

THE RIGHTS OF THE ADOPTED CHILD AND THE PUBLIC FAMILY POLICIES IN INTERCOUNTRY ADOPTION

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1. INTRODUCTION

1. The main legal research on intercountry adoption (IA) is focused on the process of constitution of adoption and the child's best interests during it, such as legal research into the prevention of trafficking of children, assuring that adoption is a way of searching for the best family for a child who does not have one... and so on. The studies and the regulations attend mainly to the *pre-adoption* period or the adoption process. 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.
2. Nevertheless, many "disrupted" adoptions have regularly been constituted, but do not work after some time. The social and psychological studies on this matter have usually found the cause to be adaptation problems in relation to some characteristic of the child: age, health or psychological problems, etc. However, the most recent studies conclude that the adaptation of the family and the child depends also on the capacity of the adoptive environment to compensate the risks associated with the history of the child and to facilitate the adaptation.¹ This social psychology approach is coincident with social policy studies that propose models, which consider the family as the subject (more than an object) of family policies because of its strength to cope

1. 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), 357. The author 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 a la 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 sobreexigencia 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".

with different situations and problems. Therefore, the duty of the market, the state, the third sector and society is to help the family to fulfil its functions trusting in its capacity instead of substituting it.² From this point of view, family adaptation after adoption is longer, and perhaps most important time to be taken into account also by the law and regulations on IA.³ The main objection to this proposal is that “the 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/her entry into the adoptive family”.⁴

3. Of the matters to be regulated by the law during the whole life of the adoptive family (the post-adoption period), some questions need to be underlined: family friendly policies or regulations that facilitate reconciliatory 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/her origins (“back to the roots” policies).

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

2. APPROACH TO THE PHENOMENON AND THE REGULATION OF INTERCOUNTRY ADOPTION

2.1. THE CASE: SPANISH COUNCIL OF STATE ADVICE NUMBER 2548/2002⁵

5. To illustrate the approach of this paper, it will start with a real case that took place recently in Spain. A Spanish married couple resident in Madrid, wishing to adopt a

² 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.

³ In relation to IA, a very recent seminar held at Innocenti Institute 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*, (Florence: The Institut degli Innocenti, 2006), (CD Rom).

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

⁵ <<http://www.consejo-estado.es/>>

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 were eligible and suitable to adopt, prepared a report including the characteristics of the child the parents would be qualified to care for. They would prefer a four-year-old boy, who is physically and psychologically healthy. The IMMF had accredited an intermediate private institution (these intermediate bodies in Spain are called “Entidades colaboradoras de adopción internacional” – ECAs), which worked with Russia and had informed the applicants they could supervise the adoption process with them. The couple signed a contract with this ECAI and the process started.

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

When Eugenia was integrated into her new family, they observed the following medical and psychological problems: myopia and light astigmatism in both eyes requiring the girl to wear glasses; malformations in palate and gums, and several caries in the teeth; behaviour disorders, attention-deficit and hyperactivity disorder, cognitive distortion, mental retardation; and early sexual activity that affected her sister’s development. The IMMF had various meetings with the family after the adoption in which the adoptive parents expressed all these problems.

On 23/3/2000, the parents sued for damages against the IMMF asking for €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 the girl “abandoned” and placed her in a Spanish institution for the care of children.

The IMMF demanded from 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) concluded that the IMMF had performed adequately in the pre-adoption period and in the post-adoption period.

2.2. THE CONCEPT OF IA AND IA AS A SOCIAL PHENOMENON

6. 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...) are connected with more than one country. Nevertheless, this paper 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/her country of origin to live far away with his/her new family because of the adoption.⁶

IA is a "peculiar and quiet migration",⁷ a phenomenon characteristic of the 1950s, which started after the Second World War,⁸ increased with the Korean and Vietnamese wars,⁹ and spread in the 1960s. PARRA-ARANGUREN states "a dramatic increase in IA which had occurred in many countries since the late 1960s 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".¹⁰ Today

⁶ This is the concept of IA taken into account in the main international conventions. The Hague Convention on Protection of Children and Co-operation, adopted on 29 May 1993 and entered into force on 1 May 1995, defines Intercountry Adoption in its Art. 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, Art. 1 of the Interamerican Convention on the Conflict of Laws on Adoption, La Paz, Bolivia, adopted on 24 May 1984 and entered into force on 26 May 1988, 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".*

⁷ B. TRILLAT, 'Une migration singulière: la adoption internationale', in *Actes du séminaire Nathalie-Masse* 25-27 mai 1992, (Paris: Centre international de l'enfance de Paris, 1992), 21; P. SELMAN, 'The quiet migration' in the new millennium: trends in intercountry adoption 1998-2003', Paper presented at the 8th global Conference Manila, 10-12 August 2005.

⁸ The origin of these population movements were the wars. The Second World War caused many displacements of European and Japanese children to the USA or Sweden; the German case is quite surprising: in 1950, American, Scandinavian or BENELUX families adopted 489 German children, in 1957-628 German children were already adopted; M.A. TECTOR, 'International adoption in West Germany: a private affair', in H. ALSTEIN, R. SIMON (eds.), *Intercountry adoption. A multinational perspective*, (York - Connecticut - London: Praeger, 1991), 119.

⁹ About 200,000 Vietnamese children left their country because of the war. The USA organised 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. LILICH (ed.), *The family in international law: some emerging problems*, (Third sokol colloquium, 1981), 87.

¹⁰ G. PARRA-ARANGUREN, 'History, philosophy and general structure of the Hague adoption convention', in D. DOEK, H. VAN LOON, O. VLAARDINGERBROEK (eds.), *Children on the move. How to implement their right to family life*, (The Hague-Boston-London: Martinus Nijhoff Publishers, 1996), 63.

it is a phenomenon involving over 40,000 children each year moving between over a hundred countries, and is nowadays in its highest level ever in global terms "confounding predictions from the early 1990s that it was a phenomenon that had peaked".¹¹

7. What can be the causes of this increasing international movement of children?

- War: Some wars, for example the Second World War, the civil war in Greece (1946 to 1949), the Korean War (1950 to 1953) and the war in Vietnam (1954 to 1975) explained the very early IA flows in the 1950s and 1960s. However, war and its aftermath are not the only factors leading countries to allow their children to be adopted abroad.
- Economic and demographic background: The flow between the States of origin of IA and the receiving States show the demographic and economic imbalance 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.
- Different models and resources for child protection.

8. It is however, evident that the major sources have not been the poorest or highest birth rate countries in that patterns persist long past the "crisis" or the war, so there are other factors that may be key factors. Such as the different models and resources of child 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:

- In the receiving countries, low birth rates combined with policies of keeping children at risk in their own families and supporting the families through the social services system, produced a diminishing availability of young children for domestic adoption (the children available are children with *special needs*). In these countries, it is important to mention the "personal motivations" of the adoptive parents as a cause of IA. 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 pull factors in the receiving countries.¹²
- In some origin countries there are "silent" policies that promote IA as the formula to finance the national children protection system. For example, IA has discouraged Korea from developing an adequate child welfare programme¹³ and China's

¹¹ P. SELMAN, supra (note 7).

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

¹³ In Korea IA began in 1955 and has placed more than 120,000 children since then. see P. SELMAN, supra (note 7).

“one child policy” has created a crisis in the rejection of girl babies that are adopted by foreign parents.

9. Some authors have affirmed that IA is a cause of 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 from developing their welfare system or to change some policies. The demand creates the supply:¹⁴ “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”.¹⁵

2.3. THE BOOM OF IA IN SPAIN

10. The first “adoptive” country in the world was the USA: between 1971 and 2005, US citizens adopted 354,294 children from other countries and in increasing numbers every year with the reduction in children available for incountry adoption.¹⁶ In the 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.¹⁷

11. Although in the 1990s Spain was a country that did not appear in the international statistics of IA, in 2005 it was the second adoptive country after the USA, the first

¹⁴ 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, in Boletín de los jueces V*, <<http://www.ncch.net>>. 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* (not published); A. BERKASTEGUI PEDRO-VIEJO, supra (note 1), 39; A. FERRELANDIS, ‘La adopción internacional’, in I. E. LAZARO GONZALEZ and I. Mayorat Narros (eds.), *Jornadas sobre Derecho de menores*, (Madrid: Universidad Pontificia Comillas, 2003), 203–212.

¹⁵ ‘Intercountry Adoption’, (December 1998) *Immigrant Digest*.
¹⁶ In 1996: 11,340 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 and Romania. For Russia and Vietnam see: *visas issued to orphans, US department of state*, <<http://travel.state.gov/family/>>.

¹⁷ We have qualified the American adoption law as neoliberal in other works, see: S. ADROHER BIOSCA, ‘Desafíos del Derecho de familia en una sociedad intercultural’, in D. BOROJO (ed.), *Familia e interculturalidad*, (Salamanca, Universidad Pontificia de Salamanca, 2003), 315–264. However, it 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 country’s laws and regulations. The US authorities cannot intervene on behalf of prospective parents with the courts in the country where the adoption takes place”, <<http://travel.state.gov/family/>>.

if we compare the ratio of IA/ population:¹⁸ from 1997–2004 there have been 24,042 IAs in Spain.¹⁹ What can be the reasons for this “family revolution” in Spain? Perhaps the broad legal and social changes in family behaviour after the political transition can partly explain this situation.

– Fewer children to be adopted: Contraceptives, AIDS, legalisation of abortion, destigmatisation of single motherhood, as well as State support for single mothers in some cases, have led 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: infertility problems are increasing, partly because of postponement of childbirth to later ages due to higher workforce participation by women. However, not all prospective parents adopt in Spain because of infertility problems. The motivations to adopt have changed significantly: 15% of the solicitants in Madrid in 2002 were single persons, 16% already had biological children (either from both of the prospective parents or from one of them) and 8% were adopted for humanitarian reasons.²⁰

In the next figure, the evolution is shown: total number of IAs in Spain, total number per continent of origin of the children and number of the main countries of origin:

Continent/country	1997	1998	1999	2000	2001	2002	2003	2004
ASIA	241	265	443	686	1.107	1.586	1.196	2.577
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
EUROPE	97	216	645	1.439	1.569	1.395	1.913	2.111
Russia	70	91	141	49	652	809	1.157	1.618
Romania	0	84	280	583	373	38	85	48
Ukraine	0	0	116	218	356	358	482	349
Bulgaria	11	27	92	123	172	181	202	57

¹⁸ 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, see P. SELMAN, supra (note 7).

¹⁹ We have published the first statistics of IA in Spain (1988–1995) after a research period in the Central Registry office of civil status, see: S. ADROHER BIOSCA, ‘La adopción internacional: una aproximación general’, in J. RODRIGUEZ TORRENTE (ed.), *Menor y familia: conflictos e implicaciones*, (Madrid: Universidad Pontificia Comillas de Madrid, 1998), 229–304. From 1997, the Spanish Ministry of Work and Social Affairs publishes the data in its web page: <<http://www.mtas.es>>. The evolution has been astonishing: in 1990 there were 2,159 incountry adoptions vs. 100 intercountry adoptions. In 1995 there were 1,406 incountry vs. 435 intercountry; in 2000: 964 incountry vs. 3,062 intercountry; in 2004: 5,541 intercountry adoptions.

²⁰ G. DAVALOS, *Perfil de los solicitantes de adopción internacional en la Comunidad de Madrid, 2002*, (Not published).

Continent/country	1997	1998	1999	2000	2001	2002	2003	2004
L. AMERICA	631	960	895	905	721	593	679	585
Colombia	250	393	361	414	319	271	282	256
Peru	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
AFRICA	0	16	23	32	31	51	163	268
Madagascar	0	8	1	10	9	19	24	13
Marruecos	0	3	12	8	5	7	20	21
Ethiopia	0	0	0	0	0	12	107	220
TOTAL	942	1.487	2.006	3.062	3.428	3.625	3.951	5.541

2.4. THE REGULATION OF IA CENTRED ON THE PRE-ADOPTION PERIOD

12. The regulation of IA in the main international instruments and in many State laws (as the Spanish ones) is focused on the pre-adoptive period. This is the orientation of Article 21 CRC²¹ 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,²² so the old conception centred on the adults' needs has been substituted by a conception centred on the children's needs: IA is one of the possible

²¹ State Parties that recognise 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 authorised 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) Recognise that intercountry adoption may be considered as an alternative means of a 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.

²² In relation to this principle, there was a deep modification in the definite text of the Convention proposed by the Finnish observer during the drafting of the CRC, 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, paras. 362-364).

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 for therein. This principle was underlined in the definite text of the Convention because during the drafting of the CRC it was stated that the State Parties must facilitate the IA and this measure is "another measure" for caring for the child. In the definite text, IA is accepted only if the child cannot be placed in foster care or in an adoptive family in his country.²³ The decision whether a child is available for adoption must be made in the child's country of origin.²⁴ However, it also concerns the receiving countries. If they "promote" IA through their pre and post-adoption measures or they do not control the private promotion of IA (for example through the internet), they contribute to the maintenance in some States of origin of deficient child welfare programmes and they contribute even to the dramatic reality of children being born to be given up for adoption, so sometimes IA creates orphans. Therefore, the subsidiarity principle is also the responsibility of the receiving States, like Spain.

13. The Hague Convention on Protection of Children and Co-operation in respect of intercountry adoption (1993) is mainly focused on the pre-adoption period, and establishes a cooperation system between public authorities of the origin and the receiving country to ensure that the adoption is constituted in the best interest of the child, the process is child centred and the subsidiarity principle is respected.²⁵

14. In Spain, there have been broad reforms in the past 10 years that have led to a complex legal framework in IA.²⁶ Spain has ratified the Hague Convention and bilateral treaties with some countries (Bolivia²⁷ and Philippines²⁸). The Spanish Private international law rules have been modified 5 times over the last 10 years; Spanish substantive family law has profoundly changed, moving from a consideration of the

²³ The Venezuela and RFA delegations wanted to define the IA as an "exceptional mean", *Ibid*, paras. 256-257.

²⁴ Although many times they do not guarantee it at all, see: N. CANTWELL, I. LAMMERANT and L. MARTINEZ-MORA, *Assessment on the adoption system in Ukraine*, a Project commissioned by the OSCE.ISS., October 2005.

²⁵ "One of its basic premises is that adoption is not an individual affair, which can be left exclusively to the child's birth parents 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", see: 'Intercountry Adoption', (December 1998) *Innocenti Digest*.

²⁶ S. ADROHER BIOSCA and V. ASSIEGO CRUZ, 'La adopción internacional', in I. LAZARO GONZALEZ, *Los menores en el Derecho español*, (Madrid: Tecnos, 2002), 407-451.

²⁷ 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, (20 December 2001) n°304 BOE.

²⁸ Protocolo de adopción internacional entre el Reino de España y la República de Filipinas hecho en Manila el 12 de noviembre de 2002, (24 January 2003) n° 21 BOE.

adoption as a private civil matter to a regulation of it as a public question, empowering the public administrative authorities at different moments of the process.²⁹ This philosophical change has coincided with two other "revolutions": the change of the model of State from a centralist to a decentralised model. Nowadays social policy (so also IA) is a competence of the "autonomous communities" rather than a State competence.³⁰ On the other hand, family law has significantly been modified with regard to different questions, some of them affecting IA, such as the fact that non-marriage couples are capable of adopting in some "autonomous communities" and homosexual married couples can adopt in Spain. All this legislation is also mainly focused on the pre-adoptive period.

3. PROTECTING THE ADOPTIVE CHILD AFTER ADOPTION

15. As noted in the introduction, protection of the adopted child does not end with the adoption; family adaptation and prevention of adoption dissolution must be taken into account by the law. Several problems that the adoptive families must face could be solved by helping the family with adequate post-adoptive policies, some of which can prevent adoption disruption or adoption dissolution.³¹

The average of IA dissolutions (or disruptions) depends on the period studied (before 1970 it was almost unknown), the country of adoption, the characteristics of the children taken into account (children with special needs, age groups, etc.).³² Although

²⁹ The main state legal framework is the *Ley Orgánica 1/1996 de protección jurídica del Menor*. 15 January 1996. (17 January 1996 nº 15, BOE, which states that the public authorities must declare the applicants eligible to adopt; authorise and control the intermediate private agencies (ECAls); 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. Therefore, the laws regulating the great majority of questions affecting IA are "autonomous".
³⁰ "For children adopted from other countries and other ethnic backgrounds, disruption of this relationship is difficult to conceptualise, since they lose 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". see: J. HARPER, 'Counselling issues in intercountry adoption disruption', (1993) vol 18 nº 3 *Adoption & fostering*, 20.
³¹ A. BERASTEGUI PEDRO-VIEJO, *Las adopciones truncadas y en riesgo en la Comunidad de Madrid*, (Madrid: Consejo Económico y Social, 2003), 30, which summarises the main studies, especially the American studies: in the USA the medium averages are approximately 10% in the Netherlands 10% and in Great Britain 18.7%. The recent European average is 5%, see: J. PALACIOS, *Identidad en la adopción Internacional*, paper in VIII Jornadas de Coordinación entre Entidades públicas y Entidades colaboradoras en Adopción Internacional, *Corresponsabilidad en la tramitación de las adopciones internacionales*, (Murcia 14-5-mars 2006), Not Published.

the most recent studies in Spain state that it is not common,³³ the adoption disruption generally takes place during adolescence—in this period, some studies suggest a certain risk of maladjustment.³⁴ Nowadays, the average age of adopted children in Spain is very low. What will happen in 5 or 10 years' time when a great number of adopted children will reach their adolescence?

16. 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 not to "promote" 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.

This paper will analyse the pre and the post-adoptive measures that can facilitate family adaptation after IA. A recent Spanish study stated that the main circumstances that were conducive to a disrupted adoption are related to public professional intervention: non-preparation of the foster parents, suitability of the foster parents, lack of information about the child and misadjusted assignment, and lack of post-adoptive follow up reports and professional support.³⁵

3.1. PREVENTING DISRUPTED ADOPTIONS IN THE PRE-ADOPTIVE PERIOD

17. 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 period. Some of them are the responsibility of the receiving States, others of the country of origin.

3.1.1. Preparation of the foster parents

18. Many countries with broad experience in IA focus their work on the parents with regard to their preparation rather than on the suitability declaration considering the

³³ The general average in Madrid is 1.5% but it reaches 6.7% in cases of adopted children older than 6 years old. (Ibid) In another study related to the cases in Spain, the total number of cases was 22, see: J. PALACIOS, Y. SANCHEZ-SANDOVAL, E. LEÓN, *Adopción internacional en España. Un nuevo país, una nueva vida*, (Madrid: Ministerio de Trabajo y Asuntos sociales, 2005), 184.
³⁴ J.H.A. VAN LOON, 'International cooperation and protection of children with regard to intercountry adoption', (1993) VII, 246:229 *Revue des Cours de l'Académie de la Haye de Droit International*.
³⁵ J. PALACIOS, Y. SANCHEZ-SANDOVAL, E. LEÓN, supra (note 33), 187.

after a social and psychological study.³⁶ In Spain, it is one of the matters that needs broad reform: each Autonomous Community has its own legislation on the matter (some more concrete, others very general) with different criteria mainly centred on the evaluation of the mental health and objective characteristics (age, economic position, etc.) more than on the capacities and attitudes towards the adoptive parenthood.³⁹ The averages of non-suitable parents differ for geographical reasons.⁴⁰ The waiting time for the family study is also different⁴¹ and the "price" of the report is geographically different.⁴² The courts that examine the appeals of parents declared non-suitable by the administrative authorities also hold different criteria.⁴³

3.1.3. Information on the child

20. 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 this is one of the causes of some disrupted adoptions.

³⁶ R.A.C. HOKSBERGEN, 'Understanding and preventing failing adoptions', in E. HIBBS, *Adoption: international perspectives*, (Madison: International University Press, 1991). In Germany 1/3 of the prospective parents are declared not suitable. Some studies state that this edgency is the reason for the low tasks, 2%, of disrupted adoptions in this country, see: 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*, (Berwyn: Swets North America INC, 1986), 173.

³⁹ J. PALACIOS, supra (note 32).

⁴⁰ In 2003, the average of non-suitable applicants ranged from 15.3% in Valencia to 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).

⁴¹ Coordinadora De Asociaciones En Defensa De La Adopción Y El CógimientO, *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 Autonomous Communities and ranged from 16.5 months in La Rioja to 5 in Catalonia.

⁴² The Special Commission created in the Spanish Senate, which published its conclusions on 13 December 2003, underlined all these dysfunctions, <<http://www.senado.es>>.

⁴³ M. AGUILAR BENTEZ DE LUGO and B. CAMPUZANO DÍAZ, 'El certificado de idoneidad para las adopciones internacionales desde la perspectiva del Derecho internacional privado español', n° 1888 *Boletín de Información del Ministerio de Justicia*, 5.

preparation as compulsory.³⁶ The preparation aims at giving prospective adoptive parents the necessary knowledge and at 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: 8 to 32 hours), but some "Autonomous Communities" have started offering it and have published some materials to "accompany" the parents' decision.³⁷ In some Autonomous Communities, preparation is held by the ECAs because the local legislation states so. In other Communities, different private associations or entities carry out the preparation. Nevertheless almost all the Communities have public information sessions with all the foster parents before the preparation takes place.

3.1.2. Public determination of the foster parents' capability, suitability and eligibility to adopt

19. The laws of the different countries regulate the process to select and to choose the prospective adoptive parents in three different categories:

- Capacity: some countries only grant such capacity to married couples, others to married couples without children, and 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, a suitability that refers to very different questions: affective capacity, family stability, physical and mental health, capacity to accept the personal story of the child and the cultural and racial differences, etc.
- Eligibility: may be there are not enough children to be adopted for all the capable and suitable applicants; the State regulations often establish different criteria to choose the best applicants for 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 suited to adopt

³⁶ 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, 'Intercountry adoption in the Netherlands. Compulsory preparation classes for new adoptive parents', (1994) 18 n° 3 *Adoption & fostering*, 16).

³⁷ For example in Valencia, Generalitat Valenciana, Direcció General De La Família I Adopcions, *Materiales para la preparación de solicitantes de adopción*; In Andalucía, some publications: J. PALACIOS, Y. SANCHEZ-SANDOVAL, E. LEON, *Adelante con la adopción*, (Sevilla: Junta de Andalucía Consejería para la igualdad y bienestar social, 2004) and L. MARTÍN SANCHEZ, *Las diferencias étnicas y culturales. Un reto en la adopción internacional*, (Sevilla: Junta de Andalucía. Consejería para la igualdad y bienestar social, 2004).

3.2. TOWARDS THE PROTECTION OF THE ADOPTIVE CHILD WITH POST-ADOPTION MEASURES

21. Even if, as we have seen, the CRC and the Hague Convention particularly focus 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 to in the CRC⁴⁴ (Arts. 7, 1⁴⁵ and 8⁴⁶) and the Hague Convention (Arts. 9⁴⁷, 16⁴⁸ and 30⁴⁹); the right (or the "desire") to a family-friendly policy in Article 18⁵⁰ CRC,

⁴⁴ M. SANTOS PAS, '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*, held at the Innocenti Institute on 26 January 2006, supra (note 3).

⁴⁵ 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.

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

⁴⁷ 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, insofar 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.

⁴⁸ (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.

⁴⁹ (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, insofar as is permitted by the law of that State.

⁵⁰ 1. State 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, State 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. State 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.

and the post-adoption services in Article 18 CRC and in Article 9 Hague Convention,⁵¹ which were qualified as obligations derived from the Convention by the special Commission held in September 2005 in the Hague.⁵² This approach is important because of the evolution of IA.

22. It is possible to draw a parallel between IA and immigration movements: depending on the social moment of immigration or IA, the law must face different situations and guarantee progressively new generation rights.⁵³ In Spain, there are already 25,000 IA children. It is important to protect them and to facilitate their family and personal adaptation. Some of these post-adoption measures, especially in Spanish law will be analysed below.

3.2.1. Family-friendly policies⁵⁴

23. In Spain, there is a general absence of family-friendly policies or family allowances (birth or adoption grants)⁵⁵ but in the last years, some reforms have been trying to change this situation, helping the families reconcile family life and work such as maternity and paternity allowances, reduction of the labour time to look after the

⁵¹ 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.

⁵² The Draft Guide to good practice under the Hague Convention drawn up by the permanent bureau, Prél Doc n° 2. August 2005, <http://www.hcch.net/upload/wop/ado_pdo2e.pdf> states: "The Convention imposes 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 for this provision in 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". See for more information on "implementation measures", J. DEGINIG, '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 Institute on 26 January 2006, supra (note 3).

⁵³ F. DASSÉTO, 'Pour une théorie des cycles migratoires', in A. BASTENIER and F. DASSÉTO, *Immigrations et nouveaux pluralismes. Une confrontation de sociétés*, (Brussels: Université, 1990), 11–40. This author states that the second moment of migration cycle is the time of creating families or regrouping families from the country of origin so law must guarantee the right to a family life and the integration of the second generation.

⁵⁴ For a comparative view, OECD, 'Babies and bosses', (2004) 3 *Reconciling work and family life*.

⁵⁵ M. T. LÓPEZ LÓPEZ UTRILLA DELA HOZA and A. VALIÑO CASTRO, *Políticas públicas y familia. Análisis de la situación en España*, (Madrid: Fundación Acción familiar, Fundación Gondara Barandiarán Ed. Cincra, 2006).

children and so on. These State and local Acts, decrees and programmes affect all the families, also the IA families. One of the factors that contribute especially to good family adaptation is the management of family stress associated with adoption,⁵⁶ so it is very important to facilitate conciliation of work time and an increasing family-time demand derived from the new member and his/her necessities (educational, medical, affective, etc.).

Nevertheless, in my opinion, in this context adoptive families must be treated the same as the others – non-justified special allowances can be considered as “promoting measures”. However, 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. Until now, the regulations only allow the taking into account of the time of travel with regard to maternity; the real advance would be to recognise an independent licence to travel and afterwards the maternity/paternity licence. That is the aim of the Concilia Plan 2006, a national accord between the public administration and workers to facilitate the family life of public workers, i.e. two months of paid work permission to travel to the country of origin.⁵⁷

3.2.2. Economic support: adoption subsidies for IA

24. IA is an expensive way of creating a family. The adoption process generates costs of travel, of a hotel in the country of origin and the costs of all the intermediaries. Some countries ask the foster parents to give a sum of money to the orphan centre through the intermediary 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 economic position. Must public authorities give special subsidies so that IA is not economically inaccessible for some families? Can the subsidies be considered a “promoting” measure?

In some countries like the 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 in managing living and care costs for children with special needs adopted through the US 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.

⁵⁶ A. BERÁSTEGUI PEDRO-VIEJO, *supra* (note 1), 240–243.

⁵⁷ <<http://www.map.es/iniciativas/>>.

In other countries, there are also IA grants to cover the expenses due to adoptions from abroad. In Denmark €5,159 per IA, in Finland €1,900 to 4,500 per IA, in Sweden €4,456 per IA, and in Belgium €1,023.45 per adoption. In other countries, there are general birth or adoption grants.⁵⁸

In Spain there are very few general family subsidies for the families (who adopt or not), and almost all the subsidies already existing depend on the family rent, so they are really social subsidies more than family subsidies.⁵⁹ Nevertheless, the economic support for adoptive or foster care families shows the existence of some subsidies (in the Autonomous Communities) that promote foster care, helping the families economically, generally without a family income limit.⁶⁰ In IA, there is still very little experience. Only two different autonomic Acts helping low-income families have been found: the Decree from Extremadura,⁶¹ which regulates adoption subsidies for the IA process, and the Order from Catalonia approving subsidies of €2,300 in 2006, also conditioned to family rent.⁶² These measures help some families to adopt, but do not promote IA.

3.2.3. Post-adoption services

25. 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.⁶³ This requirement is a compulsory obligation of the receiving countries' authorities and if the reports are not sent on time, the origin authorities may paralyse the future adoptions with this receiving country.

Nevertheless, we are not referring now to this post-adoption responsibility of the public administrations. IA is a process in which professional advice is essential, as we have seen already. In conformity with good practice developed internationally, this process begins, in the country of origin where the child's adoptability and the chances of him/her being taken into care in the country of origin are checked (the subsidiarity principle), and it involves informing, selecting and preparing prospective adoptive

⁵⁸ All the data can be verified at <http://ec.europa.eu/employment_social/>.

⁵⁹ M.T. LOPEZ UTRILLA DE LA HOZA and A. VALIÑO CASTRO, *supra* (note 55).

⁶⁰ 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 measure and therefore, there is a “promotion” of family foster care in Spain.

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

⁶² Orden BEF/74/2006. Prestacions econòmiques per a les famílies amb fills i filles a càrrec (2006) Ajut per adopció internacional, <<http://www.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.

⁶³ 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.

parents in the receiving country. Then, in cooperation with professionals in both countries, professional matching and the first meeting between the child and adopters follow, preferably within a professional supportive setting.

26. The first stages of IA family life together may also require professional support, in the interests of the completely adoptive family, and particularly of the child who then needs emotional stability and a feeling of integration. Therefore, 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.⁶⁴ The Hague Convention does not specify either who will provide post-adoption services or what services will be provided, and considers post-adoption services 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 his/her new life and the successful outcome of the adoption.⁶⁵

27. In a recent European Seminar on post-adoption,⁶⁶ a survey on adoption was presented by PREGIASCIO in which it was concluded that there was an availability of post-adoption services in almost all the 22 European countries studied with the exception of Portugal, Estonia, Hungary and Lithuania, and in Spain only in some autonomous communities. It was stated 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 by the competent public authorities. The modalities of providing services for the post-adoption period are 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, which shows an 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".⁶⁷

⁶⁴ SSL, supra (note 4).

⁶⁵ Explanatory report, para. 235.

⁶⁶ European Seminar titled: 'Which Approaches, Models, and Support Services to Adoptive Families Relations' held in Innocenti Institute on 26 January 2006, supra (note 3).

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. The government financially supports these organisations. They offer information via websites, brochures, telephone and personal counselling, and help with the bureaucratic necessities, organise pre-adoption groups, write the home-studies for international adoptions to the States of origin, support adoptive-families with different services and support networking between adoptive families (groups, meetings, seminars,

Until now, in Spain, not all the "Autonomous Communities" have post-adoption services (generally consisting of family counselling, psycho-educative intervention, psychotherapy and medical counselling), which the public authorities finance for private associations or companies. Some Communities with post-adoptive services are Madrid, Valencia,⁶⁸ Andalusia⁶⁹ and Catalonia.⁷⁰ Apart from these public initiatives, some ECALs have post-adoption services and some adoptive parents associations.

In some of the "Autonomous Communities", there are family post-adoption grants covering a percentage of these services. In Madrid, for example 100% of family counselling (between 6 to 10 sessions), 100% of psycho-educational intervention (conferences, formation, workshops, etc.), 100% of medical counselling and 50% of therapeutic intervention are covered. Usually these family subsidies are without a family income limit.⁷¹

lectures with inside information about the sending countries, etc.). 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, for setting 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 of any adoption agency and works for all the families with inter-country adopted children in the Netherlands. It has a twofold task: 1) 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.; 2) 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, the Foundation Adoption Services stimulate counsellors and physicians to have specific knowledge of and affinity with IA. A wide range of professional consultation, prevention and counselling possibilities were created for the target groups.

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

⁶⁹ In Andalusia, the service is free and can be consulted at <<http://www.juntadeandalucia.es>>.

⁷⁰ See: <<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'.

⁷¹ Diario de Sesiones de la Asamblea de Madrid nº 607, 7 February 2006. Comparecencia de la Excmra. 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 informó: "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

this right so weakly – the legal access to origin data depends both on the origin and receiving countries regulations.⁷⁶

30. In Spain, this is a great challenge for the next years when our adopted children reach their adolescence. Until now, Spanish Law and the Decree of the Registry office of civil status guarantee that in the Register of births there appears some relevant information as to a child's origin: name and address of biological parents, date of birth, place of birth, date of adoption, and the name and address of the adoptive parents. The adopted person can ask the Office of civil status for a "Certificate" when she/he is 18 years old and obtain the complete information.

Nevertheless, some problems have occurred in IA cases due to the attitude of the origin country and in other cases the adoptive parents' demands. On the one hand, some origin countries cancelled the biological data in their civil status registry after adoption and made new inscriptions with the adoptive parents' data. When the Spanish consuls had to transcribe this data, they asked the local registrar for information about the original data so that in the Spanish civil status registry the biological data could be registered.⁷⁷ But soon cases occurred in which parents asked that their adopted children appear as biological in the "Simple certificate" needed, for example, for a school, although all the relevant biological information can be obtained by asking for a "Complete certificate" available at 18 years of age.⁷⁸ Even if the Spanish authorities deny 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 outside the family, so the simple certificate will "hide" the original data, but the adoptee can obtain the data by asking for the complete certificate.⁷⁹ Therefore, in Spain the right of the

⁷⁶ "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 in Art. 7(1) CRC. 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". See: 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*, held at Innocenti Institute on 26 January 2006, supra (note 3).

⁷⁷ Resolutions of the "Dirección general de Registros y Notariado" of 23 April 1993 (Anuario DGRN 1993, 1435) and of 31 December 1994 (BIMJ nº. 1736, 97).

⁷⁸ For example the case resolved in the Resolution of 17 April 2000 (BIMJ nº 1871, 116) in which the adoptive parents of two Lebanon girls asked that in the simple certificate the place of birth be changed to the Spanish city where they lived so that other people could not deduce the adoptive relationship from this certificate. The Spanish authority denied this demand.

⁷⁹ - Instruction of the DGRN 15/2/1999 permits substitution of the original birth registration with a new one in which only contains "new" data so that the adoption information is not public.
- Statutory Order 8/7/2005 reforming the Civil Registrar. Reglement permitting requests for a change of birth registration to the Registry civil office of the place where the family is domiciled, and in the new registration only the new data will appear (with a reference to the original

The little Spanish experience on IA has led to some problems in this field: some "Autonomous Communities" consider that it is better to give these post-adoption services in the general family counselling centres so that the adoptive family is not stigmatised; sometimes some families resist using the services because they feel that it means they recognise that their adoption is problematic; there is a need for well-informed professionals in adoptive matters; ...

3.2.4. Back to the roots policies⁷²

28. "To know one's blood is somewhere else just waiting to be found unless you're lost or in a search you cannot understand."⁷³

29. The right to an identity is a first generation fundamental right. However, perhaps it is a new generation right because even if some State Constitutions and State laws relating to children recently include it as a fundamental right, there is still very little compromise in the international conventions to define its limits as we have already seen in the CRC and the Hague Convention. The scope of the right differs if the filiation is biological, adoptive or by artificial insemination.

In IA, it is a very important right because it has not only a genetic component (as in the biological filiation) but also a social component, that is, to be able to construct one's identity is essential to know where one comes from, who were one's parents and how one was abandoned. It is of great importance to many people.⁷⁴ This "travel to the past" has three steps: the revelation of the adoptive parents to the child of his/her adoptive condition, the legal possibility of knowing the identity and social origin data and finally a meeting with a past life.⁷⁵

This paper will refer to the second step, because it is the one that can be regulated by the law even if the third can be assisted by post-adoption services. The problem of assuring this right in IA is that two State laws, sometimes with different conceptions of this right, may be in conflict. That is the reason why the Hague Convention protects

especializada en supuestos de crisis o graves dificultades de vinculación, tanto en sesiones individuales como en terapias de grupo".

⁷² B. GÓMEZ BENGOCHEA, *Derecho a la identidad y filiación. Un estudio de Derecho internacional privado y Derecho comparado*, PhD Thesis, Madrid, 2005.

⁷³ M. HAYES, 'Transracial adopted people's support group', in R. PHILIPS and E. MCWILLIAM (eds.), *Afteradoption. Working with adoptive families*, (London: BAAF, 1996), 188.

⁷⁴ Y. BAER, 'Adoptees searching for their origins', in J. EKELAAR and J. SARCEVIC (eds.), *Parenthood in modern society*, (The Netherlands: Kluwer academic publishers, 1993), 247.

⁷⁵ In old IA countries like the USA there are social movements called "back to the roots" that organise "motherland tours". *Ibid.*, 245.

IA child to know about his/her origins depends on the decision of his/her parents to reveal the adoptive relationship to her/him, which is evident in an interracial adoption (the main origin country is China) but not always in other cases of IA. If the simple certificate does not give clues, a complete certificate is not always asked for, so it is possible that some of the adoptee(s) will never know their true situation or their biological data. These reforms also encourage the change of the name of the child⁸⁰ although all the studies state that it is better to maintain the original name to facilitate the construction of personal identity.⁸¹

4. CONCLUSION

31. In this paper, there has been referred to two groups of children: the group of children who have not yet been adopted and the group of children who have already been adopted. Rights of both children must be protected in IA. This work has mainly focused on the second group: the case explained at the beginning of this paper, shows that rights can be denied. The pre-adoption period regulations are essential to facilitate good matching and family adaptation but nowadays post-adoption measures are needed also, to avoid disrupted adoptions of maladjustment cases. Different public measures have been underlined: preparation of the foster parents, suitability, post-adoption services, etc. 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".⁸²

32. These questions have been analysed focusing on the Spanish experience for three reasons. It is the second receiving country in IA in the world, has 10 years of experience 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 have started to predict what may happen after a few years when

registration). The Law 15/2005 reforming the Law of the Registry office of civil status is in the same sense.

— Instruction of the DGRN 1/7/2004 permitting that in the birth registration there appears as the 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 the Registry office of civil status is in the same sense.

⁸⁰ 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 only the new name appears.

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

⁸² SSI, supra (note 4).

all these adopted children become adolescents. It is a matter of urgency to implement post-adoption measures, even if the CRC and the Hague Convention mainly design measures in the pre-adoption period, some articles of these international instruments can be the basis for national and local regulations.