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SHOULD RACE AND RELIGION BE IMPEDIMENTS TO ADOPTION?

Introduction

Some years ago I watched a TV documentary about a Korea-born woman who, having been adopted in the 1960s by an American couple, 30 years later made an attempt to find her biological parents and, in fact, her identity. She was filmed on her trip to Korea, trying to decipher falsified information about her. This story inspired me to advance my research into various aspects of intercountry adoption. It also triggered discussion on two questions: whether sharp differences between adoptive parents and children may increase controversies connected with international adoption, and if it is the state that should eliminate such possible dissimilarities before the adoption process starts.

Child's identity as a source of a problem

It seems that the answer to the former question is connected with the importance of a child's identity for his further development. Here, an initial observation may be that it was until adoption was seen as a shameful proof of one's infertility or childlessness – and something to be kept secret – that the problem did not exist because adopted children were convinced of being natural children of their adoptive parents and neither their identity, nor differences of any kind could be a source of anxiety. Obviously, that made transracial adoption impossible to hide and, consequently, unpopular. Now, when children have the right to know and learn about their roots and when it is widely believed that they should be informed about being adopted at the earliest possible stage, the question of the importance of a child's identity as distinct from his adoptive parents' is more prominent. On the

one hand, for a few decades the number of transracial adoptions has been getting larger, while on the other – there emerges an idea of open adoptions where the role of birth parents is not limited to being eliminated from their children's lives and thus hiding their origin. This means that adoption is no longer a shameful fact but rather, it is an institution whose principal aim should be to serve the best interest of the child, no matter if with the help of biological parents or not.

Dissimilarities between adoption parties?

Another observation involves dissimilarities between adoption parties. Can we determine which ones could bring results adversely affecting mutual relations between the parties or the said best interest of the child? Can the same be possible for the legislator that makes adoption law? Or maybe one should wonder if we are able to assess in any single case whether the parents would expose the child to these differences in a way so as not to compromise their future relations and the child development? Ideally, the most evident dissimilarities should be determined (bearing in mind that these may be perceptible at the first glance or not) before we proceed to identify the role of the state in this matter. Here, the most obvious, yet most difficult to conceal is race, along with religion, nationality, ethnicity and cultural background.

Adoption impediments

The differences, if laid down in adoption rules, are not likely to be seen as conditions for adoption – rather, they should be called adoption impediments. To determine the array of such differences and possibilities of circumventing them in adoption procedures for certain reasons is in most countries the responsibility of the legislator (or, to put it simply, the state). It is the state that decides on the adoption procedure and, most of all, on granting adoptive legitimation to certain persons. Adoption between parties of different national (ethnic, cultural) background than the child frequently means intercountry adoption as it involves different citizenship. In such cases the question of preservation of the child's identity is approached cautiously: may the child's cultivated unique identity hamper his adaptation to a new country? On the other hand, a popular solution (based on 1993 Hague Convention on Protection of Children and Co-operation in Respect

of Intercountry Adoption and the Convention on the Rights of the Child) is the principle of subsidiarity in respect of intercountry adoption. The state, when not able to provide the child adoptive family in the child's country of origin, agrees that the child leaves for another country to be taken care of (so, a child can be adopted abroad only if there is no one willing to adopt him in a country of his origin) – which will certainly result in breaking the ties with the child's homeland. However, there are also solutions preventing foreign adoptions: for instance, in South Africa it was not until the judgment in *Minister for Welfare and Population Development v. Fitzpatrick* and others that intercountry adoptions were allowed. Before, adoption was only possible for South African citizens or non-citizens eligible for naturalization.¹ In the Federal Capital Territory of Nigeria, adoption decree may only be made with reference to adopter who is a Nigerian citizen, in the case of joint adoption the aforementioned principle applies to both adopters.² Intercountry adoption is forbidden by the laws of Argentina³, Cuba⁴ and Paraguay (exception to this ban is the countries that ratified the Hague Adoption Convention of 1993 or signed bilateral adoption agreement with Paraguay). Cuban law does not allow intercountry adoptions, including adoption by persons with multiple citizenship – as it does not allow for having more than one citizenship.⁵ In Philippines⁶ an alien is not allowed

¹ According to Constitutional Court, (CCT08/00) [2000] ZACC 6; 2000 (7) BCLR 713 (31 May 2000).

² L. O. C. Chukwu, *Adoption of children in Nigeria under the Child's Rights Act 2003: Problems, pitfalls and prospects*, in: L. Wardle, C. S. Williams (eds), *Family Law: Balancing Interests and Pursuing Priorities*. Buffalo, New York: William S. Hein, 2007, pp. 225–231.

³ Código Civil de la República Argentina, Actualizado al 20–9–05, Biblioteca del Tribunal Superior de Justicia, http://www.jusneuquen.gov.ar/share/legislacion/leyes/codigos/codigo_civil/CC_art0311a0340.htm, Ley 24.779 Adopción de 1997 r., Legislación Argentina, No. 626, April 1997, p. 3–8, Filiation and Adoption, 23 Ann. Rev. Population L. 1996–1997, p. 69.

⁴ Family Code, Ley no. 1289, 14/02/ 1975, Gasetta Oficial 15/02/1975, W. Skierkowska, *Prawo rodzinne Republiki Kuby*, “Nowe Prawo” 1983, no. 7–8, pp. 146–147.

⁵ US Department of State, US Department of State (http://travel.state.gov/family/adoption/country/country_3092.html), UK Department of Education and Skills <http://www.dfes.gov.uk/intercountryadoption/index.shtml> and Adoption Council of Canada <http://adoption.ca/> can be treated as a source of information concerning the bans on intercountry adoptions in Cuba, Sri Lanka, Croatia, Finland, Panama, Pakistan and Haiti.

⁶ Civil Code of 1987 (art. 183–193), changing Civil Code of 1949 and The Child and Youth Welfare Code of 1974, Executive Order No. 209, July 6, 1987, as amended by Executive Order No. 227, July 17, 1987, http://www.weddingsatwork.com/culture_laws_family-code01.shtml, <http://www.abogadomo.com/main.html> (26.10.09) and also Intercountry Adoptions Act of 1995 (Republic Act No. 8043), Official Gazette, Vol. 91, No. 32, 7/08/1995, pp. 5006–5011, www.gov.ph/laws/ra8043.doc (18/07/07), Filiation and Adoption, 21 Ann. Rev. Population L. 1994–1995, p. 118.

to adopt, except a former Filipino citizen who seeks to adopt a relative by consanguinity, one who seeks to adopt the legitimate child of his or her Filipino spouse, or one who is married to a Filipino citizen and seeks to adopt jointly with his or her spouse a relative by consanguinity of the latter.⁷ In Sri Lanka local children must not be adopted by Sri Lanka-based foreigners. In Croatia intercountry adoption must be approved by the Ministry of Health and Social Welfare, which is not an easy task because of the ministry's belief that intercountry adoptions, since they make children torn away from their original moorings, are contrary to the best interest of the child. It is also in Finland that children cannot be adopted by foreigners, and Greece only allows for intercountry adoption when the adopter is of Greek citizenship or origin and does not live abroad.⁸ According to the Slovenian Marriage and Family Relations Act of 1976, it is a principle that a Slovenian child can be adopted by a Slovenian citizen⁹, under Ukrainian law unmarried foreigners cannot adopt Ukrainian children.¹⁰

Religious differences between parties of adoption

Religious differences between adoption parties are regulated by relatively few legal systems, however, adoption is not allowed in the majority of muslim countries. This stems from the interpretations of the Koran that claim it prohibits establishing of artificial family bonds. The interpretations in question are based on Koranic parable of the prophet Mohammad's marriage to his adopted son's ex-wife: a relationship traditionally conceived as unchaste. The idea of no true family ties resulting from adoption was *de facto* the springboard for acceptability of such marriage¹¹ – hence the

⁷ Although aliens not included in the foregoing exceptions may adopt Filipino children in accordance with the rules on inter-country adoptions as may be provided by law.

⁸ D. Rachford, *Statistically Speaking: Intercountry Adoption, Political Sensitivity, and the United States*, 25 Child. Legal Rts. J. 2005, p. 65.

⁹ Ur 1 SRS, no 15/76, 30/86, 1/89, 14/89; Ur 1 RS, no 13/94, 82/94, 29/95, 26/99, 70/00, 64/01, 110/02, 42/03, 16/04, also S. Kraljić, *Legal Regulation of Adoption in Slovenia – Do We Need Changes?*, in: A. Bainham (ed.), *The International Survey of Family Law*, Bristol 2006, pp. 395–406.

¹⁰ Ukrainian Family Code of 2002, Vidomosti Verhovnoi Rady Ukrainy, 2002.#21–22. St 135, Siemiejnyj kodeks Ukrainy, Informacjonno-prawwoj centr Ksilon, Charków 2005, Law no. 2562 On Legislative Amendments to Ukraine's Laws (regarding adoptions) of March 20, 2007, U. S. Department of State http://travel.state.gov/family/adoption/intercountry/intercountry_3175.html.

¹¹ N. Anderson, *Islamic Family Law*, in: A. Chloros, M. Rheinstein, M. A. Glendon (ed.), *International Encyclopedia of Comparative Law*, Vol. IV. *Persons and Family*, Mohr Siebeck, Tübingen, Leiden, Boston, 1980, p. 74.

bans on adopted children's taking the family name of the adopters, on inheritance and succession, creation of impediments to marriage between parties and treating the adopted child as a natural child of the adopters, or simply adoption bans. However, guardianship institutions (*kafalah, sarparasti*), that in a way substitute for adoption, are available only to the Muslims: pursuant to Algerian Law no. 84-11 of 9 June 1984 – Family code¹², a person entitled to legally take care of a child (*kafil*) should be a reasonable, venerable Muslim able to maintain and protect the child (*makfoul*) – the origin of the child may be known or unknown. Similarly, the Iranian Civil code stipulated that Muslims may only taken care of (*sarparasti*) by Muslims.¹³

According to currently binding Libyan religious codes regulating personal status of the Catholics, Orthodox and Protestants, both the child being adopted and the adopter should belong to the same religious community, but not necessarily the same rite.¹⁴ In Israel, the adopter should be the same religion as the child being adopted¹⁵, in India (according to Hindu Adoptions and Maintenance Act of 1956 (for Hindus, Buddhists, Jainas or Sikhs by religion) and The Juvenile Act of 1986), any Hindu has the capacity to take a son or a daughter in adoption and no person shall be capable of being taken in adoption unless he or she is Hindu.¹⁶ In Northern Ireland, it is required that all persons who must give consent to adoption, before giving the same know the adopter's religion – consent may be denied for the reasons of religious differences between the adopter and the child being adopted.¹⁷ Russian Family Code of 1995 only allows for adoption of the minor and only if this is justified by his best interest and intended with the purpose of the child's full physical, mental, spiritual and moral development, with his ethnic origin, religion, cultural background, language and education taken into account in order to guarantee suitable education in keeping with the

¹² Loi no 84-11 du 9 juin 1984 portant Code de la famille, modifiée et Complétée, Por l'Ordonnance no 05-02 du 27 février 2005, ONTE 2005, s. 25 bis.

¹³ Text of the code: <http://www.iranwd.com/laws/ltr-r226.htm>.

¹⁴ C. Mallat, *The Lebanese Legal System*, The Lebanon Report No. 2, Summer 1997, pp. 1-3.

¹⁵ Adoption of Children Act of 1981 (5741), Book of laws of 5741 (1981), 293, of 5755 (1995), 399, of 5756 (1996), 354, of 5758 (1998), 20, 295, 296, of 5764 (2004), 445, 476, Law – executory rules to the adoption of children law (verification of applicant's capacity) of 1998 (5758), Book of laws of 5758 (1998), 304 and also E. D. Jaffe, *Introduction. Co-operative global adoptions: a new east-west partnership*, in: E. D. Jaffe (ed.), *Intercountry adoptions. Laws and Perspectives of "Sending" Countries*, Martinus Nijhoff Publishers, Dordrecht/Boston/London 1995, pp. 1-6, 12-14.

¹⁶ K. Lilani, *Adoption of children from India*, in: E. D. Jaffe (ed.), *op. cit.*, pp. 25-26.

¹⁷ B. Doolan, *Principles of Irish Law*, Gill and Macmillan, Dublin 1991, p. 280.

child's heritage.¹⁸ According to Arkansas Code, court of law may, on petition of parents or guardians, place the child in a family whose religion is the same as the child's (9-9-101 to 9-9-701), while according to Delaware Code (Title 13. Domestic Relations, Chapter 9. Adoption (§ 911)), if either natural parent, in a notarized statement made prior to the placement for adoption, specifies the religion in which he or she desires the child to be raised, the Department or licensed agency shall make placement in accordance with such statement. If the natural parents declare indifference to the religion in which the child should be reared, or if their religion is not known, or if there is none, then the Department or licensed agency shall make placement without regard to religion. Although whenever the provisions appear to create a hardship for the child to be adopted in obtaining a suitable and prompt placement, the Family Court, in its discretion, may waive these requirements in the best interest of the child. A similar regulation is laid down in the Wisconsin Statutes (Charitable, Curative, Reformatory and Penal Institutions and Agencies, Chapter 48. Children's Code, § 48.82): when practicable and if requested by the birth parent, the adoptive parents shall be of the same religious faith as the birth parents of the person to be adopted, but the act also bans discrimination and hence no person may be denied the benefits of adoption because of a religious belief in the use of spiritual means through prayer for healing, because the person is deaf, blind or has other physical handicaps, because of his or her race, colour, ancestry or national origin.

More about a race as an impediment to adoption

The issue of race was of special importance especially to the southern states – there, racial dissimilarities were treated as impediment to adoption only in the 1970s. Now it is assumed that such factors as race and religion should be viewed only in respect of the best interest of the child. However, specific solutions adopted by particular states may be different – for instance, in some state statutes it is provided that religion, race, colour or origin, along with blindness, deafness and other physical handicap (Wisconsin, Florida – disablement or disability) cannot be impediments to adoption, while in others – that the court may, on petition of parents – match the child with adoptive parents of the same religion (Arkansas, De-

¹⁸ Sobranije zakonodatielstwa Rosijskoj Federacjii, 1996, No 1, cm. 16, Semejnyj Kodeks Rosijskoj Federacjii, Biblioteka Kodeksow, Moskwa 2002, pp. 61–62.

laware). As a rule, adoption agencies try to match children with adoptive families of the same race, ethnicity, culture and religion, which is in part caused by Afro-Americans' protests against the so-called "transracial adoptions" and some experts' opinions on personality disorders in black children brought up in white families.¹⁹ In the USA in 1987 transracial adoption constituted 8 per cent of overall adoption – of which 1 per cent was adoption of black children by white women and 5 per cent – children of different races by white women and 2 per cent – white children by women of other races.²⁰

Race and religion as elements of group of adoption impediments

In this context, what can be said about other prerequisites of adoption? The following picture emerges from the profusion of worldwide solutions. The most common are the prerequisites of age (minimum and maximum) of an adopter and difference in ages between an adopter and an adoptee. Apart from these, there are also: the ability to provide the child with proper education, moral values, marital status, sex (as a rule – men are not allowed to adopt girls²¹), legal capacity, no children born of the marriage or childlessness (Haiti, Lebanon, Venezuela, India – at the time of adoption, the adoptive father or mother cannot have a Hindu son, son's son or son's son's son (when adopting a boy) or a Hindu daughter or son's daughter (when adopting a girl)), full legal age, preadoptional period, remaining in bonds of marriage for certain period of time, good health condition, and consanguinity. As for consanguinity, it can be a prerequisite of adoption (according to South Dakota Codified Laws, it is possible that the father of an illegitimate child by publicly acknowledging it as his own, receiving it as such into his

¹⁹ H. D. Krause, *Family Law In a Nutshell*, West Publishing Co., St. Paul, Minn. 1977, p. 155, A. Bahl, *Color-Coordinated Families: Race Matching in Adoption in the United States and Britain*, 28 "Loyola University Chicago Law Journal" 1996–1997, p. 45, E. Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 "Duke Journal of Gender Law & Policy" 1995, pp. 99–105, S. Maldonado, *Racial hierarchy and international adoptions*, in: L. Wardle, C. S. Williams (ed.), *op. cit.*, pp. 263–264, D. S. Rossetenstein, *Trans-Racial Adoption in the United States and the Impact of Considerations Relating to Minority Population Groups on International Adoptions into the United States*, in: N. Lowe, G. Douglas (ed.), *Families Across Frontiers*, The Hague, Boston, London 1996, pp. 605–623.

²⁰ K. Mannino, *Statistically Speaking*, 22 "Children's Legal Rights Journal", Spring 2002–2003, pp. 26–27.

²¹ H. Thompson-Ahye, *Exploring Virgin Territory: Family Law in the British Virgin Islands*, in: A. Bainham (ed.), *The International Survey of Family Law*, Bristol 2006, pp. 112–114, B. A. Lambert Peterson, *An Overview of Trinidad and Tobago Family Law*, in: A. Bainham (ed.), *The International Survey of Family Law*, Bristol 2004, pp. 462–463.

family, with the consent of his wife if he is married and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth – § 25–6–1), it can be also an impediment to adoption: in Brazil it is prohibited to adopt one's siblings; in Panama there are bans on intra-family adoptions: grandparents cannot adopt their grandchildren, siblings – their minor brothers or sisters; in Australian New South Wales a court must not make an adoption order in favour of a relative of a child unless the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the child and the child has established a relationship of at least 2 years' duration with the relative (Adoption act of 2000), in Australian Victoria a court shall not make an adoption order in favour of a person who is, or persons either of whom is, the mother of the child or a putative father of a child (Adoption Act of 1984), in Bulgaria adoption bans apply to adoption by lineal relatives, brothers and sisters, with grandparents (or one of them) allowed to adopt their grandchildren only if the child was born out of wedlock or is a full- or half-orphan and if such adoption serves the best interest of the child (Family Code of 1968); in Spain it is forbidden to adopt one's descendants or close relatives – in lineal consanguinity, while up to the second degree in collateral consanguinity²²; Lithuania bans adoption of one's own children, brothers or sisters (Civil Code of 2000), while in Norway it is allowed to adopt a biological child only if such adoption will be of significance for the child's legal status, or in the case of a new adoption of a child who has been adopted (Adoption Act of 1986); in Romania there is a ban on adoption by siblings²³; Serbia has its impediment of close consanguinity²⁴, adoption is not possible between ascendants and descendants, siblings and stepsiblings, and so does Slovenia: a child cannot be adopted by his close relative, or his brother or sister²⁵; it is not possible to adopt a person younger than an adopter, unless such person is adopter's wife or husband, or brother, sister, uncle or aunt, of the whole or half blood in Massachusetts.²⁶

²² K. Bagan-Kurluta, *Adopcja dzieci. Rozwiązania prawne w wybranych państwach*, Białystok: Temida 2, 2009, pp. 29–42.

²³ *Ibidem*.

²⁴ M. Draškić, G. Kovaček Stanić, *The New Family Act of Serbia*, in: A. Bainham (ed.), *The International Survey of Family Law*, Bristol 2006, pp. 358–360 and 367–368, O. Cvejić Jančić, *Reform of adoption according to the new Serbian Family Act*, in: L. Wardle, C. S. Williams (ed.), *op. cit.*, pp. 252–259.

²⁵ S. Kraljić, *op. cit.*, pp. 395–406.

²⁶ *Religious Matching Statutes and Adoption*, 51, “New York University Law Review”,

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It is not often that a legal regulation sets forth a wide array of detailed adoption impediments, which is the case of article 116 of the Armenian Family Code of 2004 (adults can become adopters except for: a) the persons recognized incapable or restrictedly capable by court, b) spouses, one of who is recognized incapable or restrictedly capable by court, c) persons deprived of parental rights by judicial procedure or with restricted parental rights, d) persons discharged from the obligations of a guardian for the reason of not fulfilling properly the obligations put on them by law, e) former adopters, if adoption was terminated by their fault, f) the persons who cannot implement parental rights because of health reasons, g) persons, who at the moment of adoption do not have sufficient income to provide minimal living needs of a child, h) persons, who do not possess permanent place of residence, as well as an accommodation which corresponds to the established sanitary and technical requirements; i) persons who at the moment of adoption have convictions for grave or particularly grave crimes against a human being or public order and morality), also of 1999 Azerbaijanian Family Code²⁷, Belarusian Code of marriage and family of 1999²⁸, Russian Family Code of 1995²⁹ or of Vietnamese law (adopters must not be people who have certain parental rights toward minor children restricted or who have been sentenced for one of the crimes of deliberately infringing upon the life, health, dignity and honour of another person; ill-treating or persecuting their grandparents, parents, spouses, children, grandchildren and/or fosterers; inciting, forcing juvenile people to commit offenses or harbouring juvenile offenders; trafficking in, fraudulently exchanging or abducting children; committing the crimes of sexual abuse against children or acts of enticing and/or forcing their own children to act against law or social morality, but have not yet enjoyed criminal record remission (Marriage and Family Law of 2000) or of Illinois law (a person can be recognized as an

1976, pp. 262–284, *Religious Factors In Adoption, Notes*, 28 “Indiana Law Journal” 1952–1953, pp. 401–409, *Religion as a Factor In Adoption, Guardianship and Custody, Notes*, 54 “Columbia Law Review” 1954, pp. 376–403, St. Thomas More Institute for Legal Research, *Matching for Adoption: A Study of Current Trends*, 22 “Catholic Lawyer”, Winter 1976, pp. 70–86, A. R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 “Boston University Law Review” 1995, pp. 997–1060.

²⁷ Siemiejnym Kodeks Azierbajdzanskoj Respubliki utwierdzien Zakonom Azierbajdzanskoj Respubliki ot 28 diekabria 1999 goda (wstupil w silu s 1 ijunia 2000 goda), Izdatelstwo “Juridiczeskaja literatura”, Baku 2001, pp. 68–78.

²⁸ Vedomosti Natsionalnogo Sobrania Respubliki Belarus, 1999.#23. St 16, W. G. Tichinia, W. G. Gołowanow (ed.), *Kommentarij k Kodeksu Respubliki Bielaruś o brakie i semje*, Mn.: “Swietocz” 2000.

²⁹ Sobranije zakonodatielstwa Rosijskoj Federacii, 1996, No 1, cm. 16, Semejnyj Kodeks Rosijskoj Federacii, Biblioteka Kodeksow, Moskwa 2002, pp. 61–62.

unfit to have a child in a case of 1) abandonment of the child, 2) failure to maintain a reasonable degree of interest, concern or responsibility, 3) desertion of a child for more than 3 months next preceding the commencement of the adoption proceeding, 4) substantial neglect of the child – continuous or repeated, 5) extreme or repeated cruelty to the child, 6) failure to protect the child from conditions within his environment injurious to the child’s welfare, 7) depravity, 8) open and notorious adultery or fornication, 9) habitual drunkenness or addiction to drugs, 10) failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth, 11) failure by a parent to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the, or to make reasonable progress toward the return of the child to the parent, 12) evidence of intent to forgo parental rights, 13) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter, 14) inability to discharge parental responsibilities supported by competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of mental impairment, mental illness or mental retardation, 15) a finding that at birth the child’s blood, urine, or meconium contained any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of such substances, the presence of which in the newborn infant was the result of medical treatment administered to the mother or the newborn infant, and that the biological mother of this child is the biological mother of at least one other child who was adjudicated a neglected minor.³⁰

A solution adopted in the USA yet rare elsewhere in the world is to minimize the number of conditions or refrain from indicating the same in favour of assessing each adoption case in respect of the best interest of the child³¹ – in Alabama, Hawaii, Kansas, Maine, Michigan, Oregon).

³⁰ C. Benson, C. Godsil Cooper, J. Handler, R. Walters, *The Best Interests of the Child – The Illinois Adoption Act In Perspective*, 16 “DePaul Law Review” 1974–1975, pp. 100–126.

³¹ *Joint Adoption: A Queer Option?*, Note, 15 “Vermont Law Review” 1990–1991, pp. 197–226, D. E. Abrams, S. H. Ramsey, *A Primer on Adoption Law*, 52 “Juvenile and Family Court Journal”, Summer 2001, pp. 23–43, A. R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 “Boston University Law Review” 1995, pp. 997–1060, K. E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 “California Western Law Review”, No. 1, Fall 2003–2004, pp. 1–77, K. Bennison, *No Deposit No Return: The Adoption Dilemma*, 16 “Nova Law Review” 1991, pp. 909–935.

Role of the best interest of a child principle

The notion ‘the best interest of a child’ or ‘child’s welfare’ is broad and general-in purpose. It is uneasy to define, even when creating an illustration of a certain ideal state, value, situation or status of a child. The concept to leave the notion undetermined seems to be correct, suitable to enable flexible application of the principle in numerous situations and cases. The question is whether a creation of a catalogue of factors, to be taken into consideration during the process of accomplishment of the best interest of a child, would be more useful? Leaving a notion undefined makes the practitioners interpret it subjectively – strictly or broadly – according to a given situation, while a *numerus clausus* catalogue of factors would limit the possibilities to be considered. Regardless, the creation of this kind of list seems to be impossible, taking enormous diversity of cases to be dealt with into consideration. The formation of a list, that can be called a minimum catalogue is quite another matter. A proper organ dealing with a case and deciding about child’s future should deliberate factors from the list, at the same time not being limited to do so and being obliged not to omit them. For instance, a notion can be related to one of the aspects of child’s upbringing in a regular family – securing a proper psychophysical development for a child by formation of optimal educational conditions. Assessment of this factor should result in prevention from child’s ‘psychopathisation’ and so called social heritage. When resuming the preparation of factors to be considered in intercountry adoption cases, one should list the physical, mental and emotional needs of a child, on an intellectual level. The physical, mental and emotional levels of the child’s development should also be considered, such as his/her ability to understand situations and to form opinions regarding them and the consequences of organ’s decisions. Being a member of a certain family has also a great importance, as well as possibility to become a member of a new adoptive family as a person with recreated family bonds. Additionally factors connected with the child’s feelings, like safety, love and relations with all persons concerned in a case, need to be addressed. Especially in cases of a child’s placement in future adoptive family one should consider an issue of continuity of custody/care or consequences of a late decision in a case (e.g. breaking the continuity). The decision of adoption should be the best solution in given circumstances, concerning a particular child’s welfare. It should not be treated as a problem solution consisting in choice of the better from two disadvantageous options. That is why every possible option and its consequences should be also considered by an organ deciding in a case. Being more specific, if we will consider religious, cul-

tural (also language), racial origin and traditions of a child as important factors, as they are, we should pay attention on future family's attitude towards them.

Nevertheless an attempt to define 'the best interest of a child', can be understood as the ideal situation, in which a child is able to develop normally. 'Normally' means referral to certain system of moral values, but also an ideal value to be achieved. So the best interest of a child can be described both as a value and as an element of evaluation, i.e. evaluation factor in every activity (decision) concerning children. Carrying on an analysis of the notion – it can be looked upon as a conjunction of values or just one value, accomplished by numerous, impossible to take place in a closed catalogue of elements, like: sense/feeling of psychical, emotional and property comfort, or the ability to develop leading to finding a place in a society as an adult. Objective comprehension and universally accepted elements create a standard (framework) containing the subjective feelings of a child.

Adoption impediment versus the best interest of a child standard and principle of subsidiarity in intercountry adoption

Above reflections regarding the best interest of a child standard concern cases when a certain choice has to be done. Let us take a look at possible options coming into play. The first situation is when a choice is between two or several adoptive families, and the second one concerns the adoptive and foster families, the third – the adoptive family and institutional form of care (orphanage). A choice between biological and the adoptive families is possible, but infrequent – it takes place when a court decides to place a child in foster/adoptive family without parents' consent, usually depriving them of parental rights.

In every case mentioned an organ (court) has to decide on dealing with two standards: the best interest of a child and subsidiarity. It should also analyse adoption impediments, in the light of the two mentioned standards. Dealing with the best interest of a child standard means that a court should choose the best solution for a child, application of the second standard results in permission to adopt a child abroad only if there is no one willing to do so in a country of child's origin – or people willing to adopt nationally do not assure, in the court's opinion, accomplishment of the first standard. Even if foreigners are more able and willing to create the perfect conditions for a child, their application will be considered only when no one from the country of the child's origin, even less able and willing, will appear.

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In the case of obligatory application rules concerning the same race and religion of both parties of adoption, a result of choice can be different, which means that even if there are many families in a country of child's origin, a child can not be adopted by any of them because of lack of similarities prescribed by law. Then intercountry adoption cannot be fulfilled, unless someone from the same race or religion as the child will appear. The solution, when strictly applying the impediments, will be placing a child in foster family or in institutional care. Although they should provide the proper care, predominance of adoption in this sphere is obvious. Also from the point of view of accomplishment of the best interest of a child standard – this solution is unjustified. The situation repeats itself when there will not be any people of the same race or religion willing to adopt a child both in a country of child's origin and abroad. The question is – should this situation lead to child's placement in another form of care rather than to permit to adopt a child despite the impediments? If one accepts the latter solution – who should be allowed to adopt a child – a family from the child's country of origin or foreigners, according to the standard of subsidiarity?

The analyses of application of rules shows that accomplishment of both standards is rare. In fact application of them at the same time is impossible – intercountry adoptions are never compared with national adoptions, that is why there can not be a comparison concerning potential welfare of a child in the two kinds of adoption. Application of race or religion impediment can make a procedure more complicated and inconclusive.

Who is the one to decide about adoption?

The aim of all rules concerning intercountry adoption is to protect a child to be adopted. Their application sometimes brings into question, whether to reconsider how the limitations of adoption are created. The first way of their creation is by the law strictly prohibiting certain activities, as adoption by the adopter of a different race or religion than the adoptee or allowing only to adopt a child of the same race or religion. A legislator, doing so, limits a possibility to adopt, and at the same time – to be adopted. Strict bans on adoptions of this kind usually lead to situation when a court is not allowed to postpone a rule in the name of child's welfare.

Although the above situation is questionable, the next one is even more striking. The same effect can bring a regulation allowing biological parents of a child to decide about race or religion of a future adopter. It goes without

saying that both a relation between parents and children and a parental authority justify a role of parents in a family and in a child's life. It is also the autonomy of a family unit and its scope containing parents' possibility and ability to decide about a child – that justifies it. But in any given case a parent is the one willing to finish the relationship with a child – giving a consent for adoption. If an adoptive procedure is quick and there are many potential adopters to choose from, a way to limit the possibility for adoption can look like a method to assure that the chosen adopter would be the best one, i.e. with the same attributes as the child. But if a child is sick or older and additionally placed in an orphanage or when there are not too many potential adopters – it is a method of making the life of parents' biological child even harder.

Conclusion

To sum it up, the main purpose of adoption (as of any action taken in relation to an orphaned child) should be to serve the best interest of the child – hence the necessity of determining whether adoption is truly the best solution for a particular child, or maybe there are better, alternative ways. The above statement, when confronted with the differences between potential parties of adoption that have been scrutinized in this paper, may be encapsulated as follows: it should be well considered if adoption by a person of different nationality, ethnicity, culture, religion or race would be of greatest benefit to the child?

Since intercountry adoptions are usually subsidiary to domestic adoptions, it may be assumed that such adoption is preceded by extensive efforts to find adoptive parents for the child in his country and that adoption in this light is the alternative to the child's further stay in an institution. In such an instance it may be asserted, even with no reference to any particular case, that adoption is a better option for the child and therefore in his best interest.

On the other hand, racial and religious clashes, as not necessarily directly related to intercountry adoption, are handled in a different way and for them the subsidiarity principle does not hold. If it did, however, what would that mean in practice? The application of subsidiarity principle would require people in charge of the adoption process to seek prospective adoptive parents of the same race or religion as the child's, and only if this appeared impossible, they could consider candidates without regard to the race/religion criterion.

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Currently binding adoption regulations do not stipulate race as an impediment; rather, they propose bans on racial discrimination. This is typical especially of American regulations, and supported by a totally different practice – that of searching for a child of the same race (so the likelihood of a black child adopted by a white couple is as little as that of a white child adopted by a black couple). By contrast, when children are sought outside the US, racial differences play no part, to take frequent adoptions of Asian children by non-Asian families as an example. Thinking of racial differences as an impediment to adoption while leaving aside the questions of discrimination and political correctness, it must be noted that race is the only feature that may obviously make the adoption parties differ. It is therefore in the child's interest to scrutinize what impact such a visible (for both the child and his environment) dissimilarity may have on his further development.

Religious difference, by contrast, is not visible and its importance depends on whether or not one identifies their identity with religiousness. Besides, it is allowed to adopt infants and young children with no religious awareness, and older children, whose awareness is undoubtedly stronger. Again, it seems justifiable to refer to a child's best interest: if religion is of vital importance to a child, maybe we should strive to find him parents who can guarantee continuity of the child's upbringing with regard to his religious background.

On the other hand, if there are no established bonds, should the state (via statutory ban on such adoptions) deprive the child of the opportunity to find a new family? If not a state, than who should? Here, there are three practical solutions: the state, or rather the legislator making particular laws, court passing judicial decisions in adoption cases, and birth parents. While the two former ideas do not raise so much controversy, the latter seems bizarre. It is also worth consideration who is to decide if a child should be adopted by parents of the same religion. Why should parents who for any reasons deny further care of their child, decide on his future to such an extent that in effect the child is placed in an institution or in frequently changing foster families instead of having a stable family environment?

Different race or religion, if included in legal acts, are part of the legion of impediments or prerequisites present in adoption regulations. Each of them may be justified – they are here to safeguard stable and natural character of family relations resulting from adoption. However, would it be right in this context to treat the impediment of race or religion equal with those of sex or minority?

The purpose of adoption is to improve a child's wellbeing (which is proved at least by the fact that it is allowed to adopt one's own extramarital children or relatives, assuming that adoption has better effects on the child than other forms of care or guidance). All impediments should only exist to protect the child and they should be treated as such. Consequently, they should all be considered in terms of serving the best interest of the child – each particular child.

The principle of “best interest of the child” may justify a given solution introduced as a response to the social need, as exemplified by the American “open adoptions”. Judicial decisions are determined by the best interest of a particular child in the context of particular case. Social needs, on the other hand, are determined by American reality with its relatively weak opportunities of the adoption of infants unaware of their roots, and birth parents' consent to adoption of their child is often conditioned by the possibility of future contacts with or information about the child.³² However, it is hard to expect that social needs may result in the necessity of adoption impediments of race and religion to be introduced and used in the best interest of the child.

S U M M A R Y

During the twentieth century adoption became a tool ensuring a foster family environment to children. The increase of its popularity was accompanied by passing legal regulations related to adoption limitations which were to serve achieving various goals with child's best interests in the foreground whereas applying two principles, the above mentioned the best interest of the child and subsidiarity results from international regulations. The first one means that the best interest of the child should dictate the decision about adoption while the second one implies that a child might be adopted abroad only when there are no adopters from the child's mother country. In this context adoption limitations may be treated in two ways, firstly as an expression of protection of child's interests (in the form of an impediment to adoption), secondly, as factors which should be taken into account when evaluating the fulfilment of child's interest. Indicating whatever circumstance or a trait of a person as an impediment to adoption may in general stop the adoption proceeding since occurrence of such a trait will make the adoption impossible. Indicating religious or racial differences between a child and a potential adopter as an impediment makes it impossible to evaluate the fulfilment of child's interest in

³² A. R. Appell, *Increasing Options To Improve Permanency: Considerations In Drafting An Adoption With Contact Statute*, 18 “Children's Legal Rights Journal” No. 4, Fall 1998, pp. 36–37, D. E. Abrams, S. H. Ramsey, *op. cit.*, pp. 23–43.

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adoption since it makes the adoption impossible. If we assume that racial or religious differences are factors which should be taken into consideration while estimating the best interest of the child in adoption then there exist no doubt as for the possibility to apply the two principles governing adoptions. A child would be provided with a family environment abroad (if there are no adopters in the country) in a family of different race or religion (confession) if it was for the child best interest. Treating the above mentioned differences as impediments to adoption does not guarantee the fulfilment of the principle of the best interest of the child.

