

Introduction

The following text presents a legal opinion on behalf of Child Identity Protection (CHIP)¹ on the compatibility of the Republic of Korea's Special Act on Confidential childbirth (Bill)² with international standards. The proposed Bill occurs in a country context with "persistent gender-discriminatory social stigma attached to single mothers,"³ (recent) cases of infanticide and the need for children abandoned at birth, looking to exercise their right to identity. The right to access origins is currently not possible for the many tens of thousands of Korean adoptees due to the information not being collected, preserved or accessible, which has contributed to the need to investigate illegal adoptions under the Second Truth and Reconciliation Commission.⁴

Accordingly, the Bill seeks to protect the child's "inherent right to life" (Art. 6(1) CRC) by providing a mechanism for confidentiality in childbirth within a safe environment while balancing the mother's right to privacy and the child's right to identity. The Bill further aims to provide an alternative to baby boxes for women who feel that they are unable to care for their children as encouraged by the UN Committee on the Rights of the Child (CRC Committee) in 2019 :

23. *The Committee urges the State party to prohibit the "baby box" initiative, which is operated by religious organizations and which allows for the anonymous abandonment of children, and to consider introducing, as a last resort, the possibility of confidential hospital births.*⁵

Confidential hospital births provide a mechanism that ensures the health of both the mother and the child. The Bill has a number of provisions that attempt to balance the different obligations of the State :

- the Central Government and Municipalities are responsible for supporting women and ensuring safe and healthy development of infants (Art. 3)
- research on the Bill, its application and context, will occur every three years (Art. 4)
- the mother is provided counselling on importance of origins and role of biological father. Efforts to establish a hotline and designated counselling centres with minimum standards including qualifications for staff (Arts. 6-7)
- mother's details and resident registration number (national ID) are collected (Art. 9)
- father's details and resident registration number (national ID), if available, are collected (Art. 9)
- genetic and other health information is collected about the mother and father (Art. 9)
- collected information is centralised by the National Centre for the Rights of Child (Art. 9)
- the mother has access to single-parent family welfare facility (Art. 11)
- the child is registered within 14 days according to the Civil Registration laws (Art. 12)
- records are kept permanently National Centre for the Rights of Child (Art. 14(2))
- the mother has a reflection period (Art. 15)
- special cases where there can be disclosure of mother's details in case where she has passed away and/or when the child has health issues (Art. 17)

While these provisions reflect a desire to comply with international obligations, the full implementation in practice, will require substantial investment of resources including adequate budget. There should be a clearer obligation for the repartition of costs, as the current wording limits the government's responsibility of providing resources with the wording "may" in Art. 19.⁶

In addition to securing resources for the above provisions, other occasions for alignment with international standards exist. This legal opinion does not intend to provide an extensive analysis of the Bill, which has been done elsewhere notably by civil society, but focuses on the main aspects relevant to the child's identity.

International Standards on the right to identity and the right to access to information

Each person has the right to identity in terms of birth registration, name and nationality ([Article 24 of the International Covenant on Civil and Political Rights 1976 \(ICCPR\)](#)). Article 8(1) of the Convention on the Rights of the Child (CRC) further provides that State Parties are obliged “to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”.⁷ The right to identity has life-long impact and it enables other human rights to be realised.⁸ Furthermore, Article 19(2) of the ICCPR⁹ provides that the right to freedom of expression includes the freedom to seek, receive and impart information “without distinction of any kind, such as (...) birth.”¹⁰

The United Nations Special Rapporteur on Freedom of Opinion and Expression “has consistently stated that the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own.”¹¹ Accordingly, “the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government.”¹² Similarly, in their 2004 Joint Declaration, the three special mandates on freedom of expression at the United Nations, Organisation for Security and Co-operation in Europe and the Organization of American States stated that “[t]he right to access information held by public authorities is a fundamental human right.”¹³

Consequently, the right to access personal information held by a public authority is extrinsically linked to the person’s right to identity. Given the scope of Article 8 (1) CRC and the child’s right to identity in family relations, the achievement of this right entails collecting and preserving all relevant information concerning the identity of [the child’s] biological family and all the events of their life story before alternative care placement and/or adoption.¹⁴ The fulfilment of this right will also encompass the ability to access this information. In this respect, in his report in 2020, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence outlined the importance of archives and ensuring access.¹⁵ In cases where the child has been relinquished or abandoned, according to the [UN Guidelines for the Alternative Care of Children](#), the State should respect the child’s “right to access information on his/her origins where appropriate and possible under the law of the State.”¹⁶ In addition, the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention recommended that adoption records should be preserved in perpetuity, which allows for compliance with Article 30 on State’s responsibility for ensuring access to information.¹⁷ A number of regional instruments are also relevant, promoting a general right to accessing information.¹⁸

Only when information is collected and preserved in its entirety and with integrity, as well as is fully accessible, can the person’s identity be speedily re-established when elements are missing and/or falsified during their childhood as required by Article 8(2) CRC. Indeed, in this context, the Special Rapporteur on the sale and sexual exploitation of children in her report in 2017 has recommended to States to “[e]nsure the right to information about one’s origins and access to information about the rights of victims of illegal adoptions”.¹⁹ Respecting the above rights also contributes to the achievement of Sustainable Development Goals (SDG) 16.3 in terms of wide access to justice and SDG 16.9, ensuring a legal identity for all.

Based on this framework, the Bill has further opportunities for full compliance with the Republic of Korea’s international obligations as follows :

Pre-birth and pre-relinquishment protections

- 1. Concrete efforts to support the (single) mother in her caregiving role should be clearly outlined (Arts. 6-7).** While the law notes that counselling is available, it does not cover the different support services that the mother can be referred to beyond social security benefits. Support for independent living

arrangements, employment, child care and other services that contribute to creating culturally appropriate care for the child as a single mother should be outlined.²⁰

2. **The reflection period** should be reinforced with an obligation to ensure post-birth support is systematically available to all mothers during this time (Art. 15).²¹ Further, there should be a requirement that the transfer to the head of the local government even before 7 days is “exceptional with justifications noted” (Art. 13(1)).

Despite such efforts noted above, the mother may nevertheless wish to relinquish the child. In such instances, all services and support made available, should be duly recorded and accessible for the child.

Post-birth relinquishment protections

3. **Birth records should collect more comprehensive origins information (Art. 12).** The Bill does not include the place of birth, which is contrary to 2020 ECOSOC definition of legal identity, which “the basic characteristics of an individual's identity, for example, name, sex, and place and date of birth, conferred through registration and the issuance of a certificate by an authorized civil registration authority following the occurrence of birth.” (E/CN.3/2020/15). Further, the proposed text only requires recording the details of the mother and nothing about the biological father. The text should provide for all reasonable efforts to record the father’s details as part of the child’s family relations (Arts. 8, 9 CRC). The State may be inspired by the use of integrated birth certificates in Australia (NSW) which records both the birth and adoptive parents since November 2020.²²
4. **Information about birth parent(s) should “in principle” be available without their consent being a prerequisite (Arts. 16 – 17).** As the text is currently drafted, access to identifiable information without consent is only available under special circumstances such as medical situations (i.e.: disclosure in special cases). This creates a situation where the onus is on the child to provide “special reasons” as to why they should be able to access their information. In order to achieve a better balance that moves towards the child’s right to identity and to access information, the text could read that “non-disclosure” of information about birth parent(s) can only occur in special cases. The burden of proof should be on the birth parent(s) to show that providing access to identifiable information would be disproportionately detrimental to them and their families.

Promising practices in Switzerland and Germany do not create this burden of proof on the child that has been born through confidential hospital births.

For example, in Switzerland, children born during confidential births may be adopted within 12 weeks, if the mother consents. As far as tracing is concerned, the articles of the Civil Code relating to adoption apply. The child must request access to his or her data if he or she so wishes at the age of 18 or before if there is a legitimate interest (especially medical).²³ The consent of the birth parent(s) is not required and the identifiable information is available for future generations under certain circumstances.

In Germany, a government document directed to birth mothers notes that:

“when the child turns 16, they will be able to open the envelope and see your identity – they are the only person permitted to do so. Knowledge of one’s own background is among a person’s fundamental rights in Germany. It is important for the child’s personal development. However, if you would be put at risk by the disclosure of your identity at this point, you can object to this from the child’s 15th birthday onwards. To do so, you need to prove that revealing this information to the child would put you in danger.”²⁴

The Act Expanding Assistance for Pregnant Women and Regulating Confidential Birth (hereinafter: SchwHiAusbauG)²⁵ notes that there is a procedure under Art. 32(1) where Family court proceedings are described as follows:

(1) If the Federal Office of Family Affairs and Civil Society Functions denies the child access to their certification of parentage pursuant to section 31 (4), the family court shall, on the child's application, decide about the latter's right of access. The family court shall examine whether the interest of their biological mother in keeping her identity secret because of the risks to life, limb, health, personal freedom or other interests meriting protection that she fears would follow from access outweigh the child's right to know their parentage.

In a 2018 assessment of the SchwHiAusbauG law, the government has made it clear that in principle, the birth mother would only be given a “temporary anonymity” until the child is 16:

The certificate of parentage pursuant to section 26 par. 2 SchKG is a key element of the procedure for confidential birth. It contains the surname and first name, address and date of birth of the woman. Only the given pregnancy counselling centre and no other public agency knows the identity-related information. The information is sent to the BAFzA in a sealed envelope by the counselling centre, and can normally be viewed by the child when he or she turns 16. In other words, the child's right to know his or her origins is respected by granting the woman anonymity on a selective basis (not vis-à-vis the counselling centre) and temporarily only.²⁶

In this situation, the onus is on the birth parent(s) to prove that they would be endangered and not on the child that they should be able to access vital information about their origins. A system such as that in Germany seems to provide a balance that fully protects the child's right to identity except when there are circumstances dangerous to the birth parent(s), as determined by an independent Tribunal. In cases where the Tribunal refuses to divulge the birth parent(s) information, the reasons behind this decision should be made available to the child.

In both Switzerland and Germany, there is no obligation placed on the birth parent(s) to establish contact with the child following the revelation of their identifiable information, which seems reasonable in that relationships cannot be forced onto persons. Moreover, in both countries, the child has no legal rights, including inheritance, in connection with the birth parent(s).

5. Child should be informed that “additional” information is available about their birth

In both Switzerland and Germany, as well as in the proposed bill, there is no obligation on any authority to inform the child that there is information about their birth parent(s) that is accessible at a certain age. As such, the child (later adult) may never know that this information exists.

To avoid this situation, adoptive parent(s) should be made aware by professionals of the importance of the child having information about their origins, which is crucial for his or her development and well-being. Information about DNA tests (e.g.: ancestry.com and 23andme.com) and use of social media should also be provided to show the difficulties, if not impossibility, of preserving anonymity. There should be follow up reminder(s) to adoptive parent(s), with support being available about how to talk to the child about the circumstances surrounding his or her birth.

To ensure that the information is fully accessible, the State may consider ensuring that the child, now adult is informed at 18 years of age that “there is additional information about your birth that is now available, should you wish to access it now or at a later stage.” Such a provision ensures that the child (later adult) is able to access the information at a time when he or she wants to exercise his or her right to identity. It also leaves the option for the child (later adult) not to access this information. Support should be made available to the child accessing information, should this be something that he or she thinks would be helpful. Such a practice may not be necessary in countries such as Switzerland where the adoptive parent(s) are accustomed to being transparent about the birth origins of the child. Needless to say that, it is of course essential that regulatory frameworks regarding search, investigative and reunion activities are in place providing a protective framework for the adoptee, birth parent(s) and adoptive parent(s) at all times.²⁷

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- ¹ Child Identity Protection (CHIP) is an international NGO established in 2020 based in Geneva www.child-identity.org. This briefing note was prepared by Laurence Bordier and Mia Dambach with input from, Maud de Boer-Buquicchio, Nigel Cantwell and David Smolin.
- ² http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_H2QOT1Z2W001T1U0S1X1A0V5N6J1H8
- ³ Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of the Republic of Korea* CEDAW/C/KOR/CO/8 (2018) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FKOR%2FCO%2F8&Lang=en
- ⁴ At least 165 000 children have been adopted from South Korea (see Peter Selman Presentation, slide 19) <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=69> ; Kyung-Eun Lee, The Global Orphan Adoption System : South Korea's Impact on Its Origin and Development, 2021 <http://www.koroot.org/eng/board/4133/detail> ; see also media reports <https://apnews.com/general-news-6c28ae2dc735c3c818eb77b2e8c29f70>, <https://www.telegraph.co.uk/global-health/climate-and-people/international-adoption-scandal/?fbclid=IwAR0sDt6-OiMO3E2nBW-luG5LJYThxsDDqP5m19EATVgYclqJu1cb3gDC-E&mibextid=Zxz2cZ>; <https://danishkorean.dk/onewebmedia/Final%20draft%20statement.pdf> and <https://abcnews.go.com/International/wireStory/south-koreas-truth-commission-probe-foreign-adoptions-94737669>
- ⁵ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FKOR%2FCO%2F5-6&Lang=en
- ⁶ (Support for Expenses) The central government and municipalities may subsidize all or part of the following expenses within budget
- ⁷ Cf Article 8 of the ECHR which has been interpreted to include "personal identity" within the meaning of "private life." [*Goodwin v the UK* (2002) 35 EHRR 18 at 90]
- ⁸ For example, access to education, health, social services and employment
- ⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. Available here <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> . Ireland State Party, Signature: 1973, Ratification/Accession: 1989; No reservations on Article 19 on freedom of expression/access to information. (source https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4&clang=en#EndDec
- ¹⁰ See International Covenant on Civil and Political Rights, Article 2; Universal Declaration on Human Rights, Art 2.
- ¹¹ [Report of the Special Rapporteur, Mr. Abid Hussain](https://www.ohchr.org/en/docd/docId/41998/40) E/CN.4/1998/40 (28 January 1998), para 11.
- ¹² *Ibid*, para 14.
- ¹³ [Joint Declaration](https://www.ohchr.org/en/docd/docId/41998/40) by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (6 December 2004) p 2. See other relevant international standards promoting maximum disclosure in McDonagh, M. (2013), The Right to Information in International Human Rights Law, Human Rights Law Review at <https://www.corteidh.or.cr/tablas/r30698.pdf>
- ¹⁴ Cécile Jeannin and Mia Dambach, [Policy Brief 1: Respecting the child's right to identity in intercountry adoption?](https://www.ohchr.org/en/docd/docId/41998/40) Geneva, Switzerland: Child Identity Protection, p 12. The addition of "family relations" in Article 8 has its origins in Argentina's history and request to restore the identities of the children, who had been illegally removed from families linked to the opposition of the Dictatorship. Noting the advocacy efforts in this context, particularly by the grandmothers, the term "family relations" arguably goes beyond nuclear ties.
- ¹⁵ Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](https://www.ohchr.org/en/docd/docId/41998/40) (2020), paras 70-73.
- ¹⁶ [UN General Assembly, Guidelines for the Alternative Care of Children](https://www.unhcr.org/refugees/64/142), A/RES/64/142 (24 February 2010), para 42.
- ¹⁷ [HCCH, Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention](https://www.unhcr.org/refugees/64/142) (2010), recommendation 28,
- ¹⁸ [Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14](https://www.unhcr.org/refugees/64/142), [Council of Europe Convention on Access to Official Documents](https://www.unhcr.org/refugees/64/142) and [EU data protection regulations](https://www.unhcr.org/refugees/64/142)
- ¹⁹ [Report of the Special Rapporteur](https://www.unhcr.org/refugees/64/142) para 95 (j).
- ²⁰ Para 36 UN Guidelines for the Alternative Care of Children <https://digitallibrary.un.org/record/673583>
- ²¹ Para 36. Special attention should be paid, in accordance with local laws, to the provision and promotion of support and care services for single and adolescent parents and their children, whether or not born out of wedlock. States should ensure that adolescent parents retain all rights inherent to their status both as parents and as children, including access to all appropriate services for their own development, allowances to which parents are entitled, and their inheritance rights. Measures should be adopted to ensure the protection of pregnant adolescents and to guarantee that they do not interrupt their studies. Efforts should also be made to reduce the stigma attached to single and adolescent parenthood.
- ²² See example of Social Work Unit at Angkor Wat Children's Hospital in Cambodia who work with mother's at risk of abandoning their children. <https://bettercarenetwork.org/about-bcn/what-we-do/organizations-working-on-childrens-care/angkor-hospital-for-children>
- ²³ <https://www.facs.nsw.gov.au/families/adoption/introducing-integrated-birth-certificates>
- ²⁴ 268 a, b, c, d, e CC et Office fédéral de la justice (2018) L'adoption en Suisse. Confédération suisse, département fédéral de justice et police, publications fédérales. www.bj.admin.ch and https://www.hug.ch/sites/interhug/files/structures/sante_sexuelle_et_planning_familial/documents/2022_aw_accompagner_accouchement_confidentiel_en_vue_adoption.pdf
- ²⁵ <https://www.hilfetelefon-schwangere.de/en>
- ²⁶ <https://www.bmfsfj.de/resource/blob/95278/e44275eea238ab265b1c9a9599000e64/schwangerschaftsberatung---218-englisch-data.pdf> at 45
- ²⁷ 2017 Assessment of confidential hospital births <https://www.bmfsfj.de/resource/blob/138418/9b05d00da6177cde557a8593fa2a3b77/evaluation-hilfsangebote-vertrauliche-geburt-englisch-data.pdf>
- ²⁸ See 2023 CHIP Briefing Note : Safeguarding search for origins from illicit post-adoption practices (to be launched in September 2023)