

Adoption

Law and practice under the Revised European Convention on the Adoption of Children

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Foreword

Due to the social and legal changes that have occurred in Europe since the late 1960s, many member states of the Council of Europe revised their laws on adoption with the consequence that certain provisions of the 1967 European Convention on the Adoption of Children became outdated over the years. Furthermore, any different treatment between children born in wedlock and children born out of wedlock in the 1967 convention was contrary to numerous international instruments and the case law of the European Court of Human Rights. This situation urged the competent bodies of the Council of Europe to review the 1967 convention and to bring it up to date. The Working Party on Adoption (CJ-FA-GT1) was set up with the task – after having made a detailed feasibility report – of drafting a revised convention accompanied by an explanatory report. This small working party was composed of outstanding experts in the field of adoption, including, *inter alia*, the co-author of this book, Rosemary Horgan. I had the privilege of chairing this group. In July 2006, the working group completed its task. The texts were amended and approved by the competent bodies of the Council of Europe in 2006 and 2007 respectively, and finally adopted by the Committee of Ministers in 2008.

At the moment, the European Convention on the Adoption of Children (Revised) has been ratified by seven member states of the Council of Europe, with a further nine member states having signed, but not ratified it.

The revised convention underlines that any adoption has to be in the best interests of the child. Any discriminatory distinction in relation to the rights of children born to married and non-married parents has been eliminated. Finally, the revised convention provides an effective complement to the 1993 Hague convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention on Intercountry Adoption).

The authors of this book have undertaken the important task of making a coherent and comprehensive analysis of each of the articles of the revised convention. I am sure that the reader will benefit greatly by reading this book and thus gain an understanding of the revised convention and its place in the context of national and international child adoption.

I am even convinced that this better understanding of the revised convention might also promote a willingness in member states to sign and ratify the convention more rapidly.

At the end of this foreword I would like to set out my own status: before my retirement, I was a director in the Austrian Ministry of Justice and dealt with international aspects of family law. In this function I was, *inter alia*,

responsible for the Austrian authorities' responsibilities under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on Intercountry Adoption. Due to my great experience in international family law and in the work of the Council of Europe in this area, I was appointed Chair of the Working Party on Adoption, which was both a privilege and a challenge.

Werner Schütz (Austria)

Introduction

A universal phenomenon, adoption has served a range of changing interests and needs in different countries at different times. The revised European Convention on the Adoption of Children (RECAC, CETS No. 202) was introduced by the Council of Europe in 2008, in an effort to provide a modern framework for the adoption of children. The 1967 European Convention on the Adoption of Children (ECAC or the 1967 convention), which had set the standard for acceptable adoption practices prior to the RECAC, had become outdated and out of step with both international human rights norms and the national law of some member states of the Council of Europe.

The purposes of the RECAC, as identified in the Preamble, are to recognise developments in the area of child rights regionally and internationally, to reduce the difficulties caused by differences in national laws and provide an effective complement to the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention on Intercountry Adoption). In order to do so, the convention aims to establish “a greater unity” in adoption principles, procedures and legal consequences following an adoption order between countries, and promote the “best interests” of the child to the status of “paramount consideration” as a minimum standard in national laws.

The rules are intended to embody an international consensus on acceptable child adoption, reflecting the different views, legal diversity and common heritage of member states. Furthermore, they are intended to be uniform in all states that become party to the convention. Still, it is important to note that the RECAC is primarily concerned with “full adoption”, or *adoption plena*, which creates a permanent child–parent relationship, giving the child the same rights in relation to his or her new parents as those of a biological child. Indeed, Article 11.1 further refines this scope by specifying that the effects of a convention adoption require the termination of the legal relationship between the child and the biological parents.

As acknowledged in Article 11.4, states are free to make provision for other forms of adoption having more limited effects such as “simple adoption” (namely, *adoptio minus quam plena*), which allows the adopted child to maintain some legal links with his or her biological parents. Equally, countries are free to provide for the institution of *kafala*, whereby children can be provided with permanent care without altering the kinship system, and those children are entitled neither to use the family name nor to inherit.

One of the laudable aspects of the RECAC is that it complements the 1993 Hague Convention on Intercountry Adoption in that it seeks to harmonise the domestic law of the contracting states. In particular, and of considerable relevance, is the fact that it does not seek to compete with the 1993 Hague Convention on Intercountry Adoption. The RECAC will be of considerable assistance to member states as the nature of intercountry adoption changes with the movement towards simple adoption at both the domestic and intercountry adoption level.

Background to the convention

In May 2002, the European Committee on Legal Co-operation (CDCJ) entrusted the Committee of Experts on Family Law (CJ-FA) with the task of examining the European Convention on the Adoption of Children (ETS No. 58). A Working Party on Adoption was established in 2003 with the task of drafting a report containing detailed proposals on the feasibility of reviewing the European Convention on the Adoption of Children. The working party concluded, in its final activity report on adoption, that a new (revised) convention on the adoption of children should be drafted as soon as possible. In May 2004, the CDCJ adopted new terms of reference for the CJ-FA, which instructed the latter to prepare, for the attention of the CDCJ, a new convention on the adoption of children, taking into account the final report containing detailed proposals for the revision of the 1967 European Convention on the Adoption of Children and the submissions made by the member states. In June 2004, the Committee of Ministers approved these new terms of reference for the CJ-FA.

The draft of the revised convention and its explanatory report were prepared by the CJ-FA during two meetings in April and July 2006. They were amended and approved by the CJ-FA between 15 and 17 November 2006 and by the CDCJ at its meeting between 26 February and 1 March 2007. On 11 April 2007, the Ministers' Deputies requested the Parliamentary Assembly's opinion on the CJ-FA draft. On 20 April 2007, the Assembly made a referral to the Committee on Legal Affairs and Human Rights for a report and to the Social, Health and Family Affairs Committee for opinion.

On 14 May 2007, the Committee on Legal Affairs and Human Rights appointed Jaume Bartumeu Cassany (Andorra/Socialist Group) rapporteur to provide an opinion on the draft. Mr Cassany's opinion was approved by the committee on 8 November 2007. The opinion of the Social, Health and Family Affairs Committee (rapporteur: Mrs Vermot-Mangold (Switzerland, Socialist Group))

was approved by the committee on the same day; it also endorsed the opinion of Mr Cassany.¹

The Bureau of the CDCJ thereafter examined the draft European convention on the adoption of children (revised) and its explanatory report, having considered both Mr Cassany's opinion (No. 266), which had been presented to the Committee of Ministers during its meeting on 12 December 2007, and comments submitted by the United Kingdom during the meeting of the Rapporteur Group on Legal Co-operation (GR-J) on 5 April 2007.²

On 23 November 2007, the Standing Committee of the Parliamentary Assembly on behalf of the Assembly adopted its opinion on the draft convention and transmitted it to the Committee of Ministers. On 13 and 14 December 2007, the bureau of the CDCJ considered the aforementioned proposed changes submitted by the delegation of the United Kingdom as well as the proposals made in Opinion 266 (2007) of the Parliamentary Assembly of the Council of Europe, and, on 17 December 2007, the amended text of the draft convention and its explanatory report were sent to national delegations of the CDCJ for their approval by 7 January 2008.

The bureau of the CDCJ considered that only some of the proposed changes to the draft convention were merited, and thereafter instructed the Secretariat to send the revised texts to national delegations with a request for their approval of the proposed changes and to send any comments by 7 January 2008, thus permitting the GR-J to have received the feedback of national delegations prior to its meeting on 10 January 2008. Stylistic changes were proposed by the Council of Europe's Directorate of Legal Advice and it was decided to reverse the order of Articles 1 and 2 of the draft with a view to respecting the title of Part I.

On 7 May 2008, the Committee of Ministers of the Council of Europe adopted the European Convention on the Adoption of Children (Revised). The

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1. See Opinion 266 (2007) of the Parliamentary Assembly, text adopted by the Standing Committee acting on behalf of the Assembly on 23 November 2007 (see Doc. 11381, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Bartumeu Cassany, and Doc. 11453, opinion of the Social, Health and Family Affairs Committee, rapporteur: Mrs Vermot-Mangold).
 2. The UK proposed amendment was based on what they perceived to be a drafting error between the substantive provisions of the convention and the explanatory report: "Article 2 of the draft Convention excludes children who have been married from the scope of the Convention, but not those who have entered into a registered partnership. This is left to paragraph 22 of the Explanatory Report". However, it is not sufficient to alter the scope of the convention by comment in the report, because the report does not have substantive effect. Whilst the UK accepted that member states do not provide for persons under the age of 18 to enter into a registered partnership, the position set out in paragraph 22 of the explanatory report should be explicitly reflected in Articles 7 and 11 of the convention. This proposal was accepted. On the other hand, many recommendations for change contained in Opinion 266 were not adopted (paragraphs 6.1, 6.2, 6.3, 6.4 and 6.5). See CDCJ-BU (2007)32.

convention was opened for signature on 27 November 2008, in Strasbourg, on the occasion of the handover of the Swedish chair of the Committee of Ministers to Spain.