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EDITORIAL

ADOPTION AND HOMOSEXUALITY: Observations and considerations 

Following the recent judgment of the European Court of Human Rights, which declared the refusal to grant a certificate of eligibility, based – even partially – on the applicant's sexual orientation to be discriminatory, this editorial reviews the very thorny issue of adoption by homosexuals.

The judgment of the European Court of Human Rights of 22 January of this year (see article on this issue in *Procedure*, p. 7) intensively reopens the debate on the issue of adoption and homosexuality. Indeed, given that the Court's jurisdiction extends to the 47 States, which have ratified the European

Convention on Human Rights, this ruling will certainly create jurisprudence well beyond France. Thus, the legislation of countries, which formally stipulate that adoption is prohibited for homosexual applicants, finds itself in opposition to the decision of the Court, and could be challenged by those who would be its victims.

This first consequence already threatens to raise many debates, particularly in countries with a strong conservative tradition, whether it entails countries of origin or receiving countries.

Single homosexual applicants

The issue of adoption and homosexuality is a delicate one to address and raises numerous passions. In order to discuss it, it is important to, first, clearly define its boundaries.

For several years, numerous receiving countries have chosen to evade the problem by considering homosexual adoption applicants as single persons. Authorisations have been granted to applicants hiding their private life or by services responsible for their assessment, and which turned a blind eye on this reality, considering that, individually, the applicants had the skills required to care for a child.

Even though the educational skills of the assessed applicants should not be questioned, a certain degree of uneasiness still persists. The assessment of an applicant must be a transparent process, which commits the responsibility of social services and the State, which they represent. If one expects a maximum of information and guarantees on the child from countries of origin, reciprocity also requires that the social assessments of the applicants be comprehensive and compliant with the reality of the situation.

On this point, the judgment of the European Court risks leading towards systematically hiding the sexual orientation of single applicants (or those described as such), with a risk of considering an unfavourable decision as discriminatory.

Homosexual couples

The development of Civil Law has subsequently enabled homosexual couples to formalise their relationship, either by marriage or through a similar institution (e.g. PACS in France). As the couple becomes 'legitimate', the issue of joint adoption arises.

Currently Germany, Iceland, the Netherlands, Denmark, the United Kingdom, Norway, Sweden, Belgium, Spain, Quebec, and some U.S. States authorise adoptions by homosexual couples. However, conditions vary from one country to another, and some

of them, such as the Netherlands, only grant this possibility in domestic adoption.

Domestic or intercountry adoption?

Authorising adoption by same-sex couples at domestic level is one issue, considering it for intercountry adoption is another one. Firstly, the possibility of adopting the child of one's spouse certainly constitutes the recognition of a fact, and a welcomed protection for the child concerned. When a relationship is stable and the child develops happily with both his mothers or both his fathers, it is normal that the one who is not the biological parent may benefit from a minimum set of rights, in order for him to fulfil his role in daily life (the child's schooling, hospitalisation of the spouse, etc). Indeed, there exist numerous situations in which children are brought up by a same-sex couple (e.g. the partner's child, artificial insemination).

As far as wider domestic adoption is concerned, the waiting lists of national citizens make it extremely difficult for same-sex couples to access adoptable children.

On the other hand, the entry of homosexual couples into the intercountry adoption 'market' is already considered 'an empty box' by some actors in the countries in which it is authorised. Indeed, one must emphasise that countries of origin also have their say in this debate (upon the requirements that they are duly informed of the situation of the adoption applicant). Many of them set very strict conditions as to the suitability of prospective adoptive parents to adopt – whether, for example, it is in relation to their age or to the presence of biological children. Today, no country of origin, with the exception of South Africa upon some requirements, accepts domestic and intercountry adoptions by homosexual couples. Thus, it follows that, even though a receiving country may authorise homosexual couples to adopt abroad, the latter may find themselves confronted with a quasi impossibility to proceed with the process, due to a lack of countries open to their profile.

And the child?

The rare studies carried out to date only offer partial observations, which, in addition, must be handled with care, given that assumptions – favourable or not – may considerably influence the results. 'In any

case, these studies eventually tend to indicate that children with 'homoparents' do not suffer from major problems more than others. However, we still do not have information about the adults they will become, and, as stated by the Psychoanalyst Claude Halmos, on their potential suffering 'in being a man or a woman'. It may therefore be necessary to bring ourselves, during still a number of years, to not be able to rely on further 'evidence' on which to build a conviction than this'.

The Courts, for their part, are more than reluctant, when arises the reality of couple life with someone of the same sex. In this context, French jurisprudence had refused the possibility to adopt to a homosexual man, believing that the difference of sexes was necessary for the healthy development of a child. The European Court of Human Rights had justified this very same refusal on the grounds that there were uncertainties as to the development of a child, who would thus be deprived of the double maternal and paternal reference, but rejected arguments relating to a violation of articles 14 (non-discrimination) and 8 ECHR (the right to respect for private and family life). The latest ruling of the Court therefore constitutes a considerable change in its appreciation of adoption and homosexuality. However, it is

regrettable that this exclusively legal judgment (based solely upon the question of discrimination), has not been based more extensively on the child. This debate remains essentially focused on Western social development, and only offers limited space to the child himself (except in cases of adoption involving the spouse's child, as mentioned above). However, simple questions remain: does adoption by a same-sex couple not constitute an additional source of differentiation for the child, who must already assume his status as adoptee, his difference in colour, his integration, etc? Until what age can a child 'accept' a family model without a father or a mother? Are our societies genuinely ready to fully accept these family models and not to stigmatise the children?

Social and family evolution is a slow and complex process: even though homosexual communities are beginning to suffer less from the multiple forms of discrimination, which have affected them for a long time, the implications raised by the formalisation of their relationship and the adoptive filiation arising from it, tend to suggest that some more time will be necessary to integrate this new family model.

The ISS/IRC team

IRC NEWS

- **Strengthening of the ISS General Secretariat's team** 🏠: Since the beginning of the year, Iris Pulfer has supported the International Reference Centre in its activities. She has a Master in Psychology by the University of Zurich, and possesses extensive experience in research in that field. Furthermore, the Casework Division has also been strengthened thanks to the arrival of Amanda Terzidis and Christine Lambert. Amanda, who has a Master's degree in Political Sciences and a Diploma in Social Sciences, and Christine, who has a Master's degree in European Studies and Human Rights, together accumulate considerable experiences with NGOs and the United Nations in the field, and speak several languages fluently. We welcome them all three at the ISS General Secretariat.
- **ISS website** 🏠: Due to technical problems relating to the maintenance system of our website, some documents are currently unavailable via the website. Thus, if you have experienced difficulties in accessing them, please do not hesitate to contact us in order for us to send you the documents or information directly.

ACTORS IN MATTERS OF ADOPTION

Source: Permanent Bureau of the Hague Conference: http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=69.

- **Denmark:** This country has updated the contact details of its Central and Competent Authorities, as well as those of its accredited bodies.
- **El Salvador:** This country has updated the contact details of its Central Authority: Procuraduría General de la República, 1 9a Calle Pte. y 13 Avenida Norte, Torre PGR, Centro de Gobierno, San Salvador; Tel: +503 2231 9305; Fax: +503 2222 0457; <http://www.pgr.gob.sv>; Contact: Ms A.Y. Lopez de Pineda.
- **Guatemala:** This country has named its Central and Competent Authority: Consejo Nacional de Adopciones, 8a, Avenida 12-75 de la Zona 1, Ciudad de Guatemala, Guatemala ; Tel : +502 22327716.
- **Monaco:** This country has updated the contact details of its Central Authority.
- **Switzerland:** This country has updated the contact details of its Central and Competent Cantonal Authorities.
- **United States of America:** This country has named the Department of State as the Competent Authority to issue the certificates in accordance with article 23 of the Convention.

LEGISLATION

GUATEMALA: Provisions of the new Adoption Law

The new Adoption Law is a very important first step in regulating the process of domestic and intercountry adoptions in Guatemala, and creates an administrative structure in this context.

As mentioned in our Monthly Review N° 11-12/2007, the Congress of Guatemala approved the new *Ley de Adopciones* [Adoption Law] in December 2007. The Law, which came into force on 31 of December, is an initial and fundamental step in the process of reform of the country's adoption system. Thus, the legislators and the organisations, which have promoted this Law should be congratulated for their efforts in incorporating the ethical principles and the rights of the child, which should govern the entire adoption process.

General principles (Title I, Chapters I and II)

The Law offers guarantees for the rights of the child throughout the process, drawing particular emphasis on the prohibitions aimed at a better implementation of the child's best interests, on the responsibility of the State in ensuring its respect and in sanctioning any violation of the Law, as well as on the conditions of the biological parents' consent. More precisely, it is stated that the best interests of the child is 'the principle that seeks to ensure the protection and development of the child, within his biological family or, in cases where this is not possible, in another permanent family environment'.

This allows for a clear establishment of the purpose of this protection measure.

Adoptability of the child (Title I, Chap. III and Title II, Chap. III)

This pre-adoption aspect has been positively addressed and regulated in the Adoption Law, which is an important issue in the specific context of Guatemala and its practices in the adoption process. The Law has succeeded in clearly stipulating the conditions and the requirements for a declaration of adoptability to be as ethical and responsible as possible: it must be based on the assessment of a range of situations (legal, social, psychological, medical); there must be an impossibility to reintegrate the child into his family; a situation of poverty may not be a ground for adoptability; the biological parents cannot consent to the adoption before the child is born, nor within a period of six weeks following his birth; and their consent must only be granted after a process of advice, information, guidance, and family support. This approach increases both, the guarantees for the rights of the child, and the responsibility of the authorities.

Administrative structure (Title II, Chap. I and II).

The Law also creates the *Consejo Nacional de Adopciones* (CNA) [National Adoption Council], an autonomous entity, which is the Guatemalan Central Authority, in conformity with the 1993 Hague Convention¹. The CNA is composed of: (a) an Executive Council, whose main functions consist of developing policies, procedures, standards and guidelines for the adoption process; (b) a General Directorate, whose Director-General is the administrative head of the institution; (c) a multidisciplinary team, which will support the tasks in the adoption process, in order for these to comply with the Law, with transparency, ethics and internationally accepted standards, and which provides advice to biological parents, adoptive parents and the child's relatives, as well as to institutions and authorities whose consent is required; (d) a Register of domestic and intercountry adoptions, of adoption files, of adoptable children, of accredited and authorised adoption bodies, of eligible and suitable individuals and families, etc.

Title II, Chapter II provides that the private entities active in the care of children will be authorised and registered by the Central Authority. Similarly, accredited adoption bodies, which are accredited in Contracting States, will be authorised by the Central Authority of the accrediting country and by the Central Authority of Guatemala, to carry out the functions in accordance with the provisions of the Hague Convention. The application for an authorisation for a foreign accredited body to work in Guatemala will have to be submitted by the accrediting State's Central Authority to the Central Authority of Guatemala. The forthcoming regulations of the Law will establish the requirements for the authorisation of the operation of foreign bodies, as well as their supervision. This new structure, therefore, also seriously weakens the involvement of solicitors and notaries active in recent practice.

Adoption procedure (Title II, Chap. IV to VII)

The Law describes, in considerable details, the adoption proceedings – both administrative and judicial - which also reflect

the principle of shared responsibility among the States involved in intercountry adoption with Guatemala. This includes:

- the process of guidance (Chap. IV): information and professional and individual advice to applicants, as well as to biological parents, who voluntarily decide to free their child for adoption;
- the application for adoption (Chap. V): submission of the adoption application via the Central Authority/ies, compliance with the requirements to be met by the prospective adoptive parents;
- the administrative proceedings (Chap. VI): selection of suitable adopters for the child (matching), in accordance with the principle of subsidiarity of intercountry adoption and their approval, joint living and socialising period between the applicants and the child;
- the conclusion of the process (Chap. VII): judicial approval and final resolution by the Family Judge, registration of the adoption on the register, and recognition of the intercountry adoption via the Certificate.

Thanks to its extensive incorporation of ethical principles and procedural provisions, the Adoption Law is a very positive step towards the protection of the interests and the rights of children in the adoption process in Guatemala. It is hoped that its implementation will succeed in remedying the practices, which, to date, have hardly been ethical and transparent, and that the forthcoming regulations of the Law will also contribute to this progress. However, in this context, initiating new adoption proceedings in Guatemala still requires additional time in order for the Law and the regulations to be fully implemented, and for the administrative structure to be effectively operational.

¹ The contact details of the Consejo Nacional de Adopciones are: 8a, Avenida 12-75 de la Zona 1; Ciudad de Guatemala; Guatemala; Tel: +502 223 27716.

Source: Ley de Adopciones, Decree N° 77-2007, Congress of the Republic of Guatemala (<http://www.congreso.gob.gt/archivos/decretos/2007/gtdcx77-2007.pdf>); UNICEF Guatemala.

SPAIN: Approval of the new Law on Intercountry Adoption

The new law [Ley de Adopción Internacional] was approved by the Spanish Congress of Deputies on 21 December 2007, in order to harmonise legislation and existing procedures, and to respond to the challenge faced by Spain, given that the country has the highest number of intercountry adoptions in terms of population.

With 6,000 intercountry adoptions per year, and a ratio of 12.3 per 100,000 inhabitants, Spain has the highest rate in the world. In this context, the new Law aims to guarantee the protection of children against all forms of trafficking and to strengthen the concept of intercountry adoption as a protection measure for abandoned children, as part of the system of integral protection. In order to achieve these objectives and to harmonise the various existing practices in the Spanish autonomous regions, the new Law establishes a series of innovative provisions and specific requirements. We hereby intend to offer a general analysis of the latter.

Circumstances preventing or determining intercountry adoptions

In accordance with the new Law, intercountry adoptions are prohibited when the child's country of origin is in conflict or has suffered from a natural disaster, in the absence of an authority regulating the process of adoption, or if there are insufficient guarantees for the child's best interests or when legal and ethical international principles are not complied with. Such measures constitute clear progress in the prevention of trafficking in children and in the protection of their fundamental rights, such as the right not to be unreasonably separated from their biological family. Nonetheless, their impact will depend upon the definitions, which may be elaborated for 'sufficient guarantees'.

The Law also sets out some conditions for intercountry adoptions in specific cases: it provides for the possibility, in relation to a particular country, to only accept applications submitted through collaborating agencies, which have been accredited or authorised by both countries. Without completely prohibiting independent or private adoptions, the new Law limits the resort to such practices, which often increase the vulnerability of prospective adoptive parents, and which may be likely to lead to irregular practices. As far as the

competent authorities in intercountry adoption are concerned, the new Law limits the entitlement to intervene solely to public child protection authorities and to duly authorised collaborating agencies (ECAIs). By limiting the number of intermediaries in intercountry adoption, the new Law ensures a better coordination and supervision of the process.

Rules of intervention for competent authorities and requirements for adoption applicants

The new Law sets out the functions of both, the public bodies as well as the ECAIs, specifying for the latter what is meant by intermediary activity. Furthermore, in order to achieve the implementation of a coherent system, the Law foresees the establishment of genuine coordination among public bodies at national and interregional levels, in relation to the ECAIs (accreditation criteria, limitation in number, assessment of their representative in the country of origin, supervision, etc). The Law makes particular reference to an interesting tool: the introduction of a contract between the ECAI and the applicants for adoption, thereby formalising the intermediary functions, which the ECAI is responsible for in the processing of the adoption request.

With regards to applicants, the Law regulates their suitability, by defining the term, specifying its criteria, and setting a maximum period of validity for the declaration of eligibility. The Law also imposes a series of post-adoption obligations upon applicants, and recognises the right of the adoptee to know his origins. However, it limits the exercise of the latter to the adoptee once he has reached his majority, or earlier if he is represented by his parents, and requires the necessary support and involvement of public bodies in facilitating access to the required data.

Legal implications of intercountry adoptions undertaken by foreign authorities

Another improvement of this new Law is the detailed description of the system of

recognition of adoptions undertaken by foreign authorities in Spain, in the absence of international norms. The Law specifies, among other issues, that such adoptions will only be recognised in Spain if they have been formalised in valid circumstances in the country of origin. In other words, the Spanish authorities will proceed with such control, and will have to confirm that these adoptions have the same effects as those regulated in Spain. Furthermore, the Law also incorporates a provision non-existent to date: a simple adoption, or a not completely full adoption, legally completed by a foreign authority may be converted into an adoption with full implications. Thanks to this new measure, all adopted children will be able to benefit from the same rights and guarantees, whether their adoption in their country of origin was full or simple. The delicate question relating to the preservation of links with the biological family remains open, given that the latter is one of the characteristics of simple adoptions.

Beyond intercountry adoption, the new Law also amends other child protection measures enshrined in the Civil Code. Indeed, it

establishes a period of two years starting from the notification of the administrative declaration of abandonment, during which parents may request the suspension of the withdrawal of their parental authority, and a revocation of the declaration of abandonment. This measure helps in preventing children from remaining in situations, which may jeopardise their development, with the impossibility of being permanently reintegrated, or of being declared adoptable. Thus, this progress will enable a greater number of children in the care of the Spanish State to be adopted.

Spain should be congratulated for this great step forward in the protection of children in intercountry adoption. As is the case of all new legislation, the success of such a tool will now depend upon the quality of its implementation and upon the commitment of all actors involved.

Source: Ley 54/2007 de Adopción internacional, 28 December 2007, Congress of Deputies (http://www.congreso.es/constitucion/ficheros/leyes_espa/l_054_2007.pdf).

PROCEDURE

ECHR: A refusal to grant an authorisation to adopt may not be justified on grounds of the applicant's homosexuality

A recent decision of the European Court of Human Rights re-examines the issue of adoption by homosexual applicants, and emphasises that it is discriminatory to base a refusal of eligibility on the sexual orientation of the applicant.

In its decision of 22 January 2008, in the case of *E.B. v France*, the ECHR takes a step towards adoption by homosexual applicants, considering that the application by a homosexual woman cannot be blamed for the absence of paternal reference, given that this argument is not taken account of in the case of single women. In addition, French law does not provide for the need to have a reference of the other gender in order to grant an authorisation to adopt. Given that it is indeed the sexual orientation of the applicant, which, more or less explicitly, motivated the refusal to grant an authorisation to adopt, French decisions will have to be annulled as being discriminatory.

Extract: 'With regard to the ground relied on by the domestic authorities relating to the lack of a paternal referent in the household, the Court considered that this did not necessarily raise a problem in itself. However, in the present case it was permissible to question the merits of such a ground as the application had been made by a single person and not a couple. In the Court's view, that ground might therefore have led to an arbitrary refusal and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality, and the Government had been unable to prove that use of that ground at domestic level had not been leading to discrimination. Regarding the systematic reference to the lack of a "paternal referent",

the Court disputed not the desirability of addressing the issue, but the importance attached to it by the domestic authorities in the context of adoption by a single person. The fact that the applicant's homosexuality had featured to such an extent in the reasoning of the domestic authorities was significant despite the fact that the courts had considered that the refusal to grant her authorisation had not been based on that. Besides their considerations regarding the applicant's "lifestyle", they had above all confirmed the decision of the president of the council for the département recommending that the application for authorisation be refused and giving as reasons the two impugned grounds: the wording of certain opinions revealed that the applicant's homosexuality or, at other times, her status as a single person had been a determining

factor in refusing her authorisation whereas the law made express provision for the right of single persons to apply for authorisation to adopt. The Court considered that the reference to the applicant's homosexuality had been, if not explicit, at least implicit; the influence of her homosexuality on the assessment of her application had not only been established but had also been a decisive factor leading to the decision to refuse her authorisation to adopt'.

E.B. v France, Application N° 43546/02, European Court of Human Rights; the decision is available at:

<http://cmiskp.echr.coe.int/tpk197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=67683&sessionId=5854753&skin=hudoc-en&attachment=true>.

FORTHCOMING CONFERENCES, SEMINARS, SYMPOSIA AND COURSES

- **Belgium:** *International Interdisciplinary Course: Children's Rights in a Globalized World: From Principles to Practice*, Children's Rights Centre (Ghent University) and UNICEF Chair in Children's Rights (University of Antwerp), 8-19 September 2008, Ghent-Antwerp. For further information: International Course on Children's Rights; E-mail: Kathleen.Vlieghe@UGent.be; <http://www.iccr.be/>.
- **Brazil:** *Encontro nacional de Apoio à Adoção* [Nacional meeting of support to adoption], 29-31 May 2008, Recife. For further information: Coordination of ENAPA 2008; <http://www.enapa.com.br/enapa.htm>.
- **Brazil/Argentina/Paraguay:** *Seminário Trinacional de Acolhimento e Adoção: Promovendo o direito à convivência familiar e comunitária* [Trinational Seminar on Foster Care and Adoption: Promoting the right to family and community life], 22-24 May 2008, Foz do Iguaçu, Paraná. For further information, contact: Ivania Ferronato, Fundación Nosso Lar, R. Ernesto Keller, 380, Jd. Eliza I, Foz do Iguaçu, PR; Tel: (45)30252440 ; E-mail: seminariotrinacional@hotmail.com or ivaniaferronato@yahoo.com.br.
- **France:** *Séparation et individuation: processus fondamental pour le très jeune enfant* [Separation and individuation: A fundamental process for the very young child], COPES, 3-4 April, 29-30 May and 26-27 June 2008 (3 sessions of 2 days), Paris. For further information: COPES; Tel: +33 1 53 68 93 40; E-mail: copes-formation@wanadoo.fr; <http://www.lecopes.org>.
- **Switzerland:** *New Answers for Youth in Difficulties: Confronting Oneself!*, International Institute for the Rights of the Child and Foundation Constellation Active Performance, 1 April 2008, Sion. For further information: International Institute for the Rights of the Child; Tel: +41 27 205 7303; E-mail: ide@childsrightrights.org; <http://www.childsrightrights.org>.
- **United Kingdom:** *Good practice in supporting birth parents*, BAAF, 24 April 2008, London. For further information: BAAF; Tel: +44 20 7421 2637; E-mail: conferences@baaf.org.uk; <http://www.baaf.org.uk>.

As a reminder, this Monthly Review is distributed to a selected network of Authorities and professionals. It is not aimed at being posted on an internet website without the authorisation of ISS/IRC.

Table of contents of the Bulletins 1997 - 2008:

www.iss-ssi.org/Resource_Centre/Resource_Center_EN/About_ISS-IRC/about_iss-irc.html. See Activities.

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