

## **The rights of the adopted child and the public family policies in intercountry adoption**

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Prof. Salomé Adroher Biosca  
Prof. of Private international law  
Comillas University. SPAIN

*The UN Children's Rights convention. Theory meets practice.* (ALLEN, A. et al Eds.)  
INTERSENTIA, Bruselas 2007, págs. 441-63. ISBN: 90-5095-640-8.

### **1.- INTRODUCTION.**

The main law researches on the intercountry adoption (IA), are focused on the process of constitution of the adoption and the child best interests during it: preventing traffic of children, assuring that adoption is a way of searching the best family for a child who hasn't one...etc. The studies and the regulations attend mainly to the *pre-adoption* period or the adoption process. Basically, this is the matter regulated in article 21 of the CRC and in the 1993 Hague Convention on protection of children and co-operation in respect of IA.

Nevertheless, many "disrupted" adoptions have been regularly constituted, but do not work after some time. The social and psychological studies on this matter had usually founded the causes of the adaptation problems in some characteristics of the child: age, health or psychological problems.... But most recent studies conclude that the adaptation of the family and the child depends also in the capacity of the adoptive environment to compensate the risks associated to the past story or the child and to facilitate the adaptation<sup>1</sup>. This social psychology approach is coincident with social policies studies that propose models which consider the family as subject (more than an object) of family policies because of its strength to cope with different situations and problems, so the paper of the market, the state, the third sector and the society is to help the family to fulfil its functions trusting in its capacities instead of substituting it<sup>2</sup>. From this point of view, the family adaptation after adoption is a longer, and perhaps most

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<sup>1</sup> A. BERÁSTEGUI PEDRO-VIEJO *La adaptación familiar en adopción internacional. Una muestra de adoptados mayores de tres años en la Comunidad de Madrid.* (Madrid, Consejo Económico y Social de la Comunidad de Madrid, 2005). The autor of this recent study concludes: "Los patrones de adaptación del menor están explicados en una proporción muy relevante por el proceso de adaptación de la familia ala adopción internacional. En este sentido, unas bajas tasas de estrés, una percepción positiva de la situación (en términos de control, conformación de las expectativas y reestructuración positiva) una mayor adaptación familiar así como unos bajos niveles de sobrereactividad en las intervenciones educativas de los padres, interactúan para mejorar los niveles de adaptación del niño" (...) Los adoptantes serán los principales aliados del sistema de protección de menores en su tarea de proporcionar a los niños un entorno seguro y estable de desarrollo". 357.

<sup>2</sup> G. ROSSI. "Le politiche sociali per la famiglia" in G ROSSI (Ed) *Interventi a favore della coniugalità e della genitorialità.* (Milano Vita e pensiero 2005) 41-58.

important time to be taken into account also by the law and regulations on IA<sup>3</sup>. The main objection to this proposal is that “adoptive family becomes a family like any other, in the sense that it must benefit from the same protection and the same offers of assistance as any other family, without being suspected more than another of dysfunctions. Nonetheless, it remains different since it must reconcile itself with the fact that the adoptee comes from somewhere else, bearing a path of earlier disruptions and abandonment before his entry into the adoptive family”<sup>4</sup>.

Between the matters to be regulated by the law during all the life of the adoptive family (the *post-adoption* period), some questions underlined: family friendly policies or regulations that facilitate reconciling work and family life; economic support for IA families; public facilities to support post-adoption services to help the family and the child facing the difficulties of the matching process, and finally helping the child to search for his origins (“back to the roots” policies).

The present contribution will face this matter studying specially the family policies implemented in Spain, which is nowadays one of the main receiving states in IA in the world.

## **2- APPROACHING TO THE PHENOMENON AND THE REGULATION OF INTERCOUNTRY ADOPTION**

### ***2.1. The case: Spanish Council of State Advice number 2548/2002<sup>5</sup>***

To show the approach of this paper, I'll start with a real case that took place recently in Spain.

A spanish married couple resident in Madrid, wishing to adopt a russian child, applied on 7/12/1996 to the Spanish central authority in IA in the “autonomous community” of Madrid (“Instituto madrileño del menor y la familia”-IMMF). This authority after being satisfied that the applicants are eligible and suited to adopt, prepare a report including the characteristics of the child they would be qualified to care: they would prefer a four years old boy physically and psychologically healthy. The IMMF had accredited an intermediate private institution (This intermediate bodies are called in Spain “Entidades colaboradoras de adopción internacional”- ECAIs) which works with Russia and had informed the applicants they can intermediate the adoption process with them; the couple signed a contract with this ECAI and the process started.

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<sup>3</sup> In relation to IA a very recent seminar held at Innocenti Istitut has attended particularly to this period: EUROPEAN NETWORK ON NATIONAL OBSERVATORIES ON CHILDHOOD *ChildONEurope 2003-5 Activities European seminar on post-adoption. Which Approaches, Models, and Support Services to Adoptive Families Relations*. The Institut degli Innocenti, Florence february 2006 (CD Rom).

<sup>4</sup> SSI. EDITORIAL “Post adoption: the usefulness of professional support for the adoptee and his adoptive family”. Monthly Review nº 2/2006, February 2006.

<sup>5</sup> <http://www.consejo-estado.es/>

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Eight months later (22/10/96) the Russian authorities informed the ECAI that a child has been preassigned: a six year old girl with some ophthalmologic problems (strabismus) and a light mental retardation due to the institutional care. The Spanish central authority has ensured that the prospective parents have agreed (nevertheless they affirmed two years later they had been forced to by the ECAI, even in the child doesn't have the characteristics they have asked to) and approved such decision. The adoption is constituted in Russia (2/6/98) and a girl called Eugenia, arrives in Madrid with her new parents.

When Eugenia is integrated in her new family, they observed the following medical and psychological problems: myopia and light astigmatism in both eyes needing glasses; malformations in palate and gums, and several caries in the tooth; behaviour disorders, attention-deficit and hyperactivity disorder, cognitive distortion, mental retardation; and early sexual activity that affects her sister formation. The IMMF had various meetings with the family after the adoption in which the adoptive parents expressed all the problems.

On 23/3/2000, the parents sued for damages against the IMMF asking 600.000 € because of the dentist expenses, special education expenses and contemptuous damages and finally decided to "break" the adoption: on 6/4/2000 the IMMF declared "abandoned" the girl and placed her in a Spanish institution for the care of children.

The IMMF demanded the Council of State an Advice about its civil liability in this case of disrupted adoption. The Advice number 2548/2002 (on 7/11/2002) concludes that the IMMF has performed adequately in the pre- adoption period and in the post- adoption period.

## ***2.2. The concept of IA and the IA as a social phenomenon***

An adoption is *international* if one or several of its elements (residence or nationality of the child or of the foster parents, authority who constitutes the adoption...) is connected with more than one country. Nevertheless, I will refer to *intercountry* adoption as the adoption in which the child resides in one state, the foster parent or parents in another, and the child moves and leaves his country of origin to live far away with his new family because of the adoption<sup>6</sup>.

The IA is a "peculiar and quiet migration"<sup>7</sup> a phenomenon characteristic of 50s, which started after the second world war<sup>8</sup>, increased with Korea and Vietnam<sup>9</sup> wars, and

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<sup>6</sup> This is the concept of IA taken into account in the main international conventions. The Hague Convention of 29 May 1993 on protection of children and co-operation in respect of intercountry Adoption defines it in its article 2: *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.* In the same sense, article 1 of the Interamerican Convention on the conflict of laws on adoption (La Paz, Bolivia, 24 may 1984) determines that the Convention will be applied when *"el adoptante (o adoptantes) tenga su domicilio en un Estado parte y el adoptado su residencia habitual en otro Estado parte"*.

<sup>7</sup> B. TRILLAT "Une migration singulière: la adoption internationale". *Actes du séminaire Nathalie-Masse* 25-27 mai 1992 Centre international de l'enfance de Paris, 21 ; P. SELMAN "The 'quiet

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spread out in the 60s: "a dramatic increase in IA which had occurred in many countries since the late 60s to such extent that IA had become a worldwide phenomenon involving migration of children over long geographical distances and from one society and culture to another very different environment"<sup>10</sup>. Today it is a phenomenon involving over 40,000 children a year moving between over a hundred countries, and is nowadays in its highest ever level in global terms "confounding predictions from the early 1990s that was a phenomenon that had peaked"<sup>11</sup>. What can be the causes of this increasing international movement of children?

- **THE WAR:** some wars (Second World war, civil war in Greece –1946 to 49-, the Korean War –1950 to 53- and the war in Vietnam –1954 to 1975-) explained the very early IA flows in the 50ties and 60 ties. But war and its aftermath are not the only factors leading countries to allow their children to be adopted abroad.

- **ECONOMIC AND DEMOGRAPHIC BACKGROUND:** The flows between the states of origin of IA and the receiving states shows the demographic and economic unbalance between the south and the north of our planet: the level of adoption is determined by the demand for children in rich western countries and the availability of children in those countries afflicted by poverty and other ills.

- **DIFERENT MODELS AND RESOURCES FOR THE CHILDREN PROTECTION**

It is however, evident that the major sources have not been the poorest or highest birth rate countries, that patterns persist long past the "crisis" or the war, so there are other factors that may be key factors: the different models and resources of children protection in the origin and receiving countries, and the evolution of the motivations of the prospective parents are then the decisive *push* and *pull* factors:

- 1.- In the receiving countries, low birth rates combined with policies of keeping the child in risk in his family supporting the families through the social services system produces a

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migration' in the new millennium: trends in intercountry adoption 1998-2003". Paper presented at the 8<sup>th</sup> global Conference Manila, 10-12 August 2005.

<sup>8</sup> The origin of these population movements were the wars. The second world war caused many displacements of European and Japanese children to USA or Sweden; is quite surprising the German case: 489 German children were adopted by American, Scandinavian or BENELUX families in 1950; in 1957 were already 2.628. M.A. TEXTOR "International adoption in West Germany: a private affair" in ALSTEIN, H. SIMON, R. *Intercountry adoption. A multinational perspective*. PRAEGER. N. York-Connecticut-London 1991 119..

<sup>9</sup> 200.000 were the estimation of Vietnamese children who left their country because of the war. USA organizes an operation called Baby lift to evacuate between 2.000 and 3.000 Vietnamese orphans; this operation caused many human and legal problems because of its confusion and precipitation. T.E CARBONNEAU,. "Operation baby lift: the dilemma surrounding child custody controversies" in R. LILLICH (Ed). *The family in international law: some emerging problems-* Third sokol colloquium. 1981, 87.

<sup>10</sup> G. PARRA-ARANGUREN, G. "History, philosophy and general structure of the Hague adoption convention" in *Children on the move. How to implement their right to family life*. D. DOEK, H. VAN LOON, O. VLAARDINGERBROEK (EDS). London 1996, 63.

<sup>11</sup> P. SELMAN (supra, note 7)

diminishing availability of young children for domestic adoption (the children available are children with *special needs*). In these countries it's important to mention the "personal motivations" of the adoptive parents as a cause of IA. The IA has become a way of creating families not only for sterile couples: the humanitarian motivated adoptions and the new "post-modern" families (IA is sometimes a "fashion") are important the pull factors in the receiving countries<sup>12</sup>.

2.- In some origin countries there are "silent" policies that promote the IA as the formula to finance the national children protection system. For example, IA has discouraged Korea from developing an adequate child welfare programme<sup>13</sup> and China's "one child policy" has created a crisis in the rejection of girl babies that are adopted by foreign parents.

Some authors have affirmed that the IA is a cause of de child misprotection in the countries of origin: there is a growing demand for young light-skinned healthy babies, which has led to a trade of children from and to countries that discourage some sending countries to develop their welfare system or to change some politics: the demand creates the supply<sup>14</sup>: "Intercountry adoption, therefore, has come to represent in many ways the convergence of 'demand' and 'supply'. One of the more recent concrete expressions of this lie in the use of the Internet to promote adoption in ways that often involve the marketing of children — as well as spawning private adoptions and offering 'shortcuts' to the legal adoption process"<sup>15</sup>.

### **2.3. The boom of IA in Spain**

The first "adoptive" country in the world is USA: between 1971 and 2005, U.S. citizens adopted 354.294 children from other countries and in increasing numbers every year with the reduction in children available for incountry adoption<sup>16</sup>. In USA the intervention of public authorities in this matter is very little due to the "neoliberal" system which exists also in matters of family law<sup>17</sup>.

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<sup>12</sup> R.A.C. HOKSBERGEN, "Generaciones de padres adoptivos. Cambios en las motivaciones para la adopción". *Infancia y Sociedad* 12 (1991) 39.

<sup>13</sup> In Korea IA began in 1955 and has placed more than 120.000 children since then. P .SELMAN (supra note 7)

<sup>14</sup> N. CANTWELL "La adopción internacional. Un comentario sobre el número de niños adoptables y el número de personas que buscan adoptar internacionalmente" *Protección internacional del niño. Boletín de los jueces V.* (<http://www.hcch.net/e/conventions/news28e.html>); N. CANTWELL "C'est la demande effective, imbecile!" COLLOQUE SUISSE SUR L'ADOPTION INTERNATIONALE. BELLINZONA, 28-29 OCTOBRE 2004 *Tâches, possibilités et difficultés des pays d'origine* (non published); A. BERÁSTEGUI PEDRO-VIEJO, supra (note 1) 39; A. FERRÁNDIS "La adopción internacional" in I.E. LÁZARO GONZÁLEZ and I. MAYORAL NARROS (Eds.) *Jornadas sobre Derecho de menores* (Universidad Pontificia Comillas, Madrid 2003), 203-212.

<sup>15</sup> "Intercountry Adoption". *Innocenti Digest*, December 1998.

<sup>16</sup> In 1996, 11340 children; in 1998, 15.583; in 2000, 18.447; in 2002, 21.378; in 2004, 22.884, and in 2005, 22.739. The main origin countries were China, Guatemala, Korea, Philippines, Rumania. Russia and Vietnam (See *visas issued to orphans. us department of state* in <http://travel.state.gov/family/adoption/adoption>)

<sup>17</sup> I have qualified the American adoption law as *neoliberal* in other works (S.ADROHER BIOSCA. "Desafíos del Derecho de familia en una sociedad intercultural". In D. BOROBIO (Ed) *Familia e*

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Although in the 90s Spain was a country that didn't appear in the international statistics of IA, in 2005 is the second adoptive country after USA, the first if we compare number IA/ population<sup>18</sup>: from 1997-2004 there have been 24.042 IA in Spain<sup>19</sup>. What can be the reasons for this "family revolution" in my country? Perhaps the broad legal and social changes in family behaviour after the political transition can partly explain this situation:

✓Fewer children to be adopted: Contraceptive aids, legalization of abortion, destigmatization of single motherhood, as well as state support for single mothers in some cases, have lead to greatly reduced abandonment rates, and consequently the number of children who can be considered for domestic adoption has declined.

✓More prospective parents searching to adopt: the infertility problems are increasing, partly because postponement of childbirth to later ages due in many cases to higher workforce participation of women, but not all the prospective parents adopt in Spain because of fertility problems. The motivations to adopt have changed very deeply: 15% of the solicitants in Madrid in 2002 were single persons, 16% have already biological children (both of the prospective parents or of one of them) and 8% adopted for humanitarian reasons<sup>20</sup>.

In the next figure the evolution is shown: total numbers of IA in Spain, total numbers per continents of the children and numbers of the main countries of origin:

Continent/countries	1997	1998	1999	2000	2001	2002	2003	2004
<b>ASIA</b>	<b>241</b>	<b>265</b>	<b>443</b>	<b>686</b>	<b>1.107</b>	<b>1.586</b>	<b>1.196</b>	<b>2.577</b>
China	105	197	261	475	941	1.427	1.043	2.389
India	109	97	163	190	129	109	100	117
Nepal	0	0	18	16	28	35	38	68
<b>EUROPE</b>	<b>97</b>	<b>216</b>	<b>645</b>	<b>1.439</b>	<b>1.569</b>	<b>1395</b>	<b>1.913</b>	<b>2.111</b>
Russia	70	91	141	49	652	809	1157	1618
Rumania	0	84	280	583	373	38	85	48
Ucrania	0	0	116	218	356	358	482	349
Bulgaria	11	27	92	123	172	181	202	57

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*interculturalidad*. Universidad Pontificia de Salamanca. Salamanca 2003, 315-264) but is easy to deduce it from the web page of the Department of State: "International adoption is essentially a private legal matter between a private individual (or couple) who wishes to adopt, and a foreign court, which operates under that countries laws and regulations. U.S. authorities cannot intervene on behalf of prospective parents with the courts in the country where the adoption takes place". <http://travel.state.gov/family/adoption/adoption>.

<sup>18</sup> The rates of IA can be referred to three statistic standards: total number of IA, number of IA related to population; number of IA related to number of births. P SELMAN, (supra, note 7).

<sup>19</sup> I have published the first statistics of IA in Spain (1988-1995) after a research period in the Central Registry office of civil status (S.ADROHER BIOSCA "La adopción internacional: una aproximación general" in J. RODRIGUEZ TORRENTE (Ed) *Menor y familia: conflictos e implicaciones*. Universidad Pontificia Comillas de Madrid. Madrid 1998, 229-304). From 1997, the Spanish Ministry of Work and Social Affairs publishes the data in his web page: <http://mtas.es> The evolution has been astonishing: in 1990 2.159 incountry vs. 100 intercountry adoptions. In 1995, 1.406 incountry vs. 435 intercountry; in 2000, 964 incountry vs. 3062 intercountry; in 2004, 5.541 intercountry adoptions.

<sup>20</sup> G DAVALOS *Perfil de los solicitantes de adopción internacional en la Comunidad de Madrid*. 2002. (Non published)

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<b>L AMERICA</b>	<b>631</b>	<b>960</b>	<b>895</b>	<b>905</b>	<b>721</b>	<b>593</b>	<b>679</b>	<b>585</b>
Colombia	250	393	361	414	319	271	282	256
Perú	81	151	126	99	71	42	50	50
México	72	90	107	79	92	58	50	31
Guatemala	47	75	70	90	46	28	8	3
Bolivia	18	31	66	66	18	76	126	92
<b>AFRICA</b>	<b>0</b>	<b>16</b>	<b>23</b>	<b>32</b>	<b>31</b>	<b>51</b>	<b>163</b>	<b>268</b>
Madagascar	0	8	1	10	9	19	24	13
Marruecos	0	3	12	8	5	7	20	21
Etiopía	0	0	0	0	0	12	107	220
<b>TOTAL</b>	<b>942</b>	<b>1.487</b>	<b>2.006</b>	<b>3.062</b>	<b>3.428</b>	<b>3.625</b>	<b>3.951</b>	<b>5.541</b>

**2.4. The regulation of IA centred on the pre-adoption period.**

The regulation of IA in the main international instruments and also in many state laws (as the Spanish ones) is focused in the pre-adoptive period. This is the orientation of article 21 CRC<sup>21</sup> that must inform all the international and state regulations on IA. In this article, *the best interests of the child* is considered as the “paramount consideration” in IA<sup>22</sup> so the old conception centred in the adults needs has been substituted by a conception centred in the children needs: IA is one of the possible solutions for children unable to live with their birth families. Another important principle in this article is the *subsidiarity rule*. It is considered best for the child to remain within his original family or within his country of origin being adequately cared there. This principle was underlined in the definite text of the Convention because the project of CRC stated that the States members must facilitate the IA and this measure is “another measure” for caring for the child. In the definite text IA, is accepted only if

<sup>21</sup> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the 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 intercountry 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 intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in intercountry 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.

<sup>22</sup> In relation to this principle, there was a deep modification in the definite text of Convention proposed by the finish observer in the discussion of the project, enforcing the child centred conception (Consejo Económico y Social. Cuestión de una Convención sobre Derechos del Niño. Informe del Grupo de Trabajo acerca de un proyecto de Convención sobre Derechos del Niño. Distr. General. E/CN.4/ 1989/48. 2 de marzo de 1989. Español, para 362-4).

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the child cannot be placed in foster care or in an adoptive family in his country”<sup>23</sup>. The decision whether a child is available for adoption must be made in the child’s country or origin<sup>24</sup>. But, the receiving countries are also concerned about it. If they “promote” the IA through their pre and post-adoption measures or they don’t control private promotion of IA (for example in Internet) they contribute to the maintenance in some states of origin of deficient child welfare programs and even they contribute with the dramatic reality of children being born to be given in adoption: sometimes IA create orphans. So, the subsidiarity principle is responsibility also of the receiving states like Spain.

The Hague convention on protection of children and co-operation in respect of intercountry adoption (1993) is focused also mainly in the pre-adoption period, and establishes a cooperation system between public authorities of the origin and the receiving country attending that the adoption is constituted in the best interest of the child, the process is child centred and the subsidiarity principle is respected<sup>25</sup>.

In Spain there have been broad reforms in the past 10 years that have lead to a complex legal framework in IA<sup>26</sup>. Spain has ratified the Hague Convention and also bilateral treaties with some countries (Bolivia<sup>27</sup> and Filipinas<sup>28</sup>); our Private international law rules have been modified 5 times for the last 10 years; our substantive family law has also deeply changed moving from a consideration of the adoption as a private civil matter to a regulation of it as a public question, empowering the public administrative authorities in different moments of the process<sup>29</sup>. This deep philosophic change has coincided with two other “revolutions”: the change of the model of State from a centralist to a decentralized model: nowadays the social policy (so IA) is competence of the “autonomous communities” rather than a State

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<sup>23</sup> The Venezuela and RFA delegations wanted to define the IA as an “exceptional mean”. (Ibid, para 256-7.

<sup>24</sup> Although many times they don’t guaranty it al all. Is the case of Ukranie (N. CANTWELL I. LAMMERANT L. MARTÍNEZ-MORA *Assessment on the adoption system in Ukranie. Project commissioned by the OSCE.ISS.* October 2005).

<sup>25</sup> “One of its basic premises is that adoption is not an individual affair, which can be left exclusively to the child’s birthparents or legal guardians, or to the prospective adoptive parents or other intermediaries, but rather a social and legal measure for the protection of children. Consequently, procedures for intercountry adoption should ultimately be the responsibility of the States involved, which must guarantee that adoption corresponds to the child’s best interests and respects his or her fundamental rights” (“Intercountry Adoption”. Innocenti Digest, December 1998).

<sup>26</sup> S.ADROHER BIOSCA, S. and V. ASSIEGO CRUZ “la adopción internacional” in I. LÁZARO GONZÁLEZ *Los menores en el Derecho español.* (Tecnos, Madrid 2002) 407-451

<sup>27</sup> Acuerdo bilateral entre el Reino de España y la República de Bolivia en materia de adopciones hecho en Madrid el 20 de octubre de 2001 (BOE nº 304, 20 December 2001)

<sup>28</sup> Protocolo de adopción internacional entre el Reino de España y la República de Filipinas hecho en Manila el 12 de noviembre de 2002 (BOE nº 21 24 January 2003).

<sup>29</sup> The main state legal framework is the Ley Orgánica 1/1996 de protección juridical del Menor (15 January 1996- BOE nº 15, 17 January 1996) which states that the public authorities must declare the applicants eligible to adopt; authorise and control the intermediate private agencies (ECAIs); coordinate the adoption with the public authorities of the origin country and send all the information about the progress of the placement to the authorities of the origin country if they demand it

competence<sup>30</sup>. On the other hand family law has been deeply modified in different questions some of them affecting IA: non marriage couples are capable to adopt in some “autonomous communities” and homosexual married couples can also adopt in Spain. Anyway all this legislation is also mainly focused in the pre-adoptive period.

### **3.- PROTECTING THE ADOPTIVE CHILD AFTER ADOPTION**

As I have noted in the introduction, protection of the adopted child doesn't end with the adoption: family adaptation and preventing adoption dissolution must also be taken into account by the laws. There are several problems that the adoptive families must face that could be solved helping the family with adequate post-adoptive policies some of which can prevent adoption disruption or adoption dissolution<sup>31</sup>.

The average of IA dissolutions (or disruptions) depends on the period studied (before 1970 was almost unknown), the country of adoption, the characteristics of the children taken into account (children with special needs, age groups...)<sup>32</sup>. Although the most recent studies in Spain state that it's a very minority situation<sup>33</sup>, the adoption disruption generally takes place during the adolescence: in this period some studies suggest a certain risk of maladjustment<sup>34</sup>. Nowadays, the medium age of the adopted children in Spain is very low yet. What can happen in 5 or 10 years time when a great number of adopted children will reach their adolescence?

The good family adaptation depends both on the pre and post adoption measures, as can easily be deduced from the case of Eugenia explained at the beginning of this paper. Nevertheless, the pre and post IA measures must be very careful no to be “promoting” IA: we must protect the children already adopted in Spain and facilitate their adaptation but we must not “create new orphans” in the origin countries.

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<sup>30</sup> So the laws regulating the great majority of questions affecting IA are “autonomous”. I don't list all of them here for space reasons.

<sup>31</sup> “For children adopted from other countries and other ethnic backgrounds, disruption of this relationship is difficult to conceptualise, since they loss their whole existence. It renders them a stranger in the world in which they find themselves as well as in the world from which they came”. (J. HARPER, “Counselling issues in intercountry adoption disruption”. *Adoption & fostering –1993-* vol 18 n° 3, 20).

<sup>32</sup> BERÁSTEGUI PEDRO- VIEJO *Las adopciones truncadas y en riesgo en la Comunidad de Madrid*. (Madrid, Consejo Económico y Social, 2003), 30, summarizes the main studies, especially American studies: in USA the medium averages are approximately 10%; in the Netherlands 10% and in Great Britain 18,7%. The recent European average is 5% (PALACIOS. *Idoneidad en la adopción Internacional*. paper in *VIII Jornadas de Coordinación entre Entidades publicas y Entidades colaboradoras en Adopción Internacional. Corresponsabilidad en la tramitación de las adopciones internacionales* (Murcia 14-5- mars 2006). Non Publisher).

<sup>33</sup> The general average in Madrid is 1.5% but it goes to 6,7% in cases of adopted children older than 6 years old. (Ibid) In other study related to the cases in Spain, the total number of cases was 22 (J. PALACIOS, Y. SÁNCHEZ-SANDOVAL, E. LEÓN. *Adopción internacional en España. Un nuevo país, una nueva vida*. (Madrid, Ministerio de Trabajo y Asuntos sociales, 2005), 184.

<sup>34</sup> J.H.A. VAN LOON *International cooperation and protection of children with regard to intercountry adoption*. *Reccueil des Cours de l'Academie de la Haye de Droit International*. 1993 t, VII, 246.229 y ss.

I will analyse the pre and the post adoptive measures that can facilitate the family adaptation on IA. A recent Spanish study stated that the main circumstances that conduced to a disrupted adoption are related to the public professional intervention: non preparation of the foster parents, suitability of the foster parents, lack of information about the child and misadjusted assignation, and lack of post-adoptive follow up reports and professional support<sup>35</sup>.

### ***3.1.- Preventing disrupted adoptions in the pre-adoptive period***

Several competences attributed to the public authorities in IA before adoption takes place, are essential to guarantee a good family adaptation in the post adoption time. Some of them are responsibility of the receiving states, others of the country of origin.

➤ Preparation of the foster parents: Many countries with broad experience in IA focused the work with the parents in the preparation rather than in the suitability declaration considering the preparation as compulsory<sup>36</sup>. The preparation pretends giving prospective adoptive parents the necessary knowledge and making them aware of the full scope of adoptive parenthood so that eventually they can make a well-considered choice whether or not to adopt a foreign child. In Spain preparation is not legally compulsory yet (only in four Autonomous Communities and with a diverse duration: to 8 to 32 hours), but some “Autonomous communities” have started offering it and publishing some materials to “accompany” the parent’s decision<sup>37</sup>. In some Autonomous Communities, preparation is hold by the ECAIS because the local legislation states so. This is not the best solution; in other Communities different private associations or entities carry out the preparation. Nevertheless almost all the Communities have public informative sessions with all the foster parents before the preparation takes place.

➤ Public determination of the foster parents capability, suitability and eligibility to adopt. The laws of the different countries, regulate the process to select and to chose the prospective adoptive parents in three different categories: CAPACITY (some countries only recognize such capacity to married couples, others to married couples without children, in some countries single persons can adopt; the difference of age between adoptive parents and the child is not the same in the different state regulations...), SUITABILITY (the capable applicants must be declared “suitable” to adopt, suitability which can be referred to very different questions:

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<sup>35</sup> PALACIOS, Y. SÁNCHEZ-SANDOVAL, E. LEÓN. (supra note 33), 187.

<sup>36</sup> For example in Sweden (MIA. SWEDISH INTERCOUNTRY ADOPTIONS AUTHORITY. *Adoption in Sweden. Policy and procedures concerning intercountry adoption*. 2005-<http://mia.aopt.se>) or in The Netherlands (L. VAN TRUYLL, L. "Intercountry adoption in the Netherlands. Compulsory preparation classes for new adoptive parents". *Adoption & fostering – 1994- 18 n° 3*, 16).

<sup>37</sup> For example in Valencia, GENERALITAT VALENCIANA. DIRECCIÓ GENERAL DE LA FAMILIA I ADOPCIONS. *Materiales para la preparación de solicitantes de adopción*; In Andalucía, some publications: J. PALACIOS, Y. SÁNCHEZ-SANDOVAL, E. LEÓN. *Adelante con la adopción*. (Junta de Andalucía. Consejería para la igualdad y bienestar social. Sevilla 2004) and MARTÍN SÁNCHEZ, L. *Las diferencias étnicas y culturales. Un reto en la adopción internacional*. (Junta de Andalucía. Consejería para la igualdad y bienestar social. Sevilla 2004).

affective capacity, family stability, physic and mental health, capacity to acceptate the personal story of the child and his cultural and racial differences, etc...) and ELIGIBILITY (may be there are not enough children to be adopted for all the capable and suitable applicants, so the state regulations often establish different criteria to chose the best applicants for the abandoned children, to pre-assign and, after the parents and authority consent, assign the parents to the child). The suitability declaration is perhaps the central and most difficult task for the public authorities; they have to examine the foster parents and decide whether they are or not suited to adopt after a social and psychological study<sup>38</sup>. In Spain it is one of the matters that needs a broad reform: each Autonomous Community has its own legislation on the matter (some more concrete, others very general) with different criteria mainly centred in the evaluation of the mental health and objective characteristics (age, economic position...) more that in the capacities and attitudes towards the adoptive parenthood<sup>39</sup>; the averages of non suitable parents differ for geographical reasons<sup>40</sup>, the waiting time to have the family study is also different<sup>41</sup> and the “price” of the report is also geographical different...<sup>42</sup>. the Courts that examine the appeals of parents declared non suitable by the administrative authorities have also different criteria<sup>43</sup>.

➤ Information on the child. The public authorities of the child’s country of origin must prepare and send to the prospective parents and the authority of the receiving country a complete report on the child including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child’s family, and any special needs of the child so that the receiving country authorities and the prospective parents agree to the pre-assignment. There is an important lack of information in many of these reports and is one of the causes of some disrupted adoptions.

### ***3.2. Towards the protection of the adoptive child with post-adoption measures***

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<sup>38</sup> Many or the disrupted adoptions have taken place because of a lack in this question: R.A.C."HOKSBERGEN Understanding and preventing failing adoptions" in E. HIBBS. *Adoption: international perspectives*. Madison 1991. In Germany 1/3 of the prospective parents are declared not suitable. Some studies state that this exigency is the reason for the low tasks, 2%, of disrupted adoptions in this country (A. KÜHL, W WINTER-STEIN “Foreign adoption in the Federal Republic of Germany”. In R.A.C. HOKSBERGEN (Ed) *Adoption in a worldwide perspective. A review of programs, policies and legislation in 14 countries*. (Sweets North America INC Berwyn, 1986) 173.

<sup>39</sup> J PALACIOS (Supra note 32).

<sup>40</sup> In 2003, the average of non-suitable applicants goes from a 15,3% in Valencia to a 0% in Cantabria o Canarias (OBSERVATORIO DE LA INFANCIA. *Estadística básica de protección a la infancia año 2003*, Ministerio de Trabajo y Asuntos sociales. Secretaría de Estado de Servicios Sociales, familias y Discapacidad. Boletín estadístico 06,83).

<sup>41</sup> COORDINADORA DE ASOCIACIONES EN DEFENSA DE LA ADOPCIÓN Y EL ACOGIMIENTO *Estudio interautonómico sobre plazos en adopción internacional*, Madrid 2003 <http://www.asatlas.org/documentos/estudio%20sobre%20plazos%202000-2003.pdf>. This study stated that the waiting time is very different in the Autonomus Communities and goes from 16.5 months in La Rioja to 5 in Catalonia .

<sup>42</sup> All these dysfunctions were underlined by the Special Commission created in the Spanish Senate which published its conclusions on 13 December 2003 (<http://senado.es>).

<sup>43</sup> M. AGUILAR BENITEZ DE LUGO, M and B. CAMPUZANO DÍAZ “El certificado de idoneidad para las adopciones internacionales desde la perspectiva del Derecho internacional privado español”: Boletín de Información del Ministerio de Justicia nº 1888, 5.

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Even if, as we have seen, CRC and Hague Convention regulate IA focusing specially on the pre-adoption period, they mention also in some of their articles very important principles concerning the post- adoption period that encourage and justify the necessary implementation of state measures in this matter. The right to an identity is referred in CRC<sup>44</sup> (articles 7.1<sup>45</sup> and 8<sup>46</sup>) and HC (articles 9<sup>47</sup>, 16<sup>48</sup> and 30<sup>49</sup>); the right (or the “desire”) to a family friendly policy in art. 18<sup>50</sup> CRC, and the post-adoption services in articles 18 CRC and in 9 HC<sup>51</sup> which were qualified as obligations derived from the Convention by the special Commission held in September 2005 at the Hague<sup>52</sup>.

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<sup>44</sup> A recent study made by the director of Innocenti Research Centre underlines the compromise el the CRC with this right: M SANTOS PAIS “The CRC and the child’s right to an identity”. *European seminar on post adoption. Which Approaches, Models, and Support Services to Adoptive Families Relations* and held in Innocenti Institut on 26 january 2006 (supra note 3).

<sup>45</sup> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

<sup>46</sup> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

<sup>47</sup> Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption. e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

<sup>48</sup> (1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall –  
a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;

b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;

(2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

<sup>49</sup> (1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

<sup>50</sup> 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

<sup>51</sup> Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to c) promote the development of adoption counselling and post-adoption services in their States;d) provide each other with general evaluation reports about experience with intercountry adoption.

<sup>52</sup> Draft Guide to good practice under the Hague Convention drawn up by the permanent bureau. Prel Doc n° 2. August 2005. ([http://www.hcch.net/upload/wop/ado\\_pd02e.pdf](http://www.hcch.net/upload/wop/ado_pd02e.pdf)): “The Convention imposes

The importance of this approach is justified because of the evolutive moment on IA. It is possible to make a parallelism between IA and immigration movements: depending on the social moment of immigration or IA, law must face different situations and guaranty progressively new generation rights<sup>53</sup>. In Spain there are already 25.000 IA children. It's important to protect them and to facilitate their family and personal adaptation. I will now analyse some of this post adoption measures especially in Spanish law.

### **3.2.1. Family friendly policies<sup>54</sup>**

In Spain there is a general absence of family friendly politics or family allowances (birth or adoption grants)<sup>55</sup> but in the last years some reforms are trying to change this situation, helping the families reconciling family life and work: maternity and paternity allowances, reduction of the labour time to look after the children, etc... These state and local laws, decrees and programs affect all the families, also the IA families. One of the factors that contribute specially to the good family adaptation is the management of the family stress associated to the adoption<sup>56</sup>, so it's very important to facilitate conciliation of work time and an increasing family time demand derived from the new member and his/her necessities (educative, medical, affective...).

Nevertheless, in my opinion, in this context adoptive families must be treated as the others: non justified special allowances can be considered as "promoting measures". But these families may have special time problems because of the days (almost a month in many countries) estimated to travel to the country of the child. Up till now the regulation only allows taking into account the time of the travel in the maternity licence; the real advance would be to recognize an independent licence to travel, and afterwards the maternity/paternity licence. That's the aim of Concilia Plan 2006, a national accord between the public administration and

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an obligation on Central Authorities to promote counselling and post adoption services. When developing a national and intercountry adoption system, States should give consideration to who will provide post adoption services. The nature and extent of these services is not specified, but States must take all appropriate measures to promote them. This should be interpreted as meaning that States must do everything within their powers and resources to carry out the obligation. The explanatory Report elaborates on the reasons on this provision of the Convention. The words on post adoption services were added at the suggestion of some origin countries because of the importance of post adoption services to ensure the child's adjustment to his/her new home or environment and successful outcome of the adoption". A work on this "implementation measures is J.DEGLING "Post-adoption services as an instrument of implementation of the Hague Convention". *European seminar on post-adoption. Which Approaches, Models, and Support Services to Adoptive Families Relations*. Innocenti Institut on 26 January 2006 (supra note 3).

<sup>53</sup> F DASSETO "Pour une theorie des cycles migratoires" in A. BASTENIER and F. DASSETO *Immigrations et nouveaux pluralismes Une confrontation de sociétés*. (Brussels 1990, 11-40). This author states that the second moment of migration cycle is the time of creating families or regrouping ones family from the country of origin, so law must guaranty the right to family life and the integration of the second generation.

<sup>54</sup> For a comparative view, OECD *Babies and bosses. Reconciling work and family life*. 3 vols. 2004.

<sup>55</sup> M.T. LÓPEZ LÓPEZ UTRILLA DE LA HOZ, A. VALIÑO CASTRO *Políticas públicas y familia. Análisis de la situación en España*. (Fundación Acción familiar, Fundación Gondara Barandiarán Ed. Cinca, Madrid, 2006).

<sup>56</sup> A. BERÁSTEGUI PEDRO VIEJO (supra note 1) 240-3.

workers to facilitate the family life of public workers: two months of paid work permission to travel to the country of origin<sup>57</sup>.

### **3.2.2. Economical support: adoption subsidies for IA**

IA is an expensive way of creating a family. Adoption process includes a travel, a hotel in the country of origin, the costs of all the intermediaries... some countries ask the foster parents to give a sum of money to the orphan centre through the intermediate agency (obviously the combination of facilitating IA and providing such assistance is a delicate one because the latter activity may easily put the agency in a better position to get access to available children)... All these expenses may put some families in a difficult economical position. Must public authorities give special subsidies so that the IA is not economic inaccessible for some families? Can the subsidies be considered a “promoting” measure?

In some countries like USA family subsidies only cover domestic adoptions: adoption subsidies, also known as Adoption Assistance Payments (AAP), are offered by all states to assist adoptive parents manage living and care costs for children with special needs adopted through the U.S. foster care system. Federal subsidies are not available to children adopted internationally. Adoption subsidies are perhaps the single most powerful tool by which the child welfare system can encourage adoption and support adoptive families.

In others countries there are also IA grants (to cover the expenses due to the adoption from abroad): in Denmark 5.159 € per IA, in Finland 1.900 to 4.500 per IA, in Sweden 4.456€ per IA; in Belgium 1.023,45€ per adoption... In other countries there are general birth or adoption grants<sup>58</sup>.

In Spain there are very few general family subsidies for the families (who adopt or who doesn't), and almost all the subsidies already existing depend on the family rent, so they are really social subsidies more than family subsidies<sup>59</sup>. Nevertheless, the economical support for adoptive or foster care families shows the existence of some subsidies (in the Autonomous communities) that promote foster care, helping economically the families, generally without family income limit<sup>60</sup>. In IA, there is still very little experience. I have found two different autonomic laws helping economically low income families: Decree from Extremadura<sup>61</sup> which regulates adoption subsidies for IA process, and Order from Catalonia approving subsidies of

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<sup>57</sup> [http://www.map.es/iniciativas/mejora\\_de\\_la\\_administracion](http://www.map.es/iniciativas/mejora_de_la_administracion)

<sup>58</sup> All these data can be consulted in missoc statistics ([http://ec.europa.eu/employment\\_social/soc-prot/missoc98/english/f\\_main.htm](http://ec.europa.eu/employment_social/soc-prot/missoc98/english/f_main.htm)).

<sup>59</sup> M.T. LÓPEZ LÓPEZ UTRILLA DE LA HOZ, A. VALIÑO CASTRO (supra, note 55).

<sup>60</sup> There is now a “national problem” in Spain with thousands of children in institutional foster care and very few families ready to receive a child under this protection measures so there is a “promotion” of family foster care in Spain.

<sup>61</sup> Decreto 229/2005 11 octubre por el que se establecen las bases reguladoras de ayudas para la adopción internacional. DOE 18/10/2005

2.300€ in 2006 also conditioned to family rent<sup>62</sup>. These measures help some families to adopt but do not promote IA.

### **3.2.3. Post-adoption services**

Most countries of origin require the submission of follow-up reports to monitor how an adopted child develops and adjusts to the new family and social environment<sup>63</sup>. This requirement is a compulsory obligation of the receiving countries authorities and if the reports are not sent on time, origin authorities may paralyse the future adoptions with this receiving country.

Nevertheless, I'm not referring now to this post-adoption responsibility of the public administrations. The IA is a process in which the professional advice is essential as we have seen already. In conformity with good practices developed internationally, this process begins, in the country of origin checking the child's adoptability and the chances of him being taken into care in his country of origin (the subsidiarity principle) and, it involves informing, selecting and preparing prospective adoptive parents in the receiving country. Then, in cooperation with the professionals in both countries, follow the professional matching and the first meeting between the child and the adopters, preferably within a professional supportive setting.

The first stages of the IA family life together may also require *professional support*, in the interests of the whole adoptive family, and particularly of the child who then needs emotional stability and a feeling of integration. So post-adoption services constitute the last link in the chain of *professional and multidisciplinary services that are* indispensable in guaranteeing that the global adoption process succeeds in the best interests of the child and out of respect for all interested parties<sup>64</sup>. The Hague Convention does not specify neither who will provide post adoption services, nor what services will be provided and considers the post adoption services as a good practice rather than a "right". Nevertheless, the Convention considers that the purpose of the post adoption services is to ensure the child's adjustment to her new life and the successful outcome of the adoption<sup>65</sup>.

In a recent European Seminar on post-adoption<sup>66</sup> a survey on adoption was presented by Rafaela Pregliasco in which she concluded that there was availability of post adoption services in almost all the 22 European countries studied with the exception of Portugal, Estonia,

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<sup>62</sup> Orden BEF/74/2006. Prestacions econòmiques per a les famílies amb filles i fills a càrrec (2006) Ajut per adopció internacional. (<http://gencat.cat>). The condition is: *No superar unos ingresos de catorce veces el indicador público de renta de efectos múltiples anual (93.903,60 €), ponderados según el número de miembros de la unidad familiar.*

<sup>63</sup> A recent work on this matter is POST-ADOPTION (II): Follow-up reports required by countries of origin". International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC). Monthly Review n° 3/2006. March 2006.

<sup>64</sup> SSI (supra note 4).

<sup>65</sup> Explanatory report, para, 235.

<sup>66</sup> Titled *Which Approaches, Models, and Support Services to Adoptive Families Relations* and held in Innocenti Institut on 26 January 2006 (supra note 3).

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Hungary, Lithuania, and in Spain only in some autonomous communities. She states that “frequently, post adoptive support is not recognised as a self-standing service but is included among the many other services provided by subjects involved in the adoption process in various ways. Support for the post-adoption phase is generally provided both by authorised private bodies and also by the competent public authorities. The modalities of providing services for the post-adoptive period is uniform. The common element is seen in the existence of an authority charged with vigilance over the working and the supplying of post-adoption services, testifying to the awareness of the need for these services to be provided in a highly professional manner and with care. This awareness is also seen in the general tendency to set these services within the central structures of government dealing with the protection of children, which almost all countries mention in the questionnaire”<sup>67</sup>.

Up till now, in Spain, not all the “Autonomous Communities” have post adoption services (generally consisting on family counselling, psycho-educative intervention, psychotherapy, and medical counselling) which the public authorities finance to private associations or companies. Some Communities with post-adoptive services are Madrid, Valencia<sup>68</sup>, Andalusia<sup>69</sup> and Catalonia<sup>70</sup>. Apart from these public initiatives, some ECAIS have post-adoption services and also some adoptive parents associations.

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67 Some examples of the national reports showed different post-adoption practices:

In Austria there are 3 well known private organisations (they co-operate with the public youth welfare services) supporting adoption procedures and adoptive parents. These organisations are financially supported by the government. They offer information via websites, brochures, phone, personal counselling, help with the bureaucratic necessities, organise pre-adoption groups, write the home-studies for international adoptions to the States of origin and, support adoptive-families with different services, support networking between adoptive families (groups, meetings, seminars, lectures with inside information about the sending countries, ...). The meetings are often organised for families with children from a certain region or continent. They also help adopted children to contact their biological parents or biological parents to find their children.

In the Netherlands the lack of expert counselling on adoption related family problems was the reason, in 1981, to set up the Foundation Adoption Aftercare, in Dutch called 'WAN'. WAN is now part of the Foundation Adoption Services. The foundation is subsidised by the Ministry of Justice, has its own Board, and is independent from any adoption agency and works for all the families with inter-country adopted children in the Netherlands. It has a twofold task. To be available for information and consultation in the broadest sense. This means that not only adoptive parents and adopted children can consult Foundation Adoption Services, but also counsellors, teachers, lawyers, physicians, adoption agencies etc. To structure the medical and psycho/social counselling for adoptive families by making use of professional organisations that already have a task in youth or adolescent care. In order to meet the wishes of adoptive families, Foundation Adoption Services stimulated that counsellors and physicians have specific knowledge of and affinity with IAbecame available in the region. A wide range of professional consultation, prevention and counselling possibilities were created for the target groups.

<sup>68</sup> In Valencia the service is free and is offered by EULEN a private company. <http://www.gva.es>

<sup>69</sup> In Andalucía the service is free as can be consulted in the web page: <http://www.juntadeandalucia.es>.

<sup>70</sup> <http://www.gencat.cat> “El Departament de Benestar i Família, a través de l'Institut Català de l'Acolliment i de l'Adopció, ha posat en marxa el primer programa d'atenció postadoptiva de Catalunya. 'objectiu és garantir un servei de qualitat en l'assessorament i orientació a totes aquelles famílies adoptives que ho requereixen per fer front als reptes que planteja la criança, l'educació i la relació entre pares i mares amb els seus fills i filles al llarg del seu procés evolutiu”

In some of the “Autonomous Communities”, there are family post adoption grants covering a percentage of these services. In Madrid, for example 100% family counselling (between 6-10 sessions) 100% psycho-educative intervention (conferences, formation, ateliers...) 100% medical counselling and 50% of therapeutic intervention. Usually these family subsidies are without family income limit<sup>71</sup>.

The little Spanish experience on IA, leads to some problems on this field: some “Autonomous Communities” consider that it’s better to give these pos-adoption services in the general family counselling centres so that the adoptive family is not stigmatized, resistance of some families to use the services because they feel that that it means to recognize that the adoption is problematic, need of well formed professional in adoptive matters...

### **3.2.4. Back to the roots policies<sup>72</sup>.**

*To know one's blood is somewhere else just waiting to be found  
unless you're lost or in a search you cannot understand<sup>73</sup>.*

The right to the identity is a first generation fundamental right but perhaps a new generation right because some state Constitutions and children state laws are recently including it as a fundamental right, but there is still a very light compromise in the international conventions to define its limits as we have already seen in CRC and Hague Convention. Its extension differs if the filiation is biological, adoptive filiation or by ART.

In IA it is a very important right because it has not only a genetic component (as in biological filiation) but also a social component: to be able to construct one’s identity is essential to know where do I come from, who were my parents and how was my abandon story. It minds a lot and to a lot of people<sup>74</sup>. This “travel to the past” has three steps: the revelation of

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71 Diario de Sesiones de la Asamblea de Madrid nº 607, 7 february 2006. Comparecencia de la Excm. Sra. Consejera de Familia y Asuntos Sociales, a petición del Grupo Parlamentario Popular, al objeto de informar sobre medidas emprendidas en pro de la política de adopciones. The Consejera informed: “Me proponía también como objetivo contribuir al apoyo postadoptivo, por ello hemos puesto en marcha dos centros de apoyo de los que van a ser destinatarios potenciales más de 5.000 menores adoptados y sus respectivas familias durante todos estos años, y los varios miles de menores adoptados que ya son mayores de edad y que, desde luego, corresponden a adopciones realizadas antes de 1987. Desde dichos centros se dará a quien lo necesite orientación en la fase de adaptación del niño a la familia, consejos sobre peculiaridades o ritmos del desarrollo del hijo adoptado, orientación sobre cómo informar al niño sobre su condición adoptiva, y acompañamiento si desea buscar sus orígenes, complemento este último a las propias iniciativas que está llevando a cabo el Instituto Madrileño del Menor y la Familia. De la misma manera, desde esos centros se dará intervención terapéutica especializada en supuestos de crisis o graves dificultades de vinculación, tanto en sesiones individuales como en terapias de grupo”.

72 A recent doctoral Thesis which will soon be published studies very deeply this question: B. GÓMEZ BENGOCHEA. *Derecho a la identidad y filiación. Un estudio de Derecho internacional privado y Derecho comparado*. Madrid 2005.

73 HAYES, M. "Transracial adopted people's support group" in R. PHILIPS AND E. MCWILIAM (Eds). *After adoption. Working with adoptive families*. London 1996, 188.

74 Y. BAER “Adoptees searching for their origins”. In J. EEKELAAR and J. SARCEVIC (Eds). *Parenthood in modern society* (Kluwer academic publishers, The Netherlands 1993, 247.

the adoptive parents to the child of his adoptive condition, the legal possibility to know to the identity and social origin data and finally meeting with the past life<sup>75</sup>.

I'm going to refer to the second step, because is basically the one that can be regulated by the law even if the third can be assisted by post-adoption services. The problem to assure this right in IA is that two state laws, sometimes with different conceptions of this right, may be in conflict. That's the reason why the Hague Convention protects so weakly this right: the legal access to origin data depends both on origin and receiving countries regulations<sup>76</sup>.

In Spain this is a great challenge for the next years when our adopted children reach their adolescence. Up till now, Spanish Law and Decree of Registry office of civil status guaranty that in the registrar of births appears some relevant information of the child origin: name and address of biological parents/ date of birth, place of birth, date of adoption, name and address of the adoptive parents. The adopted person could ask at the Office of civil status for a "Certificate" when he is 18 years old and obtain the complete information.

Nevertheless, some problems started in IA cases derived sometimes of the attitude of origin country and in other cases of the adoptive parent's demands. On the one hand, some origin countries cancelled the biological data in its civil status registry after adoption and make a new inscription with the adoptive parent's data. When the Spanish consuls had to transcribe this data, they asked the local registrar information about the original data so that in the Spanish civil status registry the biological data are registered<sup>77</sup>. But soon started the cases in which parents asked that their adopted children should appear as biological in the "Simple certificate" needed, for example, for the school, although all the relevant biological information can be obtained asking a "Complete certificate" available at 18 years old<sup>78</sup>. Even in the Spanish authorities denied these demands, in the last 7 years broad reforms have taken place in the following sense: the adoptive data must not be public for persons or institutions out of the family, so the simple certificate will "hide" the original data, but the adoptee can obtained these

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<sup>75</sup> In old IA countries like USA there are social movements called "back to the roots" that organize "motherland tours". Ibid, 245.

<sup>76</sup> "The right of the child to obtain information about his or her origins derives from the right to know his or her parents as provided for in Article 7(1) of the *UN Convention on the Rights of the Child*. However, this right must be balanced against the right of birth parents not to have their identity disclosed to the child who is relinquished for adoption. For example, in some countries an unmarried mother who had consented to the adoption might be later harmed by the disclosure of her past". I. LAMMERANT. "La post adoption: vers un équilibre des droits et intérêts des adoptés, des adoptants et des familles d'origine". European Seminar in Post-adoption. *Which Approaches, Models, and Support Services to Adoptive Families Relations* and held in Innocenti Institut on 26 January 2006 (supra note 3).

<sup>77</sup> Resolutions of the "Dirección general de Registros y Notariado" of 23 April 1993 (Anuario DGRN 1993, 1435) and of 31 December 1994 (BIMJ n° 1736, 97).

<sup>78</sup> It's for example the case solved in the Resolution of 17 April 2000 (BIMJ n° 1871, 116) in which the adoptive parents of two Lebanon girls asked that in the simple certificate the place of birth is changed to the Spanish city where they live so that other people cannot deduce the adoptive relationship from this certificate. The Spanish authority denied this demand.

data asking the complete certificate<sup>79</sup>. So in Spain the right of the IA child to know about his origins depends on the decision of his parents to reveal the adoptive relationship to him, which is evident in an interracial adoption (the main origin country is China) but not always in the rest of IA. If the simple certificate doesn't give clues, is not frequent to ask a complete certificate, so it's possible that some of the adoptees will never know their condition or their biological data. These reforms also encourage the change of the name of the child<sup>80</sup> although all the studies stated that is better to maintain the original name to facilitate the construction of the personal identity<sup>81</sup>.

#### **4.- CONCLUSIVE REMARKS**

In this paper I have referred to two children: the one who hasn't been yet adopted and the child who has been already adopted. Rights of both children must be protected in IA. Anyway, this work has focused mainly in the second child: the case explained at the beginning shows how his rights can be denied. The pre-adoption period regulations are essential to facilitate a good matching and family adaptation but nowadays post-adoption measures are needed also to avoid disrupted adoptions of maladjustments cases. Different public measures have been underlined: preparation of the foster parents, suitability, post adoption services... All these services must be coordinated: "the existence of this chain of services constitutes probably one of the best tools in the prevention of adoption failure"<sup>82</sup>.

These questions have been analysed focusing in the Spanish experience for three reasons: It is the second receiving country in IA in the world and has arrived in a 10 years to this level and the public social system is adapting very rapidly to this phenomenon; There are already living in Spain many "recent" IA children and the studies on adaptation and disrupted adoptions start to predict what can happen in few years when all this adopted children are adolescents. It is urgent to implement post-adoption measures, even if CRC and Hague Convention are mainly focused in the pre-adoption period; some articles of these international instruments can be the basis for the national and local regulations.

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79 -Instruction of the DGRN 15/2/1999 permits to substitute the original birth registration for a new one in which only figures the "new" data so that the adoption information is not public.

-Statutory Order 8/7/2005 reforming the Civil Registrar Regalement permitting to ask for a change of the birth registration to the Registry civil office of the place where the family is domiciled, and in the new registration only will appear the new data (with a reference to the original registration). The Law 15/2005 reforming the Law of Registry office of civil status in the same sense

-Instruction of the DGRN 1/7/2004 permitting that in the birth registration appears as place of birth the domicile if the parents, not the foreign country (with a reference to the original registration). The Law 18/11/2005 reforming the Law of Registry office of civil status in the same sense.

<sup>80</sup> Advice of the DRGN 19/12/ 2003: If the parents want to change the name of the child they must do it before the birth and adoption registration in the civil register so that the new name only appears.

<sup>81</sup> "Le maintien du prénom d'origine affirme la reconnaissance de l'identité première; sa disparition implicitement et concrètement l'annule" ( S. YAKOUB "Quelques réflexions autour de l'histoire des adoptés de l'étranger". *Actes du séminaire Nathalie- Masse* 25-27 mai 1992 Centre international de l'enfance de Paris, 133).

<sup>82</sup> SSI , Supra note 4.