the introduction of the Statutes in the Transcaucasian Territory issued on November 20, 1864 ", which was approved on November 22, 1866.

The period of establishment of the Soviet power was quite eventful in terms of regulatory and legal consolidation of procedural aspects of the adoption procedure in the territories of Ukraine and Azerbaijan, since the legal bases of these two countries had been developing according to general principles.

As it is known, in the Central Asian republics of the former Soviet Union, as well as in the Caucasus region, Muslims constituted the main part of the population. The socialist legal system rejected Muslim law. There were regulations acting against social customs that were regarded as "vestiges" of the past needed to be struggled against to overcome their influence on the

consciousness and behaviour of citizens [20]. In 1926-1940, the development of the adoption law in different Soviet Union republics went different ways. In the Ukrainian Soviet Socialist Republic and Azerbaijan Soviet Socialist Republic, amendments to the adoption law were made following the changes in the Family Law of the Russian Soviet Federated Socialistic Republic (RSFSR), with additions and amendments being in many respects identical to the Code of Laws on Marriage, Family and Guardianship of the RSFSR of 1926. In contrast, in other Soviet Union republics (Uzbek SSR, Kazakh SSR) there was generally no influence of the Russian adoption law and therefore, local family legislation in those republics developed very slowly until the Great Patriotic War [ 21].

The Code of Laws on Marriage, Family, Custodianship, Guardianship and Acts of Civil Status of the Azerbaijan Soviet Socialist Republic, was adopted on May 29, 1928 at the 3<sup>rd</sup> session of the 5<sup>th</sup> convocation of the Central Executive Committee of Azerbaijan Soviet Socialist Republic and came into force on July 15, 1928. The Code was supplemented with a separate chapter entitled "On Adoption." The Resolution of 1929 introduced Article 49-1, which established that the responsibilities for keeping minors and disabled children in need were to be assigned to a stepfather or a stepmother in the following cases: a) if the parents of these children died; b) if parents did not have sufficient means to support their children [12, p.38].

Legal regulation of adoption during the 1970's - 1990's was based on The Marriage and Family Code of the RSFSR of 1969 and on subsequently adopted similar republican codes (The Marriage and Family Code of the Ukrainian Soviet Socialist Republic 1970, The Marriage and Family Code of the Azerbaijan Soviet Socialist Republic of 1970). The Soviet Union continued to elaborate the mechanism of this institution, which was later reflected not only in the family law, but also in other fields of law, related to adoption (labour and civil law, housing and land legislation, etc.). Such elaboration was aimed at establishing parental rights and was under the state control of the Soviet Union through its authorized bodies. The adoption could only take place based on the decision of the public law body [22].

The adoption decision was delegated to guardianship and custodianship agencies. As it is known, in Ukraine such practice was used until 1996. The turning point resulting in significant changes in the legal regulation of the institution of adoption, namely the introduction of a judicial procedure for examination of this type of cases, became the discovery of a mass illegal adoption of Ukrainian children by foreigners, organized by the heads of medical institutions, the Deputy Chairman of the Lviv Regional State Administration and the Chairman of one of the Lviv District State Administrations.

To date, the Civil Procedure Code of Ukraine, adopted on March 18, 2004 and amended on February 24, 2013, regulates the judicial procedure in the civil law and contains the chapter "Judicial consideration of adoption cases". Legal regulation of the pre-trial stage is carried out on the basis of the Resolution No.905 of the Cabinet of Ministers of Ukraine of 08.10.2008 "On Approval of the Procedure for Adoption and Supervision of the Observance of the Rights of Adopted Children" and Articles 213, 218, 220, 229 and 231 of The Family Code of Ukraine of January 10, 2002. Further, in order to avoid any violations of this law, any mediatory, commercial activity related to adoption of children or their transfer for guardianship, custodianship or parenting to families of Ukrainian citizens, foreigners or stateless persons is prohibited (Article 216 of The Family Code). Article 169 of the Criminal Code of Ukraine establishes criminal liability for such activities.

In Azerbaijan, the Family Code and the Civil Procedure Codes were put into effect simultaneously, on September 1, 2000. According to M.A.Movsumov, such different approaches have their advantages and disadvantages. The simultaneous adoption and enforcement of sectoral codes regulating substantive and procedural relations means a step-by-step, evolutionary mode of the law development and gives to the law-enforcer time to study and generalize the judicial practice, to develop uniform approaches to the application of substantive law standards, and to the legislator - to take appropriate measures to further improve legislation in the field of

substantive law, and subsequently to introduce a more advanced procedural law, with the account of the practice needs [6].

The most significant events in the history of the institution of adoption in Ukraine have been the legislative consolidation of the priority of foster placement of children left without parental care in a new family, and, of course, the resumption of the judicial procedure for examining and resolving cases of adoption.

The current procedure and substantive aspects of adoption under the laws of Azerbaijan and Ukraine have both common and distinctive features.

Adoptive parents in Azerbaijan may be adults of both sexes. Further, the Family Law of this country states that adoption is allowed in relation to minors and only in favour of their interests. In contrast, in Ukraine in exceptional cases the court can render a decision on the adoption of an adult who has no mother and father or was deprived of their care. The adopter of the child can be a capable person, at least twenty-one years old, with the exception of cases when the adopter is a relative of the child, which indicates that Ukrainian legislation encourages adoption by this category of people.

In the countries of interest, the law sets a minimal allowed age difference between the adopter and the adopted. In Azerbaijan, a minimum difference is 16 years, in Ukraine - 15 years. For reasons adjudicated as legally excusable, the age difference can be reduced. In case of adoption of an adult in Ukraine, the age difference cannot be less than eighteen years.

There is also a rule of adoption of children having siblings. The legislation of both countries analysed pays special attention to this issue, and therefore adoption of siblings by different persons is not allowed, except when children benefit from this. In Ukraine and Azerbaijan, adoption case is examined by the court based on the application by the person(s) wishing to adopt. The adoption case is considered by the court in accordance with the special proceedings provided for by civil procedure legislation with mandatory participation of applicants, interested parties, guardianship and custodianship authorities, and if required, other interested persons and the child himself.

The mandatory evidence for adoption cases is the opinion of the guardianship and custodianship authority providing justification of adoption and stating the observance of interests of the child being adopted and confirming that the living conditions of a person willing to adopt the child have been examined. In Azerbaijan, the court obliges the guardianship and custodianship authority to submit such an opinion prior to the case consideration, at the pre-trial stage. Based on this provision, the proceedings of the case will be suspended until the opinion is obtained. And the Civil Procedure Code of Ukraine requires that when applying to the court for adoption, the applicants should attach to their application the conclusion of the guardianship and custodianship authority.

The fact of adoption is registered at the relevant executive authority based on the court decision on adoption of the child, whereby the court sends a copy of the decision after it has been made. Under the legislation of all states, the child is considered adopted starting from the date when the decision on adoption enters into force. As many researchers correctly report, some special aspects of the adoption law in former Soviet republics and the Baltic States, demonstrate that many legislative provisions are universal, time-proven, and their expediency is beyond arguments [4; p. 89]. Further, undoubtedly, with due regard to the totality of legal regulation of adoption in the recent past; similarity of legal, economic and social conditions at present time, and presence of common problems related to adoption, there is a good reason to believe that the mutual exchange of knowledge and experience (especially regarding various ways of solving similar issues of adoption) will guarantee an improvement of the adoption law in these countries [11].

### ***Conclusion***

In summary, further development and improvement of the institution of adoption in Ukraine and Azerbaijan is one of the priority activities for children's right protection; and this is

performed through harmonization of laws and regulations on protection of the rights for those children who for some reason have lost their family, with the United Nations Convention on the Rights of the Child and other international acts.

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