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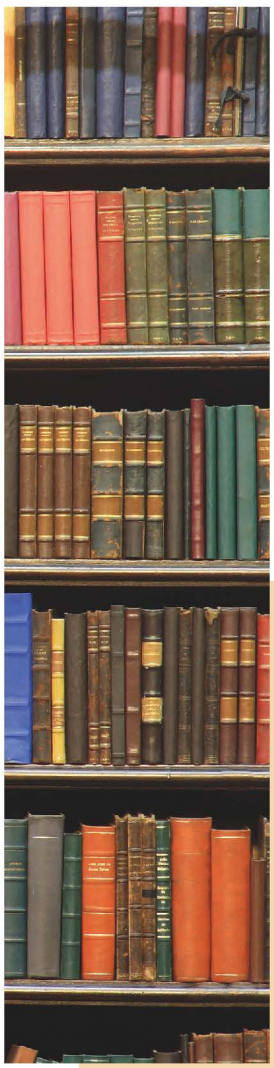

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Adoption: Cross-border legal issues Workshop 1 December 2015

Workshop for JURI and PETI Committees

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

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LEGAL AFFAIRS
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Adoption: Cross-border legal issues

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CHILD PROTECTION: TENSIONS CREATED BY THE DIVERSITY OF THE DOMESTIC LAWS OF EU MEMBER STATES

My experiences both as judge and independent consultant

Sir Mathew THORPE

My first encounter with the problem of child protection for the children of persons exercising their right to free movement within the EU came towards the end of my judicial career in November 2012, almost precisely three years ago. On the 12 November I found myself presiding in the Court of Appeal aided by Lady Justice Black, my successor as Head of international family justice and therefore a great expert in this field, and Lord Justice Elias, a virtual stranger to the area of the child law of England. The appeal before us concerned two boys of Slovak nationality. They had been born in England and spent all their lives here. English was their language. Their parents had failed them, the local authority had obtained a judicial order of removal and, after protracted care proceedings, had then obtained a full care order and finally sought an order from the Judge enabling them to place the children for adoption. The care order itself was not challenged on the Appeal, only the Judge's decision to place the two boys for adoption. The only alternative future was advanced by their maternal grandmother who sought to care for them here in Slovakia. She was fortunate in that the Slovak Republic intervened in the proceedings to support her cause. The Ambassador had attended many preliminary hearings. Andrea Ciserova appeared as the Advocate for Slovakia. The Appeal was resisted by the local authority and also by the children's guardian. There were many threads woven into the Appeal such as the involvement of the Slovak media and the grandmother's capacity to act independently. Unusually the family specialists on the Bench were divided. I was convinced that we should allow the Appeal and repatriate the children as soon as possible. Ultimately Lady Justice Black was convinced that we should dismiss the Appeal. The balance was held by Lord Justice Elias who shared my conviction and so the children were returned.

A year later, after I had retired, I was approached by the Slovak central authority who sought advice and aid in dealing with English public authorities. I acted informally until retained by the Minister of Labour to advise generally on international family law issues and on English domestic law.

During this period the problems illustrated in our Slovak case had swollen to great dimension. Our case of Re B, which is reported at (2014) 3FCR 387 and 395, had been joined by many Judgments in the High Court and in the Court of Appeal, reported and unreported, all struggling with the same fundamental issue. That issue can be simply stated: European Family Law, in the shape of Brussels II Bis, founds jurisdiction in proceedings concerning children with the Court of Habitual Residence. But where families move across European borders habitual residence in the state of chosen destination is swiftly established. Then it is the domestic law of that State which must be applied where children are in need of protection. The obvious danger is that the domestic Court of Habitual Residence may adopt too parochial an approach, too convinced of the benefits of the

professionalism which is evident at all levels of their inter disciplinary family justice system. Too little regard is then paid to language, culture and faith. Most acute does the tension become in our jurisdiction, where the adoption of children holds a strong position in our child law history and present practice. One consequence of an adoption order is to implant the children into a British family so completely that they lose their nationality of origin. These tensions and problems began to manifest throughout the European Union. The child in a particular case might be a national of any of the 10 member states stretching from the Baltic through Central Eastern Europe to the Balkans. The embassies and consulates of these ten member states were all in varying degrees involved in supporting their nationals who had migrated to England and then become involved in Children Act proceedings. My engagement was not only with Slovakia. The Polish Embassy in London and the Polish Justice Ministry in Warsaw were acutely troubled on a scale that reflected the fact that the largest immigrant population in England is Polish. First we had a day conference at the Polish Embassy in London. Later I flew to Warsaw to advise the Justice Minister on the operation of English domestic law in this field. Then I was a member of a small inter disciplinary specialist group that spent some days in Warsaw meeting relevant Polish authorities. At the same time I was advising the Bulgarian Consul in London who was in turn supporting a Bulgarian mother facing the final separation from her child.

Apart from my personal experience there were many manifestations of the resentment felt by politicians and the media at the application of English domestic law on their nationals. Petitions to the European parliament have multiplied. The Parliamentary Assembly of the Council of Europe has criticised the United Kingdom trenchantly. The Latvian Parliament has addressed a complaint to the Parliament in London. So we have to consider what specialists can do to reduce these tensions and to ensure that whilst children are protected they are not abused in the process of protection.

My own experience suggests that there is in reality much that can be done. I want to consider the media, ministerial policy and the engagement of the judiciary. I will do so in the context of my experience whilst acting for the Slovak Ministry of Labour.

As far as the media is concerned, a known expert can make a modest contribution. I have on a number of occasions been interviewed on Slovak television and I have given interviews to the Slovak press using the opportunity to explain that the English agencies act responsibly and always subject to judicial supervision. Equally when interviewed in London on television and radio I have taken the opportunity to explain the valid concerns of Eastern European States seeking to protect their nationals, both politically and diplomatically. Finally Articles in specialist legal journals enable problems to be shared, as does the twitter account which is popular in the legal community.

At a political level, ministerial exchanges between Slovakia and England have failed to produce an inter country Memorandum sought by Bratislava. London has refused to treat with individual countries seeing the problem as being more general. It is the Ministry of Education in London that is responsible for policy guidance to local authorities and the publication in July 2014 of "Working with foreign authorities – child protection cases and care orders" was a responsible contribution towards achieving greater understanding amongst English social work professionals. Furthermore, the Ministry of Education has been receptive to submissions from representatives of affected Member States. In September 2014 I convened a meeting between the Ministry of Education and Slovak and Polish officials to discuss the revision of the guidelines to give a stronger message to local authority directors and managers. An important product of that meeting was a clear statement from the Ministry of Education that agreements to regulate co-operation between a member state and an individual English local authority was not discouraged.

At the same time the tenor of judicial guidance from the Court of Appeal and from our President, Sir James Munby, emphasised the need for greater collaboration and greater

sensitivity in these cross border cases. In January 2014 came the decision of the President in Re E (2014) 2FCR 316[1] in which he drew attention to the importance of the Vienna Convention on Consular Relations 1963. I hazard that this Convention was virtually unknown to family justice lawyers and certainly not to social workers in the child protection field. It is Re E that we must thank for bringing this important Convention to the fore. More recently in the Appeal of CB on 6 August 2015[2] the President in his leading Judgment emphasised in trenchant language the obligations of English public authorities, summarised in paragraph 84 of his Judgment. In dismissing the Appeal the Court was upholding the Judgment of Mr Justice Moylan below.

We now have a triad of decisions in the Court of Appeal of which the latest is the most important. It is judgment re N (2015) EWCA Civ 1112, delivered on 2/11/15. In paragraphs 12-23 the President set out the wider context of the appeal under 3 heads: a) adoption law; b) judicial comity; c) the Vienna Convention. In paragraphs 25-73 the President set out the relevant statute law, both domestic and European. He concludes that the Brussels II bis Regulation applies only to care orders and not to placement for adoption orders. In paragraphs 74-103 the President establishes the extent of the jurisdiction of the English Court to order the adoption of a child. It has its origins in the Adoption Act 1926. Adoption was restricted to British subjects until the Adoption Act 1949 extended the jurisdiction to "an infant resident in England or Wales who is not a British subject". In paragraphs 104-111 the President considers case management and the exercise of discretion in "foreign" cases. This contains the most influential passages dealing not with the law, which is essentially clear, but with the manner in which it should be applied to "foreign" children. In this paragraph 105 is particularly forceful in its statement of the significance of the child's "national, cultural, linguistic, ethnic and religious background". In paragraphs 112-122 the President enlarges on Art. 15 of the Brussels II bis Regulation, the power to transfer English care (but not adoption) proceedings to the court of another Member State. He encourages a liberal use of the power, particularly at the earliest stage of the proceedings. In the remaining paragraphs, 123-174, the President states his reasons for dismissing the appeals of the Local Authority and the Guardian ad Litem against the order of the trial judge transferring the proceedings to Hungary. Within this section however are passages of general application as he considers and rejects a wide range of submissions advanced by the appellants. In conclusion I emphasise that this judgement crowns the Presidents previous statements in this field and will stand as the authoritative statement of English law and practice in relation to the adoption of children who are nationals of another member state.

The President of the Court of Appeal has also been equally forceful extra judicially. He has delivered papers at the residential conference of the Hague International Judicial Network and at the Anglo-German Judicial Conference this spring. Both he and Lady Justice Black delivered important papers at the seminar which I organised in collaboration with the Consul and with the support of the Ambassador at the Slovak Embassy on the 14 May. That conference has made an important contribution to better understanding and better collaboration between all public authorities. The event, although by invitation, was widely reported in the Slovakian press and also in the London press. The European parliament sent a delegation led by the Vice President, Mairead McGuiness, who spoke eloquently from the platform.

Collaboration with the Department of Education in London has continued, culminating in an important event at the Slovak Embassy in London that took place recently. The three senior officials responsible for child protection in the Ministry of Education heard the Reports and recommendations of the Consuls from each of the ten embassies. A recognition of the need for collaboration between local authorities and Consular officials was evident. Of course in

[1] See: http://www.familylawweek.co.uk/site.aspx?i=ed126781
[2] See: https://www.judiciary.gov.uk/judgments/in-the-matter-of-cb-a-child/

practice communities of persons moving to the UK are often concentrated and this allows the creation of efficacious agreements between the local authority and the particular country of emigration. I was fortunate to meet the Director of Legal Services for Peterborough at the Anglo German Conference this spring. Peterborough is the City in the midst of the rich area of fruit and vegetable production which has attracted a large Slovak work force. So since that meeting negotiations have resulted in an agreement welcomed on both sides to regulate future collaboration where Slovak children are involved in child protection proceedings in the Peterborough Court. This agreement should serve as a model for adoption or adaption in other areas and by other States.

There is no end in sight to the opportunities for further development. I intervened at a day conference organised by London University to bring together academics and other specialists with experience in this narrow but difficult field. On the 5 and 6 November a delegation of Members of the Petitions' Committee of the European Parliament has come to London for a Fact Finding Visit on an exploratory visit. This is the product of the number of petitions with which the petitions committee is faced. On the 1 December a workshop to consider cross border adoption within the European Union takes place in the European parliament.

As all here know the all-important instrument, Brussels II Bis, is due for revision and we can anticipate the publication of the Commission's proposal in the New Year. Some areas that are likely to be considered fit for revision are articles 55[3] and 56[4], which deal in part with collaboration in child protection, and Article 15[5]. When first introduced in 2005 Article 15

[3] Article 55 on Cooperation on cases specific to parental responsibility states: *The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: (a) collect and exchange information: (i) on the situation of the child; (ii) on any procedures under way; or (iii) on decisions taken concerning the child; (b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child; (c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15; (d) provide such information and assistance as is needed by courts to apply Article 56; and (e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.*

[4] Article 56 on the Placement of a child in another Member State affirms: *1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement. 2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement. 3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State. 4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.*

[5] Article 15 on the Transfer to a court better placed to hear the case states: *1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5. 2. Paragraph 1 shall apply: (a) upon application from a party; or (b) of the court's own motion; or (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3. A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties. 3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State: (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or (b) is the former habitual residence of the child; or (c) is the place of the child's nationality; or (d) is the habitual residence of a holder of parental responsibility; or (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property. 4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1. If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14. 5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of*

was seen as a concession to common law states which was unlikely to be much invoked. Recent experience has shown that it is a vital tool in managing cross border child protection. The President has frequently urged the obligation on the Court seized with a cross border child protection case to consider an Article 15 transfer to the jurisdiction of origin and nationality at the earliest stage in the proceedings. Although statistics are not compiled I know that many Judges and Courts are increasingly seeing the merits of returning the management of child protection issues to the state from which the family originates.

I am in no doubt of the importance and the utility of the work that I have been privileged to do in this field since my retirement. In international family law and in European cross border child protection in particular, Slovakia has been a European leader. Last month saw the third in the series of annual International Family Law Conferences that Slovakia has hosted and each has exceeded its predecessor in ambition and achievement. Not least of our achievements has been to unite the 10 Member States through their diplomatic commissions in London in the recognition that all share a common problem and a common interest and that the advancement of that interest will be most fully achieved by acting not individually but as a powerful union within the union itself.

the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14. 6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.

THE VIEW OF OMBUDSMEN FOR CHILDREN FROM THE PERSPECTIVE OF THE POLISH, EUROPEAN AND INTERNATIONAL LAW

Paweł JAROS

Foreign Adoption[1]

According to the Polish Family and Guardianship Code, Article 114^2 § 1, adoption that results in the adoptee changing his or her current place of residence in the Republic of Poland to a place of residence in another state may take place only if this is the only way the adoptee may be provided with proper substitute family environment.

In § 2 of this article it is provided that § 1 is not applicable if there is a relationship of consanguinity or affinity between the adopter and the adoptee or the adopter has already adopted the sister or brother of the adoptee.

1. This regulation is usually applied by Polish courts, which does not exclude its application by a foreign court if Polish Law is the governing law. However, article 114^2 encompasses a strictly defined hypothesis and does not include cases of foreign adoption that Polish courts may encounter, for example adoption of a child that comes from a foreign country by applicants living in Poland. Yet it must be kept in mind that the domestic law of the adoptee shall be usually applied in such cases as it probably provides a similar rule that restricts foreign adoption or says that a permit issued by a relevant authority is required.

2. The discussed regulation was introduced in 1995 to realize the provisions of article 21 sub-paragraph b of the Convention on the Rights of the Child[2] (hereafter: CRC) according to which States Parties shall recognize adoption resulting in transferring a child to another state as a substitute form of child's care if the child cannot be placed in a foster family or in an adoptive family or if the child cannot be provided with care in his state of origin in any other way (the principle of subsidiarity of foreign adoption). The subsequent sub-paragraphs of article 21 (c, d, e) of the Convention on the Rights of the Child also refer to foreign adoption and require State Parties to ensure that the child concerned by foreign adoption enjoys safeguards and standards equivalent to those existing in the case of domestic adoption, they allow to take all necessary measures to ensure, in case of adoption into another state, that persons involved in it do not receive improper financial gains for it. To achieve these objectives the Convention recommends the States Parties by concluding bilateral or multilateral agreements, where applicable.

3. The condition for application of article 114^2 is the change of the current place of residence of the adoptee in the Republic of Poland to a place of residence in another state.

[1] The term 'foreign adoption' is used in the English version of the Polish Family and Guardianship Code translated by Nicholas Faulkner (C.H. Beck, Warsaw 2010). Foreign adoption is also called 'inter-country' adoption (Convention on the Rights of the Child), 'inter-state adoption', 'international adoption' and 'transnational adoption' [Translator's note].
[2] New York, 20 November 1989; United Nations, *Treaty Series* , vol. 1577, p. 3

The child's place of residence is regulated by article 26 and article 27 of the Polish Civil Code. According to article 26 § 1 of the Polish Civil Code the place of residence of a child that remains under parental authority is the place of residence of the parents or the parent who is exclusively entitled to parental authority or to whom the execution of parental authority was entrusted. If both parents are equally entitled to parental authority but they live apart, the place of child's residence shall be the place of residence of that parent at whose place the child is staying. If the child is not staying at any parent's place on a regular basis, the child's place of residence shall be determined by family court (article 26 § 2 of the Polish Civil Code).

4. Article 114^2 specifies the term of foreign adoption, which according to article 21 sub-paragraph b of the Convention on the Rights of the Child is based on 'placing the child in a foreign state'. The notion provided by the Convention is not precise and should it be interpreted as physical transportation of a child, it would support omission of restrictions regarding foreign adoption by taking children earlier out of their state of origin under any excuse to conceal the real intent of adoption. Taking a child out of the state in this way is then ineffective pursuant to article 114^2 as the child does not change his or her place of residence in this way.

5. According to article 114^2 the nationality of both the child and the applicants is unimportant. In particular Polish nationality of the applicants living abroad does not exclude the application of the regulation discussed hereunder. Nevertheless, as indicated above, the nationality is important to define the governing law - the child's nationality other than Polish would usually determine the application of a relevant regulation of the child's domestic law instead of article 114^2. According to article 58 of the Act of 04 February 2011 - International Private Law, adoption cannot take place without respecting the domestic law of a child who is considered to be adopted regarding consent given by the child, consent of the child legal representative and permission of relevant state authority as well as restrictions for adoption for the reason of change of the current place of residence to a place of residence in a foreign state. In all proceedings concerning adoption where the adopter or the minor concerned is a citizen of a foreign country, the court should first investigate whether Polish courts have jurisdiction over the case and what law – Polish or foreign – shall be applicable. This is regulated by provisions of agreements to which Poland is a Party or by applicable regulations of international private law[3]. It must be then stressed that in a case of foreign adoption, Polish court, if it has jurisdiction over the case, usually does not adjudicate only on the basis of Polish Law. Application of foreign law refers also to cases when a child who is going to be adopted by foreigners is a Polish citizen, as pursuant to article 57 item 1 of the international private law adoption is governed by the domestic law of the adoptee, subject to article 58 referred to above which defines the scope of application of the domestic law of the adoptee. The new act includes also a specific standard regarding joint adoption. Pursuant to article 57, item 2 of this Act, joint adoption by the spouses is governed by their common domestic law. In case there is no common domestic law, the law of this state is applied, in which both spouses have their place of residence, and in case they do not have their places of residence in the same state – the law of this state, in which both spouses have their place of ordinary stay. If the spouses do not have their places of ordinary stay in the same state, the law of this state is applied to which they are most closely linked.

6. Foreign law shall not be applied only in case both the child and the adopters are of Polish nationality or when, by way of exception, a bilateral agreement provides exclusive governance of the adoptee's law. It must be then remembered that rules of conflict of law may be included in bilateral agreements that Poland had concluded together with other states, particularly with the states of East-Central Europe. In principle, regulations they

[3] Decision of the Supreme Court of 19 April 1984, III CRN 297/83, Lexis.pl no. 321113

include regarding governing law for adoption were in line with the principle adopted in the Act of 1963 – generally speaking, the domestic law of the adopters is the governing law and with respect to child's and the child's statutory representatives' consents – the domestic law of those persons; moreover, the law of the adoptee is applied with regard to permission of relevant authority if such permission is required. Hence regulations enshrined in agreements include the following rules of conflict of law: 1) for adoption, the governing law is the law of the State party whose citizen is the adopter at the moment of application's submission; 2) for adoption it is necessary to have, if this is required by the law of the party the adoptee is the citizen of, the consent of the adoptee, of his or her statutory representative and of the state authority of this party, to whom the domestic law of the adoptee is applied; 3) if the child is being adopted by spouses one of whom is a citizen of one party and the other is a citizen of other party, requirements provided by law of both parties must be met. Different regulations are included in, for example, the agreement between Poland and France on applicable law, jurisdiction and enforcement of judgements in the field of personal and family law developed in Warsaw on 5 April 1967. Pursuant to article 12 of this agreement, the conditions and effects of adoption are subject to law of that party on whose territory the adoptee and adopter or spouses that adopt jointly have their place of residence. Yet if the adopter or spouses who adopt jointly have their place of residence within the territory of one party and the adoptee – within the territory of the other party, the conditions and effects of the adoption are subject to law of that party the adoptee is the citizen of, so in a typical situation of foreign adoption of a Polish child by applicants residing in France Polish law is applied in general. Pursuant to item 3 of this article, forms of adoption are governed by the law of that party on whose territory the adoption is taking place. This is an ill-considered solution as it results in an option for Polish courts to decide on such forms of adoptions that are unknown to French law. Hence despite the agreement referred to above is applicable, problems with acknowledgement of Polish courts' decisions are born.

7. If foreign law is to be applied, Polish court may find it difficult to meet the requirement of the rules of operation of common courts, which in § 223 provides that in the decision on adoption the court determines the type of adoption by mentioning one of the following terms: 'full insoluble adoption' or 'full adoption' or 'incomplete adoption'. These terms are connected with types of adoptions known in Polish legal system and may have different meanings in foreign legal systems. Hence it is proposed to quote the legal basis of the applied foreign law in the conclusion of the judgement in such cases[4].

8. Also article 20 paragraph 3, second sentence of the Convention on the Rights of the Child, is essential for foreign adoption, as it tells to pay due regard to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background when choosing the right solution.

9. In the 1980s and at the beginning of 1990s the number of foreign adoptions adjudicated by court grew. This caused doubts both with respect to probable improper financial gains that persons involved in informal agency could receive and to the condition of the child's wellbeing[5]. Ratification of the Convention on the Rights of the Child itself did not bring any change to the situation. Only the adjudication of the Supreme Court did have any influence on that practice, which concluded, by means of an resolution adopted by 7 judges on 12 June 1992, III CZP 48/92 (OSNCP 1992, no. 10, item 179) that the principle of precedence of domestic means of care by virtue of the Convention on the Rights of the Child itself shall be applied. The Supreme Court concluded that adoption of a Polish child connected with

[4] See R Zegadlo, 2014, in: W. Borysiak, M. Manowska, J. Sadomski, E. Skowrońska-Bocian, B. Trębska, E. Trybulska-Skoczelas, J. Wierciński, R. Zegadło, *Kodeks rodzinny i opiekuńczy [The Family and Guardianship Code]* Comment, edited by J. Wierciński, 1st edition, Warsaw.

moving the child to another country may take place if there are no possibilities to place the child in a foster family or adoptive family in Poland on equal terms. The child's best interest should be the paramount consideration (article 20 sub-paragraph 3 and article 21 sub-paragraph b) of the Convention on the Rights of the Child). Moreover, the Supreme Court stated in that resolution that the regulations enshrined in article 21 sub-paragraphs d) and e) and article 35 of the Convention on the Rights of the Child require that the adoption agency be carried out by specialized and competent bodies who cooperate with relevant foreign organizations on the basis of relevant agreements, yet those regulation do not specifically limit the list of actors who deal with adoption agency. In several subsequent decisions, the Supreme Court relativized this principle by expressing a view that the principle of precedence of domestic adoption defined in article 114^2, in case it collides with the principle of the child's well-being, must yield this principle. For example, there was a decision of 05 July 2006, IV CSK 127/06 (Lexis.pl no 1573283), in which the Supreme Court concluded that the well-being (the best interest) of the child is of paramount consideration and requires to be considered in every case concerning custody over the minor, hence also in case of adoption both foreign and domestic. Hence, although in the light of article 114^2 § 1 of the Family and Guardianship Code, foreign adoption should indeed be considered as *ultima ratio*, the paramount interest of the child, the child's well-being, the possibility develop fully and in harmony, may require that the principle of precedence of domestic adoption be rejected in a specific case.

10. Mitigation of the rigorism of the standard set forth in article 21 sub-paragraph b) of the Convention on the Rights of the Child is well-grounded and this tendency becomes evident not only in the judicature of the Supreme Court but also in Polish regulations that implement that standard. The UN Conventions are then characterised by high level of generality, which makes them loose their legal accuracy. If the indicated standard was interpreted literally, there would be practically no grounds for foreign adoption, and, before all, it would bring results contradictory to the child's wellbeing. It seems then that it comes from that provision that foreign adoption excludes the possibility to provide any form of care at all, nor even institutional, in the child's country of origin, which was accurately pointed out by the Supreme Court in the resolution adopted on 12 June 1992, by stating that literal interpretation of article 21 sub-paragraph b) of the Convention on the Rights of the Child could lead to a conclusion that even the perspective of placing the child in domestic institution of care should exclude the decision on foreign adoption. According to the Supreme Court, such stand cannot be accepted. The consideration of the child's wellbeing definitely justifies the principle of precedence of foster family care over the institutional forms of care (residential institutions). Polish legislator took this direction in 1995 by specifying that the possibility to provide a proper foster family care in Poland is an argument against foreign adoption. Hence a residential institution is not an alternative for foreign adoption any more. Nevertheless even this specification of the Convention would not be satisfactory if we assume that professional foster family is still such an alternative. This aspect gained significance particularly after changes introduced by the Act on family support and foster care system, the concept of which is to replace the residential and institutional care with family-type forms of foster care, such as foster family and family children's home. Institutional forms of care should be eliminated gradually but starting from the youngest children, that is those who are most often adopted. It is then the state's duty - arising from the law - to provide family-type forms of care - even those professional. If we assume that those forms of care exhaust the condition of proper foster family environment, then in the light of article 114^2 § 1 there would be no possibility of foreign adoption at all except for exceptions admitted in § 2 of this article. The standard of § 1 would yet keep its practical meaning if we focus on the meaning of the word 'proper' when interpreting it. In this context we should also remind the decision of the Supreme Court of 12 June 2012, V CSK 283/11 (Lexis.pl no 4966192), in which it was stressed that legal institutions which came

[5] See. E. Holewińska – Łapińska, 1994. Adopcje zagraniczne. [Foreign adoptions] Warsaw, 232 -235.

along the institution of adoption and which were designed to reach the same goals (foster families, family children's homes) did not create such parent-child relation as adoption. Such possibilities of interpretation, particularly reference to the child's well-being as a principle paramount to article 114^2 § 1, allow to have each case assessed individually. In the decision of 5 July 2006 mentioned above the Supreme Court stated in that case that domestic adoption by the relatives of the child is not in line with the child's wellbeing as the alternative to foreign adoption, which was applied for[6]. Yet it seems that only exceptional circumstances of this case could justify such serious departure from the principle of article 114^2 § 1. Generally speaking, any domestic adoptive family as well as foster family formed by any family members or relatives or other persons close to the child (non-professional foster family) should take precedence. Possible departures from that principle that may appear in particular circumstances and that do not fall within the hypothesis of 114^2 § 2 [7]. When applying the article 114^2 § 1 in case concerning foreign adoption it must be first determined if adoption (and not, for example, foster family) is a proper solution for the involved child. When the answer is yes, it must be then investigated if a domestic adoptive family could be found for the child[8].

11. The assessment of admissibility of foreign adoption with respect to a particular child takes usually place already before the case is taken to court and before the child is associated with a potential foreign adoptive family. The basic means in that respect is qualification for foreign adoption, which is carried out by the adoption agency which keeps a central database, after the child is qualified for adoption by the specific agency that is managing the child's case and after search for candidates for adopters through the agency of all adoption agencies in the state appears ineffective. Pursuant to article 163 of the Act on family support and foster care system, the Minister of Labour and Social Policy decided that the Masovian Centre of Social Policy [Mazowieckie Centrum Polityki Społecznej], Voivodeship Centre of Adoption in Warsaw [Wojewódzki Ośrodek Adopcyjny w Warszawie] is the institution to keep the central database of children waiting for adoption. In subsequent announcement of the same day the Minister of Labour and Social Policy published a list of adoption agencies entitled to cooperate with central authorities of other states or organizations or adoption agencies licensed by authorities of other states. These are: Masovian Centre of Social Policy [Mazowieckie Centrum Polityki Społecznej], Voivodeship Centre of Adoption in Warsaw [Wojewódzki Ośrodek Adopcyjny w Warszawie] mentioned earlier, State Adoption Agency of the Children's Friends Society in Warsaw [Krajowy Ośrodek Adopcyjny Towarzystwa Przyjaciół Dzieci w Warszawie] and the Catholic Adoption Agency in Warsaw [Katolicki Ośrodek Adopcyjny w Warszawie]. Only the agencies mentioned above may carry out the adoption procedures connected with changing the child's place of residence into a place of residence out of Poland. In case a candidate adopter lives outside the territory of Poland, the above mentioned agencies submit the information on the child to the representatives of the organizations or adoption agencies licensed by governments of other states, after the child is qualified for adoption, and allow the foreign candidates, after they receive a positive qualifying opinion, to contact the child, unless the adoption is realized by member of the child's family.

12. According to article 167 of the above-mentioned act, the condition for qualification for foreign adoption is not the lack of proper substitute family environment but lack of adoptive family in the state. Hence the child may be qualified for adoption resulting in change of the

[6] See more E. Holewińska - Lapińska, 2003, in: T Smyczyński (ed.) *System prawa prywatnego [The system of private law]* vol. 12 prawo rodzinne i opekuńcze [family and guardianship law], Warsaw, 567 – 581.
[7] E. Holewińska – Łapińska,1998, *Adopcje zagraniczne w praktyce polskich sądów [Foreign adoptions in the practice of Polish Courts],* Warsaw, 136 -139.
[8] J. Gajda, in: K. Pietrzykowski (ed.), 2009, *Kodeks rodzinny i opiekuńczy z komentarz [Family and Guardianship Code with a comment]* , Warsaw, 998-999].

current place of residence in Poland to a place of residence in another state after all possibilities of finding a candidate for adopter of that child within the state are exhausted, unless there is a relationship of consanguinity or affinity between the adopter and the adoptee or the adopter has already adopted a sister or brother of the adoptee. It must be explained that there is not contradiction between the provisions of the act quoted here and the provisions of the Code.

13. Article 114^2 § 2 excludes the principle of foreign adoption subsidiarity mentioned in § 1 if there is a relationship of consanguinity or affinity between the adopter and the adoptee or the adopter has already adopted the sister or brother of the adoptee. *Lege non distinguente* this exclusion covers all degrees of relationship of consanguinity or affinity, including stepbrothers and stepsisters. This exclusion is repeated literally in article 167 of the Act on family support and foster care system.

14. Polish court adjudicates when it has jurisdiction. In this respect there are no multilateral agreements yet there are many bilateral agreements concluded by Poland especially with countries of East-Central Europe. As a rule, the agreements acknowledge the jurisdiction of the court of the child's state of origin. Yet there are exceptions to this rule, as for example in the agreement between Poland and Hungary on the legal assistance in civil, family and criminal matters, signed in Budapest on 06 March 1959[9] it was decided that courts of those states shall have jurisdiction of which the adopter is the citizen (article 36 item 4 of this agreement). If there is no bilateral agreement, the jurisdiction is defined by article 1106^4 of the Code of Civil Procedure. Pursuant to its § 1, domestic jurisdiction covers cases connected with adoption if the person who is going to be adopted is a Polish Citizen or, in case of a foreigner, this person has the place of residence or place of ordinary stay in Poland. Moreover, in the light of § 2 of this article, cases pertaining to adoption fall under domestic jurisdiction also when the adopter is a Polish citizen and has his or her place of residence or place of ordinary stay in the Republic of Poland. In case of joint adoption by spouses it is enough that one of the spouses is a Polish Citizen and has his or her place of residence or the place of ordinary stay in Poland.

15. The regulations of article 114^2 were introduced by the amendment of 1995, so after Poland had signed the Convention on the Rights of the Child but before Poland signed the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption developed in Hague, on 29 May 1993[10] (hereafter "the 1993 Hague Convention"), which became effective for Poland on 22 September 1996. According to article 2 item 1 of this 1993 Hague Convention, the Convention shall be applied when the child who has his or her habitual residence on one state (state of origin) was, has or will be moved to another state (receiving state) or, after adoption in the state of origin by spouses or a person who have their habitual residence in the receiving state or for the purpose of such adoption in the receiving state or the state of origin. Indeed the principles of this Convention can be applied only among states that ratified the Convention, nevertheless the number of such countries is high enough to call the scope of application of the Convention's principles close to universal.

16. Unlike article 114^2, the 1993 Hague Convention does not connect the consequences of foreign adoption with a change of place of residence but with the place of habitual residence of the child. The notion of habitual (permanent) residence of the child appears as common term in many international legal instruments regarding family and guardianship matters, including in EU law and notably in the Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Official

[9] Dz. U., Journal of Laws of 1960, No 8, Item 54, with amendments
[10] Dz. U., Journal of Laws of 2000, No 39, Item 448

Journal EU 2003 L 338/1 with amendments) - the so called Brussels II bis. This notion owes its position in the private international law to the Hague conventions. It appears in the Convention of 01 June 1970 on the Recognition of Divorces and Legal Separations, the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors and in the substitutive for it Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (hereafter the 1996 Hague Convention), as well as in the Convention discussed hereunder. As a result of amendment to the Code of Civil Procedure by the Act of 05 December 2008 [11] the notion of 'place of habitual residence' appeared in many places in the text, and first of all - in the international civil procedure where it serves as a link in defining the jurisdiction, particularly in matrimonial and guardianship matters. Since that moment, this term appears also in article 41 of the Code of Civil Procedure, which defines the local jurisdiction of the court in matrimonial matters. This link appears also in the new Act - the international private law. There was, however, no decision to define the term of 'place of ordinary stay' neither in the international legal acts mentioned above, nor in the domestic regulations. The place of habitual residence is a purely factual circumstance and means a place where the life (everyday) activity of a particular person is centralized. The place of habitual residence should be considered as a purely factual circumstance also in case of children. With the Council Resolution (CE) no 2201/2003 there was already an attempt to define this term. The European Court of Justice, in its judgement of 02 April 2009 no C-523/07[12] concluded that the 'term "habitual (permanent) residence" according to article 8 (1) of the Regulation no 2201/2003 should be interpreted in the way that the place of habitual residence is located where some kind of integration of the child with the family and social environment can be observed. In particular the following aspects must be taken into account: stability, legality, conditions and reasons for stay and transfer of the family to a given Member State, the child's nationality, the school the child attends and its conditions, foreign languages skills and family and social bonds of the child in this Member State. It is the domestic court's task to determine the place of habitual (permanent) residence of the child based on all significant factual circumstances of a given case'. Also the decision of the Supreme Court of 26 September 2000 falls within the scope of such interpretation (ref. no I CKN 776/00[13]), according to this decision, the place of habitual (permanent) residence, pursuant to article 3 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction is defined by the facts that manifest the long-lasting and stable stay of the child in the place where the child satisfies all his or her needs, regardless whether persons who are taking care of the child have the intention of permanent stay, and the place of the child's habitual residence is not defined by the will of persons who are taking care if the child.

17. The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption became effective for Poland when article 114^2 of the Family and Guardianship Code was already in application. Since then, the standards of this Convention take precedence over the standard of article 114^2 of the Family and Guardianship Code in relationship between States Parties of the Convention if these norms collide, as pursuant to article 91 paragraph 2 of the Constitution an international agreement ratified upon prior consent express in an act has precedence over the act if the domestic act and the international are contradictory to each other in that matter.

The principle of subsidiarity of foreign adoption is expressed in the Hague Convention in a more liberal way than in article 114^2 of the Family and Guardianship Code, not to mention

[11] Dz. U., Journal of Laws, No 234, Item 1571)
[12] Official Journal UE 2008 C 22/35
[13] OSNC 2001, no 3, item 38

the CRC. This is the principle the article 4 of the 1993 Hague Convention refers to, as the article concludes that adoption to which the provisions of the Convention refer may take place only when relevant authorities of the child's country of origin had concluded, having thoroughly investigated the options of placing the child in the child's country of origin, that foreign adoption remains in line with the best interest of the child. Such perspective allows, in particular state of affairs, to admit foreign adoption if it is justified by child's wellbeing, though there is an option to place the child in the child's country of origin. Although the principle of subsidiarity in the 1993 Hague Convention concerns every adoption subject to Convention without exceptions, yet it is formulated in a more flexible way, which in case of a intra-family adoption leaves a possibility to the court to argue that despite the possibility to place the child in the country of origin, foreign adoption by relatives is more suitable for the child's well-being.

Hence, within this framework, an exception can be admitted such as provided by Polish Law in case of intra-family adoption (article 144^2 § 2 of the Family and Guardianship Code). Moreover, in case of intra-family adoption, an evident exception is provided from the requirements of the Convention regarding pre-adoption contact. Pursuant to article 29 of the Convention, no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a) to c), and Article 5, sub-paragraph a), have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

18. Based on the Convention's provision, a Central Authority was appointed to carry out tasks arising from the Convention in States parties to the Convention. In Poland this function was appointed to the Ministry of Labour and Social Policy. The legally substantive regulations of Article 4 and 5 of the 1993 Hague Convention are addressed to the Ministry and, first of all, to institutions that prepare adoptions and courts that adjudicate in adoption cases. Pursuant to Article 4 of the 1993 Hague Convention, adoption which the provisions of the Convention refer to, may take place only when the competent state authorities have determined that conditions defined thoroughly in that regulation have been met. Pursuant to Article 5 of the 1993 Hague Convention, adoptions which the provisions of the Convention refer to, may take place only when the competent authorities of the receiving state: 1) have concluded that the prospective adopters are suitable and appropriate as adoptive parents, 2) have ensured that the prospective adopters had been provided with relevant counselling and 3) have concluded that the child is or will be entitled to enter and stay permanently in the receiving state.

19. The conventional procedure of foreign adoption is defined by the regulations of chapter IV of the 1993 Hague Convention. They include provisions addressed first of all to central authorities defined appointed pursuant to the Convention, but sometimes also to other bodies and the applicants, as for example article 14. Persons who have their ordinary place of stay in the contracting state and who are going to adopt a child that resides permanently in another contracting state should turn to the central authority of the state of their ordinary stay. Central Authorities are obliged to cooperate on the basis of procedures that are defined in detail in the Convention's standards. Also, in the course of the procedure, the child's opinion and the child's consent should be taken into account, with proper consideration for the child's age and level of maturity.

CONFLICTS AND COORDINATION OF FAMILY STATUSES: TOWARDS THEIR RECOGNITION WITHIN THE EU?

Gian Paolo ROMANO

KEY FINDINGS

- Family law continues to vary considerably across the Member States. The rules on *conditions* to celebrate marriage, to register a partnership, to obtain divorce or annulment of marriage, to adopt or be adopted, to acknowledge, disavow or establish fatherhood, to give birth through surrogacy or other forms of reproductive assistance, are all left to the domestic legislations of the Member States. The *effects* that flow from those « family statuses » in terms of rights and obligations of the « status holders » – as between themselves and as against third parties – are also shaped by domestic law.

- When it comes to *private international law*, a number of existing or proposed EU Regulations provide for international jurisdiction, law applicable and recognition of decisions relating to *effects* of those statuses, such as Maintenance Regulation, Brussels IIa, Succession Regulation and soon Matrimonial Property Regulation and Regulation on Property Consequences of Registered Partnerships. By contrast, little has been done in the field of the *creation*, and intra-EU *recognition* of creation, or *termination*, and intra-EU *recognition* of termination, of those family statuses, which issues are still under the control of the individual Member States. The only exception is divorce and separation, which are covered by Rome III Regulation when it comes to applicable law, and, when it comes to jurisdiction and recognition, by Brussels IIa, which also deals with annulment of marriage, but still allows Member State A to issue a divorce decree while permitting Member State B not to recognize it, albeit on limited grounds.

- As long as the European Union (« EU ») continues to allow Member State A to confer a family status to two individuals while allowing Member State B (and C, D…) not to recognize it, the EU is in fact paving the way to « *intra-EU conflicts of family statuses* ». Those « *limping family relationship* » may generate inextricable « *conflicts of legal rights and obligations* » across the EU which not only have the potential of undermining the benefits of the EU Regulations on effects, but may encourage litigation, create confusion and chaos in the private law sphere of the individuals and favour self-justice behaviours. This state of affairs is not only inconsistent with the idea of Member States being « *united in diversity* », their *legal diversity* resulting here not in *unity* but in *division and discord*, but also with the objective to establish an « *area of freedom, security and justice* », the exercise of the fundamental freedoms being hindered. The result of these conflicts is hardly compatible with human rights, as the ECHR suggested in a number of rulings on cross-border adoption and surrogacy. More generally, while legal pluralism may be a source of wealth and fuel human progress, legal conflicts are contrary to the very essence of Law and Order.

- This note discusses four possible pathways that the EU may be willing to take in order to avert intra-EU conflicts of family statuses or alleviate their adverse consequences for the individuals concerned. The *first* is about coordinating the effects of two inconsistent family statuses in order to avoid conflict of rights and obligations. The *second* is about preventing the conflict of statuses by requiring mutual recognition by all Member States of a family status created by one of them. The *third* is about bringing together the competent authorities of two or more Member States and having them participate in a kind of co-decision process. The *fourth* is to gradually develop EU legislation on creation and termination of family statuses and have it administered by EU authorities whose acts are no longer subject to recognition but are binding on Member States.

1. This note – which has been prepared in the framework of a workshop titled « Adoption: Cross-Border Issues » – purports to share some ideas on how the Member States may coordinate their action in order to spare EU citizens and EU residents conflicts between inconsistent family statuses and conflicts of legal rights and obligations arising from them. As a matter of fact, not only are those situations, sometimes referred to as «limping relationship» («*statuts boiteux*»), inconsistent with the objective to create an «area of freedom, security and justice», but they also have the potential to hinder the exercise by the affected EU citizens and EU residents of the fundamental freedoms on which the EU is premised.

2. This note will first define a *family status*, explain how it works (I) and remind what is the current stand of the EU legislation in this respect (II). It will then move to briefly show the incompatibility of conflicts of family statuses and their effects with fundamental principles of EU law (III) and will finally discuss some of the pathways that the EU may be willing to embark on to prevent those conflicts or alleviate the adverse consequences that they may generate for EU citizens and EU residents (IV).

I. HOW A FAMILY STATUS WORKS: CONDITIONS AND EFFECTS

3. This note deals with **family law areas** such as marriage, including same-sex marriage, registered partnership and child-parent relationship, including all types of filiation: legitimate, natural (« out-of-the-wedlock »), adoptive and resulting from reproductive technologies, such as surrogacy.

4. For the purposes of this note, a « **family status »** is the status that is conferred upon the individuals who apply for it (or one of whom applies for it: see point 8 below) and satisfy the relevant formal and substantive requirements. For example, « *marital status* » is the status of a person who is married to another person, « *child status* » is the status of a person who (legally) is a child of another person, who in turn has « *parental status* » with respect to that person, and so on. The person holding a particular family status will hereinafter be referred to as « **(family) status holder** ». Most – although not all – of the family statuses affect the « civil status » (« *état civil* ») of the status holder.

> The marital status affects the « *état civil* » of the spouse, just as the status of registered partner, adoptee or adoptive parent, and divorcee. The French PACS (« *pacte civil de solidarité* ») does not affect the « *état civil* » of the status holders or « *pacsés* » although it also gives rise to a family status within the meaning of this note.

5. A family status **arises** and **comes to an end** (1). It generates a bundle of **substantive rights and obligations** for the status holders, which are the « effects » of that particular status (2).

1. FAMILY STATUS: *CREATION* AND *TERMINATION*

6. A family status is generally **sought** by one or two persons, who *apply* for it, and granted by **a public authority** after making sure that the applicant or applicants satisfy the conditions to be awarded that particular status. The public authority can be *administrative* such as a civil servant or a notary public, or *judicial.*

7. The authority is generally **administrative** if two persons seek together the conferment of the family status, in which case there is no conflict of claims between the interested parties or, as the case may be, particularly in the case of children, their representatives.

> Marriage is generally celebrated by a *civil registrar*, both applicants wishing to obtain marital status, although in some countries (e.g. some Muslim countries) it is a tribunal who solemnizes it. Registered partnership is also, as a rule, concluded before and registered with a *civil servant*, although the French PACS is registered with a *tribunal.* Acknowledgment of fatherhood (« *reconnaissance de paternité* ») may be effected through a *civil registrar* or a *notary public* or both, depending on the legal systems. When jointly prompted by the partners, dissolution of registered partnership may also, in some countries, be performed by a notary public or even a *qualified lawyer* (who is performing a public function).

8. If the public authority is *judicial*, it can exercise **contentious** or **non-contentious** (sometimes referred to as « voluntary ») jurisdiction (« *juridiction gracieuse* », « *freiwillige Gerichtsbarkeit* », « *giurisdizione volontaria* »). In **non-contentious proceedings**, there is either *joint application* by both interested parties or one of them applies for the status concerned and the other acquiesce. In **contentious proceedings**, there is a *claimant*, who applies for the family status, and a *respondent* who resists such a claim and seeks to avoid the conferment of the status both on him or herself and the applicant.

> *Divorce* is generally pronounced by a *judicial* authority. Spouses may jointly apply for it, in which case proceedings are non-contentious. But if one of the spouses petitions for divorce against the other who resists the application, proceedings become *contentious* and the parties become *litigants*. This is also the case for a paternity action brought by the allegedly biological child against the allegedly biological father to the extent that latter resists the claim.
>
> *Adoption* also normally results from a *judicial* order although a number of administrative authorities are, as a rule, also involved in the proceedings. The adoption proceedings may be *contentious* to the extent that, typically, the biological parents (or one of them) oppose(s) the conferment of the adoptive parents status on to the applicants, or *non-contentious*, when all individuals involved – adoptive parents and, depending on the legislation, biological parents – agree to the adoption.

9. The family status may be **identical for both status holders**, such as for spouses or registered partners, or different for both and symetrical, such as between a parent and his or her child.

Madame Dupont, French national, and *Signor* Bianchi, Italian national, who are married to each other, have mutual rights and obligations of essentially identical nature. Following acknowledgment of fatherhood, *Pan* Sczegola *senior,* a Polish national, earns the status of father of *Pan* Sczegola *junior,* who in turn is awarded the status of natural child of *Pan* Sczegola *senior*. *Pan* Sczegola *senior* in his capacity as father has rights and obligations towards his child *Pan* Sczegola *junior* that are different from the rights and obligations that his child has towards him.

10. Any and all family statuses are, sooner or later, bound to come to **an end** (including through *death*: see below, point 11). Termination may take the form of *annulment* (sometimes labelled as *revocation*) or *dissolution*. Annulment is said to generate effects *ex tunc* whereas dissolution is said to generate effects *ex nunc*. The distinction, however, is not always clear cut.

- As a result of *annulment* (or revocation) of a status, a **prior family status** is generally resumed by the individuals concerned.
- As a result of *dissolution* (other than through death) of the status holder, most effects are generally terminated but some of them may be maintained, although sometimes to a lesser extent or for a limited duration.
- A family status may also be « softened » without being terminated, with some of the effects being removed and the remainder maintained, as in case of *judicial separation* of spouses *ex mensa et thoro*.

  If an action for *paternity disavowal* succeeds, the claimant is no longer father of the respondent, who in turn is no longer child of the claimant, i.e. the *parental status* as well as the *child status* are terminated.

  Some legislations allow for *revocation* of an *adoption*, as a result of which the adoptee loses the status of adoptive child of the adopted parent(s), and conversely.

  Through *dissolution* of a *registered partnership*, the status of registered partner comes to an end.

  Spouses who are judicially separated still enjoy marital status but they are liberated from some of the consequences of that status, such as the fidelity obligation. If marriage is terminated through *divorce*, the parties become *divorcee* but one of them may still have to pay support to the other. If marriage is terminated through *annulment*, the parties generally resume the status of *unmarried*, although some of the effects of marriage may be maintained, typically in case of good faith of one spouse or both (so-called « *mariage putatif* »).

11. Death of a status holder terminates all his or her family statuses. As to the surviving status holder, death gives rise to another status, that of a surviving spouse (or widower), or surviving child (or orphan), that is typically relevant for succession or adoption purposes.

2. FAMILY STATUS: *EFFECTS*

12. The family status generates **a bundle of substantive rights and obligations** as *between the parties* and *as against third parties and public authorities*. Those rights and obligations are the **effects** of the status. As a matter of fact, a family status is *defined* by the effects that it generates in the sphere of the status holders. Some of the effects arise immediately on conferment of the family status while others arise after the passage of time or if and when an additional event occur.

Mutual obligations of fidelity and moral and material assistance between spouses arise as a result, and at the time, of celebration of marriage without any further conditions. The entitlement of a spouse to obtain nationality of the country of which the other spouse is citizen may flow from both valid marriage *and* a period of residence in the country concerned (3 years, 5 years, etc).

13. Some of the effects are **public law effects**, i.e. arise as against public authorities, such as the right to obtain the **nationality** of a country, to benefit from **tax advantages** or **particular pension schemes**, entitlement to **family regrouping**, etc.

If the marriage between *Madame* Dupont and *Signor* Bianchi is solemnized in France and is recognized in Italy, *Madame* Dupont and *Signor* Bianchi will be regarded as spouses for the purposes of both French and, as the case may be, Italian tax or social security legislation. *Madame* Dupont may further be entitled to Italian nationality, although Italy is free to make application for Italian nationality by a foreign spouse of an Italian citizen conditional upon a residence requirement.

14. Family statuses also generate **private law effects** and this note will essentially be concerned with private law effects. Some of those effects consist in mutual rights and obligations arising as **between the status holders**, while some of them may arise between one status holder (or both) and **a third party.**

For example, *Madame* Dupont in her capacity as spouse of *Signor* Bianchi is entitled to receive compensation for moral damages from the third party who is responsible for the accident that has left *Signor* Bianchi incapacitated (to the extent that the relevant provisions make such a right dependent on the *marital* status).

15. Another important effect flowing from a family status is to **prohibit** the status holder from acquiring a family status that is held to be **incompatible** with that status.

If *Herr* Steiner, a German national, and *Kurios* Anthopoulos, a Greek national, have their same-sex partnership registered in Germany, *Herr* Steiner is not permitted to marry *Frau* Lein, a German national (nor any other woman on Earth) in Germany nor in any other Member State (nor in any other country) that has recognized the registered partnership between *Herr Steiner* and *Kurios* Anthopoulos, because the status of registered partner of a person is, according to German law, incompatible with, and prevents conferment of, the status of spouse of another person (or the same person).

If *Signor* Bianchi *senior* is, legally (although not biologically), the father of *Signor* Bianchi *junior*, because *Signor* Bianchi *senior* is the husband of *Madame* Dupont, who is the mother of *Signor* Bianchi *junior*, the status of child of *Signor* Bianchi is incompatible with the status of child of *Monsieur* Leclerc, although latter is the biological father of *Signor* Bianchi *junior*. As a consequence, *Monsieur* Leclerc cannot acknowledge *Signor* Bianchi *junior* as his natural son as long as *Signor* Bianchi *junior* possesses the status of legitimate son of *Signor* Bianchi *senior*.

II. THE CURRENT LEGAL FRAMEWORK WITHIN THE EU

16. There is no common EU *substantive* rules with respect to the areas of family law covered in this note (1). When it comes to *private international law*, the rules relating to the *creation* or *termination* of the family statuses are essentially still domestic, with the important exception of divorce, separation and annulment of marriage, which are covered by two EU Regulations. On the other hand, the private international rules (whether on international jurisdiction, law applicable and recognition of decisions) relating to *effects* flowing from most of the family statuses are provided by a set of existing or proposed EU Regulations (2). This situation is likely to generate *conflicts of family statuses* and may result in *inextricable conflicts of legal rights and obligations* for the EU citizens and EU residents involved (3).

1. NO COMMON EU SUBSTANTIVE RULES

17. The **substantive requirements** that the applicants for a particular family status need to satisfy in order to obtain that status as well as the **procedure** they have to follow and the **authority** which has the power to assess those requirements and to award them the family status, are determined by **domestic law** of the Member States. The **substantive effects** flowing from those family statuses are also determined by domestic law.

18. In other words, there is no EU substantive law on *marriage*, no EU substantive law on *adoption*, no EU substantive law on *divorce,* no EU substantive law on *acknowledgment of paternity* or *disowal of paternity*… There is no **European adoption** pronounced by a European authority and having effects across the whole of the European Union. There is no **European marriage,** which may be celebrated by a **European authority** and has simultaneous effects across the whole **European Union**. There is a French, Italian, Spanish, Lithuanian, Hungarian, Greek set of rules on conditions to get married, a French, Italian, Spanish, Lithuanian, Hungarian, Greek set of rules on conditions to adopt and be adopted, etc.

> Today, *Madame* Dupont and *Signor* Bianchi are only permitted to marry through a *mono-national* (i.e. of one country only) civil servant, either a French *officier de l'état civil* or an Italian *ufficiale dello stato civile* or the corresponding authority of any other Member State with which they may have a connection deemed sufficient by that Member State to empower its authorities to solemnize marriage if the applicants satisfy the relevant requirements. Otherwise stated, *Madame* Dupont and *Signor* Bianchi cannot have their union celebrated by **a civil servant of the European Union**. They can only rely on either a *French* « *acte de mariage* » or on an *Italian* « *atto di matrimonio* » (or the corresponding act of another Member State), **they have no right to seek and obtain an** « **EU act (or certificate) of marriage** » which is effective simultaneously in France and Italy as well as across the whole of the EU territory without having to go through a recognition process.
>
> Today, if *Madame* Dupont and *Signor* Bianchi reside in Germany and they want to **adopt** a child, there are no EU substantive rules on adoption and no EU authorities having the power to pronounce an EU adoption order. *Madame* Dupont and *Signor* Bianchi have either to comply with German substantive rules or with Italian substantive rules or with French substantive rules or with all of them, depending on the relevant conflict rules; the adoption order will be a French adoption order (or an Italian adoption order or a German adoption order) pronounced through a French authority (or an Italian or German authority); and the French adoption order is not simultaneously valid in the whole EU, it is not binding on the Italian

authorities nor on the German authorities, those Italian and German authorities being still permitted to deny recognition of the French adoption order (also see below, point 23).

2. PRIVATE INTERNATIONAL LAW: DOMESTIC RULES WHEN IT COMES TO CREATION OR TERMINATION WITH THE EXCEPTION OF DISSOLUTION OF MARRIAGE, BUT EU RULES WHEN IT COMES TO EFFECTS

19. When it comes to private international law, a distinction should be made between *creation or termination* of the family status, on the one side (2.1), and the *effects* flowing from that status, or its termination, on the other (2.2).

2.1. Creation or termination of family statuses

20. It is appropriate to further distinguish between rules on *international jurisdiction* (a), *applicable law* (b) and *recognition* (c). There are no common EU rules on any of those issues, with the exception of *dissolution, separation or annulment* of marriage (d).

21. **a) International jurisdiction or competence.** There is **no common EU rules** on *international jurisdiction or competence* of the domestic authorities of the Member States to examine a request for adoption and issue an adoption order, to solemnize marriage, to register a partnership, to adjudicate on a paternity dispute, to approve and allow implementation of a surrogacy agreement, etc.

> If *Madame* Dupont and *Signor* Bianchi want to get married, there is no EU legislation providing that the authorities of the Member States are competent, for example, based on domicile or residence or nationality of one of the spouses. It is for each Member State to determine the *connections* which they deem sufficient to confer such power on their authorities.
>
> If the allegedly biological child, who is a Lithuanian national living in Latvia, of *Pan* Szczegola, who is a Polish national living in Poland, wants to files a paternity action against *Pan* Szczegola, there is no EU legislation providing that the authorities of the Member States are competent to hear paternity disputes based on domicile of defendant or domicile of claimant or nationality of claimant or defendant. There are *Lithuanian* rules on international jurisdiction with respect to paternity disputes, *Latvian* rules on international jurisdiction with respect to those disputes, *Polish* rules on international jurisdiction with respect to those disputes, etc.

22. **b) Applicable law**. Nor are there any common EU rules on *law applicable* to substantive and formal requirements to obtain the marital status or the registered partner status, to adopt and be adopted, to acknowledg, disavow or claim paternity, etc.

> If *Madame* Dupont and *Signor* Bianchi want to get married, it is for France or for Italy or for the United Kingdom or for Lithuania to say which law applies to the capacity to marry. It is for Lithuania or Poland or Germany (depending on the forum) to say which law applies to the substantive requirements to bring paternity action, and so on.

23. **c) Recognition**. Once a family status has been created in a Member State, the question as to whether or not the family status is **recognized** in other Member States is left for the legislation of each Member State. **There are no common EU rules on mutual**

recognition of family statuses which requires recognition or lays down common rules providing for common grounds for non-recognition.

The Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of **Marriages** is only in force in two Member States, the Netherlands and Luxembourg. The 2007 Convention on the recognition of registered partnerships (French: *Convention sur la reconnaissance des partenariats enregistrés*) is a multilateral convention, drafted by the *International Commission on Civil Status* which provides the acceptance in other countries of any form of registered partnership, which is not a marriage. Having being ratified only by Spain, it has not entered into force.

If *Madame* Dupont and *Signor* Bianchi have their marriage solemnized in France, then there is no **EU legislation** applying to the question as to whether or not the marital status that they have acquired in France should be recognized in Italy or in Germany or in Spain. This question is governed by Italian – German or Spanish – rules on recognition or non recognition of marriages celebrated abroad.

If *Pan* Szczegola acknowledges a child in Poland before the Polish competent authorities, there is no EU legislation requiring recognition by Lithuania of the child status and parental status that have been validly created in Poland nor EU legislation setting out the grounds justifying such refusal of recognition.

The 1993 Hague Convention on Inter-Country Adoption is in force in **all Member States**. The scope of application of this instrument is, however, **restricted** and does not extend, for example, a) to adoptions of the *child of the spouse or partner or cohabitee* nor b) to adoptions by *unmarried couples* (whether cohabitees or not) nor c) to adoptions by *same-sex couples* (including married or registered partners) nor d) to adoptions of *adults* (as in the *Negrepontis* case: see point 46 below) nor e) to adoptions of children who are *physically present* on the territory of the State of habitual residence of the parent, such as *refugee children*[1]. In addition, the Convention is not applicable f) when the country of **habitual residence of the child is not a State Party**, which is the case of **half of the sovereign countries** of the globe (Russia, almost all African countries except for a few of them, such as Burkina Faso and Zambia, etc).

For example, an adoption by a German national of the natural child of his Italian wife (wherever the child resides) falls outside the 1993 Hague Convention, an adoption by two English heterosexual cohabitees of a Bulgarian child also falls outside the Convention, and so does an adoption by a French woman of a Syrian refugee child who is physically present in France or an adoption by a Greek orthodox bishop of an adult pronounced in the United States (as in the *Negrepontis* case: see point 46) or an adoption by two Italian ladies living in the United Kingdom as a couple of any child whatever his or her nationality and his or her country of residence, etc. In each of those cases, because the adoption proceeding is not covered by the 1993 Hague Convention and is in fact a *domestic* (rather than *inter-country*) proceeding, if the adoption is pronounced, the question as to whether or not this adoption and the family statuses that it creates are recognized in a Member State, including a Member State who has a strong connection with the child or the parent, is not governed by the 1993 Hague Convention but by **its domestic rules on recognition or non-recognition of foreign adoptions**.

[1] See for example A. Bucher, in A. Bucher (ed.), Commentaire Romand, Loi sur le droit international privé – Convention de Lugano, Helbing Lichtenhahn, 2011, p. 610-611.

The 1993 Hague Convention seeks to ensure that an adoption pronounced in a State Party is recognized in the other State Parties. And yet Article 24 still provides that « *the recognition of an adoption* ***may be refused*** *in a Contracting State only if the adoption is manifestly contrary to its* ***public policy****, taking into account the best interests of the child* ». In other words, **a State Party is still allowed by the 1993 Hague Convention to pronounce an adoption and another State Party is still allowed, based on its own public policy, not to recognize this adoption and not to recognize the family status that the adoption has conferred to the individuals involved.** To be sure, the State involved in the intercountry proceedings (i.e. State of residence of the child or of the applicants) other than the one whose authorities have pronounced the adoption will generally not withhold recognition, its authorities having had the possibility to oppose the adoption at an early stage. However, another State which also has a strong connection with the child or the applicant(s), such as the **State of nationality of the applicant or the child,** and whose authorities were never consulted in the course of the inter-country proceedings (the 1993 Hague Convention does not provide for any direct involvement of the State of nationality of the applicant or of the child) will still be free, based on the 1993 Hague Convention, not to recognize the adoption and the family status that flows from such adoption in the State Party of origin.

> If an Italian woman permanently living in the United Kingdom wants to adopt a Peruvian (or a Bulgarian, or a Romanian, etc.) child through the 1993 Hague Convention, and the Peruvian (or the Bulgarian, or the Romanian, etc.) authorities pronounce the adoption, the UK will most certainly recognize the adoption because the UK was actually involved in the adoption proceedings, which was an *inter-country* proceedings. But Italy, the national State of the adoptive mother, where the civil status registry of the adoptive mother is kept, and **which was not involved in the inter-country proceedings, remains free, based on Article 24 of the 1993 Hague Convention, to deny recognition of the foreign adoption and not to inscribe it in the Italian civil status registry** due to the fact that adoption by a single person is not allowed by Italian law (although the European Convention on Human Rights may compel recognition: see the *Wagner* case, point 46 below).

24. **d) Exception**: **divorce, separation and annulment of marriage.** The only exception – although of considerable practical relevance – is termination of marital status through **divorce, separation and annulment of marriage.**

- The *international jurisdiction* to hear an application for divorce, separation and annulment of marriage as well as the *recognition* in a Member State of a decision rendered in another Member State in one of those ares are governed by the « **Brussels IIa Regulation »**[2], which is in force in all of 28 Member States.
- The *law applicable* to divorce and legal separation (not annulment of marriage) is designated by the « **Rome III Regulation »**[3], which implements « enhanced cooperation » among the 14 Member States which are bound by it.

> Recognition or non-recognition in Italy of a divorce pronounced in France is governed by Brussels IIa Regulation (articles 21 et seq.) If marriage between *Madame* Dupont and *Signor* Bianchi is celebrated in the UK and then annulled in

[2] Council Regulation (EC) 2201/2003.
[3] Council Regulation (EU) 1259/2010.

the UK, recognition or non-recognition in France or Italy of the English annulment order is also governed Brussels IIa Regulation.

If *Madame* Dupont files for divorce in France or in Italy, the law applicable to the grounds for divorce is determined in Italy and France by the Rome III Regulation and is principle the same except for the possibility of the Member State whose law is not that designated by this Regulation to rely on its own public policy (article 12) and apply its own law.

2.2. Effects of family statuses

25. The legal landscape looks different when it comes to the *effects* flowing from a family status, particularly the mutual rights and obligations of the status holders as between themselves and as against their successors. Private international law with respect to those effects is, to a significant extent, governed by existing or proposed **EU Regulations or Hague Conventions** (a). The effects that are still left to the domestic private international law of the Member States are only a few (b).

26. **a) Effects covered by existing or proposed EU legislation and Hague Conventions.** Private international law relating to maintenance, parent and child relationship, matrimonial property, patrimonial consequences of registered partnerships and succession is or will soon be covered by EU Regulations. This is true for both *international jurisdiction, law applicable* and *recognition of foreign decisions*.

- **Maintenance.** International jurisdiction and recognition of maintenance orders are governed by the « **European Maintenance Regulation** »[4]. As regards the law applicable to maintenance rights and obligations, the Maintenance Regulation refers to the the **2007 Hague Protocol** (article 15).

  If *Monsieur* Dupont and *Signor* Bianchi acquire the status of same-sex spouses, the question as to whether and to which extent *Monsieur* Dupont is entitled to maintenance from *Signor* Bianchi, and conversely, is determined based on the law designated by 2007 Hague Protocol which is binding on France and Italy. The Maintenance Regulation determines which authorities (French or Italian or French and Italian, etc.) have the power to hear those maintenance disputes as well as the grounds based on which Italy may refuse recognition of a French maintenance order, and France may refuse recognition of an Italian maintenance order.

- **Child/Parent Relationship**. Once the parental and child status has been established (whether through birth, adoption, acknowledgment, judicial establishment, and so on) the consequences in terms of rights and duties of the parent or the parents towards the child as well as the rights and obligations that each of the parents has as against the other are governed by the law designated through the **Hague Convention 1996** which is in force in **all Member States** (in Italy as of 1er January 2016).

  Once the child and parental status of *Pan* Szczegola *senior* and *Pan* Szczegola *junior* has been established (through acknowledgment of fatherhood or a paternity action), the law applicable to rights and duties in terms of custody or access are determined by the Hague Convention 1996. The question whether the applicant for access right may be brought before the Polish court or the Lithuanian court or the Latvian court is determined by Brussels IIa Regulation, which is in force in Poland, Lithuania, Latvia and all other Member States. Brussels IIa Regulation also governs recognition of Lithuanian child custody and access orders in Poland, and the other way round.

[4] Council Regulation (EC) 4/2009.

- **Matrimonial property and patrimonial effects of registered partnership**. The law applicable as well as the international jurisdiction and recognition of decisions relating to **patrimonial effects** of marriage as well as of registered partnership are likely to be defined uniformly by two European instruments that are in preparation[5].

  If *Herr* Steiner and *Kurios* Anthopoulos are registered partners in Germany, it is the proposed EU Regulation on property consequences of registered partnership that will determine which courts have power to hear disputes relating to property consequences between them, which law applies to those consequences and which are the grounds permitting Greece not to recognize a German decision on this issue, and conversely.

- **Succession.** The effects of a particular family status when it comes to **inheritance** are governed by the « **European Succession Regulation »**[6] which also covers the three traditional issues of jurisdiction, governing law and recognition of decisions but also extends to the novel area of recognition of the « European Succession Certificate ».

  It is in principle the Succession Regulation that determines the law applicable to the succession of *Signor* Bianchi, including the question whether or not *Monsieur* Dupont is a legitimate or forced heir of the deceased (« *héritier légitime* », « *erede legittimo* », ou « *réservataire* », « *legittimario* ») and for which portion.

27. **b) Effects not covered by existing or proposed EU legislation**. There is no EU legislation, whether existing or proposed (to the best of our knowledge), on **general** or ***personal effects*** of marriage (« *effets généraux du mariage* », « *allgemeine Ehewirkungen* », « *effetti personali del matrimonio* ») or on the impact that a particular family status may have on the **family name** of the status holder(s). As a result, international jurisdiction, applicable law and recognition of public acts or decisions relating to those areas of family law are still in the realm of each Member States to govern.

Once *Madame* Dupont is married to *Signor* Bianchi, there is no EU Regulation that says for to which extent they have fidelity and assistance obligation (other than through spousal support, which is covered by the Maintenance Regulation) and which are the consequences of their violations, or whether each of the spouses has the power to conclude alone an act which is in the objective interests of the family and is binding on both spouses, nor is there an EU Regulation that designates the law applicable to the consequences that marriage has on the *family name* of the spouses.

3. CONFLICTS OF FAMILY STATUSES AND THEIR CONSEQUENCES

28. The current situation allows for *conflicts of family statuses* to arise within the European Union (3.1). The conflict of family statuses may in turn generate conflicts of substantive rights and obligations, which conflicts may ultimately have no *legal solution* and result in *legal chaos* for the individuals who are caught up in those conflicts (3.2).

[5] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of *matrimonial property regimes* COM(2011) 126, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the *property consequences of registered partnerships*, COM(2011) 127 of 16 March 2011.
[6] Regulation EU 650/2012.

3.1. Possibility of conflict of family statuses

29. A conflict of family statuses is the situation where two individuals have, in the eyes of one country with which they have a strong connection, a particular family status but, in the eyes of another country with which they also have a strong connection, they have another status which is regarded by the substantive legislations of both countries as **incompatible** with the first.

30. The **« intra-EU conflict of family status »** is a situation where, in the eyes of a **Member State A**, two individuals have a particular family status, and, in the eyes of a **Member State B**, they have another family status which is incompatible with the one in A. The most common source of intra-EU conflict of family statuses is when a family status conferred by a **Member State A** (which one may call the *« Member State of creation »* **or** *« Member State of origin »* of that family status) **is not recognized in Member State B** (« *Member State of non-recognition* »).

> If the family status is awarded by a judicial decision of Member State A – that is generally the case when it comes to divorce, adoption and establishment of paternity – non-recognition of the family status may be the direct result of non-recognition of the judicial decision that has conferred it. The causes of non-recognition may the traditional grounds justifying refusal to recognise a decision, such as substantive and procedural public policy, breach of due process rights, and so.

31. As long as a Member State is allowed to create a particular family status and confer it to two individuals and another Member State is allowed not to recognize such family status, **an intra-EU conflict of family statuses is bound to arise.**

- A conflict of family statuses may arise even in the **area covered by the only instrument that exists on this subject matter**, which is **Brussels IIa Regulation**. As a matter of fact, this EU Regulation does not oblige Member State B to recognize the divorce – and the subsequent family status of divorcees – issued in Member State A. Article 22 of Brussels IIa Regulation still lists **a number of grounds** which would permit Member State B not to recognize divorce. If a Member State A issues a divorce decree and a Member State B does not recognize the divorce, an intra-European conflict of statuses between Member State A and Member State B (and potentially other Member States) arises.

  > If a divorce between Mrs O'Connor, an Irish national, and Mr Svensson, a Swedisn national, is pronounced in Sweden based on unilateral application made by Mr Svensson, Ireland can still refuse to recognize the Swedish divorce decree based on one of the grounds listed in Article 22 of Brussels IIa Regulation. If the Swedish divorce is not recognized in Ireland, Mrs O'Connor and Mr Svensson are still *spouses* for Ireland while they are already *divorcees* for Sweden. This is a *Swedish/Irish conflict of family statuses.*
  >
  > If the marriage between *Madame* Dupont and *Signor* Bianchi has been annulled through an Italian annulment of marriage but the annulment decision is not recognized in France based on one of the grounds listed in Article 22 of Brussels IIa Regulation, *Madame* Dupont and *Signor* Bianchi have unmarried status in Italy while they still have marital status in France. This is « *limping marriage* » and « *limping termination of marriage* ».

- Conflicts of family statuses are even more likely to arise with respect to **family statuses that are not subject to any EU legislation**[7]. In the field of **celebration**

[7] This is without prejudice to what has been said above, point 23, with respect to inter-country adoption.

(as opposed to termination) of marriage, registered partnership and creation (through adoption, surrogacy, acknowledgment or establishement of paternity) **or termination of filiation** (contestation or disavowal of fatherhood) a Member State is, as law stands today[8], permitted by EU law, which is silent on this point, to give rise to a family status and a Member State with which the two individuals have already at the time of conferment or will have at any subsequent time a connection is permitted **not to recognize this status.**

> If *Herr* Steiner and *Kurios* Anthopoulos register their partnership in Germany and their same-sex partnership is not recognized in Greece, then they will be caught in a **German-Greek conflict of family statuses**: they have, in the eyes of Germany, the status of *registered partners*, in the eyes of Greece, the status of *single*.

> If Mr and Mrs Smith, who live together as a couple but are unmarried – the adoption by an unmarried couple falling outside the 1993 Hague Convention on Inter-Country Adoption: see point 23 above – have adopted a child without the consent of the biological mother, who turns out to be a Romanian named Mrs Ungureanu, and Romania does not recognize the UK adoption order on that ground, the minor concerned is child of Mr and Mrs Smith in the eyes of the UK whereas he is child of Mrs Ungureanu in the eyes of Romania. That's a **UK-Romanian conflict of statuses** and particularly of motherhood.

32. An intra-EU conflict of family statuses may also arise due to the different position that two Member States may take with respect to recognition or non-recognition of a status conferred by a **third State**. If two individuals having connections with Member State A and Member State B apply for and are awarded a family status in a Third State C, and if Member State A recognizes such a status while Member State B does not, an intra-EU conflict of family statuses arises.

> Mr Smith, a UK national, and *Madame* Dupont, a French national, married with each other, have recourse to a surrogate mother in California, who delivers a baby. The birth certificate established in California reports that Mr Smith and *Madame* Dupont are the parents of the child. If the UK recognizes such birth certificate and the underlying parents-child legal relationship, whereas France does not, a French-British conflict of family status arises.

3.2. Adverse consequences flowing from intra-European conflicts of family statuses

33. A family status being *defined* by the substantive rights and obligations that it generates in the sphere of the status holders, an intra-European conflict of family statuses threatens to result in a **conflict of substantive rights and obligations for the individuals concerned.** It is appropriate to distinguish between *law applicable* to effects (a) and recognition of *foreign decisions* relating to those effects (b).

34. **a) Law applicable to effects**. Even if the **law applicable** to a particular effect (maintenance, marital property, succession, etc.) **is the same** from the point of view of **two Member States**, due to their being bound by EU Regulation governing those effects, each of the Member States whose authorities may be seized of a question relating to those effects may be tempted to implement the law designated by the relevant EU Regulation **by applying the status that the individuals have within its own legal system.**

[8] And except for the existence of the 1993 Hague Convention on Inter-Country Adoption: see point 23 above.

35. For example, if the law applicable to *succession* is that of Member State B of non-recognition, the Member State A of origin may be tempted to apply the law of Member State B without taking into account the non-recognition of the family status created by Member State A. Conversely, if law applicable to succession is that of Member State A of origin of the family status, Member State B of non-recognition of that status will be tempted to regard the status that the individuals concerned have or used to have in the eyes of Member State B as relevant for the purposes of succession.

36. The **disagreement** between Member State A and Member State B as to which is the applicable family status for the purposes of succession as well as for the purposes of any other set of effects flowing from a family status or the absence of termination of that family status will result **in legal uncertainty**, because the individuals have prior to litigation no idea of **what their mutual rights and obligations are**, as well as in **incentives for litigation and race to the courthouse** (« forum shopping »). This defeats the purposes of having Regulations providing uniform rules of law applicable to rights and obligations arising out of family relationships which is to contribute to legal certainty and, as a result, to reduce litigation.

> *Monsieur* Dupont and *Signor* Bianchi are married in France but their marital status is not recognized in Italy because Italy regards same-sex marriage of an Italian national abroad as contrary to public policy. If *Signor* Bianchi dies intestate, the applicable law is determined both in France and in Italy by the Succession Regulation. ***Monsieur* Dupont is the *surviving spouse* in the eyes of France whereas he has *not* the status of surviving spouse in the eyes of Italy because he had no status of *spouse* in the first place.** Let us stipulate that *Signor* Bianchi leaves no children nor parents but a brother and a sister. If the law governing the succession of *Signor* Bianchi is Italian law because habitual residence of *Signor* Bianchi was in Italy (article 21 of the Succession Regulation), then the French authorities may be willing to apply the provisions of the Italian *Codice civile* relating to succession of the surviving spouse and award the whole assets of *Signor* Bianchi to *Monsieur* Dupont, whereas the Italian authorities will most probably apply the provisions of the Italian *Codice civile* relating to succession of a person leaving no surviving spouse, children or parents and award the whole assets to *Signor* Bianchi's brother and sister.
>
> After *Signor* Bianchi's death, **there is no certainty as to who** (*Monsieur* Dupont? the deceased's brother and sister?) **is entitled to inherit his assets**. This ultimately turns on whether *Monsieur* Dupont is regarded as being the surviving spouse or not: **France says *yes* and Italy says *no***. This situation of uncertainty may encourage *Monsieur* Dupont to run to the French judge and *Signor* Bianchi's brother and sister to run to the Italian judge, i.e. **encourages litigation, *forum shopping* and *forum running*.**

37. **b) Recognition of foreign decisions as to effects.** Even if there is no possibility of two courts being seized of the matter simultaneously, the Member State A of the creation of a family status may refuse to recognise a decision of Member State B which in turn failed to recognize the family status that was created by Member State B and ruled on the dispute regardless of that status. This is bound to generate *a conflict of public policies,* with each of Member State A and Member State B refusing to recognize the decision of the other for failure to take the « good » family status into account and being prepared to adjudicate anew. This **may generate a conflict of adjudications and of legal systems between Member State A and Member State B.**

38. As EU law stands today, **there is virtually no possibility of having this conflict of adjudications and of legal systems between Member States settled by a higher**

authority. This means that the individuals concerned have no legal way to determine their dispute and identify their rights and obligations. The Member States and, more importantly, the EU is committing a **denial of justice** towards those individuals. The result is that the individuals may be inclined to resort to **self-justice** and **state-of-nature behaviours.**

> Let us assume that part of the assets left by *Signor* Bianchi is in France and part of them is in Italy. If the brother and sister of *Signor* Bianchi bring an action before the Italian authorities and obtain a decision awarding title of all assets to them and the Italian decision is presented in France for recognition and enforcement, France can, on application of *Monsieur* Dupont, deny recognition because of the French public policy. *Monsieur* Dupont may then start proceedings again in France and obtain a decision awarding the whole assets to him. If *Monsieur* Dupont also has assets in Italy, the brother and sister of *Signor* Bianchi may try to obtain the delivery of those assets by way of compensation for not having being allowed to secure possession of French assets to which they were entitled based on the Italian decision. **The conflict between *Monsieur* Dupont and the brother and sister of *Signor* Bianchi is not settled *by law*** because there is no legal way of resolving the French-Italian conflict of legal systems which is in turn triggered by French-Italian conflict of family status.
>
> If the UK regards a person as a child of Mr and Mrs Smith, who have adopted the child through a UK adoption order, and Romania regards that person as a child of Mrs Ungureanu, her biological mother, because Romania fails to recognize the UK adoption order, then, regardless of whether UK law applies or Romanian law applies, Mrs Smith may apply for custody in the UK and the UK judge is willing to award custody to Mrs Smith but this custody order is unlikely to be recognized in Romania and, if it is not, Mrs Ungureanu may apply for custody in Romania and a Romanian judge will likely award custody to Mrs Ungureanu. This is a **UK/Romanian conflict of custody orders** flowing from a UK/Romanian conflict of statuses which in turn flows from the fact that UK has pronounced an adoption order that Romania has failed to recognize.

39. **c) Same status but with different persons.** As indicated above (point 15), one of the effects of a family status is to prevent conferment of **another family status** which is incompatible with the first one. Now, if Member State A has created a status and Member State B fails to recognize it, Member State B may be willing to allow one of the individuals concerned to apply for and be awarded another status (typically with a third individual) incompatible with the one initially conferred by Member State A, and Member State A will in turn deny recognition of that new status. The question as to what are the legal rights and obligations arising out of those inconsistent statuses **will likely spiral out of control of the Member States and the outcome will be legal chaos.**

> *Monsieur* Dupont and *Signor* Bianchi get married in France. If their marriage is not recognized in Italy, *Signor* Bianchi is, for Italy, still *unmarried*. **Being unmarried in the eyes of Italy, Italy may be tempted to allow him to get married to *Signora* Rossi** (or to any other woman) **in Italy** (just as Greece may allow him to get married to *Kuria* Anthopoulos to the extent that Greece also fails to recognize the French marriage). If he does, *Signor* Bianchi will actually be married to *Monsieur* Dupont for France and to *Signora* Rossi for Italy. In a way, he will be a cross-border « bigamous » individual. The consequences of all this in terms of rights and obligations between *Signor* Bianchi, *Monsieur* Dupont and *Signora* Rossi will be **chaos and confusion.**

III. INCONSISTENCY OF CONFLICT OF FAMILY STATUSES WITH PRINCIPLES OF EU LAW

40. Eliminating the differences among the **substantive** legislations of the Member States on *conditions* and *effects* of marriage, adoption, kinship, divorce, paternity, and so on, is neither feasible in the foreseeable future nor desirable, because it is not strictly necessary to prevent the kinds of conflicts discussed above for the individuals concerned. But all players involved – the Member States and the European Union – should make sure that this diversity does not cause inextricable conflicts.

41. If the motto of the European Union is « ***united in diversity*** », which in French is « *unie dans la diversité* », « *unie* » being presumably referred to the Union, while the Italian version sounds « *uniti nella diversità* », « *uniti* » being ostensibly referred to the **Member States**, the situation of conflicts described above is certainly not that of a *diversity resulting in unity and harmony,* but that of a *diversity generating conflict, discord and division* between the Member States as to the rights and obligations of the EU citizens and EU residents who have acquired a family status in Member State A which is not recognized in Member State B. **While *legal pluralism* may be a source of wealth and fuel human progress, *legal conflicts* are contrary to the very essence, and defeat the very purpose, of Law and Order**.

42. As a result, each and all of the Member States should have an interest in sparing their citizens and residents the hardship, confusion and disorder resulting from those situations of conflicts (unanimity being required within the Council in order to take steps concerning « *family law with cross-border implications* »[9]). Each and all of the Member States should be concerned with advancing the interests of Law and Order and contributing to the prosperity of their citizens and residents. As to the EU, it has not only the **power** but increasingly a **duty** towards the EU citizens and EU residents to prevent or resolve those conflicts, whose threat or existence is hardly consistent with the objective of creating an « *area of freedom, [security] and justice* »[10] (1) as well as with the *human rights* (2).

1. INCONSISTENCY WITH THE OBJECTIVE OF CREATING AN AREA OF *FREEDOM, (SECURITY) AND JUSTICE*

43. **Justice.** The conflict of family statuses and of the disorder and confusion they have the potential to create in the sphere of the affected individuals threatens to cause injustice to those individuals.

- If a dispute arises between those individuals as to whether or not some specific rights and obligations have arisen between them, and Member State A of creation of the family status says that the individuals have those rights and obligations while Member State B denying recognition of that family status says they do not have those rights and obligations, this may, as we have seen (points 36-38), ignite litigation between the individuals and encourage « *race to the forum* ».
- To the extent that each of the Member States A and B will refuse recognition of the decisions made by the other on the ground that the other Member State's judge has not applied the status that the individuals possesses in its own view, a conflict of adjudications is bound to arise and this conflict is not resolved by the law and may result in denial of justice (« *déni de justice* »; « *Rechtsverweigerung* »), which is itself an injustice. Such a conflict will then, as we have seen (point 38), be solved through

[9] Article 81(3) TFEU.
[10] As Article 67(1) of the TFEU provides.

mechanisms other than legal mechanisms, that is self-justice and law of the jungle behaviours.

44. **Freedom.** Existence of conflicts of family statuses run counter to the objective of shaping an area of *freedom*, to the extent that this freedom includes the **fundamental freedoms** on which the European Union rests, and particularly the **freedom of persons** – of *movement*, of *establishment*, of *exercising a profession*, of *purchasing and moving assets*. Indeed, those who have acquired a family status in Member State A may prefer not to move or transfer assets to Member State B to the extent that Member State B fails to recognize that family status and pave the way to a conflict of family statuses, i.e. to confusion and disorder in the personal and financial sphere of the individuals concerned.

This has been recognized and proclaimed by the European Court of Justice in the ***Grunkin-Paul*** case with respect to the area of surnames[11]. The Court of Justice held that the fact for a child who has obtained a particular family name in Member State A (Danemark) based on the substantive law of this Member State **not to have this family name recognized** in Member State B (Germany) with which the child also have « strong links » (point 27) represents an obstacle to the **freedom of movement of this child.** The Court of Justice has also emphasized the « **serious inconvenience** » (point 29) caused to the child as a result of the differences in the surname resulting from the « documents, attestations, certificates and diplomas » issued by both Member States (point 27).

Now, it would seem that the « inconvenience » that results for a person from having being awarded by Member State A the status of a child of another person (through adoption or surrogacy, for example) and not having that status recognized in Member State B with which he or she has significant ties **is even more « serious » in terms of one of the core elements of his identity, i.e. the critical question of who is his father and who is his mother.** As the ECHR has indicated, « an essential aspect of the individual's identity is at stake as soon as filiation is involved »[12] and that « the right to privacy, which implies that everyone has the possibility to establish the substance of its identity, including its filiation » (translation is ours[13].

As to *Signor* Bianchi and *Monsieur* Dupont, they may decide not to move from France to Italy even if they both may have been offered some attractive professional positions in Italy for fear that the marital status they have acquired in France is not recognized in Italy and that they may be faced with inextricable difficulties. *Signor* Bianchi may also prefer to move all his assets to France rather than leaving some of them in Italy to reduce the possibility of any litigation arising between *Monsieur* Dupont and his own brother and sister to secure his assets upon death.

If a child is born through surrogacy in the UK to a Hungarian mother and a Hungarian father while they were both residing and working in the UK, they may prefer not to move back to Hungary for fear of causing the child to lose status in Hungary and of losing themselves paternity and maternity rights.

[11] ECJ, 14 October 2008, C-353/06.
[12] « *un aspect essentiel de l'identité des individus est en jeu dès lors que l'on touche à la filiation* » (26 June 2014, *Mennesson v. France*, point 80).
[13] « *le droit au respect de la vie privée, qui implique que chacun puisse établir la substance de son identité, y compris sa filiation* » (26 June 2014, *Labassée v. France*, point 27).

2. INCONSISTENCY OF CONFLICT OF STATUS WITH HUMAN RIGHTS

45. The conflicts of statuses have also, on a number of occasions, been held to entail consequences which are **contrary to human rights of the individuals concerned**. To be true, this has so far taken place in the children area, both regarding **adoption** – *Wagner* case[14] and *Negrepontis* case[15] – and **surrogacy** – *Mennesson* and *Labassée* cases[16]. But it is easy to anticipate that the Strasbourg Court will in the near future reach the same conclusion in other areas of the family law.

46. In each of those cases, the Strasbourg Court held that refusal by a Member State (Luxembourg, Greece and France) to recognize the child status and the parental status that had been validly conferred abroad according to the substantive law of the country of origin resulted in violating the rights of the child and the parents to respect for their family life. Interestingly, in all those cases, the State having created the controversial status was **extra-European** (Peru, Michigan, California and Minnesota). There is good reason to believe that if failure by a Member State to recognize a family status created in a **Third State** already qualifies as a **violation of human rights** within the meaning of the European Convention of Human Rights to which the Third State is not a party, this is even more so – and the violation is in principle, and all things being equal, even **less justified** – if a Member State fails to recognize a status validly conferred by another Member State, both Member States being party to the European Convention of Human Rights.

> In the *Wagner* case, the adoption was of a *minor,* the adoptive parent being an unmarried woman. The adoption was pronounced in Peru and Luxembourg had refused to recognize it on the ground that that the adoptive mother was a citizen of Luxembourg and that the substantive law in Luxembourg prohibits adoption by an unmarried woman. While the recognition had been requested for the purposes of registering the legal status in the relevant civil status registry as well as for purposes of nationality, the ECHR also mentioned other effects, such as *succession* (point 29 of the decision).
>
> In the *Negrepontis* case, the adoptee, Mr Giannisis, was an *adult* and the adoptive parent, Mr Negrepontis, an unmarried man who happened to be a bishop of the east orthodox Christian church. The adoption was pronounced in the State of Michigan (U.S.) and neither the adoptee nor the adoptive parent had taken steps to have that status recognized in Greece. After Mr Negrepontis died, a dispute arose as to whether Mr Giannisis was allowed to carry the family name of the deceased and, more importantly, as to who was entitled to the deceased's fortune. The brothers and sisters of the deceased claimed they were his legitimate heirs *ab intestato* due to Mr Giannisis having, in the eyes of Greece, no status of adoptive child, the adoption established in the U.S. being not recognizable in Greece. Mr Giannisis argued that he did have the status of surviving child in the eyes of Greece and, therefore, he was entitled to the whole estate. Greek judicial authorities, including the Supreme Court, declared that the Michigan adoption order did not qualify for recognition in Greece. The Strasbourg Court concluded that failure by Greece to recognize the status of adopted child, including for the purposes of succession, amounted to a violation of the European Convention on Human Rights.

[14] ECHR, 28 June 2007.
[15] ECHR, 2 May 2011.
[16] ECHR, 26 June 2014.

IV. PATHWAYS TO PREVENT INTRA-EU CONFLICTS OF FAMILY STATUSES OR ALLEVIATE THEIR CONSEQUENCES

47. A number of **pathways** are available **in order to avert intra-EU conflicts of family statuses or alleviate their adverse consequences for the individuals concerned**. Each of those pathways has its *strengths* and *weaknesses* – and it is impossible to explore here all of the predictable ones in detail. The solution that may be the best option in a particular area of family law may not prove the most desirable in another area. Also, not all of those approaches may be technically implemented in all of the areas of family law.

48. We will discuss **four** of those methods or strategies: the first is about coordinating the effects of two inconsistent family statuses so as to avert conflicts of rights and obligations (1); the second is about preventing the conflict of statuses by requiring mutual, compulsory recognition by all Member States of a family status created by one of them (2); the third is bringing together the competent authorities of two or more Member States and have them participate in a kind of co-decisions mechanisms (3); the fourth is to progressively develop an EU substantive legislation on creation and termination of family statuses and have it administered by EU authorities whose decisions are binding on all Member States (4).

1. OPTION 1: ALLOWING CONFLICT OF STATUSES BUT COORDINATING THEIR EFFECTS

49. The first option rests on a two-fold premise:

- on the one hand, Member State A is allowed to **create** a family status based on its own substantive law while Member State B is allowed **not to recognize** it based on its own family law policy, which means that the individuals concerned have a family status for Member State A and another family status for Member State B;

- on the other hand, when it comes to **private law effects**, coordination is achieved by requiring each Member State to give effect to the status that the individuals concerned have **in the eyes of the Member State whose law is applicable to those effects.** As a result, if applicable law is that of *Member State A of creation* of the family status which Member State B has failed to recognize, Member State B has to apply the non-recognized status for the purposes of those effects; conversely, if the law applicable is that of *Member State B of non-recognition*, Member State A should defer to the status that the individuals have in the eyes of Member State B and therefore not give effect, for those limited purposes, to the status that its authorities have validly created.

  > France remains free to grant *Monsieur* Dupont and *Signor* Bianchi the possibility of entering into same-sex marriage and Italy remains free not to recognize this marriage. Failure by Italy to recognize this marriage means for example a) that *Signor* Bianchi will not be reported as « married » (« *coniugato* ») in the Italian civil status registry (« *registro dello stato civile* »), b) that *Monsieur* Dupont will not qualify for Italian nationality based on marital status, which he does not possess, c) that *Monsieur* Dupont and *Signor* Bianchi may not be regarded by the Italian authorities as spouses for tax or social security purposes, etc.

But when it comes to **private law effects** (maintenance, marital property, succession, family name, etc.), the *French status* (that of spouses) will prevail, including before the Italian authorities, when French law applies to those effects, while the *Italian status* (that of non-spouses) will prevail, including before the French authorities, when Italian law is applicable to those effects, and the German status (whether Germany recognizes the French same-sex marriage or fails to recognize and support the Italian position) will prevail, including before the Italian and French authorities, when German law is applicable to those effects.

- For example, if *Signor* Bianchi dies intestate and his succession is governed by **Italian law**, because *Signor* Bianchi had his last habitual residence in Italy (based on article 21 of the Succession Regulation, which would prevent *Signor* Bianchi to choose French law), French authorities will have to regard *Signor* Bianchi as having no surviving spouse for the purposes of the distribution of his estate upon death. As a consequence, in the potential dispute between *Monsieur* Dupont and *Signor* Bianchi's brother and sister, French authorities will have to find for the *Signor* Bianchi's brother and sister.
- If the succession of *Signor* Bianchi is governed by **French law**, typically because *Signor* Bianchi had his last habitual residence in France, then the Italian authorities will have to accept that, for succession purposes, *Monsieur* Dupont is the surviving spouse and they will have to uphold his claim to inherit the whole of his assets, thereby excluding *Signor* Bianchi's brother and sister from the succession.
- If *Signor* Bianchi and *Monsieur* Dupont have moved to **Germany** and *Signor* Bianchi dies intestate with habitual residence in **Germany**, then German law applies to his succession. Now, if Germany recognizes the marital status of *Signor* Bianchi and *Monsieur* Dupont, then German, French and Italian authorities will have to apply the status of surviving spouse and distribute the assets accordingly.

To the extent that the Regulations applying to effects of a family status allow the **parties to choose the law applicable** – as is increasingly the case: Succession Regulation, Maintenance Regulation, Proposals for Matrimonial Regime provide for some measure of *optio iuris* – and the law of the Member State of creation of a family status is included among those laws which may be chosen by the parties, **those EU conflict rules allowing for party autonomy would contribute, under this Option 1, to preventing conflicts of family statuses** (see example under point 52 below).

50. This approach also and *a fortiori* requires Member State B of non-recognition to give effect to **any foreign judgment** of Member State A of creation based on the family status created in A and on the substantive law of A. In other words, **Member State B is no longer permitted to oppose recognition based on public policy due to the fact that the status created in A has not been recognized in B.**

If a French judgment awards and transfers the whole estate of *Signor* Bianchi to *Monsieur* Dupont based on French law, which is applicable according to the Succession Regulation, and part of *Signor* Bianchi's assets are in Italy, the Italian exequatur judge will not be permitted to deny recognition of the French decision on the ground that the same-sex marriage between *Signor* Bianchi and *Monsieur* Dupont was denied recognition in Italy.

51. Although complex to implement, Option 1 attempts to preserve and harmonise the right of a Member State to create a family status and the right of another Member State not to be bound by a family status that offends its own concept of family law. Steps are taken only to the extent that is strictly necessary to **avoid inextricable conflicts of legal rights and obligations** whose threat encourages litigation and whose occurrence ultimately creates confusion, disorder and chaos for the individuals.

> In each of the three scenarios stipulated above (point 50), there is **no conflict of rights and obligations** when it comes to determining who has title over the assets of the succession. *Monsieur* Dupont as well as *Signor* Bianchi's brother and sister will benefit from a **reasonable certainty and predictability** as to their rights and obligations with respect to those assets. *Monsieur* Dupont knows, in the first scenario, that he has no legitimate claim over *Signor* Bianchi's assets and he is unlikely to be willing to start judicial proceedings to secure them. The brother and sister of the deceased know, in the second scenario, that they have no legitimate claim over their deceased brother's estate and they are unlikely to file an action against *Monsieur* Dupont but will spontaneously hand over to him those assets that are in their possession. **Litigation is reduced and so are the costs of justice for the French and Italian taxpayers.**

52. The price to pay for embracing this approach is **a measure of incoherence** as to the outcomes because, with respect to *some* effects, two individuals have a particular status, whereas with respect to *other* effects, they have an incompatible status.

> Let us assume that *Monsieur* Dupont and *Signor* Bianchi have chosen French law as applicable to their matrimonial property regime (which the Proposed Regulation on Matrimonial Property Regimes – see point 26 above – will certainly allow them to do). If *Signor* Bianchi dies intestate having his habitual residence in Italy, then *Monsieur* Dupont will be regarded as *spouse* (in the whole of EU) for the purposes of distributing *marital property* whereas he will be regarded as not being a *surviving spouse* (in the whole of EU) for the purposes of *succession*.

53. If this approach is adopted, it would be advisable – and indeed arguably *necessary* – to prevent Member State B of non-recognition from allowing one or both of the individuals concerned or other individuals to seek and obtain from its authorities a family status which is incompatible with the non-recognized one, otherwise, as seen above (point 39), chaos in the private sphere of individuals can quickly become irreversible. As a consequence, Member State B of non-recognition may be required to report in its civil status registry that the person has acquired a family status in Member State A, although that family status has not been recognized in B.

> Even if Italy is free not to recognize the status of married of *Signor* Bianchi and *Monsieur* Dupont, Italy should nonetheless be prohibited to allow *Signor* Bianchi to marry *Signora* Rossi in Italy as long as the marriage between *Signor* Bianchi and *Monsieur* Dupont is not dissolved (in France or in any other country for which *Signor* Bianchi and *Monsieur* Dupont are married).
>
> If fatherhood and motherhood of Mister Smith, a UK national, and *Frau* Steinbeck, an Austrian national, with respect to a child born through surrogacy in the UK is not recognized in Austria, the Austrian authorities should nonetheless be prevented to allow the creation of incompatible child status, and for example to put the child for adoption by parents other than Mister Smith and *Frau* Steinbeck.

2. OPTION 2: MAKING MUTUAL RECOGNITION OF FAMILY STATUSES COMPULSORY

54. The second approach is technically easier to implement, although it may be viewed as impinging more intrusively on the sovereignty of the Member States. According to that approach, the family status validly created in a Member State A is binding not only on the authorities of that Member State but **also on the authorities of Member State B as well as of all other Member States.**

> Whoever is validly married in France earns marital status in the whole of EU; whoever is validly adopted in the UK, has adoptive child status in the whole of EU; whoever is validly registered partner in Germany enjoys registered partner status in the whole of the EU; whoever is parent of a child born through surrogacy in Greece is legal parent of that child in the whole of the EU; whoever is divorced in Sweden has the status of divorcee in the whole of the EU, etc.
>
> This means that **Brussels IIa Regulation would also need to be revised** as it still allows Sweden to issue a divorce decree while allowing Ireland not to recognize this divorce (although on limited grounds) nor the status of divorcees that Sweden conferred to the parties at the Swedish proceedings (see above, point 31).

55. As a result, once a Member State A has awarded a family status to two individuals, the Member State B with which the individuals also have a strong connection **will lose the option not to recognize that family status**. Mutual recognition **becomes compulsory or mandatory** and ultimately is no longer a true recognition in the traditional sense of the word, which involves the possibility for the « State addressed » or « requested State » to assess the judgment or public act and the relationship that it has established and not to recognize it, in part or in whole. Once they have acquired a status in Member State A, the individuals will both enjoy it and have to comply with all the mutual obligations that it generates in Member State B in principle for all effects that this status is capable of generating.

> Once the partnership between *Herr* Steiner and *Kurios* Anthopoulos is registered in Germany, Greece will, under this alternative approach, have no choice but to recognize the status of registered partner in respect of maintenance, succession, property consequences, and so on. On the other hand, if *Herr* Schmidt, German national, and *Kuria* Nikolopoulos, Greek national, have recourse to *surrogacy* in Greece, the filiation established through surrogacy in Greece will have to be recognized in Germany in respect of all effects flowing from that status (custody, access, family name, maintenance, succession, and so on).

56. In order for this Option 2 to be acceptable, however, Member State A should be prevented to give rise to a particular family status if the individuals concerned **have no sufficient geographical connection with it.** This is important to avoid « **legal tourism** » (*same-sex marriage tourism, surrogacy tourism, adoption tourism*, etc.) that has little to do with the principle of freedom of persons as encapsulated in the EU founding documents and DNA, and will unnecessarily undermine the freedom of a State to equip itself with the substantive family-law legislation that reflects its own values without advancing the freedom of another State to allow individuals having a connection with it to benefit from its own substantive family-law legislation and the legal facilities it offers.

> For example, it would not be unreasonable to prevent Italian same-sex couples having no connection with France but wishing to get married from being able to spend two-days in France and getting married there. Nor would it be unreasonable to prevent French couples having no connection with Greece to resort to surrogate

mothers in Greece and travel there to obtain the delivery of the baby (cp ECHR, *Mennesson*, point 62).

57. The particular connection that is sufficient to allow a Member State A to create a family status **may be different** depending on the areas of family law involved.

- The connection required may be *stronger* (and typically consists of a combination of two connecting factors) when it comes to some **controversial institutions** that some Member States allow and other Member States are strenously opposed to, such as *same-sex marriage*, *surrogacy* and *adoption by homosexual couples*.
- The connection required may be *lesser* when it comes to institutions that are **common to all Member States** even if the substantive requirements are different, such as heterosexual marriage, divorce, acknowledgment of fatherhood, establishment of fatherhood through paternity action and disavowal of paternity.

  When it comes to *same-sex marriage*, EU legislation may, in order to allow a Member State to celebrate it and confer the relevant status to two applicants, require nationality *and* residence of one of the applicants or nationality of one applicant *and* residence of the other or residence of *both* applicants and it can also require a *qualified residence* (six-month residence or one-year residence or two-year residence). Regarding *surrogacy* or *adoption by same-sex couples*, EU legislation may require residence of both intended parents or nationality of one of them *and* residence of the other, etc. On the contrary, when it comes to *heterosexual marriage* or adoption by *heterosexual spouses*, nationality *or* (not « *and* ») residence of one of both spouses may be sufficient.

58. To ensure that the required connection is really satisfied, the Member State other than that whose authorities have been requested to create the status and which also have a connection with the parties (and which will be required to recognize the status if and when it is created) **may be allowed to submit its observations and to challenge satisfaction of the relevant conditions, including the required geographical connection.** In case of disagreement between the authorities of the Member States on whether the connection is satisfied, the **matter may be referred to an EU higher authority whose decision will be binding on the authorities of the Member States**.

Let us stipulate that the EU legislation embracing this Option 2 requires the two applicants none of whom has the French nationality to be both habitually resident in France and to have been so for a minimum period of one year. *Signor* Bianchi, Italian, and *Signor* Rossi, also Italian, file with the French « *officier de l'état civil* » an application for marriage. The French « *officier de l'état civil* » may be required to contact the Italian authority (« *ufficiale dello Stato civile* ») who, once the marriage is celebrated, will be tasked with inscribing it in the Italian civil-status registry and inform them of the application for same-sex marriage. The Italian authority may have the possibility of **submitting its observations within a specific time-limit**, for example 30 days (which may be the same as for the *bans de mariage*) and, typically, argue that *Signor* Rossi is actually resident in Italy and does not qualifies for same-sex marriage in France. In case of **disagreement** between the French authorities, who are of the view that the required connection with France is fulfilled, and the Italian authorities, who are of the opinion that the required connection is not fulfilled, an EU authority may be seized of the matter and decide in a way that it will be binding on both French and Italian authorities.

59. A mid-way solution between Option 1 and Option 2 would be to require Member State 2 to recognize the status created in Member State 1 but **only after a period of time** starting from the creation of the family status (one year, two years etc.).

3. OPTION 3: HAVING TWO (OR MORE) MEMBER STATES PARTICIPATE IN THE CREATION OR TERMINATION OF STATUS THROUGH CO-DECISIONAL MECHANISMS

60. A third alternative is about having the Member States that present a connection with the individuals to **participate in the decision whether or not to create the particular family status** for which those individuals (or one of them) apply. Rather than allowing Member State A to give rise to that status and allowing Member State B to subsequently deny recognition of that status, typically based on public policy, this option suggests that it may make more sense to require the authorities of Member State A to **inform** the authorities of Member State B about the application that has been filed with them and to allow the authorities of Member State B to **submit their observations** as to whether or not conferring that status comports with the interests of the persons involved or **whether the recognition may be problematic**.

- If both the authorities of Member State A and Member State B *agree* that the status should be awarded to the applicants, then the status will be created in B and will be binding on both Member State A and Member State B which took part in the creation process as well as on any other Member State with which the individuals, at the time of creation of the status, had no connection and which had no title to be involved in the process of conferment of that status. If they both agree that it is better not to award that status, that status will not be created by the authorities of Member State A (and, obviously, will not have to be recognized in Member State B).

  In case of a **proposed surrogacy agreement** filed with the UK authorities by two Italian citizens living in London and involving a proposed surrogate mother also living in the UK, the UK authorities may have to contact the Italian authorities of the nationality of the intentional mother and father (as well as of the « intentional child ») and inform them of the proposed agreement between the applicants and the surrogate mother. The Italian authority will then have the possibility of **stating its views** and, for example, take position **against** the implementation of the proposed agreement. The UK authorities will have to take into account those views and may, for example, **refuse** to authorise implementation of the surrogacy. If the Italian authority does not oppose the implementation of the agreement, then the UK authorities may decide to authorise implementation. If a baby is born as a result of it, and in the UK act of birth he or she is indicated as child of the intentional mother and father, Italy would have no longer the option not to recognize this status, Italian authorities having being consulted and having not opposed to it. **Any other Member State** with which the child or the parents may subsequently develop a particular connection, typically by a subsequent transfer of domicile or residence, would **also be bound** by, and compelled to give effect to, that status.

- If the authorities of Member State A and Member State B *disagree*, the result may, depending on the particular areas involved, be a) either to prevent the creation of the family status or b) to permit the creation all the same and compel Member State B to recognize that status, or c) to have the disagreement settled by an EU authority.

If the UK authorities want to authorise implementation of the agreement notwithstanding the opposition of the Italian authorities, *one option* would be to allow them to do so and require the Italian authority to respect and recognize the parent-child relationship that will arise. **Article 11(8) of the Brussels IIa Regulation** provides for a similar « co-decisional » mechanism where the *Member State of refuge*, in the case of a cross-border parental child abduction, is allowed to state its views against the return of the child and the *Member State of the habitual residence* has to take into account those views although it retains the « last word » and, as a consequence, may require the return of the child all the same. An *alternative option* would be to require the UK authorities to submit the disagreement between the UK and the Italian authorities before an EU authority the decision of which would be binding on both Member States.

61. This kind of « **co-decisional process** » – or « **collaborative process** » – is not feasible nor desirable in all areas of the family law but may be feasible and desirable in some of them, typically in some areas of children law where the authorities concerned have to proceed based on the « best interests of the child », which allow them to exercise a measure of discretion, predictability being a less cogent concern. An interesting model in this respect is the **1993 Hague Convention on Inter-Country Adoption,** whose basic scheme and purpose is to bring together the authorities of two States, that of the residence of the child and that of the residence of the applicants, and have them *agree* on the adoption process so as to avoid a situation where a State pronounces an adoption and the other State will not recognize it, i.e. so as to **avoid a conflict of family statuses for the individuals concerned.**

It is true that, as recalled above (point 23), Article 24 of the 1993 Hague Convention on Inter-Country Adoption still allows a State Party not to recognize the adoption pronounced in another State Party on public policy grounds based on the interests of the child (based on *its own* view of the interests of the child). But the possibility for the State Party of residence of the applicants to invoke this non-recognition ground **is seriously curbed** by the fact that its authorities took part in the process and had all opportunity to raise any objection based on their own legislation and to stop the process based on their own public policy. On the other hand, any other State Party whose authorities were **not involved** in the cross-border proceedings – typically the State of nationality of the adoptive parents or of one of them or the State of nationality of the child – or any other State party with which the adoptive child and the adoptive parents may develop a subsequent bond (typically by moving their domicile there) is still permitted, under the 1993 Hague Convention, not to recognize the adoption based on its own public policy and thereby to create a limping relationship.

4. OPTION 4: ENACTING EU LAWS ON CREATION AND TERMINATION OF FAMILY STATUSES AND SETTING UP EU AUTHORITIES TO ADMINISTER THEM

62. Option 4 is a **long-term** perspective. It is going to require a significant transformation of the current landscape, which makes it hardly implementable in the near future. It is about shaping and enacting **EU *optional* legislation** about conditions to be awarded a family status as well as, preferably, to set up **EU authorities** – EU *administrative* authorities, such as **EU civil registrars** (« *officiers de l'état civil européens* »), and EU *judicial authorities* – which would be tasked with administering this EU substantive legislation and confer the relevant family status if the requirements that such legislation

provides are fulfilled by the applicants. The **procedure** to be followed before the EU authorities would also be laid down by EU legislation.

> One model in this respect is the **Unified Patent Court**, which will start operations in a few years, and will consist of a central division in Paris and sections in London and Munich (article 7(2) of the « Unified Patent Court Agrement ») as well as a number of regional and local divisions (Nordic division for Sweden, Lithuanian, Latvia, etc., an Italian division for Italy, etc.). So EU civil registrars and EU family court may have a central division or office (with some sections) and a number of regional and local divisions or offices.

63. This EU legislation would be *optional* in that **it will not replace the substantive legislations of the Member States**. The EU legislation would provide an *option* typically for the individuals having contacts with more than one Member States. Those individuals will no longer have to resort to *mono-national law* and *mono-national authorities* of one only of the Member States with which they have connections but could rely **on an EU law and EU authorities.**

> *Madame* Dupont and *Signor* Bianchi would no longer be forced to choose between either a French marriage or an Italian marriage but they would be able to rely on an **EU marriage.** They would have the option to have their marriage solemnized by the central, regional or local *officier de l'état civil de l'Union européenne* (in Paris or in Milan, etc.). The marriage, once celebrated by the EU civil registrar following the procedure also laid down by EU legislation, would **obviously exist both in France and Italy and in all Member States**. The same would be true for *Monsieur* Dupont and *Signor* Bianchi to the extent that the EU substantive legislation would permit same-sex marriage. No conflict of statuses would be permitted to arise.

64. Needless to say, this would thus have to be done gradually. **Adoption may possibly be an area from where to start.**

- This is so, on the one hand, because the cross-border character of family relationship is yet more frequent in the adoption law – the child often coming from a country other than that of the applicant(s) – than in the area of celebration of marriage or of the establishment of paternity.
- On the other hand, because the Member States seem to be more acutely aware of the harm that may result for the child if a Member State **is left free to issue an adoption order and another Member State is left free not to recognize it**, which harm has indeed been repeatedly underscored by the European Court of Human Rights[17].

  > Wishing to adopt a child, Mrs Svensson, Swedish national, and *Senhor* Pessoa, Portuguese national, a married couple living in the Netherlands, would be entitled to resort to **EU adoption** handled by EU authorities scattered across the EU territory. The procedure may for example be started with the local or regional division of the EU family court responsible for Portugal or the Netherlands or Sweden or with the central division in Brussels. The substantive requirements would be governed by EU legislation which would have to determine whether unmarried couples may adopt, minimum age, etc. The Portuguese and the Swedish protection authorities and governmental agents would be allowed, if they so wish, to intervene in the procedure. If the adoption were pronounced by the EU authority, it would be binding on all Member States, including Portugal, Sweden and the Netherlands. **No refusal to recognize**

[17] ECHR, 3 May 2011, n. 56759/08, *Negrepontis,* ECHR, 28 June 2007, n° 76340/01: see above, point 47.

would be possible. The Member States concerned would no longer be permitted to disagree on whether or not the individuals concerned have the status of adoptive parent or of adoptive child. The conflict of status would be averted.

The changes that this system will bring about over the current scheme of the 1993 Hague Convention on Inter-Country Adoption are significant.

- Under the 1993 Hague Convention, the State of habitual residence of the applicant(s) essentially applies its **own *mono-national* substantive law** (sometimes – but it is rare – in addition to the mono-national substantive law of a foreign country as designated by its conflict of law provisions) **to the question whether the applicant(s) is or are entitled to adopt** (whether an applicant alone is allowed to adopt, what's the minimum and maximum age of the applicant(s), whether there has to be a minimum or maximum age gap between the applicant(s) and the child, etc: Art. 5 a) and 17 d) of the Convention)[18]. On the other hand, the State of habitual residence of the child essentially applies its **own mono-national substantive law** to the question whether the **child is adoptable, including whether consent of some persons or institutions is required** (of the child him- or herself, of the biological parents, etc.), how this consent, if necessary, should be expressed, and, if consent is withheld, whether and under which circumstances, adoption may be pronounced all the same (see Art. 4 a), c) and d of the Convention), except for the compliance with some formal and substantive provisions which are laid down by the 1993 Hague Convention itself (e.g. Art. 4 *d)* 2), 4 *d)* 4)[19]. In addition to being complex, application of two mono-national domestic sets of legal provisions may result in discouraging applicant(s) from adopting.

  For example, an unmarried heterosexual couple of Italians (or Brits or French and so on) living **in Italy** or an unmarried Luxembourg (or Portuguese, or Spanish, and so on) woman living **in Luxembourg** are, today, prevented from adopting a Romanian child (or a child of any residence or any nationality) through 1993 Hague Convention because Italian or Luxembourg law is, based on the 1993 Hague Convention, applicable to the question whether the applicant(s) are good candidates for the adoption and the answer provided by Italian law, which prohibits adoptions by cohabitees, and Luxembourg law, which prohibits adoption by single woman, **is that they do not qualify for adoption**. To the extent that the EU substantive adoption law that is discussed under this Option 4 **would be more liberal** than the one that is in place in some of the EU Member States as to the question of *who is entitled to adopt*, **a significant number of intra-EU adoptions would be possible under this Option 4 whereas they are impossible under the current legal framework**.

- As repeatedly indicated above (points 23 and 61), the 1993 Hague Convention still allows a State Party not to recognize, based on its own public policy, the adoption pronounced in another State Party, **which would no longer be possible if the adoption order were issued by a European – as opposed to mono-national – authority.**

[18] See for example A. Bucher, in A. Bucher (ed.), Commentaire Romand, Loi sur le droit international privé – Convention de Lugano, Helbing Lichtenhahn, 2011, p. 615, n° 29.
[19] See A. Bucher (note 18), p. 617, n° 36.

RECOGNITION OF INTERCOUNTRY ADOPTIONS - PRACTICAL OPERATION OF THE 1993 HAGUE CONVENTION

Laura MARTÍNEZ-MORA

KEY FINDINGS

- All 95 Contracting States to the 1993 Hague Convention (including all the European Union Member States) benefit from the **automatic recognition of intercountry adoptions done between them**.
- This **automatic recognition is based upon the adoption being granted in accordance with the guarantees and safeguards of the Convention**. In other words, intercountry adoptions need to respect the guarantees and safeguards established in the Convention in order to be recognised.
- The 1993 Hague Convention allows for **recognition which is faster, simple**, **low-cost** and provides **certainty** that the parents of an adopted child are recognised as his/her parents in all other Contracting States.

1. INTRODUCTION

This note is prepared for the Workshop on "Adoption – Cross-border legal issues" that will take place at the European Parliament on the 1st December 2015. This workshop will discuss, among other things, the cross-border recognition of both intercountry adoptions and domestic adoptions.

The main objective of this note is to present how the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter "the Convention" or "the 1993 Hague Convention") regulates the automatic recognition of intercountry adoption, and also what the achievements and remaining challenges are regarding this particular issue.

2. THE 1993 HAGUE CONVENTION

The 1993 Hague Convention **establishes minimum standards** to protect the rights of children who are subject of intercountry adoption, as well as respecting and protecting the rights of families of origin and adoptive families. In doing so, it **reinforces and adds substantive safeguards** and procedures to the broad principles and norms laid down in the 1989 United Nations Convention on the Rights of the Child (**UNCRC**), in particular Article 21 as well as Article 35, and the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography.

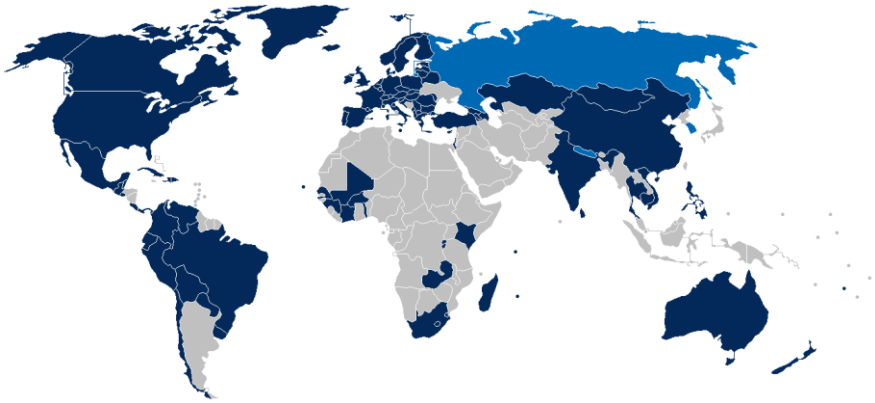
These minimum standards are key to **preventing the abduction, sale and trafficking of children and to eliminating the different abuses** related with intercountry adoption (*e.g.*, corruption, bribery, solicitation of children, falsification of documents, non-qualified intermediaries).

In addition, the Convention establishes a **legal framework for co-operation** between authorities in the States of origin and in the receiving States. The Convention has created a reliable system of co-operation between Central Authorities, competent authorities (*e.g.*, courts and administrative bodies) and adoption accredited bodies,[1] both at the international level and at the national level. This recognised international network of authorities and bodies linked through the Convention ensures greater co-operation, which helps prevent problems and can expedite the adoption process.

For intercountry adoptions done in compliance with the above-mentioned safeguards, the 1993 Hague Convention requires their **automatic recognition in all Contracting States**.

In practice this means that all intercountry adoptions between the 95 Contracting States to the Convention[2] benefit from these guarantees and this automatic recognition. Included among these 95 States are the 28 Member States of the European Union. Importantly, the 95 Contracting States represent both receiving States and States of origin, a factor which demonstrates the Convention's broad appeal and which has been crucial to its success.

Map 1 : The 95 Contracting States to the 1993 Hague Convention (dark blue) **and the 3 States which have only signed but not yet ratified the Convention** (light blue)



Source: Hague Conference on Private International Law (HCCH), 23 November 2015

3. THE SCOPE OF THE 1993 HAGUE CONVENTION

Before presenting the issue of recognition in more detail it is important to recall that the 1993 Hague Convention applies:

All documents mentioned in this document drafted by the Hague Conference on Private International Law (HCCH) are available on the HCCH website at < www.hcch.net > under "Intercountry Adoption Section".
[1] The contact details of over 1000 authorities/bodies are published on the HCCH website.
[2] As of 23 November 2015.

- only where the child and the prospective adoptive parents are **habitually resident** in *different* Contracting States (Art. 2(1)),[3] and

- only to adoptions which create a permanent parent-child relationship (*lien de filiation*) (Art. 2(2)). Such adoptions include both **full adoptions,** which terminate the previous parent-child relationship and create a new permanent relationship, and **simple adoptions,** which establish a permanent parent-child relationship and the transfer of parental responsibility but do not terminate the pre-existing relationship between the child and his/her birth parents.

4. THE MEANING OF RECOGNITION "BY OPERATION OF LAW" [4]

As the Explanatory Report of the 1993 Hague Convention[5] explains, the phrase recognition "by operation of law" in Article 23 means that recognition of adoptions undertaken under the Convention shall take place automatically. This means that there is **no need for** a procedure for:

1. **recognition** (adoptive parents do not need to go to court in the receiving State to seek recognition of the adoption order or follow any *exequatur* procedures);

2. **enforcement** (adoptive parents do not need to go to court in the receiving State to seek enforcement of the adoption order);

3. **registration**[6] (provisions may be made for registration of the adoption in the receiving State, but this must not affect recognition);[7] or

4. **re-adoption in the receiving State** (adoptive parents do not need to "re-adopt" their children in the receiving State).

The Convention integrates the hitherto often separated two adoption procedures in the State of origin and the receiving State into **one single procedure**. It thereby supersedes the practice that an adoption already granted in the State of origin is to be made anew in the receiving State in order to produce such effects.[8] As these two adoption procedures were not co-ordinated, situations could arise where under the laws of the State of origin the child had become the child of the adoptive parents – and perhaps had lost his or her nationality as a result – but then was not allowed to enter and reside permanently in the State where the adoptive parents lived. The child thus fell into a legal limbo. This happened, for example, more than once, when in the 1990s children were hastily adopted from Romania to other States. Nowadays, this may still happen in regard to intercountry

[3] Art. 2 (1): "The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin."
For more information on the concept of habitual residence, see HCCH, "Globalisation and international mobility: Habitual residence and the scope of the 1993 Convention", Prel. Doc. No 3 of May 2015 for the attention of the Special Commission of June 2015 on the practical operation of the 1993 Hague Convention, 2015.
[4] The need for additional procedures to be completed in order to recognise an adoption made in accordance with the Convention should be clearly distinguished from cases where the adoption takes place after the transfer of the child to the receiving State. The latter is permitted under the Convention (see Art. 21). It is the case regarding adoptions from the Philippines and Thailand, where the child is placed for a trial period with the prospective adoptive parents in the receiving State. If the trial period is positive, then the adoption is granted.
[5] G. Parra-Aranguren, Explanatory Report on the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session,* Tome II, "*Adoption – co-operation*", pp. 537-651 (hereinafter, "Explanatory Report").
[6] *Ibid.*, para. 409.
[7] See related challenges, at section 9 of this document.
[8] Explanatory Report, *supra,* note 5, para. 402.

adoptions done outside the scope of the Convention, as well as in situations in which recognition of a domestic adoption is sought in another State.

The Convention turns these two unconnected procedures into a one-step co-operative process, in which the State of origin and the receiving State are inextricably linked. They are obliged to co-operate in the adoption procedure including, as an essential part thereof, the child's migration to the receiving State. This joint responsibility benefits every Convention adoption and reduces the likelihood that issues regarding the adoption will arise after the child leaves his or her country of origin.

This automatic recognition also means that the Convention gives **immediate certainty** to the status of the child, and prevents a revision of the contents of the foreign adoption. However, very importantly, as said above, automatic recognition is **based upon the adoption being granted in accordance with the guarantees established in the Convention**.

5. THE CERTIFICATE OF CONFORMITY OF AN ADOPTION WITH THE 1993 HAGUE CONVENTION

The form of the certificate

The 1993 Hague Convention does not prescribe the formal requirements of the certificate. However, Contracting States have developed a **recommended model form**, which is available on the Hague Conference on Private International Law (HCCH) website. The following 19 European Union Member States are already using this recommended model form when issuing the decision on intercountry adoption: Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden, and the UK.[9] It is highly desirable that those European Union Member States which are not yet applying the agreed model form follow suit.

The content of the certificate

The 1993 Hague Convention establishes that the certificate of conformity of an adoption with the Convention must specify when and by whom the agreements under Article 17(c) were given.

Article 17(c) stipulates that any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if the Central Authorities of both States have agreed that the adoption may proceed. Therefore, if it becomes apparent that the proposed adoption is not in the best interests of the child, or that there has been a significant defect in the procedure, the Central Authorities must not give their agreement under Article 17(c) that the adoption may proceed. Since Article 17(c) is a crucially important procedural safeguard, the certificate requires specific confirmation that both Central Authorities have given their agreement. Of course, this assumes that all other requirements of the Convention are also respected.

The authorities which issue the certificate

At the time of ratification or accession, Contracting States must notify the depositary of the 1993 Hague Convention (*i.e.*, the Ministry of Foreign Affairs of the Netherlands) of the

[9] See HCCH Country Profiles of the Contracting States to the 1993 Hague Convention. Other States using the recommended model form are: Albania, Australia, Burkina Faso, Burundi, Cambodia, Canada (Nova Scotia, Ontario and Quebec), China, Colombia, Dominican Republic, Ecuador, Haiti, India, Lesotho, Madagascar, Moldova, Monaco, New Zealand, Norway, Switzerland, Thailand, Togo, USA and Viet Nam.

identity and functions of the authority or authorities which are competent to make the certification.[10] Without such notification, the depositary will not accept the State's instrument of ratification of, or accession to, the Convention.

6. THE EFFECTS OF RECOGNITION

The recognition of an intercountry adoption under the 1993 Hague Convention includes the recognition of:

- the **legal parent-child relationship** between the child and his or her adoptive parents;
- the **parental responsibility** of the adoptive parents for the child; and
- the **termination of the pre-existing legal relationship** between the child and his or her mother and father, in the case of full adoptions. [11]

7. REFUSAL OF RECOGNITION

It is only possible to refuse to recognise an adoption if that particular adoption is **manifestly contrary to the public policy of the recognising State**, taking into account the best interests of the child. Non-recognition may exceptionally arise, for example, when there has been a violation of the rights of the biological parent, in particular, the absence of informed consent. However, refusal of recognition is usually not in the best interests of a child.

It is doubtful whether non-recognition is the appropriate response for a defect in the procedures (*e.g.,* the report on the child is not complete), or a minor impropriety (*e.g.,* a small bribe was given to a minor official to expedite the process).

If there has been a **serious breach** of Convention procedures (*e.g.,* agreement under Art. 17(c) was not given), the concerned Central Authorities should try to rectify the matter as soon as possible.[12]

8. AUTOMATIC RECOGNITON IS ONE OF THE MAJOR SUCCESSES OF THE 1993 HAGUE CONVENTION[13]

The main way to monitor the implementation of the 1993 Hague Convention is through the Special Commission meetings to review the practical operation of the Convention (hereinafter, "Special Commissions"). These meetings, convened about every five years, are attended mainly by States Parties and States interested in joining the Convention, as well as by international organizations. At the end of each meeting, participants agree on conclusions and recommendations that will guide the implementation of the Convention.

Automatic recognition has been discussed in all the Special Commission meetings since the entry into force of the Convention, including at the last meeting which took place in June 2015. In preparation for the 2015 meeting, the Permanent Bureau of the HCCH distributed

[10] Art. 23(2).
[11] Art. 26(1).
[12] For more information on this issue, please refer to HCCH, *Guide to Good Practice No 1: The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*, Family Law (Jordan Publishing Ltd), 2008 (hereinafter, "Guide to Good Practice No 1"), Chapter 8.7.
[13] This section is partly taken from HCCH, "20 years of the 1993 Hague Convention – Assessing the impact of the Convention on laws and practices relating to intercountry adoption and the protection of children", Prel. Doc. No 3 of May 2015 for the attention of the Special Commission of June 2015 on the practical operation of the 1993 Hague Convention, 2015 (hereinafter "20 years"), section 2.3.

a Questionnaire to Contracting States on the first 20 years of the Convention (which entered into force in 1995). In their responses, **many States commented that the automatic recognition of intercountry adoptions made between Contracting States is a clear improvement** for families on the situation which existed prior to implementation of the Convention. The reason for this improvement is that automatic recognition provides greater certainty, security, and stability as well as quicker, less expensive procedures for families[14] (see also section 4 of this note).

One of the biggest achievements is that **intercountry adoptions** which now take place between States Parties to the Convention **are much more likely to involve greater safeguards, as required under the Convention.** This means that children as well as prospective adoptive parents and biological parents benefit from those greater safeguards which were not present before the Convention existed and are often not required by non-Parties.

In practice, this means that the **children who have been adopted according to the standards of the Convention, and whose adoptions were certified as having been made in conformity with the Convention, were truly in need of adoption and are adopted by a family that is suitable to raise them**. In other words, the Convention minimises the chances that children and biological and adoptive parents are exploited during the adoption process.

Application of the Convention has also **streamlined the adoption process, allowing adopted children to more easily relocate to the receiving State** because, among other things, the competent authorities of the receiving State shall determine – before the adoption is finalised – that the child is or will be authorised to enter and reside permanently in that State (Art. 5). This also leads to greater stability, unlike in non-Convention cases, where a child adopted from abroad may not necessarily be permitted to enter (or reside permanently) in the receiving State. This latter situation, which the Convention effectively prevents if all safeguards and procedures are applied properly, can be tragic for the child and the adoptive family, which may be forced to relocate just to be united with the child.

9. REMAINING CHALLENGES REGARDING THE RECOGNITION PROVISIONS OF THE 1993 HAGUE CONVENTION[15]

There remain two central and significant challenges in relation to the implementation of "automatic recognition", neither of which are new:[16]

Quality of Article 23 certificates

Several States reported that **work still needs to be done to improve the quality of Article 23 certificates** since they do not always include all the necessary information or

[14] See the answers to HCCH, "Questionnaire on the impact of the 1993 Hague Convention on Laws and Practices relating to the Intercountry Adoption and the Protection of Children", Prel. Doc. No 1 of July 2014 for the attention of the Special Commission of June 2015 on the practical operation of the 1993 Hague Convention (hereinafter, "2014 HCCH Questionnaire No 1"), Question 13 (a): Belgium, Canada (in some provinces), Chile, Finland, France, Germany, Ireland, Mexico, New Zealand, Spain, Switzerland and United States.
[15] This section is partly taken from the "20 years" document, *supra,* note 13.
[16] Despite attention being devoted to this topic at previous Special Commission meetings, and recommended guidance and a recommended model form for Art. 23 certificates having been developed and published, there is still much work to be done to "secure", in all cases, the legal status of intercountry adopted children (per Art. 1 (c)). See documentation from previous meetings of the Special Commission on the practical operation of the 1993 Hague Convention (in 2000: Recommendations Nos 17-19, and Report, paras 73-76; in 2005: Recommendation No 3, and Report, paras 67, 105-106; and, in 2010: Recommendations Nos 15-18, and Report, paras 48-54).

they contain incorrect information.[17] This hinders automatic recognition and means that there is often a need for further communication and collaboration to try to resolve the defects in the certificates. It therefore causes delays and legal insecurity for families.

Additional procedures are still needed for recognition in some States

In some States, the Article 23 certificates do not lead to "automatic recognition" in the sense required by the Convention[18] because additional procedures are still required by these States for the adoption to be recognised.[19] As an example, in some States, the adoption decision has to be transcribed into the civil registry in order for it to be recognised.[20]

These additional procedures required for the adoption to be recognised are not consistent with the 1993 Hague Convention. Moreover, they may be particularly problematic if the transcription process takes a long time and, while waiting for the transcription, the intercountry adopted child is neither a national of that State nor, according to that State's law, the legal child of the adoptive parents.[21]

Moreover, it appears that, in practice, adoptive parents in some cases may still request that a court recognise the adoption decision, even if it is not legally required, because experience has shown that difficulties can occur when the Article 23 certificate is relied upon in daily life (due to the unfamiliarity of some authorities with the Convention).[22]

Lastly, even if automatic recognition of the adoption decision occurs, some responses indicated that additional, sometimes lengthy, procedures can be required, for example, to obtain a new birth certificate for the adopted child[23] or for the child to obtain the nationality of the adoptive parents.[24]

10. WAY FORWARD

Recommendations from the 2015 Special Commission meeting to overcome the remaining challenges

Conscious of such challenges in relation to Article 23 of the Convention, in its Conclusions and Recommendations, the 2015 Special Commission emphasised the importance of:[25]

- **clearly designating the authorities** competent to issue Article 23 certificates and keeping this **information updated**;
- **automatically issuing such certificates** following an adoption decision made in accordance with the Convention wherever possible;
- **providing adoptive parents with the original** of the Article 23 certificate without delay and, at the same time, **sending a copy** of the certificate **to the Central Authorities** of both Contracting States;
- **using the "Model Form** for the Certificate of Conformity of Intercountry Adoption"

[17] 2014 HCCH Questionnaire No 1, Question 13 (b): Belgium, Canada, and New Zealand. This could be easily resolved if States used the Recommended Model form approved by the HCCH and available on its website.
[18] See Guide to Good Practice No 1, *supra,* note 12, Chapters 7.2.12 and 7.4.11.
[19] This concern was expressed in responses to 2014 HCCH Questionnaire No 1, Question 13(b) by Canada, Chile, Colombia, Latvia, Mexico, Norway, Philippines and Viet Nam, and also to Question 18 (c) by Peru. The following States acknowledged that additional procedures are required in their jurisdictions: Question 13 (b): Belgium, Brazil (also Question 17 (c)), France and Italy (EurAdopt). See also Question 1: France and Germany.
[20] 2014 HCCH Questionnaire No 1, Question 1: Belgium (this is done by the federal Central Authority), France and Italy.
[21] This is the case in Italy - see 2014 HCCH Questionnaire No 1, Question 13 (b): Italy (EurAdopt).
[22] 2014 HCCH Questionnaire No 1, Question 13 (a): Germany.
[23] 2014 HCCH Questionnaire No 1, Question 13 (b): Australia.
[24] 2014 HCCH Questionnaire No 1, Question 13 (b): France.
[25] See Conclusion and Recommendation No 36 of the 2015 Special Commission meeting. Conclusion and Recommendation No 36 reinforces previous Conclusion and Recommendations on this matter from earlier Special Commissions (in 2000, Conclusion and Recommendations Nos 2(h), 17, 18 and 19; and in 2010, Conclusion and Recommendations Nos 15, 16 and 17).

to promote consistent practice; and

- where an Article 23 certificate is incomplete or defective, **co-operating to regularise the situation**.

In addition, the 2015 Special Commission reminded Contracting States that **no additional procedure may be imposed as a condition of recognition**.[26]

The importance of properly implementing the recommendations from Special Commissions

The Convention depends for its proper operation on close co-operation between States of origin and receiving States. Such co-operation can assist a State in improving its practices to ensure that they are in accordance with the Convention. However, if a Contracting State does not respect the guarantees established in the Convention, other Contracting States may decide not to engage in intercountry adoptions with it.

Contracting States to the 1993 Hague Convention, including European Union Member States, are encouraged to review their own practices, and where appropriate and feasible modify them in order to implement the conclusions and recommendations of Special Commission meetings as well as other guidance established, for example, in the two Guides to Good Practice.[27]

As the Convention does not provide for an international supervisory body to enforce compliance with Parties' obligations, recommendations of Special Commissions are extremely important as they are the primary means of improving the implementation of the Convention. The possibility of the Permanent Bureau assuming a greater supervisory role has been raised in the past. However, the limited resources and mandate of the Permanent Bureau do not make this option possible. Rather, the emphasis has been put on prevention of bad practices, in particular through co-operation and technical assistance. The Permanent Bureau regularly provides advice and support to requesting countries on a wide range of issues relating to the implementation of the Convention.

More recently, the Permanent Bureau has provided, on request, more extensive technical assistance to targeted States (or groups of States) through its Intercountry Adoption Technical Assistance Programme (ICATAP). The purpose of technical assistance provided by the HCCH is to assist States in the implementation of the 1993 Hague Convention, with a view to its effective and consistent operation.

This technical assistance, which is provided in co-operation with other States, as well as organisations such as UNICEF, International Social Service and Terre des Hommes, is indispensable. The Permanent Bureau welcomes further support from States and other international organisations to help with monitoring the operation of the Convention and technical assistance programs.

11. CONCLUSION

Recognition of intercountry adoptions

As the number of Contracting States to the 1993 Hague Convention increases, **the automatic recognition of intercountry adoptions done in accordance with the Convention is becoming more common globally.** A major success of the 1993 Hague

[26] *Ibid*, Conclusion and Recommendation No 37 (see also Conclusion and Recommendation No 18 of the 2010 Special Commission).
[27] See for example, Guide to Good Practice No 1, supra, note 12 and HCCH, *Guide to Good Practice No 2: Accreditation and Adoption Accredited Bodies,* Family Law (Jordan Publishing Ltd), 2012.

Convention is that recognition of adoptions by operation of law is based on a trustworthy procedure, involving key safeguards, for which the State of origin and the receiving State share responsibility. The recognition by operation of law of an adoption decision issued in another State reflects mutual trust between the States involved that the safeguards and minimum standards of the Convention have been respected.

In practice, the feedback received by the Permanent Bureau of the HCCH from States Parties regarding this automatic recognition between States Parties is very positive and it is seen as a **major success of the Convention** (see section 8 above). Therefore, the Permanent Bureau does not see a need to further legislate in this area at the global or regional level.[28]

However, there are still many **intercountry adoptions done with non-Contracting States** (*e.g.,* important States of origin such as Ethiopia, the Russian Federation and Ukraine) and these thus do not benefit from the guarantees of the Convention. The Special Commission to review the practical operation of the 1993 Hague Convention has recommended many times that all Contracting States should, to the extent possible, apply the safeguards and procedures of the Convention also in relation to such non-Contracting States.[29] The follow-up of this Recommendation is important, and in so far as these safeguards and procedures are indeed respected, this may facilitate the recognition of the resulting adoption in other States. However, such recognition is not automatic and remains uncertain. Therefore, all Contracting States, including **European Union Member States**, while acting in accordance with the 2000 Recommendation **should do their utmost to encourage those States and other non-Contracting States to join the 1993 Hague Convention**. This would allow all States and all persons to benefit from **the same widely recognised common global system** which protects the rights of adoptable and adopted children, and those of their birth and adoptive families. It would also assist in efforts to prevent and address the abduction, sale and trafficking of children and to eliminate the different abuses related to intercountry adoption.

Taking into account the success of the 1993 Hague Convention and the fact that an increasing number of States are seriously contemplating becoming a party to the Convention, **assisting such States in becoming parties would be seen as the appropriate path in order to guarantee that all children benefit from the same safeguards,** and avoid a parallel system with less guarantees.[30] For example, European Union Member States could specifically encourage non-Contracting States which are neighbouring counties and/or candidate countries to the European Union to become party to the Convention, and assist them in their path towards that objective. Such measures

[28] See HCCH, "Agreements and other Arrangements between States parties", Fact Sheet No 4 of May 2015 for the attention of the Special Commission of June 2015 on the practical operation of the 1993 Hague Convention, 2015: Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations (Art. 39(2)). Such agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21 (Art. 39(2)). However, such agreements have risks such as: They might supplant rather than supplement the Convention.
- They might not always be consistent with the Convention.
- Article 39(2) agreements are allowed to derogate from the provisions of Articles 14 to 16 and 18 to 21 of the 1993 HC (Art. 39(2)). This may carry the risk that not all safeguards of the 1993 HC will be applied to intercountry adoptions undertaken under such agreements.
- Contracting States may declare to the depositary that they will not be bound to recognise intercountry adoptions made in accordance with an agreement concluded in accordance with Article 39(2) (Art. 25). Therefore, intercountry adoptions done under Article 39(2) agreements would not benefit from automatic recognition in all States Parties to the Convention.

[29] See the Conclusions and Recommendations of the following Special Commissions: in 2000, No 11; in 2005, No 19; and in 2010, No 36.

[30] Along these lines, the 2015 Special Commission noted the risk that the multiplication of bilateral agreements with non-Contracting States could deter these non-Contracting States from becoming party to the Convention (Conclusion and Recommendation No 35).

would complement the work being done through Intercountry Adoption Technical Assistance Programme (ICATAP) of HCCH.

Recognition of domestic adoptions

Finally, some words regarding the recognition of domestic adoptions. **The 1993 Hague Convention does not cover domestic adoptions and therefore some of the problems that existed in regard to intercountry adoptions prior to the Convention may appear in domestic adoptions now** (*e.g.,* domestic adoptions already granted in one State that need to be made anew in another State, problems to enter and reside in another State). Practice shows that this is a challenge these days due to the more frequent movement of persons in our globalised world, and in particular in the European Union with the free movement of persons. It should be noted, however, that this problem is not restricted to the European Union – it is, as such, a world-wide issue, and therefore, it may be useful to discuss this important matter at the global level.

In further work regarding the recognition of domestic adoptions specifically is undertaken, the 1993 Hague Convention may be the source of ideas and good practices that should also be applied to domestic adoptions. Moreover, the *Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions* contains helpful criteria, safeguards and procedures for the recognition of foreign adoptions.

Summary of main recommendations

To summarise, it is crucial that European Union Member States implement correctly the recommendations mentioned above, and in particular that they (as applicable): (1) use the Model Form approved by the HCCH if they are not yet doing so (see section 5); (2) keep the Depositary updated regarding the competent authorities for issuing Article 23 certificates (see section 9); (3) co-operate to regularize the situation where an Article 23 certificate is incomplete or defective (see section 9); (4) ensure that no additional procedures are imposed as a condition to recognition (see section 9); and (5) encourage non-Contracting States to join the Convention, assisting and supporting them in their paths towards signature and ratification or accession.

CROSS-BORDER RECOGNITION OF DOMESTIC ADOPTIONS - OBSTACLES TO FREE MOVEMENT

Ruth CABEZA

KEY FINDINGS

- There is no mechanism within the EU which provides for the obligatory recognition and enforcement of domestic adoption orders made within other Member States.
- The uncertainty of treatment in Member States as to the recognition of the parent child relationship following adoption may serve to act as a barrier to free movement of families when the adopted child was born a citizen of a different Member State.
- If a domestic adoption order is made in a Member State, and it is not recognised in another Member State, the other Member State would not be obliged, pursuant to Brussels II a[1], to recognise and give effect to the parental responsibility which is acquired by the adopters consequent upon the making of the adoption order.
- There is a lack of clarity as to the effect of a domestic adoption order which confers upon the child an entitlement to citizenship of the Member State in which the adoption took place vis a vis the child's nationality at birth. This may have implications for the child in relation to tax and/or national service obligations.
- A lack of uniform recognition of domestic adoption orders throughout Member States may give rise to unanticipated rights and obligations vis a vis third parties arising out of inheritance and intestacy provisions of the country of the child's birth parents.

1. RECOGNITION OF DOMESTIC ADOPTION ORDERS

Since time immemorial cultures across the globe have had mechanisms which provided a framework for a family to offer permanent care to a child who was not their biological child. The concept of adoption is ancient and has evolved over time in different cultures to produce variants, which, even across a geographical areas as small as the EU, can vary widely. However, at its most basic level, the key defining feature of adoption is that it confers on adoptive parents and children the rights and duties that arise between a child and a natural parent. Often, though not always, adoption will also extinguish the rights and obligations between the natural parent and the child.

The legal relationship of parent and child gives a child a legal connection to a primary and extended family unit, from whom it is owed, and to whom it may owe, legally enforceable obligations – including financial obligations. It may also give rise to rights against their family members in relation to inheritance. A child's family connections are often fundamental to their own rights and obligations vis a vis the state of their parent's nationality. If the child's nationality changes as a result of an adoption, the child's duties in

[1] Council Regulation (EC) No 2001/2003 concerning Jurisdiction and the Recognition and Enforcement in Judgments in Matrimonial Matters and Matters of parental responsibility

terms of national service and taxation for example may alter significantly from how they stood at the moment of the child's birth.

It is trite to state that adoption lasts for a lifetime, not just a childhood, but it is an important fact to hold in mind since the recognition of adoption orders is relevant to a person not only during their minority but for the whole of their life, including their working life. **The rights and duties of an adopted adult to their legal family, and to each state of which they are a citizen, should be clear to the adult concerned when moving through the EU. This is particularly the case where a person's failure to comply with such obligations can give rise to criminal liability**. A lack of clarity as to a person's status (while a child or an adult) is therefore wholly unsatisfactory for a number of reasons, among which, is the obstacle that it may present to that person with regard to free movement within the EU.

1.1. The Definition of Inter-Country Adoption

The 1993 Hague Convention[2], which governs intercountry adoption, is limited to adoptions where the adopter is habitually resident in one member state and the child is habitually resident in another member state. Accordingly, **the adoption of a child who is a citizen of country A and is habitually resident in country B, by a person who is habitually resident in country B will not be governed by the 1993 Hague Convention,** since both child and adopters are habitually resident in the same country. Adoptions which have been granted pursuant to the procedures laid down in the 1993 Hague Convention are often referred to as Convention adoptions, and that is a term that will be deployed throughout this note to differentiate between a domestic adoption (ie: one made pursuant to the domestic law of the country granting the order) and an adoption made within a Member State in accordance with the provisions of the 1993 Hague Convention.

The citizenship of the adopter and the child are not relevant factors for the determination of the applicability of the 1993 Hague Convention. The move away from nationality to habitual residence as the determining features of a Convention adoption under the 1993 Hague Convention was a deliberate and considered decision. The rationale behind it was that it was considered that the country of the child's place of habitual residence was better equipped to assess the child as being suitable and available for adoption than the country of the child's nationality or citizenship (if different). This is because the decision is ultimately a welfare based decision, the welfare of the child being the paramount consideration, and the welfare information relied upon to reach that determination would ordinarily be more readily available in the country of the child's habitual residence. It was open to the 1993 Convention writers to make provision that an adoption had to be agreed on a tripartite basis under article 17, if the country of the child's nationality was neither the state of origin nor the receiving state, and/or the child's nationality differed from that of the adopter(s). However, no such provision exists in the 1993 Hague Convention. Indeed if a child is a national of country A, lives in country B and is being considered for adoption by a person who lives in country C, it is only the agreement of country B and C that the adoption should proceed that is required under Article 17 (c) of the 1993 Convention. Furthermore, if country B, like all EU Member States, is a party to the Convention, it is obliged by Article 23 to recognise and give effect to the adoption. These issues are complex and were given very careful thought in the many years that the 1993 Hague Convention was deliberated over. This is particularly clear in paragraphs 71-73 of the Explanatory Report[3] which read:

[2] Hague Convention 33. Convention on Protection of Children and Co-operation in respect of Intercountry Adoption concluded on 29 May 1993
[3]Explanatory Report on the 1993 Hague Intercountry Adoption Convention drawn up by G. Parra-Aranguren; 1994

71. Article 2 does not take into consideration the nationality of the parties to determine the scope of the Convention, among other reasons because the State of the nationality would not be able to comply with many of the obligations imposed by the Convention's rules, such as the preparation of the reports required by Articles 15 and 16. Therefore, even though the nationality of the parties shall not be a barrier to intercountry adoptions, it should not be forgotten that it may be one of the elements to be considered by the State of origin and the receiving State, as well as other personal characteristics, before agreeing that the adoption may proceed, as established by Article 17, sub-paragraph c. 72 Nevertheless, Working Document No 124, submitted by Egypt for the second reading, proposed to add a new article to Chapter I, as follows: "This Convention shall not apply to citizens of the countries in which adoption is considered against the domestic law"; when introduced for consideration, it was amended to read: "This Convention shall not apply to citizens of the countries in which adoption is considered against the public policy unless intercountry adoption is necessary for the best interests of the child". It was explained that the proposal intended to cover the situation that might arise when the adopted child is a citizen of a country which considers adoption to be against its public policy, but resides habitually in a Contracting State where adoption is admitted.

72.The granting of adoption of a child "may well cause the individual grave harm and put him or her in an intolerable situation", because the State of his or her nationality will continue to consider the child as a national and will not give information on him or her, "if they felt humiliated about the lack of consultation concerning the adoption". Besides, the State of the nationality will hold the child accountable for violating its laws, and when returning, he or she will be prejudiced in matters such as taxation. Therefore, the suggested formula aimed to obtain a reasonable compromise, in line with the acknowledged public policy exception in matters of recognition of foreign adoptions, since it would keep the door open for adoption of children who are citizens either of countries which do not recognize adoption but that do not consider it against their public policy, or of countries which consider adoption against their public policy but are willing to recognize adoptions in cases of necessity. However, the proposal could not be considered, in accordance with the Rules of Procedure, for lack of enough support.

73. Although the Convention does not expressly take into consideration the nationality of the interested parties to the adoption, Article 2 refers to the countries where the child and the prospective adoptive parents are resident as the "State of origin" and as the "receiving State", respectively. The expression "State of origin" was criticized, because it may bring about misunderstandings if interpreted as the "State of the nationality". However, it was kept because its specific meaning within the Convention was considered very clear and no confusion should reasonably arise.

While there is a residual power of a Member State to refuse recognition under Article 24 of the 1993 Convention, the basis for such refusal is extremely limited and must be in accordance with the best interest of the child.

1.2. The Definition of International Adoption?

By contrast, where a foreign national child lives in an EU country and is adopted under the domestic law of that country by a person living in the same EU country, there is no obligation under EU law for other EU countries to recognise and give effect to that adoption. While this is probably of little practical consequence when the child is a citizen of the country in which the adoption takes place, the situation is less straightforward when the child is a national of another Member State. As set out below, it is also possible for the courts of one Member State to make an adoption order concerning adopters and children who are both habitually resident in another Member State. It is probably right to say that such adoptions are 'international' but it would be incorrect to say that they are 'inter-country'. When considering whether or not there should be any form of EU instrument

which would require mandatory recognition by Member States of adoptions orders made pursuant to the domestic law of a different Member State, it is suggested that the following questions arise:

- Should there be automatic recognition by all Member States of adoption orders made in accordance with the domestic law governing adoption in the Member State which made the adoption order?
- Should automatic recognition of adoption orders made under the domestic law of a Member State be limited to those made by a Member State in relation to a child who is habitually resident in that Member State and/or a citizen of that Member State at the date that the court became seized of the adoption application?
- Should the adoption order only be automatically recognised if the Member State of the child's place of habitual residence has agreed that the adoption should proceed in advance of the final adoption being granted, in circumstances where the Member State seized with the adoption application is not the Member State in which the child is habitually resident. This could be done by a process analogous to that under Article 17 of the 1993 Hague Convention?
- Should the adoption order only be automatically recognised if the Member State of which the child is a citizen, has agreed that the adoption should proceed in advance of the final adoption being granted, in circumstances where the Member State seized with the adoption application is not the Member State of which the child is a citizen. This could be done by a process analogous to that under Article 17 of the 1993 Convention.
- Should adoptions orders be automatically recognised if the Central Authority of the child's country of habitual residence and/or nationality have been notified of the application process and provided with information and reports relied upon in the proceedings in the Member State seized with the adoption application prior to the adoption order being granted in the Member State (in a process analogous to Article 33 of the 1996 Convention[4] for example)?
- Should an adoption order be capable of being recognised by means of a uniform registration process which allowed for refusal of recognition in terms similar to those set out in Article 24 of the 1993 Convention?

This list is of course not exhaustive, but intended to be an illustration of the issues which need to be considered and the different solutions which may be considered appropriate.

1.3. The Definition of Domestic Adoption

An adoption is a domestic adoption when made pursuant to the law of the country that makes it in circumstances where the 1993 Hague Convention does not apply. There is no EU law governing the jurisdictional basis for the making of a domestic adoption order.

There is no requirement under EU law that at the time of the application for a domestic adoption order the child and/or the adopter is habitually resident in the country in which the domestic adoption order is made. In England for example, an adopter who is habitually resident outside the UK is still eligible to apply to adopt a child provided that they are domiciled within the British Isles (which includes the Channel Islands).[5] Furthermore, there is no requirement under English law that a child is habitually resident in England at the time of the application for, or the making of, an adoption order.

[4] Hague Convention 34. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental Responsibility and Measures for the Protection of Children (concluded 19 October 1996)
[5] S.49 Adoption and Children Act 2002

This means that a person habitually resident outside of the UK can nonetheless adopt a child living in the country of their habitual residence under English law, whether or not the country of their habitual residence is another EU Member State. Clearly the courts of England would have to have regard to whether or not the adoption order sought would be recognised in the country of the child's habitual residence. This would be an important factor within the welfare evaluation that the court must undertake before granting an adoption order. If the adoption order would not be recognised by the country of the child's nationality and/or habitual residence, the uncertainty of status for the child which would exist following such an adoption is likely to be a powerful factor that may well cause the court to refuse to make the adoption order. However, as a matter of English and EU law, the English court would have the power to make the adoption order if it was satisfied that the order was in the child's best interests [6]. Equally, the Member State in which the child and the adopters live would be entitled to ignore that order.

Let us consider an entirely fictitious example to illustrate some of the inconsistencies and practical consequences of the current inter-relationship of domestic versus Convention adoptions:

Abigail was born in Toyland in 2010 to parents who were both citizens of Atlantis working in Toyland. Abigail is a citizen of Atlantis and is habitually resident in Toyland where she has lived her whole life. Marina is Abigail's aunt (the sister of Abigail's father). In 2005 Marina went backpacking round the world and spent some time living and working in Neverland. While in Neverland she met and fell in love with Felicity and in 2007 Marina and Felicity married under the law of Neverland, which provides for same sex marriage. Felicity is a citizen of Neverland and has a domicile of origin that country. Toyland, Neverland and Atlantis are all Member States of the EU. In 2010 Marina and Felicity decided to enlarge their family by adopting a child from Narnia. Narnia is not a Member State of the EU but is party to the 1993 Hague Convention. Simon, a child habitually resident in Narnia, was placed with Marina and Felicity for adoption in February 2011 once both Narnia and Neverland had agreed that the adoption should proceed under Article 17 of the 1993 Convention. Marina and Felicity adopted Simon in Neverland in September 2011 and the Neverland central authority produced a certificate pursuant to Article 23 of the 1993 Convention. Both Marina and Felicity leave Neverland with Simon in 2012 to live in Toyland where Marina had been offered a brilliant job opportunity. Toyland does not have same sex marriage or civil partnership, and there is discrimination against same sex couples in their family laws. In particular under the law of Toyland it is no possible for same sex couples to adopt a child. However, they have not experienced any difficulty in being accepted as the legal parents of Simon for any purposes in Toyland.

Marina and Felicity do not intend to live in Toyland in the long term and if not before, then intend to move back to Neverland when they retire. In February 2014, very sadly, both of Abigail's parents die in a car accident. By their wills, Abigail's parents had appointed Marina and Felicity as the guardians of Abigail in the event of their death. Felicity is 49 when Abigail's parents die. The laws of Atlantis allow adoption by same sex couples but prohibit the adoption of children by adopters who are over the age of 45 years. However, under the domestic adoption law of Neverland, Felicity and Marina can adopt as a couple because Felicity has retained her domicile in that country. Marina and Felicity want Abigail to feel as much as part of their family as Simon and to have equal status as him as their child. Under the law of Neverland a person is eligible to adopt a child if they are domiciled in Neverland and over the age of 21. There is no upper age limit. Furthermore, if a couple, including a same sex couple wish to adopt they may do so provided they are both over the age of 21 and at least one them is domiciled in Neverland. Accordingly, Marina and Felicity apply to the courts of Neverland to adopt Abigail. As part of the domestic adoption process in

[6] See the recent case of Re N [2015] EWCA Civ 1112 which provides a comprehensive analysis of the jurisdiction of the English court to make a domestic adoption order where there is a foreign element.

Neverland Marina and Felicity are thoroughly assessed by the child protection services in the area they used to live in, and Marina's wishes and feelings are taken into account. The court in Neverland hears expert evidence as to whether or not the adoption order will be recognised in Toyland and is told it will not. However, having evaluated fully all the welfare issues the Judge is of the view that it is better for Abigail, having regard to her welfare for the whole of her life, that she is adopted and at the final hearing May 2015 the High Court in Neverland makes an adoption order which confers full parenthood on both Marina and Felicity.

Both Toyland and Atlantis recognise the Convention adoption as creating a parent and child relationship between Simon and Marina and Felicity. However neither Toyland nor Atlantis recognise the adoption order made in Neverland regarding Abigail. This has serious consequences for Abigail. When Marina and Felicity apply to Toyland's welfare benefit department for tax credits for Abigail they are told that this is only available for parents and in Toyland are eligible for this benefit. When they apply to enrol Abigail in the local school they are told that only people with parental responsibility can enrol a child. Although the adoption order conferred parental responsibility on them, that order is not recognised and so they are unable to rely on that order as conferring parental responsibility on them. Abigail has a rare genetic disease. A new treatment has just been made available and in 70% of cases its use can offer a patient a vast improvement in their quality of life. However the treatment is not without complication and carries some risk, and in a very small number of cases the treatment can exacerbate the symptoms of the treatment. Marina and Felicity have looked into this in great depth and they are of the strong view that in Abigail's the risks are extremely low and she is likely to benefit enormously. Abigail's doctors agree. However, the doctors require the authorisation of Abigail's parents and therefore Abigail is unable to have the treatment in Toyland. Although the treatment is also available in Toyland it involves regular in patient treatment and community nurse oversight over a period of 12 months at least. If Marina has to return to live in Neverland so that Abigail can obtain this treatment she will have to give up her job. Marina and Felicity are told that they will need to apply to the court of Toyland for an order conferring upon them parental responsibility. While this application is very likely to succeed, it will take time and is expensive and it will add stress to the family at this time, particularly when they had believed that following the adoption they were the legal parents of Abigail.

A further complication for Abigail arises out of the inheritance law in Atlantis. Marina was the eldest child in her family and she inherited the family estate worth EUR10,000,000. Under the tax provisions of Atlantis a child can inherit up to EUR5,000,000 under their parent's will tax free. However as Atlantis does not recognise the Neverland domestic adoption order Abigail will not be able to benefit from this provision. Simon on the hand will not have to pay tax on his share of his mother's estate when she dies.

1.4. European Convention on the Adoption of Children

Although the European Convention on the Adoption of Children (Revised)[7] is designed to promote minimum standards of practice in domestic adoptions, it does not bind members to recognise and enforce adoption orders made in other member states. It has not been taken up widely and there is no compulsion within EU law for members to ratify it.[8]

[7] European Convention on the Adoption of Children (Revised) Council of Europe Treaty Series - No. 202, Strasbourg, 27.XI.2008

[8] The status table for the European Convention on the Adoption of children can be found at http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/202/signatures?p_auth=bJ79eM8p on the Council of Europe website. As at the date of writing it is in force in only 10 Member States.

1.5. Brussels II a

Although this regulation mandates the recognition and enforcement of orders concerning parental responsibility, it does not include orders which govern the attribution of parenthood. The Regulation explicitly excludes adoptions ("decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption") from its scope under Art. 1(3)b. In case there is any doubt about the interpretation of this provision recital 10 to the Regulation states: **In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons**. Adoption is also expressly excluded by Article 2 of the Regulation. It is therefore clear that member states are not required to recognise adoption orders pursuant to their obligations under Brussels II a. This means that the provisions relating to jurisdiction under Article 8 do not apply to adoptions.

One consequence of an adoption order is that the adoptive parents acquire parental responsibility for the adopted child and the parental responsibility of the birth parents is usually restricted or extinguished. **If the recognition of the adoption order is not mandated by the Regulation then it must follow that the rights and obligations arising in consequence of the order are likewise excluded from the Regulation.** This gives rise to a situation where there is a potential for a lack of clarity as to who has the right to make decisions for a child if the adopters move to live in a country other than that which made the adoption order. This is clearly very unsatisfactory for the child concerned as well as for the adopters.

It may be worthwhile expressly considering whether or not Brussels II a should expressly include recognition of the parental responsibility which is conferred on an adopter when an adoption order is made, even it does not require member states to recognise the effect that an adoption order has in relation to parenthood or the right of the birth parents to exercise of parental responsibility for the child.

2. IMPACT OF NON RECOGNITION OF DOMESTIC ADOPTIONS

It must be stressed that the absence of EU regulation requiring the recognition of domestic adoption orders made in another Member State does not mean that such orders are never recognised. There is nothing to prevent a Member State enacting laws governing the circumstances under which it will recognise and give effect to domestic adoption orders made in another Member State. Clearly as a matter of comity, countries within the EU, and indeed more widely, have laws which govern the conditions on which they will recognise and give effect to foreign domestic adoption orders. However, since this will be a matter for the domestic law of each Member State, which will vary from state, there is no uniform system of law governing such recognition.

In England all adoptions made under the law of other EU member states are automatically recognised as Overseas Adoptions.[9] In terms of status, Overseas Adoptions have the same effect under English law as domestic adoptions. The only significant difference is that Overseas Adoptions do not automatically confer British citizenship on the adopted child of a British adopter. It may be useful to evaluate the law governing recognition of foreign adoptions in other member states to determine the extent to which the automatic recognition given by England is typical, or whether adopters will generally need to undertake a legal process by which they could obtain recognition of their foreign adoption in another EU member state to member state. Unfortunately it has not been possible to undertake that research within the limited ambit of this paper.

[9] S.66 Adoption and Children Act 2002

At present there is a proposal for research into the impact that the current lack of recognition of domestic adoptions is having on the free movement of citizens in the EU. However it is unlikely that such research will yield much by way of statistical evidence, because when adopters travel overseas, the child's papers, including their passport and ID papers, will not identify that they are adopted children. Therefore it is unlikely that authorities in different member states, would be in a position to treat adoptive parents differently to natural parents.

However, among other things it is intended that research will be undertaken to ascertain:

- The extent to which adoptive children have been the subject of prosecution for failure to comply with obligations to the state of which they were citizens at birth.
- The extent to which disputes regarding inheritance rights have arisen in cases of adoption of children where recognition by one member state of the adoption order made in another member state has been relevant and or determinative. [10]
- CJEU cases concerning the recognition of parental responsibility of adopters who are either on holiday; living temporarily in another member state or have emigrated to another member state.

3. REASONS TO RETAIN CURRENT POLICY OF NON-RECOGNITION

It is recognised that there is a very great variety of practices in relation to adoption throughout the EU. There is considerable difference between Member States in relation to the qualities which render a person or a couple suitable to adopt a child. The rules with regard to upper and lower age limits vary, and more controversially, there are some countries that allow same sex couples to adopt and some which only allow heterosexual married couples to adopt. There is very wide variation of the conditions under which a child is suitable to be adopted. In particular, whether or not a parent has given their consent to the adoption and if not the circumstances under which their consent can be over-ruled by the court. Adoption orders, unlike parental responsibility orders, last a lifetime not a childhood. Adoption orders effect third parties and create/sever legal obligations in relation to third parties. At present there is a disquiet in some quarters with regard to the use of non-consensual adoption (sometimes called forced adoption) in the UK.[11] These factors may in combination or as individual concerns be seen to provide valid reasons why member states should retain the freedom to choose to recognise an adoption order made in another member state, and, where it would be an affront to their public policy, to refuse such recognition.

4. REASONS TO CONSIDER RECOGNITION OF DOMESTIC ADOPTION

Recognition of domestic adoptions throughout the EU will provide children with certainty of status and will enhance the security of their primary placement. All Member States within the EU are members of the 1993 Hague Convention. As such they are already bound under Article 23 of that Convention to recognise adoption orders made in other states party to that Convention. It is not enough for the a state to say that the

[10] In 2014 the writer prepared an expert opinion which was relied on in proceedings before the French Court on the effect of an adoption made in England in a disputed inheritance claim made by the natural child of a Frenchman adopted in England by an English family in the 1950s, suggesting that these issues do actually arise and are not just academic in nature.

[11] See the report prepared by Dr Clare Fenton-Glynn in June 2015 for the European Parliament (Policy Department C) on Adoptions without consent at: http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL_STU(2015)519236_EN.pdf and the Report (Rapporteur, Ms Olga Borzova) of the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of the Council of Europe, *Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States* published in January 2015

Convention adoption was made in circumstances which are an affront to their public policies. The refusal to recognise the adoption must also be in the best interest of the child. All Member States have already given up their right to refuse to recognise foreign adoption orders made in accordance with the 1993 Hague Convention.

Similarly, **all Member States are members of the United Nations Convention on the Rights of the Child (UNCRC)[12].** Accordingly all Member States are bound by provisions 20 and 21 which read:

Article 20 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child. 3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21 States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of t vche child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

All Member States agree to the principle of mutual trust and respect for the judicial bodies within each other's Member States. These facts lead to the irresistible conclusion that it is desirable for the EU to institute a mechanism by which mandatory recognition by all Member States of domestic adoptions undertaken by way of judicial process in all other Member States is achieved.

Such a development would bring the following benefits:

- Adopters and their adoptive children would not need to take legal advice on their status before travelling to other member states for short, medium or permanent changes of residence or even, renounce to their project of travelling to another Member State due to non-recognition;
- Adoptive children would have certainty of status;
- Adoptive parents would not need to undertake an adoption process in more than one member state in order to ensure their status is recognised;

[12] United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with article 49

- There would be clarity across all member states of the legal relationships that a child had with his birth and adoptive parents and this would significantly reduce (if not eliminate) litigation as to inheritance arising out of a dispute as to the status of the child and the deceased.
- Mutual trust and respect for orders made by judicial bodies, applying the principles of the UNCRC, in particular Articles 20 and 21 thereof, are likely to strengthen the ties between Member States and increase confidence in citizens in being able to move freely between Member States.

RECOGNIZING CHILD PROTECTION MEASURES IN MIDDLE EASTERN LEGAL SYSTEMS AS EQUIVALENTS TO ADOPTION - A FRESH LOOK ON MAGHREBIAN *KAFALA*, IRANIAN SARPARASTI AND IRAQI DAMM

Nadjma YASSARI

KEY FINDINGS

- Adoption laws worldwide display great variety and differences. As conceptions and perceptions of adoption are continuously subject to change a flexible approach to the concept is indispensable to grasp its many variants in particular for the sake of the recognition of foreign adoption under domestic law. The **essence of adoption today** revolves around the **creation of a permanent legal and social bond between a child and new parents for the welfare of the child**.

- Because of the prohibition of adoption in traditional Islamic law, **the issue of adoption remains a very sensitive issue in Muslim jurisdictions**. Except for Tunisia, no majority Muslim jurisdiction has introduced an institution called adoption in its statutes.

- A functional comparative approach to adoption and its surrogates that **emphasises the effects of the respective legal structures** is more instructive than the focus on the label "adoption" and its formal prohibition. Through this lens, **functional equivalents to adoption may be detected in Muslim jurisdictions.**

- Awareness of the complexity of adoption surrogates and their recognition in Western courts can be raised **firstly**, by a **better appreciation of foreign law** and **a reassessment of given conceptions** on child protection measures amounting to adoption in other jurisdictions through additional training and closer cooperation with the legal and academic communities in those countries. **Secondly**, a reconsideration of traditional thought pattern and a careful examination of terminology are useful. **Thirdly**, a rethinking of domestic rules on the recognition of foreign adoption emanating from countries where full adoption is prohibited, is desirable.

1. RECOGNITION MECHANISMS IN RELATION TO THE ADOPTION OF CHILDREN IN MIDDLE EASTERN COUNTRIES

In over thirty countries of the world, family law matters may come under legal regulations inspired by codified or uncodified Islamic law. From these countries, Egypt, Tunisia, Jordan, Israel, India, the Philippines, and Morocco are members of the Hague Conference on

Private International Law. Amongst these countries India, the Philippines, and Israel have ratified the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereafter "the Hague Adoption Convention"). Amongst the non-member states Mali and Kenya are bound by the said Convention. Iraq, Kuwait, Oman, Pakistan, and Lebanon have ratified one or more Hague Conventions, but not the Hague Adoption Convention. The recognition of adoption originating in Muslim countries in European countries therefore generally falls under the domestic rules of each state.

Under German law, the recognition of a foreign adoption of a minor child is regulated in the Law on the Effects of Adoption (Adoptionswirkungsgesetz, AdWirkG); the adoption of adults is regulated by the Law on the Procedure in Family Matters and in Non-Contentious Proceedings (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG). The AdWirkG itself differentiates two types of adoptions: decree adoption and contractual adoption. The first kind can be recognised, the second type must be declared valid. Again, these procedures fall under different statutes. In lack of application of the Hague Adoption Convention, the recognition of decree adoptions falls under § 109 FamFG, whereas contractual adoptions must be declared valid under the regular rules of German private international law (Art. 22 f. EGBGB).[1] In addition, if under the law under which the adoption was made, the legal relationship between the child and his biological parents is completely severed, the court can declare that the adoption equals a German adoption (§ 2 para. 2 AdWirkG). Otherwise, the applicants may ask the court to transform the weak adoption into a full adoption under German law (§ 3 AdWirkG). For this last procedure, the consent of the parents of the adopted child must be sought.

This legal setting works under a conception of adoption that for obvious reasons is inspired by German law. For an adequate transposition of adoption laws in the legal systems worldwide, however, **a broader comparative approach is required**. In view of the recognition of "adoptions" or similar "acts" performed under the laws of Middle Eastern countries, it is therefore crucial to find a suitable description of "adoption", i.e. the taking of responsibility for a parentless child. The crucial question therefore is, how do Middle Eastern jurisdictions regulate "adoption" if any existent and if not, are there other legal instruments for the placement of parentless children into new homes, that operate in a functionally equivalent way to adoption?[2]

2. THE ESSENCE OF ADOPTION TODAY: A RECONSIDERATION

Historically, adoptions worldwide mostly involved the **adoption of adults by adults**, mostly for financial reasons (inheritance) and for the continuity of the family name. Today, although the adoption of adults still exists in some jurisdictions, adoption is mainly focused on the permanent connection of a minor person to a new family in the best interests of the adoptee.

In fact, a broad look into regulations on adoption in legal systems worldwide reveals that this description represents the lowest common denominator, as the **effects of adoption vary considerably among the different systems**: adoptions may[3] or may not affect the

[1] BeckOK FamFG/Sieghörtner FamFG § 108 Rn. 26-28.
[2] This briefing is based on the following paper by the author, Nadjma Yassari, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, American Journal of Comparative Law 63 (2015) (forthcoming).
[3] For example in Italy (§ 27 Law of 4 March 1983); in France (Arts. 357, 361 code civil).

name of the child, and may create mutually exclusive,[4] additional,[5] or unilateral succession rights.[6] In some countries, adoption creates new kinship relationship between the family of the adopting parents and the adoptee;[7] in some this does not happen.[8] The relationship of the child to his/her biological parents may continue[9] or it may extinguish.[10] Adoption may be irrevocable;[11] more often, however, it can come to an end exceptionally for the welfare of the adoptee.[12] In fact, the diversity of the potential effects of adoption is its most outstanding characteristic.[13] Further, conceptions and perceptions of adoption are continuously subject to change and a flexible approach to the concept is indispensable to grasp its many variants.

What can be deduced from this diversity is that adoption laws are less concerned with the extinction of legal links to the birth parents and the replacement of biological filiation with an identical fictitious relationship. Rather, adoption is seen as a way to generate a **permanent legal relation** between new parents and a child, with the new parents having **full parental authority**, (including the personal and financial care, the administration of its financial affairs, the choice of residency), thus creating a new social bond, conceived of as a close personal relationship between the child and the new parents to raise and care for it as their own. Finally and most importantly, adoption must take place for **the welfare of the child**. It is against **these three features** that the legal structures for the placement of children in new homes existing in Middle Eastern countries will be looked at next.

3. THE REJECTION OF ADOPTION IN MIDDLE EASTERN COUNTRIES: WHAT DOES IT MEAN?

The perception that Muslim jurisdictions prohibit adoption is closely linked with the **rejection of the concept of "adoption"** (in Arabic *tabannī*) in traditional Islamic jurisprudence.[14] As a result, Western courts have often dismissed actions for the recognition of "adoptions" performed in Middle Eastern jurisdictions. This perception fails, however, to consider the changing nature and variety of adoption laws worldwide, as shown above. As a matter of fact, Middle Eastern jurisdictions do vary as to their official position to adoption: some **jurisdictions have regulations on adoption** (labelled *tabannī*), such

[4] For example in Germany (§ 1754 BGB); in Sweden (Ch. 4 Föräldrabalk (FB)).
[5] For example in Austria (§ 199 ABGB); in France (Art. 364 code civil).
[6] Under Turkish law, for example, the child inherits from his adoptive parents, but they do not inherit from him (Art. 314 Civil Code).
[7] For example in Sweden (FB 4); in France (in an *adoption plénière* (Art. 356 code civil). In Germany (§ 1754 BGB).
[8] For example in Austria (§ 197 ABGB); in France (in an *adoption simple*, Art. 366 code civil) and the *adopción simple* under Argentinian law (Art. 329 civil code).
[9] For example in Austria (§ 198 ABGB); in France (in an *adoption simple*, Art. 367 code civil).
[10] In most jurisdictions, the child's relationship to his/her biological parents ceases, with the exception of marriage impediments. Examples include Italy (§ 27 L. n. 184/1983), Spain (Art. 178 para. 3 civil code), France (Art. 356 code civil), Tunisia (Art. 15 Law no. 27 of 1958), Canadian British Columbia (sec. 37 Adoption Act, RSBC 1996). In Germany, the marriage between an adoptive parent and its adoptive child will be valid, whereas the adoption will be dissolved *ipse jure* (§§ 1755, 1766 BGB).
[11] For example in France (in an *adoption plénière*, Art. 359 code civil).
[12] For example in Austria (§§ 200–203 ABGB); in Germany (§§ 1760–1763 BGB); in the Canadian province of British Columbia, in case of fraud if the Supreme Court of British Columbia considers it to be in the child's best interests (Adoption Act, RSBC 1996, sec. 40). In France, only the *adoption simple* may be revoked (Art. 370 code civil).
[13] Philippe Malaurie and Hugues Fulchiron, La famille, (3d ed. 2009) 549.
[14] In fact, Islamic law prohibits any legal entity that (1) permits the transfer of the name (ism) of one person to another person not related to her by blood, (2) establishes intestate inheritance rights not based on biological and legitimate descent, and (3) instigates marriage impediments between persons other than blood relatives and in-laws. On the prohibition of adoption (*tabannī*) in traditional Islamic law see generally Faisal Kutty, Islamic "Adoptions": Kafalah, Raadah, Istilhaq and the Best Interests of the Child, in Robert L. Ballard et al. (eds.), The Intercountry Adoption Debate (2015) 539.

as Tunisia.[15] Also, Muslims in India[16] and Sri Lanka[17] may adopt a child. Next are those **countries that explicitly prohibit** the institution of ***tabannī***. Examples are Kuwait,[18] Morocco,[19] Yemen,[20] Algeria,[21] Egypt,[22] Jordan,[23] Yemen,[24] and Bahrain.[25] Thirdly, some **jurisdictions have no regulations** in statutory law on the matter of adoption, such as Iran, Iraq, Syria, Qatar, Oman, or Pakistan.

But all these countries have in common, that beside their official statement or their silence on the issue of *tabannī* they do provide - to different degrees and regulatory density – for various measures for the protection of minors, including the placement of orphaned or abandoned children in host families. Whether or not these instruments represent functional equivalents to adoption, ie whether they create a permanent legal relationship in the best interests of the child with the transfer of full parental care and responsibility to the new parents must be analysed for each jurisdiction individually. In the following, three legal constructions shall be looked at in more depth: Maghrebian *kafāla*, Iranian *sarparastī* and Iraqi *ḍamm*.

4. MAGHREBIAN *KAFĀLA* AS ADOPTION SURROGATES

4.1. Moroccan and Tunisian *kafāla*

In Europe **the institution of *kafāla*** is the best known legal entity for the care of parentless or abandoned children.[26] It must however be noted that this term is mainly used in the Maghreb (eg Morocco, Algeria, and Tunisia) to denote the placement of children in new families.[27] Although the use of the terms *kafāla* (for the institution), *kāfil* (for the person(s) undertaking *kafāla*), and *makfūl* (for the child) suggests that the same legal structure exists in all of these states, this is not the case, as the **details of *kafāla* differ in each country**. As such, **Moroccan and Tunisian *kafāla*** disqualifies as potential equivalents of adoption, as they end automatically when the *makfūl* reaches majority.[28]

[15] Law no. 27 of 1958 on Public Guardianship, *Kafāla* and Adoption, Official Gazette of 7 March 1958. Also, the Somali Code of Family Code provides for provisions on adoption.
[16] See Shabnam Hashmi v. Union of India & Ors., (2014) 4 S.C.C. 1 (holding that adoption by any person irrespective of religion, caste, creed, etc. is permissible).
[17] Savitri Goonesekere, The Best Interests of the Child: A South Asian Perspective, 8 Int'l J.L. & Fam. (1994) 136, maintains that the Sri Lankan Adoption of Children Ordinance, Cap. 61 (first enacted by Ordinance no. 24 of 1941), is also applicable to Muslims.
[18] Art. 167 Family Code, Law no. 51 of 1984, Official Gazette of 23 July 1984.
[19] Art. 149 Family Code, Law no. 70.03 of 2004, Official Gazette of 5 Feb. 2004.
[20] Art. 135 Code of Personal Status, Law no. 20 of 1992, Official Gazette of 31 Mar. 1992.
[21] Art. 46 Family Code, Law no. 11 of 1984, Official Gazette of 12 June 1984.
[22] Art. 4 Child Act, Law no. 12 of 1996, Official Gazette of 28 Mar. 1996, as amended by Law no. 126 of 2008, Official Gazette of 15 June and 10 July 2008.
[23] Art. 162 Code of Personal Status, Law no. 36 of 2010, Official Gazette of 17 Oct. 2010.
[24] Art. 135 Code of Personal Status, Law no. 20 of 1992, Official Gazette of 31 Mar. 1992.
[25] Art. 72 Family Code, Law no. 19 of 2009, Official Gazette of 4 June 2009.
[26] See, e.g., Yamina Kebir, The Status of Children and Their Protection in Algerian Law, 5 Y.B. Islamic & Middle Eastern L. (1998–1999) 170; Eric Jayme, Die kulturelle Dimension des Rechts - ihre Bedeutung für das internationale Privatrecht und die Rechtsvergleichung, 67 RabelsZ (2003) 217; Usang M. Assim & Julia Sloth-Nielsen, Islamic Kafalah as an Alternative Care Option for Children Deprived of a Family Environment, 14 Afr. Hum. Rts. L.J. (2014) 322.
[27] Egypt, Sudan, and Libya also use the term *kafāla* in child law. Originally, the term *kafāla* is taken from the Islamic law of obligation, to denote a contract whereby a person undertakes something in favour of another person, on account of having a material or moral interest in the undertaking. In the Gulf States, *kafāla* generally refers to the system of sponsorship according to which a foreign worker needs a guarantor to enter the work force of those states.
[28] Art. 7 Tunisian Law no. 27 of 1958; Art. 25 of the Moroccan Decree Promulgating the Law on Foster Care for Abandoned Children no. 1-02-172 of 5 Sept. 2002.

> Thus, the legal relationship of a child placed in Tunisia or in Morocco as a *makfūl* in a new family, will terminate automatically when the child reaches majority (ie 18 years).

These arrangements are thus **not designed as a *permanent* taking on of responsibility** over a child as one's own, but as protective processes for a certain period of time.[29] This also illustrates that ***kafāla* is not a substitute for adoption**, but a distinct legal concept, functionally similar to foster care. For Tunisian law, this can also be seen in the fact that adoption is permissible and that a child may be adopted by his *kāfil* under the scheme of *tabannī*.[30]

4.2. Algerian kafāla

Algerian *kafāla* contrasts the Moroccan and Tunisian models in two important respects. First, an Algerian *kāfil* is not only granted the personal care, i.e. custody, of the child (*ḥaḍāna*),[31] as are the Tunisian and Moroccan *kafīl*, but he/she will also become the legal guardian (*walī*) of the *makfūl*, [32] with full authority to manage the child's assets, a privilege assigned only to the biological father or paternal grandfather under Islamic law.[33] Consequently, under the Algerian *kafāla*, **the *kāfil* is granted comprehensive parental care without state interference**.

> Thus, an Algerian *kafīl* has full parental authority in relation to its *makfūl*, including personal care, education, choice of schooling, the right to immigrate with the child abroad, the right to manage its financial affairs, etc… There are no legal differences as regards parental care between the relationship created by legitimate genetic descent and *kafāla*.

The second significant difference lies in the rules on the revocation of *kafāla*, regulated in two articles in the Alg. Family Code. According to Art. 124 the biological parents of the child can petition for the return (*ʿawda*) of the child under their guardianship (*wilāya*).[34] In addition, the law requires that the child consents to the return, and where it is under the age of thirteen, the court must give its consent to safeguard the child's best interests.

> In case of a "return" of the child, the child may be physically returned but it may also remain with the *kafīl*, whose rights are then limited to the personal care, excluding all right emanating from *wilāya*, ie the financial care and the right to give consent to the (first) marriage in case of a girl.

Furthermore, Art. 125 Alg. Family Code regulates the conditions for an action for the cancellation (*takhallī*) of the *kafāla*. However this norm is formulated very broadly: it only states that the action must be brought before the same court that assigned *kafāla* and that the relevant state authorities must be notified beforehand. Some commentators have

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[29] Lucie Pruvost, Intégration familiale de l'enfant sans généalogie en Algérie et en Tunisie: kafāla ou adoption, in Recueil d'articles offert à Maurice Borrmans par ses collègues et amis (1996) 175.
[30] Lucie Pruvost, L'enfant abandonné: bilan de législation tunisienne, 36 Revue de l'Institut des belles-lettres arabes (1973) 145. This is regulated in Art. 2 Law no. 47 of 1967 (Law on the Organization of Familial Placements), Official Gazette of 21 Nov. 1967.
[31] Art. 116 Alg. Family Code Law. In Tunisia, the *kāfil* is awarded only custody of the child (Arts. 3, 5 Law no. 27 of 1958); the same applies to Morocco under Art. 22 Decree no. 1-02-172 of 2002.
[32] Art. 121 Alg. Family Code reads: "The *wilāya qānūniyya* is transferred to the *kāfil*". See also Nadia Younsi Haddad, La kafala en droit algérien, 37 Revue algérienne des sciences juridiques économiques et politiques, (1999) 24 f. On *wilāya*, see Lena-Maria Möller, An Enduring Relic: Family Law Reform and the Inflexibility of Wilāya, 63 Am. J. Comp. L. (2015) (forthcoming).
[33] On parental care in traditional Islamic law see, Ahmed Fekry Ibrahim, The Best Interests of the Child in Pre-modern Islamic Juristic Discourse and Practice, 63 Am. J. Comp. L. (2015) (forthcoming).
[34] See Nadia Younsi Haddad, 37 Revue algérienne des sciences juridiques économiques et politiques (1999) 37.

interpreted this article to mean that the *kafāla* may be ended by the *kāfil* as he/she wishes,[35] therefore making the legal status of the *makfūl* uncertain. With this interpretation, Algerian *kafāla* cannot be understood to be a functional equivalent to adoption.

However, when looking at the goals and purposes of the Algerian legislature when it designed the *kafāla* regime and with due consideration of the overarching principle that *kafāla* must be in the best interests of the child, an alternative view emerges. In fact, the regulations was primarily enacted to improve the desolate situation of abandoned children (mostly born out of wedlock),[36] whose number had continuously risen into the 1980s.[37]

To respect the traditional view on adoption in Islamic law, the Algerian legislature rejected *tabannī* and made it clear that *kafāla* did not touch upon filiation. On the other hand, however, subscribing to the principles of the best interests of the child,[38] the legislature awarded *kafāla* substantive effects: **full parental care** (*ḥaḍāna* and *wilāya*) passes to the *kāfil* and the *kāfil* is permitted to make **bequests in favour of the *makfūl*** by testamentary disposition.[39] Furthermore, although the *makfūl* keeps his/her birth filiation (*nasab*, Art. 120), a subsequent decree of 1992[40] empowers the *kāfil* to **transfer his surname to his *makfūl***.[41]

> Thus, for example, Mrs. Harroudj who takes the baby girl Lena into her *kafāla* enjoys full parental authority (including *ḥaḍana* and *wilāya*) as a biological parent. The child takes the surname of the *kafīla*, ie Lena Harroudj and may benefit from a bequest up to one third of the *kafīla's* estate. The *kafāla* may only be revoked in the best interests of the child by court decree.

It can thus be inferred that **Algerian *kafāla* is aimed at creating a permanent, enduring bond between the *makfūl* and the *kāfil*** and that any cancellation of the *kafāla* can only be justified by the best interests of the child, as the overarching principle.[42] **For the sake of its recognition** in a Western court, Algerian *kafāla* may be characterised as a functional equivalent of adoption.

This interpretation may be an alternative option in particular with regard to France where the courts are frequently concerned with *kafāla*-arrangement from the Maghreb. In fact, most recently the European Court of Justice dismissed the action of a French woman, Mrs. Harroudj, who had challenged a French law according to which the adoption of a foreign

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[35] See Nacira Saadi, L'institution de la kafala en Algérie et sa perception par le système juridique français, 1 Revue internationale de droit comparé (2014) 115; Nadia Ait Zaï, La kafāla en droit algérien, in Hervé Bleuchot (ed.), Les institutions traditionelles dans le monde arabe (1996) 95, para. 28.

[36] For an historical account of the introduction of *kafāla* in the Alg. Family Code, see Saadi, 1 Revue internationale de droit comparé (2014) 103 f.; Younsi Haddad, 37 Revue algérienne des sciences juridiques économiques et politiques (1999)11 f.

[37] Nadia Ait Zaï, in Hervé Bleuchot (ed.), Les institutions traditionelles dans le monde arabe (1996) 95, para. 14; Emilie Barraud, La filiation légitime à l'épreuve des mutations sociales au Maghreb, 59 Droit et cultures (2010) 255, para. 32, 33. According to statistics from national Algerian orphanages the mortality rate of children in state welfare institutions rose from 25% in 1977 to 78% in 1986; see also Interview with an Algerian Feminist: New Family Code Deprives Algerian Women of Rights, 15 Off Our Backs (International Issue), no. 3 (1985) 5–7, 23.

[38] See Arts. 65-69, 124 Alg. Family Code. The Algerian Supreme Court has also adopted this view; in regard to parental care, see, e.g., Supreme Court, decision no. 424292 of 13 Feb. 2008, 1 Majallat al-Maḥkama al-ʿUlyā, 267 (2008); Supreme Court, decision no. 613469 of 10 Mar. 2011, 1 Majallat al-Maḥkama al-ʿUlyā, 285 (2012).

[39] Art. 123 Alg. Family Code.

[40] That is if the *makfūl* is of unknown descent; see Decree no. 157 of 1971 Regarding the Change of Name, Official Gazette of 11 June 1971, as amended by Decree no. 24 of 1992, Official Gazette of 22 Jan. 1992.

[41] See Yamina Bettahar, La construction sociale de la parentalité : l'exemple de l'Algérie, L'Année du Maghreb (2005–2006) 163.

[42] See also Younsi Haddad, 37 Revue algérienne des sciences juridiques économiques et politiques (1999) 38, who emphasises that *kafāla* may only be cancelled under exceptional circumstances in the child's interest.

minor cannot be ordered where the personal law of the child's state of nationality prohibits that institution, unless the minor was born in France and resides habitually there, as representing a violation of Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The woman wanted to adopt the Algerian baby girl in her *kafāla* [43] and French Courts had dismissed the case. The French Courts (the Lyon Court of Appeal) had held that

> "Under French law, simple or full adoption creates a legal parent-child relationship for the benefit of the adopters and cannot be equated with kafala."

The court was aware of the effects of Algerian *kafāla*, including the fact, that the child had been given the name of her *kāfīl*. Nevertheless it insisted that the *kafīl* would "retains the status of guardian", insinuating that this status was insufficient for a full parent-child relationship.

Here the focus of attention on labels rather than the effects of any of the entities "simple/full adoption" or *kafāla* is quite evident. There are no clear statement as to the nature of any of these entities and in particular the difference or similarities between an "adoption simple" and a *kafāla*. Also, the term "guardian" (in French *tuteur*) is used without any elaboration on its meaning in Algerian law. In fact, in citing the relevant articles of the Algerian Family Code the European Court ignored Art. 121 according to which, the *kafīl* is granted full parental authority under Algerian law.

The **basic thought pattern of the Court** that "adoption, emanating from classical Roman law" is an "imitation of nature" which "creates, between the adopter and the adoptee, a legal relationship that is identical to that existing between parent and child" **is insufficient to embrace all the facets of adoption laws** today and it does not inform us, as to the contents and essences that need to be matched for the sake of the recognition of foreign child protection measures equivalent to adoption.

What is instead needed is a **sensitivity as to the meaning of "adoption**" in a domestic and in an international setting, as well as a reconsideration of recognition policies to shift from an *in abstracto* consideration of foreign law to a focus on the individual effects of any given foreign entity as to its potential as an adoption surrogate.

5. ALTERNATIVE MEANS FOR THE PROTECTION AND CARE OF CHILDREN

5.1. Iraqi *damm*

Iraqi law does not contain any explicit regulation on the prohibition of *tabannī*. Rather, it has regulated an institution that is labelled *ḍamm* (which literally means "accretion" or "attachment") in the **Juvenile Welfare Act of 1983**.[44] By this institution, the court can **award all rights and duties of parental care to new parents**.[45] Furthermore, the child

[43] Harroudj v. France, no. 43631/09 (Eur. Ct. H.R. Oct. 4, 2012), available at http://hudoc.echr.coe.int/eng?i=001-113819. On this case, see Imen Gallala-Arndt, Die Einwirkung der Europäischen Konvention für Menschenrechte auf das Internationale Privatrecht am Beispiel der Rezeption der *Kafala* in Europa: Besprechung der Entscheidung des EGMR Nr. 43631/09 vom 4.10.2012, Harroudj / Frankreich, 79 RabelsZ (2015) 405-28.

[44] Juvenile Welfare Act no. 76 of 1983, Official Gazette no. 2951 of 1 Aug. 1983.

[45] Arts. 3(5), 43(a) Act no. 76 of 1983; Konrad Dilger, Die Adoption im modernen Orient - ein Beitrag zu den hiyal im islamischen Recht, 6 Recht van de Islam 51 (1988).

must be given a **share in the estate of the adoptive parents**.[46] Finally, the **best interests of the child must be observed as a fundamental principle.**

> Thus, under an Iraqi *ḍamm* the adoptive parents have **full parental authority**, including personal care, educational rights, choice of schooling, the right to migrate with the child abroad, the right to manage its financial affairs, etc. Further, the child has an **obligatory succession right** in relation to its adoptive parents. There are no legal differences as regards parental care between the relationship created by legitimate genetic descent and *ḍamm*.

In addition, the act points to the regulations on the acknowledgment of filiation (*al-iqrār bi-l-bunūwa*) regulated in the Iraqi Law on Personal Status of 1959.[47] The acknowledgment of filiation is a well-known structure of traditional Islamic law. Whereas generally, legitimate filiation is based on the principle of the "child of the marital bed", i.e. filiation by conception in a valid marriage, Islamic scholars developed the figure of acknowledgment of filiation to lift children born under doubtful circumstances into the status of legitimate offspring. This figure has been taken up in all national Muslim jurisdictions.

Thus, according to Iraqi law, the acknowledgment of filiation of a child of unknown descent establishes the child's filiation to the acknowledging person, if filiation in that concrete case is factually possible.[48] Consequently, the **acknowledged child enjoys the legal status of a legitimate biological child**.

> The combination of the legal effects of *ḍamm* (which in itself can already be considered an equivalent to adoption) and acknowledgment of filiation gives the child the status of a biological, legitimate child. As a result, the **Iraqi regulations amount to full adoption**.

This view has also been embraced by a **recent judgment by the court of first instance of Stuttgart in March 2015**. [49] The applicants for the recognition of an Iraqi *ḍamm* granted by the court of first instance of Karbala, Iraq, were spouses of Iraqi nationality resident in Germany. The spouses had fulfilled all necessary requirements under Iraqi law, including all medical tests. They had been interviewed by the Juvenile Welfare Organisation and had accomplished a six-month trial period during which the new parents had taken the child in their responsibility. The German court held that the effects of Iraqi *ḍamm* were **equivalent to at least a strong adoption under German law**. It also stated that the Iraqi authority had been aware that the child was to be brought permanently to Germany. As a result, the court recognised the possibility of an international adoption in relation with Iraq.

5.2. Iranian *sarparastī*

5.2.1. The Act on the Protection of Children without a Guardian

Iranian family law did not have any explicit regulations on adoption, which in Farsi is called *farzand-khāndigī* until 1975, when the **Act on the Protection of Children without a**

[46] Art. 43(b) Act no. 76 of 1983.
[47] Art. 52–54 Law on Personal Status no. 188 of 1959, Official Gazette no. 280 of 30 Dec. 1959.
[48] Muḥammad Shafīq al-ʿĀnnī, Aḥkām al-Aḥwāl al-Shakhṣiyya fī al-ʿIrāq [The law of Personal Status in Iraq] (1970) 125 f.
[49] Court of first instance Stuttgart (AG Stuttgart), decision of 20 March 2015, file no. 29 F 1386/13 (unpublished, on file with author).

Guardian (CPA 1975)[50] was passed. The CPA 1975 introduced a new institution called *sarparastī* that provided for familial placement of parentless children.

The effects of *saraparastī* in the CPA 1975 were as follows: spouses that had commonly applied for *sarparastī* would be awarded **full parental care**, i.e. custody, the duty to maintain the child and the right to manage the child's assets without any room reserved for state interference.[51] Also, the child would take the **family name** of his *sarparast*.[52] The legal bond thus created amounted to **a new legal relationship** under which the **rights and duties of a natural, legitimate parent–child relationship** were established.

Sarparastī did not, however, produce *all* the effects of biological legitimate descent (or full adoption for that matter), as its legal implications did not apply to the relatives of the *sarparast*. It also failed to create statutory intestate succession rights. Aware of these flaws, the CPA 1975 put the *sarparast* under the **legal obligation to make sure that all expenses of the child's** upbringing were **safeguarded** in case of the *sarparast*'s death. S*arparastī* could only be revoked in the best interests of the child. For abandoned children only, *sarparastī* could be cancelled by a contract between the biological parents and the *sarparast*, under the supervision of the court.[53]

> Thus, *sarparastī*, in its 1975 version, amounted to a permanent integration of the child into a new family and the creation of a parent–child relationship that functionally corresponded to adoption.[54]

In 2012, the **German court of appeal of Cologne recognised an Iranian *sarparastī*** under the scheme of a weak adoption and transformed it into a full adoption of German law.[55] The court overturned the decision of the court of first instance that had dismissed the action for recognition with a simple reference to "Islamic law" and the Qur'an, according to which, the court claimed, adoption was prohibited. The court of first instance had not even looked up national Iranian family law, but had dismissed on an *in abstracto* basis adoptions in Muslim jurisdictions as such.[56] The court of appeal of Cologne consulted the regulations of the CPA 1975 and held that the Iranian *sarparastī* displayed the effects of a weak adoption under German law and could be recognised under the scheme of § 2 AdWirkG. It was the first decision recognising an Iranian *saraparastī* as an equivalent to adoption.[57]

5.2.2. Act on the Protection of Children without a Guardian [*bī sarparast*] or with an Unworthy Guardian [*bad-sarparast*]

In 2013, the CPA 1975 was repealed and a new law called **Act on the Protection of Children without a Guardian [*bī sarparast*] or with an Unworthy Guardian [*bad-***

[50] Act on the Protection of Children Without a Guardian of 20 march 1975 (CPA 1975), Official Gazette no. 8819 of 20 April 1975; see also the parliamentary debates regarding its enactment, Muzākāirāt-i Majlis-i Shūrā-i Millī, [The debates of the Parliament] 23d Year, Sess. no. 190 of the Parliament of 20 Oct. 1974 15–22 (1974).
[51] Art. 11 CPA 1975
[52] Art. 14 CPA 1975.
[53] Art. 16, 17 CPA 1975. According to Art. 17 the court had to carefully balance reasons for the revocation and had to endeavour to maintain the *sarparastī* arrangement.
[54] Kisch Beevers & S.N. Ebrahimi, *Iranian Child Protection Law: Towards a Concept of Adoption*, INT'L FAM. L., Nov. 172 (2002). Beevers and Ebrahimi equate the 1975 *sarparastī* arrangement with the *adoption simple* of French law.
[55] Court of appeal of Cologne (OLG Köln), decision of 23 April 2012, file no. II-4 UF 185/10, 4 UF 185/10, StAZ (2012) 339-43.
[56] Court of first instance of Cologne (AG Köln), decision of 29 April 2010, file no. 304 F 279/09 (unpublished, on file with author)
[57] Subsequently, there have been other decisions recognizing Iranian *sarparastī* as weak adoption under German law, for example Court of first instance of Cologne (AG Köln), decision of 9 Sept. 2013, file no 312 F 321/12 (unpublished, file with author)

***sarparast*]** (CPA 2013) came into force. [58] This reform was initiated by the Welfare Juvenile Organisation who criticised that the CPA 1975 did not regulate the *temporary* familial placement of children, whose parents were unable to raise them. The new Act's name reflects the **two purposes of the new law**: on the one hand, the CPA 2013 wants to **renew the** existing rules on the permanent placement of children without a *sarparast* in new homes and on the other hand it seeks to **establish new rules for the temporary placement** of children who are not properly cared for in foster families.[59]

Unfortunately, the CPA 2013 displays several flaws and incoherencies. It suffers from bad law drafting, has lacunas and lacks clarity. The term *sarparastī* is not defined, nor does the act explicitly categorise its regulations as to those pertaining to temporary or permanent placements. An in-depth look into the act, however, allows distinguishing between these two schemes. Furthermore, the CPA 2013 must be set against the regulations of the **new Act on the Protection of the Family** (FPA 2013),[60] which was also enacted in 2013 and which **introduced the best interests of the child as the paramount principle in child law**.[61]

The distinction between temporary and permanent placement can be detected on three levels: first, the act differentiates between children whose parents or paternal grandfather are deceased or are not traceable (unknown), and those who still have living relatives that are unable to raise them.[62] Secondly, it establishes different degrees of parental care for the first and the second category and thirdly it requires a strong financial commitment on the part of parents willing to take on orphans or children with unknown parents.

It is therefore argued that the **first category of children** is meant to be **placed permanently into a new home**, awarding the new parents **full parental care and financial responsibility in the best interests of the child**. Those parents must endorse responsibility for all living costs and ensure that all the financial upbringing of the child is secured in case of their death.[63] In practice, the adoptive parents erect an irrevocable public will in favour of the child. Further, a life insurance in favour of the child must be contracted. These requirements must be accomplished in order for the final decree on *sarparastī* to be issued. Finally, the child is also included in the group of beneficiaries entitled to a share in the pension rights of the *sarparast* in the event of their death.[64]

> Thus, an orphaned child or a child of unknown descent can be given into the permanent care of new parents, who are vested with full parental authority, with the legal obligation to provide financially for the child, even beyond their death.

For children with living relatives (father/mother/paternal grandfather or a male designated by the father (*waṣī*)), the law foresees a **different scheme**. Although their *sarparast* are entrusted with the personal care of the child, they are restricted in their authority to manage the child's affairs and must coordinate all their actions with the courts. Furthermore, they do not necessarily have to commit financially to the upbringing of the child. Finally, in case the relatives of the child overcome their personal deficiencies, they

[58] Act on the Protection of Children without a Guardian or with an Unworthy Guardian of 2 Oct. 2013 (CPA 2013), Official Gazette no. 19997 of 28 Oct. 2013.
[59] See statement of the parliamentary expert group of 7 March 2009, http://rc.majlis.ir/fa/legal_draft/state_popup/737945?fk_legal_draft_oid=720687&a=download&sub=p (original Farsi version).
[60] Act on the Protection of the Family of 19 Feb. 2013 (FPA), Official Gazette no. 19835 of 11 April 2013.
[61] Art. 40-47 FPA 2013; Art 45 FPA 2013 states as a general rule that all decisions related to children and youth must be taken with their best interests in mind.
[62] Art. 8 CPA 2013.
[63] Art. 14 and 15 CPA 2013

may, under the supervision of the court and with due consideration of the best interests of the child, retrieve the child without the *sarparast* having to agree to it.[65]

> Thus, children with living but unfit relatives are given into temporary care into families, the foster parents are vested with limited parental authority and may be exempted from providing financially for the child.

Finally, the **regulations on the revocation** of the *sarparastī* lend themselves to the existence of two schemes. *Sarparastī* may be revoked by court order in three instances: first, if the conduct of the child or the new parents is insupportable and as a result detrimental to the child's welfare; second, by a contractual agreement between the *sarparast* and the major child;[66] and third, whenever any of the parents (or the paternal grandfather or *waṣī*) reclaims the child.[67] This last ground for revocation can evidently only apply to children who have living relatives and whose placement must be considered to have been temporary. In all cases, the court must take into account the best interests of the child as the paramount criterion.

The law thus envisages **two schemes**:

- **First, a permanent placement** for orphan children and children whose parents/grandfather are unknown and whose care, physical, psychological, and financial upbringing is fully vested in the *sarparast*. The *sarparastī* may only be revoked in the best interests of the child by court decree.
- **Second a temporary placement for children with unfit parents** (or grandfather or *waṣī*), whose *sarparast* may or may not be granted certain financial authority and who is exempted from committing financially to the upbringing of the child. These children may be reclaimed by their relatives.

The **drafting weaknesses and ambiguities of the CPA 2013** may, however, pose problems in respect of the recognition of an Iranian *sarparastī* in Western courts. It is therefore crucial to contextualise the law within the domestic legal setting in which it was conceived of. Although the two schemes for the placement of children in new homes are deductible in the act, the act remains difficult to read and articles are not categorised consistently. This can partly be explained by the sensitivity of the issue of adoption and the potential opposition of parts of the legislative apparatus, in particular the Council of Guardian, who scans all legislations as to their compatibility to Islamic law. Thus even if it must be acknowledged that the Parliament operated within the limits of its opportunities, ambiguities remains. As a reaction in practice, to avoid disturbances, the State Welfare Offices in Iran regularly chose orphaned or abandoned children (of unknown parents) for international adoptions. It is against this setting and with due consideration of the best interests of the child as the paramount principle in child law that the CPA 2013 must be read. So far no action has been brought before a Western court for the recognition of a *sarparastī* under the new scheme of the CPA 2013.

6. EVALUATION AND RECOMMENDATIONS

Because of the prohibition of adoption in traditional Islamic law, the **issue of adoption** remains a **very sensitive issue in Muslim jurisdictions**. Except for Tunisia, no country has regulated an institution labelled "adoption" (Arabic *tabannī*).

[64] Art. 19 CPA 2013.
[65] Art. 8 para. 1 CPA 2013.
[66] Art. 25 CPA 2013.
[67] Art. 25 CPA 2013.

Notwithstanding, a fresh look into the various regulations on the protection and care of orphaned and abandoned children in selected Muslim jurisdictions reveals that legal structures may be found, which can be characterised as surrogates for adoptions. To identify those schemes **the attention must shift from labels to functions,** ie the focus must be laid on the effects of these structures and the reasons and policies national legislatures had in mind when designing such regulations. It must be noted, that these schemes are not traceable in all Muslim jurisdictions. Where, however, orphans or children of unknown parents may be legally **incorporated into new families on a permanent basis**, with full **parental care passing to the new parents** the floor is opened to investigate further into the specific institution as to its potential as an adoption surrogate. Also, as a general trend, Muslim jurisdictions have introduced in the last decades the principle of the **best interests of the child as a fundamental legal principle**. Whereas in the beginning this principle was to be applied foremost in cases of custody disputes, it has been elevated in most jurisdictions to the paramount principle in all matters related to children and youth.

> Therefore, it is thus argued, that a legal entity that provides for a permanent attachment of a minor to new parents, affording them full parental authority and responsibility and that stands under the overarching principle of the welfare of the child can be recognized as an adoption surrogate. The courts will have to decide on a case-to-case basis with due consideration of the best interests of child.

To trace those structures in any given Muslim jurisdiction, a careful **re-visiting of given ideas** on child care and protection in Muslim jurisdictions is needed. The difficulties to overcome are not to be underestimated. For example, until 2011 the Bundesamt der Justiz, the German State Office charged with giving its opinion on the existence and hence recognition of foreign adoption, has used a standard formula when judging on "adoptions" in Muslim jurisdictions: with reference to the "Qur'an" or to "Islamic law" in general the existence of adoption in any Muslim jurisdiction has been dismissed on an *in abstracto* basis. In the same vein, the European Court of Justice states in Harroudj v. France that "under Islamic law adoption is prohibited (haraam)". These mantra-like repetitions have shut away the many facets of child protection measures conceived of by the national legislatures in Muslim jurisdictions.

The picture is also distorted by the fact, that many Muslim jurisdictions do prohibit explicitly *tabannī*. The re-examination of the regulations on the placement of children in the Muslim jurisdictions under review, however, has shown that adoption surrogates can be found even in jurisdictions that explicitly prohibit *tabannī*. This is not to say that the respective jurisdictions are not aware of their own statutes. For the sake of domestic Algerian law it is safe to state that *tabannī* is prohibited in Algeria, as it is in many other jurisdictions. But for the sake of recognition a more nuanced approach must be adopted. This can be facilitated by a reconsideration of the changing nature of adoptive relationships worldwide and a extraction of its essence today.

This procedure is in **particular important for Western courts** that faced with various legal structures unknown to them have to decide on the recognition of those entities as "adoption" under domestic (Western) law. **How can this be accomplished?**

- Firstly, a new comparative approach can be adopted to better appreciate the content of foreign law and to reassess given conceptions on adoption and their surrogates in other jurisdictions.

Traditional thought pattern ought to be questioned and definitions reframed: what is the actual meaning of adoption, what is its mandatory essence, what effects does a full parent-

child relationship encompass? How do they compare to the content of those foreign structures? This could be provided for by additional training or seminars on child protection measures in foreign jurisdictions for the Western legal communities and a closer cooperation with the legal and academic circles in the relevant countries.

- Secondly, a reconsideration of terminology is useful.

Leaving aside labels and shifting attention to functions could entail, for example, the giving up of certain terms and the replacement of them by a description of the desired effects to satisfy the essence of "adoption". By way of example a possible measure to encourage and open the path for Muslim jurisdictions to join international agreement such as the Hague Adoption Convention, would be to rephrase its title and chose or add a more descriptive formula as to the targeted measures, avoiding or complementing the term "adoption".

- Thirdly, a rethinking of domestic rules on the recognition of foreign adoption emanating in countries where full adoption is prohibited, is desirable.

For example the German AdWirkG provides for the recognition of a foreign "adoption" as a weak adoption under German law where certain minimum effects of a parent-child relationship are met.

> For instance, if an Iranian couple domiciled in Germany has been awarded the *sarparastī* of an Iranian child, and the child is brought to Germany, the court can recognize the *sarparastī* as a weak adoption. The child will have a legal status that is inferior to the status of a biological child, in particular the relationship of the child to its biological parents might persist (including name rights and succession rights) also, the child may not automatically acquire German nationality, nor does it inherit legally from its adoptive parents.

As a weak adoption does not have all effects of a full parent-child relationship, German law further provides for a scheme to have a weak adoption transformed into a full adoption of German law. In the sketched case the adoptive parents would petition for this transformation before the German court. This transformation, however, requires that the biological parent(s) of the adopted child consent to the full adoption. This would mean that biological parents, who are still living in the country of origin, have to consent to full adoption, a legal construct that is non-existent in their home country. In practice, following scenarios have taken place: as the consent must be officialised to be accepted in German courts, the biological parents of for instance an Iranian infant adopted under the scheme of a weak adoption would have to go the German embassy in Tehran and give an official consent to the (full) adoption of German law. The German embassies in Muslim jurisdictions, however, have refrained from certifying any consent to full adoption, because they are not allowed to certify anything prohibited under the laws of that country. In such a scenario even a shift to the effects of adoption will not help, as no Iranian national can legally waive inheritance rights or disinherit its biological child. In other words, the legal requirement in recognition regulations to obtain the consent to *full adoption* for nationals of countries *that do not know full adoption* is impossible to achieve. With due consideration of the interests at stake (in particular the best interests of the child) these rules need to be rethought.

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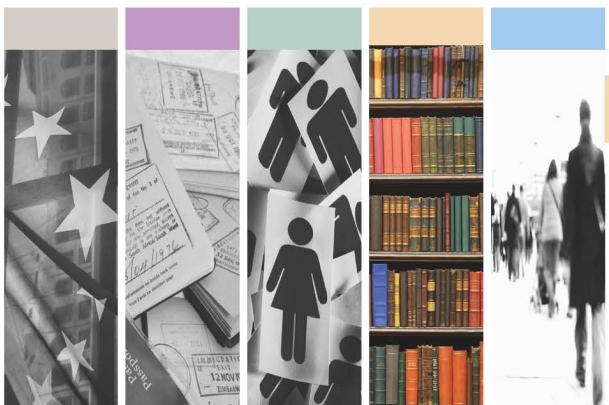

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