

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

Report
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REPORT
ON THE RECOGNITION OF
FOREIGN ADOPTION DECREES

IRELAND
The Law Reform Commission
Ardilaun Centre, 111, St Stephen's Green, Dublin 2

THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General twenty-eight Reports containing proposals for reform of the law. It has also published eleven Working Papers, one Consultation Paper and Annual Reports. Details will be found on pp. 43-46.

The Commissioners at present are:

The Hon Mr. Justice Ronan Keane, Judge of the High Court, President;
 John F. Buckley, Esq., B.A., LL.B., Solicitor;
 William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Associate Professor of Law, University of Dublin;
 Ms. Maureen Gaffney, B.A., M.A. (Univ. of Chicago), Senior Psychologist, Eastern Health Board; Research Associate, University of Dublin;
 Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

William Binchy, Esq., B.A., B.C.L., LL.M., Barrister-at-Law, is Research Counsellor to the Commission.

Ms. Grainne de Burca, B.C.L., LL.M. (Michigan), Ms. Rachel Hussey, LL.B. and Ms. Una Ó Raifeartaigh, B.C.L. are Research Assistants.

Further information from:

The Secretary,
 The Law Reform Commission,
 Ardilaun Centre,
 111 St. Stephen's Green, Dublin 2.
 Telephone: 715699.

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GLOSSARY OF LEGAL TERMS

Legitimation

The process of conferring what in some legal systems is described as "legitimate" status on a child after its birth, as, for example, where parents of a child born outside marriage marry one another.

Declaration of prodigality

A ruling by a court that a curator or guardian should be appointed of a person whose extravagant habits manifest an inability to administer his own affairs.

Private international law: Conflict of laws

These expressions refer to the legal principles applied by our courts when an issue arises which contains a foreign element and when, accordingly, reference to the Irish legal system alone might be unjust or unreasonable.

Domicile

The term in private international law for the territory having a distinct legal system in which a person has his or her permanent home, a connection which determines what legal system regulates many of the legal questions affecting him or her personally. These include questions of status, e.g., whether a child is to be regarded in Irish law as the child of its natural parents or its adoptive parents.

Lex (or leges) domicilii

The law (or laws) of a person's domicile.

Lex successionis

The legal system which determines rights of succession or inheritance to a person's estate.

Lex patriae

National law.

Lex situs

The law of the place where the property is situated.

CHAPTER 1: INTRODUCTION

1. In its first programme of law reform, the Commission announced its intention of examining various aspects of private international law. When the present members of the Commission took up office in January 1987, they took the view that one of the branches of this subject which merited particular attention was the recognition of foreign adoption decrees. It seemed probable that there was a number of people living in the State who had been adopted abroad and that the number was likely to increase. It was also thought possible that, with the decrease in the number of children available for adoption within the State, an increasing number of Irish parents might be seeking to adopt children abroad. At that time, however, the Adoption (No.2) Bill 1987 was initiated and it was decided to defer further examination of the whole subject until the Bill's fate was known, since its provisions could have implications in the area of recognition of foreign adoption decrees. In the event, the Bill was referred by the President to the Supreme Court for a decision as to its constitutionality. Following the Court's ruling on the 26th July 1988 upholding the Bill's constitutionality, it was decided to resume the examination of the whole question.

2. As a first step, a Discussion Paper was prepared which was circulated to a number of bodies and persons with a special interest in the subject. This Paper contained the Commission's provisional recommendations on the question. Observations on the Commission's Paper were received from the following:

Mr Bernard Carey, Registrar of An Bord Uchtála.

District Justice Agnes Cassidy, former Chairman of An Bord Uchtála.

Mr P. F. Curran, Chairman of the Revenue Commissioners.

Mr Donal Devitt, Principal, Children's Legislation Division, Department of Health.

Mr Declan Quigley, Former Senior Legal Assistant, Office of the Attorney General.

Deputy Alan Shatter.

The Commission would like to express their gratitude to those who made observations. They have been of considerable assistance in

enabling us to formulate our final proposals for reform. It must, as usual, be emphasised, however, that the Commission is solely responsible for the contents of this Report.

3. The present law is unsatisfactory. Although it is generally assumed that foreign adoptions may be recognised under existing law, the circumstances in which recognition may be afforded have never been clearly defined either in case law or by statute. Since there are probably a number of people living in this country, both children and adults, who have been adopted abroad, it is a matter of concern that their status under Irish law should remain uncertain. This Report sets out our proposals as to how the law should be clarified and amended so as to eliminate existing anomalies and uncertainties.

4. At the same time, the limitations on our present enquiry should be understood. As we have pointed out, it seems likely that an increasing number of Irish parents are seeking to adopt children abroad. We have been informed by the Adoption Board that they receive a small number of applications from such couples who have "adopted" a child abroad and who now wish to adopt the child under Irish Law. Such overseas "adoptions" have usually been effected in Third World countries. In the majority of cases dealt with by the Board, the requirements of Irish law as to eligibility for adoption and the obtaining of consents were met. In others, however, they were not, so that it was not possible for the Board to grant the applications for adoption under Irish law. Since the adoptive parents in such cases are neither domiciled nor even resident for any significant period of time in the country of adoption, it is obvious that such adoptions would fail to meet the threshold requirements of any system of recognition of foreign adoption decrees which uses normally acceptable criteria. It is unfortunately the case that adoptive parents in this position will not necessarily be assisted by the proposals in our Report if they are implemented.

5. The Commission fully recognises the problem created by such adoptions and accepts that they are likely to increase with the decreasing number of children available for adoption in the State and the continuing rise in the population of Third World countries. It is generally acknowledged, however, that this problem can only be tackled at an international level and it has already been decided that the 17th session of the Hague Conference on Private International Law in 1993 will be devoted to the finalisation of a convention on *The Adoption of Children Coming from Abroad*. In these circumstances, it would be premature for the Commission to embark on an examination of this particular topic.

6. This Report sets out the present position as to the recognition of foreign adoption decrees under Irish law and the relevant provisions of the *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions*. It also considers the proposals contained in the Report of the Review Committee on Adoption Services on *Adoption* as to the recognition of foreign adoptions. Finally, it sets out the Commission's proposals for reform.

CHAPTER 2: THE PRESENT LAW

5. Adoption consists of the establishment of a legal relationship of parent and child where this relationship does not necessarily depend on a natural relationship.¹ This very general definition simplifies a most complex range of adoption laws which have existed in different cultures at different times.² The policy of adoption has sometimes been directed towards benefiting the adoptive parents, as in Greece and Rome, where "[f]amily ties were strengthened in consequence and the name and property of ancient and noble houses were preserved from extinction".³ This policy is reflected even today in the law of some African⁴ and Asian⁵ countries.

6. In Ireland, other European countries and North America, a major goal of adoption is to promote the welfare of the child. There are, however, significant differences in a number of these countries as to the legal effects of adoption. In many common law countries, including Ireland, adoption has the effect of completely extinguishing the legal relationship between the natural parents and the child who is adopted. In some other countries, however, the legal relationship is only modified. Thus, the child may in some cases have succession rights in the estate of his or her natural and adoptive parents.⁶ In some of the countries traditionally favouring a complete severance of the legal relationship, a view has developed in recent years in favour of modification of the present position, on the basis that some form of less final and complete placement of their children might appeal to young mothers.⁷

7. Other differences may be mentioned briefly.⁸ In some countries only children may be adopted; in others there is no age limit.⁹ In some countries adoption is by private agreement; in others it must be formally approved by a public authority, such as An Bord Uchtala in Ireland, or by a court. Some countries restrict eligibility for adoption to orphans and children designated illegitimate; others, in varying degrees, provide for the compulsory or voluntary adoption of legitimate children. Some countries provide for the extinction of the rights of one parent after a divorce and for the adoption of the child by the other parent and a later spouse; in other countries divorce does not sever parent-child relationships in this way.

8. Adoption did not become part of Irish law until 1952.¹⁰ Before then, only one reported decision¹¹ considered the question whether foreign adoptions would be recognised in Ireland and, if so, the extent to which their effects would also be recognised. In England, before adoption was introduced there in 1926, Dicey¹² considered that, since adoption was unknown at common law, the courts should not recognise the status of the adopted child. A Canadian decision¹³ took the same view.

As against this, courts have been able to recognise the status of legitimation¹⁴ and of declarations of prodigality;¹⁵ it seems "a complete non-sequitur"¹⁶ to suggest that because of the mere fact that adoption was not part of our law, our courts should deny recognition to this status, provided, of course, no consideration of public policy would prevent them from doing so.

Nevertheless, in *In re Tamburrini*,¹⁷ in 1944, the High Court gave short shrift to the claims of a man to have custody of his adoptive son based on a foreign adoption order. Here, an Irish woman had gone to live in Scotland where she gave birth to a boy, outside marriage. She sent the child back to be reared by her parents in Ireland, and over the years contributed regularly towards his maintenance. When the boy was four, she married a divorced man in Scotland, who was not the child's father. The following year she and her husband formally adopted the boy under the provisions of the *Adoption of Children (Scotland) Act 1930*. They later sought custody of the child from his grandparents, who resisted their request.

The High Court rejected the application of the mother and adoptive father, and the child was permitted to remain with his grandparents. The Court was primarily concerned with the child's religious welfare, which, it felt, would not be served by moving the child to Scotland.

Of interest in the present context is the fact that Maguire P, during argument, enquired of counsel for the applicants whether he relied solely on the natural rights of the mother or on "any alleged right of Antonio Tamburrini, as adoptive father".¹⁸ Counsel replied that he relied on the mother's natural rights, adding: "but under the law of Scotland Antonio Tamburrini has now the legal rights of a father and any order made by this court should give custody to the two prosecutors".¹⁹

In the judgments of the Court, Maguire P²⁰ alone referred to the question of the adoptive father's claim. He said:

"Although Antonio Tamburrini had adopted the child and is anxious to have him come to live with him, we are of the opinion that in a case such as this his rights can not be placed on the same plane as a real parent's."²¹

The case shows how little weight was attached to the status of a foreign adoption order in 1944, when no institution of adoption existed in Ireland. Not only were the rights of the adoptive father given virtually no attention, but the Court also ignored any rights of the mother as adoptive parent of her own child.²²

Jurisdiction to Make an Adoption Order

9. An adoption order may be made only where the child resides in the State,²³ and where the applicants are ordinarily resident in the State

and have been so resident during the year ending on the date of the order.²⁴

Thus, the domicile of neither the child nor the applicants is relevant. So far as the child is concerned, this relieves the authorities of the task, which may be a difficult and complex one in many cases, of attempting to discern the domicile of the child's mother or father, as the case may be. The whole subject of the domicile of children is plagued by uncertainties.²⁵ If the authorities were obliged to work out the domicile of children otherwise eligible for adoption, they would have to resort frequently to the court for guidance on the matter. Moreover, a requirement that the child or the applicants should be domiciled within the State would lead to arbitrary results, to the detriment of the child in many instances.²⁶ "Residence" is probably a better notion than "living", since it connotes a stronger degree of continuity than the latter term.²⁷ Clearly, what the legislation is seeking to prevent is an adoption of a child whose presence within the State is fleeting. "Residence" accomplishes this goal.

10. The eligibility of applicants for adoption must next be considered. Section 11(1) of the *Adoption Act 1952*, as amended by section 5 of the *Adoption Act 1964* and section 5 of the *Adoption Act 1974* provides that only the following categories are eligible to adopt:

- (a) Married couples living together;
- (b) The mother, natural father or "relative" of the child;
- (c) Widows and (subject to restrictions) widowers.²⁸

The Acts throw no direct light on the question as to how the courts are to determine, if called upon to do so, whether persons fall into such categories as "a married couple", "a widow" or "a widower". It would seem reasonable, however, that the capacity of the person concerned to marry should be determined by having regard to the conflicts of law rules on the question. In other words if, in the case of a married couple, the parties have such a capacity according to the law of the countries of both their domiciles, then, but not otherwise, do they fulfil the requirements of eligibility.

As to the meaning of "relative" in this context, section 3 of the 1952 Act defines the word as meaning:

"grandparent, brother, sister, uncle or aunt, whether of the whole blood, of the half-blood or by affinity, relationship to an illegitimate child being traced through the mother only."

Again the statute gives no guidance on the question of what law is to determine the legitimate or illegitimate status of the child. Again it seems reasonable that our conflicts of law rules on the subject of legitimacy²⁹ should determine the question.

11. The subject of eligibility for adoption gives rise to similar questions. Those eligible for voluntary adoption are children residing in the State³⁰ who are: (a) orphans;³¹ (b) illegitimate children;³² and (c) certain legitimate children.³³ No major difficulty in relation to conflict of laws arises with respect to orphans.³⁴ So far as illegitimate children are concerned, conflict rules as to legitimacy should determine the question.

The position regarding legitimated children is the subject of a specific statutory provision. Section 2(1) of the *Adoption Act 1964* permits the adoption of a child "who has been legitimated or whose legitimation has been recognised in pursuance of the provision of the Legitimacy Act 1931", provided the child's birth has not been re-registered in pursuance of the provisions of the Schedule to the 1931 Act "or in pursuance of the law of a country other than the State". (These provisions would appear to be intended to facilitate the adoption of an illegitimate child whose natural mother had consented to the adoption but married the natural father before an adoption order was made. Without such a provision, it would not have been possible to make an adoption order in respect of a legitimated child, save in the exceptional circumstances envisaged by the Adoption Act 1988). Clearly, a foreign legitimation recognised under the 1931 Act comes within the scope of section 2(1).

But what about a foreign legitimation recognised *other than* under the 1931 Act? There seems no sound policy justification for excluding children thus legitimated from the scope of section 2(1), at all events where it is not very easy to fit them within its express words. Perhaps it can be said simply that they have "been legitimated"; but if this expression covers *these* children it should be sufficiently strong to cover children whose legitimation has been recognised under the 1931 Act, yet the latter receive specific mention.³⁵

12. Some uncertainty surrounds the requirement that the birth of the legitimated child should not have been re-registered "in pursuance of the law of a country other than the State". The position is that some countries may have provisions requiring re-registration, others not. For those requiring re-registration, section 2(1) provides that no such registration should actually have occurred. So far as those countries not requiring any re-registration are concerned, it is not clear whether this renders the child ineligible under section 2(1) or (more probably) that it renders irrelevant the requirement as to non-registration. Section 2(1) does not attempt to identify *which* country's law is relevant. This will depend on the choice of law rules as to recognition of foreign legitimations.

13. Apart from the limited scope of operation of choice of law rules in respect of eligibility to adopt and to be adopted, it appears that our law of adoption does not in general involve choice-of-law principles. Thus an Irish adoption complying with the requirements of Irish law will be valid regardless of the fact that it fails to comply with the requirements for adoption under the *lex (or leges) domicilii* of the child and of the applicants.³⁶

Basis of Recognition of Foreign Adoptions"

14. There is no reported decision of the courts in the Republic of Ireland setting out the circumstances in which a foreign adoption may be recognised. Nor are there any statutory rules governing recognition. Nevertheless, some statute law proceeds on the assumption that recognition principles exist. Recent examples are sections 3(1)(b) and 92(1)(b) of the *Status of Children Act 1987*, which make reference to a

person adopted abroad whose adoption is 'recognised by virtue of the law for the time being in force in the State'.

15. It seems likely that the present position is governed by the common law, and that, under common law, a foreign adoption is entitled to recognition if the adopting parents were, at the time of the adoption, domiciled in the country where the adoption was effected. We understand that this principle was accepted and applied by McKenzie J in a case stated to the High Court by the Adoption Board on 25 June 1987. In that case an English adoption order was refused recognition because, at the time of the order, the natural mother (who was adopting her own child) was not domiciled in England. After obtaining the English order the mother had returned to live in this country, had married and had applied, together with her husband, to adopt the same child in Ireland. Had the English adoption been entitled to recognition the child would have been ineligible for re-adoption.

16. In the absence of reported decisions it is worth exploring other approaches that might possibly be taken by the courts to the problem of recognition. These are:

(a) *Refusal to Recognise Foreign Adoptions because the Legal Nature of Adoption varies so greatly from country to country*

One approach requires the court to refuse to recognise foreign adoptions because the legal nature of adoption varies so greatly from country to country. In *Re Wilson*,³⁸ Vaisey J asked:

"Am I to scrutinise the laws of the Province of Quebec, which are by no means the same as the English law of adoption, and see whether, in my judgment, they come sufficiently close to such last-mentioned law to oblige or allow me to say that an adoption effected in that province is for the relevant purposes exactly the same in its consequence as one made under the law of England? Such a task is, in my judgment, quite beyond my powers."

This approach seems to have little to commend it.

There is, of course, a problem in some instances as to the extent to which a legal process denominated "adoption" in a particular foreign law is akin to adoption under Irish law but this is by no means a unique type of problem in the conflicts of law.³⁹ One solution is to ask an all-or nothing question: "Is the legal process sufficiently similar with adoption in our law to be treated as an adoption?" If the answer is yes, then there is no further question to be asked. Even if the foreign legal process is in some respects different to our notion of adoption, these differences will be ignored. If the answer is no, then whatever similarities there may be with our notion of adoption will be ignored.

(b) *The Reciprocity Principle*

17. Another approach is to recognise foreign adoptions if carried out in circumstances which, had they occurred in Ireland, would have entitled the Irish authorities to exercise jurisdiction.⁴⁰

In the English decision of *Re Valentine's Settlement*,⁴¹ in 1965, Lord Denning MR said:

"[W]hen is the status of adoption duly constituted? Clearly it is so when it is constituted in another country in similar circumstances as we claim for ourselves. Our courts should recognise a jurisdiction which *mutatis mutandis* they claim for themselves . . ."

We claim jurisdiction to make an adoption order when the adopting parents are domiciled in this country and the child is resident here. So also, out of the comity of nations, we should recognise an adoption order made by another country when the adopting parents are domiciled there and the child is resident there."

A reciprocity principle based on similar jurisdictional criteria could work unsatisfactorily. Our jurisdictional requirements are liberal but our eligibility requirements are narrowly drawn. Where a country with similar jurisdictional requirements but wide-ranging eligibility requirements permitted an adoption it is not certain that recognition would necessarily be desirable. To this it may be said that our courts are always free to resort to public policy⁴³ where the eligibility requirements are too wide-ranging, and that, whether the reciprocity principle or one based on domicile is favoured, the problem of over-liberal eligibility requirements may arise.

(c) *A Domicile-Based Test*

18. Another approach bases the recognition of foreign adoptions, whether exclusively or as one of a number of grounds, on domicile. It is perhaps not unreasonable that domicile should play a significant role since adoption (in the law of many countries) changes status,⁴⁴ and such an important result should not lightly be recognised. Domicile, it may be said, has a sufficiently strong and permanent force to base recognition of foreign adoptions upon it.

If domicile is the test, *whose* domicile should enter into consideration? One solution recognises a foreign adoption only where it is valid according to the *leges domicilii* of the child *and* the adoptive parents. This cumulative approach was supported by Barnard J in *Re Wilby*⁴⁵ and Vaisey J in *Re Wilson*.⁴⁶

In favour of this view, it may be said that, since adoption alters the status of both the child and the parents, it should not be recognised unless it is effective under the domiciliary laws of all parties concerned.⁴⁷ In this regard it has been argued that adoption differs from legitimation in that adoption involves no necessary prior connection by blood between the parties:

"Where [blood] ties exist... it is adequate to disregard the [child]'s personal law. But if the relationship of father and child is created independently of any natural ties, regard must be had to the child's personal law which, not only in a legal but also in a natural sense is different from that of the adopter, and on which the adopter's personal law has never had a possibility of 'fastening' itself. Moreover, adoption to a large extent disconnects the ties between the child and its family whose interests will be reasonably protected by taking into account the personal law

which it has 'fastened' on the child. The situation is, in some respects, similar to that to be faced in connection with marriage the creation of which depends on both spouses' personal law. Before the marriage a woman is no way subject to her future husband's personal law and, therefore, she cannot become his wife but by the force of their respective personal laws. Exclusive reliance on the adopters personal law would be equally unjustified."⁴⁸

As against this, the cumulative rule restricts the number of adoptions which will be treated as effective. This may cause hardship and injustice in some instances.⁴⁹

19. If a choice has to be made between the *lex domicilii* of the child⁵⁰ and that of the parents which should prevail? The argument in favour of the child's *lex domicilii* is based on the consideration that the law from which the child is withdrawn and which provides the existing framework of his legal relations should have some say in the change.⁵¹ The fact that the child in most cases will not be old enough to protect his own interests is a further reason for giving emphasis to the child's *lex domicilii*. Nor should one ignore the interests of the child's natural parent or parents, since, if the adoption is recognised, their rights in relation to their child will no longer be recognised.⁵²

The principal argument in favour of selecting the adoptive parents' *lex domicilii* is that in most cases the child, when adopted, will be living in the country of the adoptive parents' domicile; this will be his centre of gravity during the time he is growing up with them, and "[t]o attribute to him a connection with a system of law with which he has, perhaps, had no point of contact since his earliest months might be considered artificial".⁵³ The analogy with custody proceedings has been pressed, debatably⁵⁴ perhaps, on the basis that one should have regard to the best interests of the child⁵⁵ by looking to the future rather than the past.

*Effects of Adoption*⁵⁶

20. It is one thing to recognise a child's status as an adopted person, it is "a very different thing"⁵⁷ to hold that this status controls succession and other entitlements under Irish law.

21. Let us consider first the position where succession is governed by Irish law. Children adopted under the *Adoption Acts 1952-88* are in the same position, for succession purposes, as their adoptive parents' children from within marriage, provided, in cases of testate succession, that they were adopted before the will was executed. (It should be noted that in the case of wills executed after June 14th 1988, the *Status of Children Act 1987* provides that it is no longer necessary that the children should have been adopted *before* the will was executed). But what is the position where there has been a foreign adoption that is recognised under Irish law?

22. Until recently, there was no clear answer to this question. Now, however, s.27(3) of the *Status of Children Act 1987* provides that:

"For the purposes of any property right to which this section or section 4A (inserted by this Act) of the (Succession) Act of 1965 relates, the provisions of section 26 of the Adoption Act 1952 (which relates to the property rights of persons adopted under the Adoption Act 1952 to 1976) shall be construed as applying also to any person adopted outside the State whose adoption is recognised by virtue of the law for the time being in force in the State."

It is, accordingly, now clear that the succession rights of a child adopted abroad are to be the same as those of a child adopted under Irish law, provided, of course, that the foreign adoption is recognised under Irish law.

23. Where the succession is governed by foreign law, the best approach would seem to be to refer the whole question to the *lex successionis*.⁵⁸ This straightforward solution would not be affected by the provision of the Status of Children Act already mentioned.

Foreign Adoption Decrees and Taxation

24. Certain features of revenue legislation which affect the present position as to the recognition of foreign adoption decrees should be noted. Thus under section 2 of the Capital Acquisitions Tax Act 1976, "child" is defined as including

"(b) a child adopted-

(i) under the Adoption Acts, 1952 or 1974; or

(ii) under an adoption law, other than the Adoption Acts 1952 to 1974, being an adoption that has in the place where the law applies, substantially the same effect in relation to property rights (including the law of succession) as an adoption under the Adoption Acts, 1952 to 1974, has in the State in relation to such rights".

Similar provisions are to be found in relation to income tax, corporation tax, residential property tax, capital gains tax and stamp duty. It will be observed that the recognition of foreign adoptions for these purposes is significantly less qualified than the present general law and, indeed, than that law if it were altered in accordance with proposals subsequently made in this Report.

Constitutional Aspects of the Recognition of Adoption Decrees

25. The effect of the Constitution on conflict of law rules relating to adoption must next be considered. Such rules, as they existed at the date of the coming into force of the Constitution, were preserved as part of our law, subject to the Constitution itself and to the extent to which they were not inconsistent with the Constitution.⁵⁹ A question may arise as to whether the choice of law rules discussed above are consistent with the Constitution in permitting the recognition under Irish law of adoptions which might be thought to abridge or remove the constitutionally guaranteed rights of parents, children or others.

26. There is as yet no decision of the Superior Courts in this area. There have been a number of cases in recent years concerning the custody of children removed from the jurisdiction of other courts in which judges have considered the extent to which the principle of the comity of courts can outweigh the constitutionally guaranteed rights of parents and children.⁶⁰ No general principle can be extracted with any confidence from these decisions and they afford no real guidance as to the effect of the Constitution on conflict of law rules relating to adoption.

27. The problem is most likely to arise in the case of adoptions of legitimate children effected, with or without the consent of the parents, under jurisdictions which permit such adoptions. Such adoptions are now permissible under Irish law by virtue of the *Adoption Act 1988*, but only in the strictly limited circumstances envisaged by that Act. Such adoptions may only be effected where the High Court makes an order authorising the adoption and such an order may only be made where certain pre-conditions have been met, including a requirement that the parents have, for physical or moral reasons, failed in their duty towards the child and that the failure constitutes an abandonment of their parental rights.

The President before signing the Adoption (No.2) Bill 1987, as the Act then was, referred it to the Supreme Court for a decision on the question as to whether it was repugnant to the Constitution or to any provision thereof. The Court ruled on the 26th July 1988 that none of the provisions of the Act was repugnant to the Constitution or any provisions thereof.⁶¹ The Court rejected a submission by counsel assigned to oppose the Bill that it represented an attack upon the constitution and authority of the family to which the child belonged by altering the constitution of the family for all time, saying:

"The Court rejects the submission that the nature of the family as a unit group possessing inalienable and imprescriptible rights makes it constitutionally impermissible for a statute to restore to any member of an individual family constitutional rights of which he has been deprived by a method which disturbs or alters the constitution of that family if that method is necessary to achieve that purpose."⁶²

28. It does not follow, however, from the Court's decision that legislation which permitted such adoptions subject to less stringent safeguards for the constitutional rights of those concerned would be upheld. In this context, it should be noted that the phrase "physical or moral reasons" used by the draftsman in s.3(1)(A) mirrors precisely the language used in Article 42.5 of the Constitution. This gives added significance to the comment of the Court as to how that expression should be interpreted:

"Furthermore, the failure must arise for physical or moral reasons. This does not mean that the failure must necessarily in every case be blameworthy, but it does mean that a failure due to externally originating circumstances such as poverty would not constitute a failure within the meaning of the sub-clause."⁶³

However, the fact that the Oireachtas may be precluded by the provisions of Articles 40, 41 and 42 of the Constitution from enacting legislation which permitted the adoption of legitimate children other than in the exceptional circumstances envisaged by Article 42.5, does not necessarily mean that a conflict of law rule, which has as its consequence the recognition of such an adoption decree by another jurisdiction, would be inconsistent with the Constitution. In the area of divorce, where similar problems of status and public policy in the context of private international law arise, the Irish courts have been at pains to distinguish between the effects of the public policy underlying the Constitution which prohibits the positive enforcement in this jurisdiction of laws which offend that public policy and the more passive recognition of the status which those laws bring about as a matter of private international law.⁶⁴

29. We accordingly approach our consideration of the topic on the basis that the choice of law rules already discussed do not involve any necessary conflict with the provisions of the Constitution. It should also be noted that Article 15 of the Hague Convention discussed below enables the contracting states to disregard its provisions when their observance would be "manifestly contrary to public policy".

Reform of the Law

30. The Review Committee on Adoption Services, in its Report, entitled *Adoption*,⁶⁵ published in 1984, addressed some issues relating to conflicts of law. The Committee referred to section 5(2) of the *Adoption Act 1964*, which stipulates that prospective adopters must be ordinarily resident in the State and have been so resident during the year preceding the date of the adoption order. From the information available to them, they were satisfied that this provision works well, and they recommend no change in the law. The requirement that the prospective adopters be "ordinarily" resident here removed any doubts as to the eligibility to adopt of Irish persons obliged temporarily to live abroad in the course of their work.

31. The Committee stated that they "would be opposed to any measure which would encourage or facilitate trafficking in children for adoption purposes".⁶⁶ They considered that the fact that there may be many young children orphaned or abandoned as a result of conditions of war or poverty or famine should not be regarded as a justification for removing them from their native environment. Instead, concern for the deprived children of distressed or undeveloped countries could "best be shown by assisting the various national and international agencies working to relieve the problems of such areas by improving conditions within them".⁶⁷

32. The Committee accepted that there will be particular instances in which people living in Ireland may wish to adopt a foreign child and where the circumstances would justify a favourable view being taken of such an application. They recommended, however, that it should be obligatory for all applications in respect of the adoption of a foreign child

to be made through a registered adoption society or health board." The agencies would have the responsibility to make enquiries about the background of the child and to ensure that the necessary conditions, particularly those relating to consent, had been fulfilled."

33. On the question of recognition of adoption orders made abroad, the Review Committee recommended that the Minister for Health should be empowered by statute "to designate countries whose adoption orders would be recognised in Ireland".¹⁰ The effect of this recognition would be "to accord the same rights to children adopted in these countries as children who had been adopted under Irish law".¹¹ The Minister would also be given powers to draw up rules governing the recognition of adoption orders made in non-designated countries.¹² The Committee considered that the recognition of foreign adoptions should have retrospective effect but they suggested that, in framing the law, consideration should be given to making the recognition of foreign orders retrospective without affecting rights that are vested, such as those in relation to succession.¹³

- ¹ See Shatter, ch.12, *Rabel*, vol.1, ch.17, *Binchy*, ch.17.
- ² See *Rabel*, vol.1, 678-679, *Scoles & Hay*, 545, 546, Lipstein, *Adoption in Private International Law: Reflection on the Scope and the Limits of a Convention*, 12 Int. & Comp. L.Q. 835, at 835-836 (1963), Huard, *The Law of Adoption: Ancient and Modern*, 9 Vand.L.Rev.743 (1956), Hamilton-Grierson, *An Example of Legal Make-Believe*, 20 Jurid. Rev. 32 (1908), 21 Jurid. Rev. 17 (1909).
- ³ Jones, *Adoption in the Conflict of Laws*, 5 Int. & Comp. L. Q. 207, (1956). See further Brosnan, *The Law of Adoption*, 22 Colum.L.Rev.332, at 332-335 (1922), Presser, *The Historical Background of the American Law of Adoption*, 11 J.of Fam.L. 443, at 445-448 (1971).
- ⁴ See O'Collins, *The Influence of Western Adoption Laws on Customary Adoption in the Third World*, ch. 18 of P. Bean, ed., *Adoption. Essays in Social Policy, Law, Sociology*, at 290-292 (1984).
- ⁵ See Yong-Han Kim, *Legislative Tendency of Adoption in the Developing Country*, ch. 15 of F. Bates ed., *The Child and the Law* (1976).
- ⁶ Cf. Jones, *Adoption in the Conflict of Laws*, 5 Int. & Comp. L. Q. 207, at 207 (1956), Cohn, Note, 83 L. Q. Rev. 177, at 177-179 (1967), Lipstein, *Adoption in Private International Law: Reflection on the Scope and Limits of a Convention*, 12 Int. & Comp. L. Q. 835, at 835-836 (1963), Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 Cornell L.Q. 152 (1966), Rein, *Relatives by Blood, Adoption and Association: Who Should Get What and Why*, 37 Vand.L.Rev. 771 (1984), Crowe, *Comment*, 60 St. John's L.Rev. 329 (1986), Wiseman French, Note, 53 Brooklyn L. Rev. 1007 (1988).
- ⁷ Cf. Amadio & Deutsch, *Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives*, 22 J. of Family L. 59, at 70-72 (1983), Katz, *Rewriting the Adoption Story*, 5 Family Advocate No. 1, p.9 (1982). For a broader discussion of recent trends, see Johnston, *Is Adoption Outmoded?* 6 Otago L. Rev. 15 (1985), Sencer, Note: *Adoption in the Non-Traditional Family - A Look at Some Alternatives*, 16 Hofstra L.Rev. 191 (1987).
- ⁸ Cf. Hoggett, *Adoption Law: An Overview*, ch. 8 of P. Bean ed., *Adoption: Essays in Social Policy, Law, and Sociology* (1984).
- ⁹ Cf. Brosnan, *supra*, at 340, Merrill & Merrill, *Toward Uniformity in Adoption Law*, 40 Iowa L. Rev. 299, at 323 (1955).
- ¹⁰ Adoption Act 1952. See Shatter, 175-176.
- ¹¹ *In re Tamburrini*, [1944] I.R. 508 (High Ct.).
- ¹² 3rd ed., 502-503 (1922).
- ¹³ *Burnfiel v Burnfiel*, [1926] 2 D.L.R. 129.
- ¹⁴ Cf. *Re Goodman's Trusts*, 17 Ch. D. 266 (1881), *Re Andros*, 24 Ch. D. 637 (1883).
- ¹⁵ Cf. *Baindail v Baindail*, [1946] P. 122, *Worms v De Valdor*, 49 LJ Ch. 261.
- ¹⁶ Jones, *Adoption in the Conflict of Laws*, 5 Int. & Comp. L.Q. 207, at 209 (1956).
- ¹⁷ [1944] I.R. 508 (High Ct.).
- ¹⁸ *Id.*, at 509.
- ¹⁹ *Id.*, at 509.
- ²⁰ With whom Maguire J concurred.
- ²¹ *Id.*, at 513.
- ²² This may be because her counsel apparently placed no reliance on these rights: cf. *id.*, at 509.
- ²³ *Adoption Act 1952*, section 10.
- ²⁴ *Adoption Act 1964*, section 5(2), substituting a new subsection (4) for the original subsection (4) of section 11 of the *Adoption Act 1952*. Under the 1952 Act, it was necessary for the applicants to reside in the State (original section 11(4)). Moreover section 11(5), which was deleted by section 5(3) of the 1964 Act, had provided that an adoption order could not be made unless the applicant or, if the applicant were a married couple, the husband was an Irish citizen or had been ordinarily resident in the State during the five years preceding the date of the application.
- ²⁵ Cf. our Working Paper No. 10-1981, *Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws*, ch. 8, and the *Domicile and Recognition of Foreign Divorces Act 1986*, sections 2-4. See also *Binchy*, 82-92.
- ²⁶ See Morris, *Some Recent Developments in the English Private International Law of Adoption*, Festschrift for Mann 241, at 243 (1977) (criticising English law, which made domicile the sole jurisdictional criterion). Cf. De Nova, *Adoption in Comparative Private International Law* [196] 80-81.

- ²⁷ Cf. McClean & Patchett, *English Jurisdiction in Adoption*, 19 Int. & Comp. L.Q. 1, at 8 (1970).
- ²⁸ In *O.G. v Attorney General* (1985) ILRM 61, McMahon J found unconstitutional a requirement in section 5 of the 1974 Act that widowers had to have at least one other child in their custody. It may be that the other restrictions on the eligibility of widowers to adopt are also unconstitutional as being unjustifiably discriminatory between the sexes. Cf Forde, *Constitutional Law of Ireland*, p. 600.
- ²⁹ See *Binchy*, ch.16.
- ³⁰ *Adoption Act 1951*, section 10.
- ³¹ *Id.*
- ³² *Id.*
- ³³ *Adoption Act 1964*, section 2(1). The *Adoption Act 1988*, considered later in this Report, introduces the principle of compulsory adoption of children, regardless of whether or not their parents have married each other. The jurisdictional requirements of section 10 of the 1952 Act are dispensed with by section 2(2) of the 1988 Act, but this does not involve a significant change in practice since the applicants must ordinarily reside in a functional area of one of the Health Boards (section 1(1)(c)) and the child must have been in their custody and have had a home with them for at least a year (section 3(1), clause II).
- ³⁴ The question whether a country's law as to presumption of death is a matter of substance or procedure could perhaps give rise to difficulties in some cases: cf. *Binchy*, 628-631, *Cheshire & North*, 685-686.
- ³⁵ The requirements in section 2(1) concerning re-registration suggest (though far from conclusively) that legitimation *per subsequens matrimonium* was envisaged.
- ³⁶ Cf. Morris, *Some Recent Developments in the English Private International Law of Adoption*, Festschrift for Mann 241, at 246-247 (1971). For critical analysis of this approach see De Nova, *Adoption in Comparative Private International Law*, [1961] I Recueil des cours 68, ch. 1. Of course, the international implications of a proposed adoption could be a factor to be taken into account in determining whether the adoption should be made: cf. *Re B (S) (An Infant)*, [1968] Ch.204 (Goff, J.), but this does not affect the principle that the *lex fori* controls.
- ³⁷ See *Binchy*, 372-374. Scarman, *English Law and Foreign Adoptions*, 11 Int. & Comp. L.Q. 635 (1962), Cowen, *English Law and Foreign Adoptions*, 12 Int. & Comp. L.Q. 168 (1963) (a useful comparative study), Morris, *Some Recent Developments in the English Private International Law of Adoption*, Festschrift for Mann 241, at 248-255 (1977), Lipstein, *Adoption in Private International Law: Reflections on the Scope and Limits of a Convention*, 12 Int. & Comp. L. Q. 835, at 839ff (1963), O'Connell, *Recognition and Effects of Foreign Adoption Orders*, 33 Can. Bar Rev. 635 (1955), Kennedy, *Adoption in the Conflict of Laws*, 34 Can. Bar Rev. 507, at 521ff (1956) (an excellent analysis), Jones, *Adoption in the Conflict of Laws*, 5 Int. & Comp. L.Q. 207, at 210-216 (1956), Taintor, *Adoption in the Conflict of Laws*, 15 U Pittsburgh L. Rev. 222 (1954), Inglis, *Adoption, The Marshall Case, and The Conflict of Laws*, 35 Can. Bar Rev. 1027 (1957), Inglis *Recognition of Foreign Adoptions*, 32 Austr. L.J. 216 (1958), Gerber, *Some Aspects of Adoptions in the Conflict of Laws*, 38 Austr. L.J. 309 (1965), North, *Note: Adoption, Succession, and the Conflict of Laws*, 28 Modern L. Rev. 470 (1965), Groffier, *L'adoption en droit international privé compare*, [1976] Rev. Critique de Dr. Int. Prive 603, at 635-651, Inglis, *Adoption and Succession in Private International Law*, 6 Int. & Comp. L.Q. 202 (1957).
- ³⁸ [1954] Ch. 733, at 741. Cf. *Re Wilby*, [1956] P. 174, at 180 (Barnard J.), and see *In re Tamburrini*, [1944] I.R. 508 (High Ct.), discussed *supra*, pp. 5-7.
- ³⁹ The definition of marriage may present somewhat similar difficulties in certain instances: cf. Scarman, *English Law and Foreign Adoptions*, 11 Int. & Comp. L.Q. 635, at 638 (1962), *Nachimson v Nachimson*, [1930] P. 217. See also Kennedy, *Adoption in the Conflict of Laws*, 34 Can. Bar Rev. 507, at 545-546 (1956):

"We may look to the foreign adoption law to determine whether the adoption resembles adoption as we know it. In cases of foreign marriage, of which there are many forms, we examine the nature of the foreign institution. If it is in substance marriage as we know it, we accept it and treat the parties to it as married. Even if it is polygamous we accept it for succession purposes. So, too, in adoption it is neither necessary nor proper to go beyond the question of substance. Rituals called 'adoptions' but which are in substance something else - for example, a form of ancestor worship - will not be accepted. On the other hand, where we have what is in substance an adoption, differences in detail do not matter. In both marriage and adoption differences in the age limits, residence periods, consents necessary, and other details do not prevent our acceptance of the foreign institution."

- ⁴ Cf. *Travers v Holley*, [1953] P. 246 (C.A., per Hodson LJ), Kennedy, *Reciprocity in the Recognition of Foreign Judgments*, 32 Can. Bar Rev. 359, at 370-372 (1954); O'Connell, *Recognition and Effects of Foreign Adoption Orders*, 33 Can. Bar Rev. 635, at 642 (1955); Kennedy, *Adoption in the Conflict of Laws*, 34 Can. Bar Rev. 507, at 523-525 (1956).
- ⁵ [1965] Ch. 831 (C.A.).
- ⁶ Citing *Travers v Holley*, *supra*.
- ⁷ Cf. Morris, *Some Recent Development in the English Private International Law of Adoption*, Festschrift for Mann, 241, at 249 (1977): "Public policy is probably more important a reservation in the law of adoption than in any other part of the conflict of laws, because the laws of some foreign countries differ so sharply from English law as to the objects and effects of adoption."
- ⁸ Cf. O'Connell, *Recognition and Effects of Foreign Adoption Orders*, 33 Can. Bar Rev. 635, at 638-639 (1955).
- ⁹ [1956] 2 W.L.R. 262.
- ¹⁰ [1954] Ch. 733. See also *Perpetual Trustee Co. Ltd v Montouri*, [1982] 1 N.S.W.L.R. 710, at 716-717 (Rath J).
- ¹¹ Jones, *Adoption in the Conflict of Laws*, 5 Int. & Comp. L.Q. 207, at 209 (1956).
- ¹² Mann, *Legitimation and Adoption in Private International Law*, 57, 112, at 123-124 (1941).
- ¹³ Cf. O'Connell, *Recognition and Effects of Foreign Adoption Orders*, 33 Can. Bar Rev. 635, at 638, 641 (1951).
- ¹⁴ A *via media* would be to develop a concept of "divisible adoption", whereby liberal recognition rules would ensure that the child obtained all the benefits of adoption, but the interests of the child's natural parents would nonetheless be protected: cf. Baade, *Interstate and Foreign Adoptions in North Carolina*, 40 N. Car. L. Rev. 691, at 716 (1962). This would no doubt be a complex and challenging development, but, in view of its generosity of spirit to all affected parties, merits some consideration, though the price in terms of increased legal uncertainty weighs against it.
- ¹⁵ O'Connell, *Recognition and Effects of Foreign Adoption Orders*, 33 Can. Bar Rev. 635, at 641 (1955).
- ¹⁶ *Id.*
- ¹⁷ *Id.*, at 642.
- ¹⁸ Cf. Baade, *Interstate and Foreign Adoption in North Carolina*, 40 N. Car. L. Rev. 691, at 703-704 (1962).
- ¹⁹ Cf. *Scoles & Hay*, 543.
- ²⁰ See O'Connell, *Recognition and effects of Foreign Adoption Orders*, 33 Can. Bar Rev. 635 (1955), North, *Note: Adoption, Succession, and the Conflict of Laws*, 28 Modern L. Rev. 470 (1965), Inglis, *Adoption and Succession in Private International Law*, 6 Int. & Comp. L.Q. 202 (1957), Inglis, *Adoption, the Marshall Case, and the Conflict of Laws*, 35 Can. Bar Rev. 1027 (1957), De Nova, *Adoption in Comparative Private International Law*, [1961] - 1 Recueil des cours 68, Part II.
- ²¹ Scarman, *English Law and Foreign Adoptions*, 11 Int. & Comp. L.Q. 635, at 636 (1962).
- ²² Cf. *Dicey & Morris*, 9th ed., 1973, 493.
- ²³ Article 50.1.
- ²⁴ *Northampton County Council v ABF and MBF*, [1982] I.L.R.M. 164 (High Ct., Hamilton J 1981); *Kent County Council v CS*, [1984] I.L.R.M. 292 (High Ct., Finlay P 1983); *Oxfordshire County Council v JH and VH*, unreported, High Ct., Costello, J, judgment delivered 19 May 1988 (1988-421Sp). Similar questions were considered by the Supreme Court in *Sanders v Mid-Western Health Board*, unreported, judgment delivered 23 June 1987 (*Irish Times*, 24 June 1987), affirming High Ct., Hamilton P 11 May 1987. There were, however, no written judgments in the Supreme Court.
- ²⁵ *In the Matter of Article 26 of the Constitution and In the Matter of the Adoption (No.2) Bill 1987*, unreported, judgment delivered 26 July 1988.
- ²⁶ Transcript, p. 12.
- ²⁷ Transcript, p. 15.
- ²⁸ *Mayo-Perrott v Mayo-Perrott*, [1958] I.R. 336; *Bank of Ireland v Caffin*, [1971] I.R. 123; *Gaffney v Gaffney*, [1975] I.R. 133; *Sachs v Standard Chartered Bank*, [1987] I.L.R.M. 297.
- ²⁹ Pl. 2467 (1984).
- ³⁰ *Id.*, para. 3.13.

¹⁷ *Id.*

¹⁸ *Id.*, para. 3.14.

¹⁹ *Id.*

²⁰ *Id.*, para. 13.17. This recommendation was no doubt influenced by a similar approach commanding support in Britain: cf. the *Adoption Act 1968*, section 4(3) and the *Children Act 1975*, Schedule 1. *Dicey & Morris*, 874, fn. 52 state that the countries designated by the Secretary of State "include most of the member countries of the Commission (exceptions include India and Bangladesh) and United Kingdom dependent territory, all Western European countries, Yugoslavia, Greece, Turkey, S. Africa and the United States of America".

²¹ Review Committee on Adoption Services' Report, para. 13.17.

²² Para. 13.17 of the Report.

²³ *Id.*, para. 13.18.

CHAPTER 3: THE HAGUE CONVENTION ON ADOPTIONS

34. In this chapter we discuss the *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*,¹ drafted at the 10th Session of the Hague Conference on Private International Law in 1964. The Convention contains some interesting solutions to the conflict between nationality and domicile as connecting factors in adoption, as well as introducing provisions for a modest degree of co-operation between the authorities of different countries when international adoptions are being made.² First the limits of the Convention should be noted, as they are "at least as important as its provisions".³ The Convention covers only adoptions with a foreign element: it does not extend to wholly "internal" adoptions, where the adopter or adopters and the child all possess the same nationality and habitually reside in the State of which they are nationals.⁴ Thus, the question of the recognition abroad of these adoptions, "which are of course much more numerous and thus more important in practice",⁵ was left to another day.⁶

35. The next and arguably most significant⁷ limitation is that the convention does not extend to the incidents and effects of an adoption recognised by another State. It goes only so far as to say (in Article 8) that every adoption granted by an authority having jurisdiction under the terms of Article 3, para. 1 of the Convention is to "be recognised without further formality in all contracting States".⁸ The precise content of this recognition is left to be determined by each individual State, "for the obvious reason that there was no hope at the Conference of reaching a consensus on this point among 23 different States, each of which attributed different incidents to its own domestic adoption orders".⁹

The background to this final outcome is worth examining, Professor Joost Blom explains:

"The sweeping provisions of the Bureau's initial draft, which would have placed the adopted child in the same position legally as a legitimate natural born child,¹⁰ even if none of the laws of the relevant States gave effect to domestic adoptions, was replaced in the Commission Speciale's draft by a choice of law rule referring all effects, other than those relating to succession and nationality, to the national law of the adopting parents.¹¹ Even the Commission Speciale put this solution forward rather hesitantly;¹²

it was rejected almost at once by the Second Commission of the Conference,¹⁴ and after numerous alternative suggestions had failed to get a majority, it was decided to omit from the Convention any provision on the effects to be given to an adoption.¹⁴ See especially the comments of the President of the Second Commission^{15, 16}

Professor Blom goes on to say that:

"The absence of any provision on the incidents which States must attribute to a Convention adoption is a most serious omission from the Convention, since the whole purpose of creating the body of rules which it contains was to ensure that when an adoption was made in one country, the parties to it would know what their relationship would be in the eyes of other countries. In fact, this relationship may still be subject to variation as parties move from one State to another, or as the issue of their relationship arises in different States. It is to be hoped that the parties to the Convention will adopt the same approach as Britain has done in the 1968 Act, and assimilate Convention adoptions to domestic adoptions so far as their incidents are concerned. Even such uniformity of approach, however, will not mean a uniformity of incidents throughout Convention countries, so long as there remain wide divergences between the national laws as to what the incidents of adoption are. Having a Convention adoption, therefore, may improve the rights of a child or an adopting parent, but it cannot guarantee them."¹⁷

36. The next limitation in the scope of the Convention that should be noted is that the Convention deals only with adoptions by a single adopting parent, or by spouses, of children under the age of 18 who have not been married.¹⁸

The Adoptive Parent or Parents

37. The Convention applies to an adoption where the adoptive parent "possessing the nationality of one of the contracting States, has his habitual residence within one of these States, or spouses each of whom, possessing the nationality of one of the contracting States, has his or her habitual residence within one of these States".¹⁹ It is not necessary that the spouses actually habitually reside in the State of the nationality of either or both of them: it is enough that they habitually reside in any one²⁰ of the contracting States.

Jurisdiction to grant an adoption is vested in:

- (a) the authorities of the State where the adopter habitually resides or, in the case of an adoption by spouses, the authorities of the State in which both habitually reside;
- (b) the authorities of the State of which the adopter is a national or, in the case of an adoption by spouses, the authorities of the State of which both are nationals.²¹

The Adopted Child

38. The Convention, as we have mentioned, applies to a child who has not attained the age of eighteen years at the time when the application for adoption is made and has not married.²² Furthermore, the child must possess the nationality of one of the contracting States *and* have his or her habitual residence within one of these States²³ (not necessarily the same as the one of which the child is a national).

Choice of Law

39. The authorities who have jurisdiction based on the habitual residence of the adopter (or adopters) must apply their internal law to the conditions governing an adoption.²⁴ However, they must apply the national law of the child relating to consents and consultations, other than those in respect of an adopter, his family or his or her spouse.²⁵ Moreover, they must respect any provision prohibiting adoption contained in the national law of the adopter (or, in the case of an adoption by spouses, any such provision of their common national law)²⁶ if the State of which the adopter is (or adopters are) nationals has made a declaration, when signing, ratifying or acceding to the Convention, specifying the provisions of its internal law prohibiting adoptions founded upon:

- (a) the existence of descendants of the adopter or adopters;
- (b) the fact that a single person is applying to adopt;
- (c) the existence of a blood relationship between an adopter and the child;
- (d) the existence of a previous adoption of the child by other persons;
- (e) the requirement of a difference in age between adopter or adopters and the child;
- (f) the age of the adopter or adopters and that of the child;
- (g) the fact that the child does not reside with the adopter or adopters.²⁷

40. Commenting on these provisions, Professor Joost Blom says:

“The use of the term ‘prohibition’ in the text of the treaty, a term which suggests an exceptional bar, is somewhat misleading. In fact, the list of kinds of prohibitions which may be declared by a State is so comprehensive that a State which wished to do so could compel the other countries to apply substantially the whole of its own domestic law on the conditions for adoption, other than consents, providing the adopting parent or the adopting spouses were its nationals

The relevant prohibitions of the foreign law are not to be applied instead of the corresponding rules of forum law in all cases, but cumulatively with them; that is to say, an adoption cannot be granted unless the conditions both of the law of the forum and of the parents’ *lex patriae* are met. The more restrictive law is thus always applied. Since many civil law

jurisdictions have adoption laws which contain conditions of this kind, it will be seen that this choice of law rule may have a greater impact than the first reading might suggest: Austria has declared prohibitions of types (d), (e) and (f), and Switzerland will probably declare prohibitions of types (e), (f) and (g), if she ratifies the Convention."²⁵

The Interest of the Child

41. The authorities having jurisdiction to grant an adoption under Article 3 of the Convention must not do so "unless it will be in the interest of the child".²⁹ Before granting an adoption they must carry out, through the agency of the appropriate local authorities, a thorough inquiry relating to the adopter or adopters, the child and his or her family.³⁰ As far as possible this inquiry must be carried out in co-operation with public or private organisations qualified in the field of intercountry adoptions and the help of social workers having special training or having particular experience concerning the problems of adoption.³¹ The authorities of all the contracting States are required promptly to give all the assistance requested for the purposes of an adoption governed by the Convention.³²

*Annulment and Revocation of Adoptions*³³

42. Article 7 of the Convention is concerned with the annulment and revocation of adoptions. It provides as follows:

"Jurisdiction to annul or to revoke an adoption governed by the present Convention shall be vested in —

- (a) the authorities of the contracting State in which the person adopted habitually resides at the time when the application to annul or to revoke the adoption is made;
- (b) the authorities of the State in which at that time the adopter habitually resides or, in the case of an adoption by spouses, both of them habitually reside;
- (c) the authorities of the State which granted the adoption.

An adoption may be annulled -

- (a) on any ground permitted by the internal law of the State which granted the adoption; or
- (b) in accordance with the national law of the adopter or adopters at the time when that adoption was granted where the application to annul is based on failure to comply with a prohibition to which the second paragraph of article 4 applies; or
- (c) in accordance with the national law of the person adopted at the time when the adoption was granted in cases where the application to annul is based on failure to obtain a consent required by that law.

An adoption may be revoked in accordance with the internal law of the authority exercising jurisdiction."

Recognition

43. Article 8 deals with recognition. It provides that every adoption, and every annulment or revocation of an adoption, to which relevant articles of the Convention apply "shall be recognised without further formality in all contracting States". Moreover, if any question arises in a contracting State with respect to the recognition of such an adoption, annulment or revocation, the authorities of that State, in considering the jurisdiction of the authority which granted the adoption or made the annulment or revocation, "shall be bound by the findings of fact on which that authority based its jurisdiction".

Professor Graveson has commented, in relation to this provision in Article 8 that:

"[I]t would no doubt be open to a recognising court to attack the original jurisdiction on the ground of a wrong conclusion drawn from the facts found by the original court, but the facts so found are themselves invulnerable."³⁴

It is worth noting Unger's observations on Article 8:

"English courts would thus have to recognise the revocation of an English adoption order made where the adopters of the child are of foreign nationality and either party subsequently becomes habitually resident abroad. Such sacrifice of the principle and finality of adoptions, a fundamental principle of English law, might be prevented by recourse to Article 15 which permits contracting states to disregard the provisions of the Convention when their observance would be manifestly contrary to public policy. The prospect of having to choose between the sacrifice of an important principle and involving public policy may not be attractive but it might arise, quite apart from the Convention, wherever one of the parties to an English adoption, having acquired a foreign domicile, there obtains a decree of revocation."³⁵

Possibly a Constitutional problem could arise in Ireland in relation to Article 8; the constitutional requirement that "truth must out"³⁶ may possibly be in potential conflict with the Article. If this is so, we could avail ourselves of Article 15.

International Notifications

44. Article 9 provides that where an authority has granted an adoption pursuant to Article 3, paragraph 1, it must notify this fact to the other State, if any, the authorities of which would have been empowered to grant an adoption under Article 3, to the State of which the child is a national and to the contracting State where the child was born.

Article 9 also provides that, when an authority having jurisdiction under Article 7, paragraph 1, has annulled or revoked an adoption, it must notify this fact to the State the authority of which has granted the adoption, to the State of which the child is a national and to the contracting State where the child was born.

Other Provisions

45. The Convention contains a number of other provisions which should be noted. Of particular importance is Article 15, which is to the effect that the provisions of the Convention may be disregarded in contracting States "only where this observance would be manifestly contrary to public policy".

Article 16 provides that each contracting State must designate the authorities having power to grant, annul or revoke adoptions, to exchange communications relative to the welfare of children considered for adoption and to receive information about adoption of a child who is a national or who was born there.

- See *Actes et documents de la dixième session 7 au 28 octobre 1964*, tome 11: Adoption (1965). For commentary, see *Scoble & Hay*, 546-549; Unger, *Hague Conference on Private International Law: Draft Convention on Adoptions*, 28 *Modern L. Rev.* 463 (1965); Lipstein, *The Tenth Session of the Hague Conference on Private International Law, 1964*, [1965] *Camb. L.J.* 224, at 224-230; McClean & Patchett, *English Jurisdiction in Adoption*, 19 *Int. & Comp. L.Q.* 1, at 12ff (1970); Graveson, *The Tenth Session of the Hague Conference of Private International Law*, 14 *Int. & Comp. L.Q.* 528, at 532-538 (1965); Blom, *The Adoption Act 1968, and the Conflict of Laws*, 22 *Int. & Comp. L.Q.* 109, at 110-125 (1973); Loussouarn, *La xme session de la Conférence de la Haye de droit international privé*, 92 *J. du dr. internat.* 5, at 6-11 (1965); Amram, *Report on the Tenth Session of the Hague Conference on Private International Law*, 59 *Amer. J. of Comp. L.* 87, at 88-89 (1965).
- 10 Cf. Blom, *The Adoption Act 1968, and the Conflict of Laws*, 22 *Int. & Comp. L.Q.* 109, at 110-112 (1973).
- 11 *Id.*, at 113.
- 12 Article 2(b).
- 13 Lipstein, *The Tenth Session of the Hague Conference on Private International Law, 1964*, [1965] *Camb. L.J.* 224, at 224.
- 14 Cf. Graveson, *The Tenth Session of the Hague Conference on Private International Law*, 14 *Int. & Comp. L.Q.* 528, at 534 (1965):
- [I]t was considered that fewer problems would be likely to arise over the recognition of internal adoptions than over the establishment of jurisdiction and applicable law to make adoption orders, and that there might well be States disposed to recognise internal adoptions which would not be prepared to ratify a convention on the wider topic. The exclusion of internal adoptions by Article 2(b) from the Convention should, therefore, be read in conjunction with the United Kingdom proposal (which was accepted) to include as a possible item for the future work of the Conference the recognition of internal adoptions granted by other States. [Citing item B. IV(1)(d) of the Final Act.]
- 15 Cf. Blom, *supra*, at 113.
- 16 Article 8 has a similar provision in relation to the recognition of every decision annulling or revoking an adoption granted by an authority having jurisdiction under Articles 7; cf. *infra*, pp. 51-53.
- 17 Blom, *supra*, at 114.
- 18 Articles 25, *Actes*, pp. 27 and 32-35.
- 19 Article 8, *Actes*, p. 84.
- 20 *Actes*, pp. 90, 97-103.
- 21 *Id.*, pp. 307-308.
- 22 *Id.*, pp. 309-321.
- 23 *Id.*, pp. 328-329.
- 24 Blom, *supra*, at 113-114, fn. 25.
- 25 *Id.*, at 114.
- 26 Article 1. Graveson explains that:
- [T]he decision to limit adoption to a child who had not attained the age of eighteen years of age at the time of application for adoption and who had not married, was taken after long discussion among those who favoured this criterion and those who would prefer the age of majority as defined by the relevant system. Beyond these two points of view one or two countries, and notably Belgium, would favour a provision allowing the adoption of adults, a not uncommon practice under Belgian law. *The Tenth Session of the Hague Conference on Private International Law*, 14 *Int. & Comp. L.Q.* 528, at 533 (1965).
- 27 Article 1. Article 10 provides that for the purposes of the Convention, an adopter or a child who is stateless or whose nationality is unknown, is deemed to have the nationality of the State of his habitual residence.
- 28 Article 2(a) and 3.
- 29 Article 3. The problem of double nationality is not dealt with in the Convention, "being regarded as a more general question of which the application to the matter of adoption is only a special case": Graveson, *supra*, at 534.
- 30 Article 1.
- 31 *Id.* Article 10 provides that, for the purposes of the Convention, an adopter or a child who is stateless or whose nationality is unknown, is deemed to have the nationality of the State of his habitual residence.

- ¹¹ Article 4.
- ¹² Article 5.
- ¹³ Article 4.
- ¹⁴ Article 13. A proposal by the Irish delegation that a prohibition in the national law of the adopters based on difference of religion should be included in the list was rejected by 13 votes to 3 (Spain, Ireland and Israel) with six abstentions (Denmark, United States of America, Finland, Japan, Norway and Switzerland). *Actes et documents*, tome 2, p. 274. For later developments in the Irish internal law, see *M. v. An Bord Uchtala*, [1975] I.R. 81 *Adoption Act 1974*, section 4, *Shatter*, 296-297, Report of the Review Committee on Adoption Services, *Adoption*, para. 4.21 (Pl. 2467, 1984).
- ¹⁵ Blom, *supra*, at 116-117.
- ¹⁶ Article 6.
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ See Blom, *supra*, at 120ff.; Lipstein, *The Tenth Session of the Hague Conference on Private International Law*, 1964, [1965] *Camb. L.J.* 224, at 227-228.
- ²¹ Graveson, *supra*, at 537. Cf. Blom, *supra*, at 119, who considers that "[t]he practical effect of [lack of jurisdiction] to the recognition rule is likely to be small, because the findings of fact on which the court based its jurisdiction, including presumably findings of nationality or habitual residence, are binding on any court which is asked to recognise the adoption". In a footnote (at 119-120, fn. 63), Blom adds:
 "Although these [i.e. nationality or habitual residence] are strictly speaking questions of 'mixed law and fact', being terms which must have a particular legal meaning, Art. 8(3) would be largely ineffective if they were not included as 'findings of fact'. Habitual residence, at any rate, was clearly considered a question of fact at the Conference It would also be extremely awkward if English courts were to be free to review the application by foreign courts of their own laws of nationality. Cf. however, the opinion of the Law Commission (Law Com. No. 34: *Hague Convention on Recognition of Divorces and Legal Separations*, Cmnd. 4542, pp. 14-15), in construing the similarly worded provision (Art. 6(1)) of the Convention on Recognition of Divorces and Legal Separations, that the wording did not cover findings of habitual residence and nationality. These were consequently provided for specifically in the Recognition of Divorces and Legal Separations Act 1971, s.5(2). The fact that the Hague Conference did not discuss the problem at all (see *Actes*, pp. 304, 327-335 and 362-365, where one would have expected a discussion of it), combined with the emphasis on habitual residence as a 'notion de fait', suggests strongly that it was assumed that habitual residence and nationality were findings of fact for the purposes of Art. 8(3)."
- ²² Unger, *Hague Conference on Private International Law: Draft Convention on Adoptions*, 28 *Modern L. Rev.* 463, at 465 (1965).
- ²³ *Cf. S. v S.*, [1983] I.R. 68. See further Hogan, Note: *Natural and Constitutional Justice - Adieu to Laissez-Faire*, 19 *Ir. Jur.* (N.S.) 309, at 317-318 (1984).

CHAPTER 4: RECOMMENDATIONS

The Hague Convention

46. Having outlined the strengths and weaknesses of the Convention we now must consider whether it should become part of our law. We have noted three limitations in particular:

1. The Convention does not apply to wholly "internal" adoptions;
2. It does not extend to the incidents and effects of adoption recognised by another State;
3. It deals only with adoptions by a single adopting parent, or by spouses, of children under the age of 18 who have not been married.

The practical utility of Ireland's ratifying the Convention is significantly reduced by the fact that it has been ratified by three countries only, Austria, Switzerland and the United Kingdom, although it was adopted as long ago as 1965. Moreover, it may be superseded, in part at least, by the Convention on the *Adoption of Children Coming from Abroad* which it is hoped to adopt at the seventeenth session in 1993.

Our conclusion is that these factors indicate that Ireland should not ratify this particular Convention. If, contrary to that view, it was thought desirable that Ireland should ratify the Convention, it would obviously be important for a declaration to be made pursuant to Article 13 specifying the provisions in our adoption legislation which would render unlawful adoptions to which paragraphs (b) to (f) inclusive of that article apply.

Reform of Recognition Principles

47. If it is accepted that the Hague Convention should not form the basis of recognition principles in the future, it is necessary to consider what should. It seems to us that in devising recognition principles the following factors should be taken into account.

- (1) It is highly undesirable that the law should remain in its present uncertain state. It seems likely that there are living in the State a number of people who have been adopted abroad. Increased mobility within the EC has probably added to the number. It has also been

suggested to us that, with the decrease in the number of children available for adoption within the State, an increasing number of Irish parents may be seeking to adopt children abroad.

(2) It is important that recognition principles be explicit and clear for a number of reasons. Numerous legal consequences flow from the recognition or non-recognition of an adoption order. Upon the validity of an adoption order may depend such a fundamental matter as entitlement to exercise parental rights. The rights and liabilities of an adopted person in relation to such matters as succession, maintenance and taxation may also be in issue. In any matter of status the law should seek, insofar as possible, to avoid uncertainty. It ought to be possible for an adopted person to obtain clear legal advice as to his status without the need to mount costly legal proceedings. Equally the law should be framed in such a way that the various administrative officials who are called upon from time to time to determine the status of individuals adopted abroad should be able to do so without too much complication and without the need to state cases to the courts.

(3) Any reformulation of recognition principles must have regard to the fact that the law already assumes that certain foreign adoptions may be recognised. The existing common law position is ill-defined. Nevertheless, new recognition principles should not have the effect of retrospectively rendering invalid adoption orders which, under existing law, might be entitled to recognition. It seems likely that, under the existing common law, an adoption order is entitled to recognition where the adopting parents are domiciled in the country where the adoption order is made at the time of its making. Adoption orders entitled to recognition under this principle should not be disturbed. At the same time, any new rules which have the effect of extending the circumstances in which recognition may be afforded should operate prospectively only. This does not mean that new recognition principles should not extend to existing foreign adoption orders, but rather that recognition should take effect from the date of the coming into force of the new legislation, rather than from the date of the original adoption order.

(4) The new framework of recognition principles should recognise the possibility of exceptional cases where, for Constitutional or other public policy reasons, the court may wish to set aside the normal recognition principles. This is already the situation under common law recognition principles. It is also our view, however, that the courts should be sparing in their use of the public policy exception. We have already referred to the need for a high degree of certainty and predictability in the law where matters of status are concerned. Such an objective would not be achieved if the general principles of recognition were too easily set aside on public policy grounds.

(5) The application of Constitutional principles may occasionally be appropriate in cases involving the recognition of foreign adoptions. It should, however, be borne in mind that the implications of the application of Constitutional principles in a recognition context may be

different from those which arise in purely domestic cases. Apart from the question of whether Irish Constitutional principles should, in principle, be applicable to persons having no connection with Ireland, some weight has to be attached to the problems created by limping adoptions (that is, in this context, adoptions which are generally recognised abroad but not in Ireland). There is also some risk that, if the rigorous protection afforded by the Constitution to the rights of natural married parents is extended without limit to foreign adoptions, Ireland could become something of a haven for certain disaffected foreign parents. It should also be noted that recognition cases quite often arise many years after a foreign adoption has been effected and at a time when the application of Constitutional principles may serve little practical purpose. We therefore believe that it would be wrong to lay down a general principle in legislation explicitly mandating non-recognition of foreign adoptions on Constitutional grounds. It should be possible for Judges, within the context of a general principle allowing non-recognition for reasons of public policy, to distinguish between cases where the application of Constitutional principles is appropriate from those where it is not.

(6) We are not in a position to assess the policies underlying specific taxation rules. For this reason, we do not wish to propose any amendments to the statutory rules relating to the recognition of foreign adoptions in the context of income tax, corporation tax, capital gains tax and residential property tax to which reference is made in para. 24 above. It is, however, worthy of comment that in these contexts the recognition of a foreign adoption is not dependent on jurisdictional requirements, but rather on the substantive effects of adoption in the country of adoption. This is a somewhat unusual approach, which clearly would not be appropriate in other contexts. The absence of a jurisdictional test may result in an adoption being recognised where all the parties concerned had no more than a fleeting connection with the country of adoption. On the other hand, an adoption might not be recognised despite a strong link between all the relevant parties and the country of adoption by reason only of the fact that its legal effects in that country differ from the effects of an Irish adoption order.

Designated Country Adoptions

48. Our conclusions, based on these considerations, are as follows.

49. We recommend, following the recommendations of the Adoption Review Committee, that *legislation be enacted giving the Minister for Health power to designate countries (or jurisdictions) whose adoption orders would be recognised in Ireland*. If this approach were favoured, a valid adoption made in England or France, for example, would be recognised here, if these were designated countries, with our conflicts rules laying down no requirements as to the domicile, nationality or residence of the child or the natural or adoptive parents. Of course, in order to be valid under the law of England or France, the adoption would have to comply with the jurisdictional and other requirements of the law of England or France; but, from country to country, there

naturally will be a great variation in these requirements, with some countries laying few obstacles in the path of a valid adoption.

50. It has been represented to the Commission that this proposal, which was provisionally made in our Discussion Paper, does not indicate with sufficient precision the basis on which designations should be made. It was also suggested that there were considerable administrative implications in the proposal which had not been sufficiently explored. We have carefully noted these objections but are satisfied that we should adhere to our provisional recommendation. We do not think that any substantial difficulty should be encountered by the Minister in deciding to what countries recognition should be extended. While in practice it may well be that recognition will be confined to those countries whose legal, social and political structures are broadly similar to our own (such as, for example, most of the member States of the European community), we do not think it would be either practical or desirable to attempt to set out specific criteria by which the Minister should be guided. We note, in this context, that the equivalent English legislation which has been in operation since 1968 does not set out specific criteria and we are not aware that any problems have been encountered in that jurisdiction.

51. We further recommend that *recognition under this head be confined to adoption orders made in respect of persons below the age of 18, and to adoptions effected under legislative provisions only. An adoption order made in a designated country should be regarded as having the same consequences as an adoption order made under the Adoption Acts.* This will be of great practical significance in relation to citizenship, maintenance and guardianship. Recognition under this provision should operate as from the date of designation.

52. We further recommend that these provisions should be *without prejudice to the right of a court in a particular case to refuse recognition on the ground that recognition would be manifestly contrary to public policy.* Another possibility would be to leave it to the Minister to assess, in the case of any particular jurisdiction, whether the possible constitutional difficulties are such as to make it undesirable for him to exercise his powers. We would prefer not to include such a provision in the legislation. Under such a provision the Minister might feel obliged to refuse to designate any country whose adoption law contains any provision, no matter how little used, which might be regarded as constitutionally suspect. The Minister might indeed find it difficult under such a provision to designate any country. It seems preferable to allow the Minister to designate those countries whose adoption laws have a broadly similar purpose as our own, leaving the courts with discretion to refuse recognition in particular cases on grounds of public policy.

Specific Recognition Principles

53. In addition to giving the Minister a power of designation, the legislation should contain further specific recognition rules. These will

be required to govern the recognition of adoptions in countries or jurisdictions not designated by the Minister. To avoid anomalies, the recognition principles should, as a minimum, include the circumstances in which, under existing common law, adoption orders are probably entitled to recognition. We accordingly recommend that *the legislation should provide for the avoidance of doubt, that an adoption order made in a country in which either or both of the adopting parents were domiciled at the time it was made will be recognised*. We recognise the objections to the use of domicile as a connecting factor. However, it would be wrong in our view that reform should result in the law being any more restrictive than it already is. We also recommend that *a n adoption recognised in the country or jurisdiction where either or both of the adopting parents are domiciled at the time of the order should be recognised*.

54. In addition, we recommend that *an adoption order made in the country or jurisdiction where either or both the adopting parents had his or her habitual residence at the time of the order, should be recognised*. Habitual residence is, for reasons explained in our *Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws* a more satisfactory connecting factor than domicile. As with domicile, we recommend that *an adoption order recognised in the country where the adopting parents had their habitual residence should also be entitled to recognition. In the case of habitual residence, recognition would have prospective effect only, in the sense that an adoption recognised on that basis, but made before the legislation, should be regarded as effective as from the coming into force of the legislation*.

55. As with designated country adoptions, *recognition should be limited to adoptions of persons below the age of 18 and a recognised adoption should have the same consequences as a domestic adoption. The courts should be entitled to refuse recognition on the basis that recognition would be manifestly contrary to public policy*.

Court Declarations as to Adoptions

56. It has been represented to us that the position of persons adopted in other jurisdictions and now living in Ireland might be further improved by giving the courts jurisdiction to declare in any particular case that an adoption order effected in another jurisdiction is valid in Irish law. The production of the relevant court order to various state agencies could well eliminate delays, particularly in those cases where it may be difficult for an administrative official to decide the issue of recognition. This is most likely to be so where the adoption has taken place in a non-designated country. We accordingly recommend that *the High Court should be given jurisdiction to make a declaration that the applicant is or is not the adopted child of a named person by virtue of a foreign adoption. The declaration should be available only on the application of the person whose adoptive status is in question and the applicant should be either domiciled or habitually resident in the State at the time of the application*.¹ The High Court should have jurisdiction because a declaration is most likely to be sought in cases where the

issue of recognition is complex. We would emphasise that the production of a declaration should not be regarded as a pre-condition to the recognition of a foreign adoption by an administrative authority. There are many cases where the question of recognition could be easily determined without recourse to the courts, especially where the adoption was made in a designated country. It might be desirable in the legislation to include a provision making this clear.

¹ Cf. *Family Law Act 1986* (England), s. 63 of which gives the High Court and County Court jurisdiction to make such declarations.

CHAPTER 5: SUMMARY OF RECOMMENDATIONS

1. Legislation should be enacted giving the Minister for Health power to designate countries or jurisdictions whose adoption orders would be recognised in Ireland: para 49.
2. Recognition of such adoption orders should be confined to those made in respect of persons below the age of 18 and to adoptions effected under legislative provisions only: para 50.
3. An adoption order made in a designated country should be regarded as having the same consequences as an adoption order made under the *Adoption Acts 1952 to 1988: ibid.*
4. Doubts as to the validity in Ireland of foreign adoption decrees of countries where one or both of the adopting parents were domiciled at the time of the making of the adoption decree should be removed by legislation in the case of all such adoptions whether effected before or after the enactment of the legislation: para 52.
5. Legislation should further provide for the recognition in Ireland of foreign adoption decrees of countries where one or both of the adopting parents are habitually resident at the date of the making of the decree. In the case of such adoptions, however, recognition of adoption decrees already granted should only take effect as from the coming into force of the proposed legislation: para 53.
6. Recognition should also be limited in these cases to adoption of persons under the age of 18 and recognition should have the same consequences as in a domestic adoption: para 54.
7. These provisions should be without prejudice to the right of the courts in particular cases to refuse recognition on the ground that recognition would be manifestly contrary to public policy: paras 51 and 54.

8. The High Court should be empowered to grant declarations as to the validity of foreign adoption decrees.

9. Ireland should not ratify the *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption*: para 46.

APPENDIX

XIII. CONVENTION ON JURISDICTION, APPLICABLE
LAW AND RECOGNITION OF DECREES
RELATING TO ADOPTIONS

(Concluded November 15, 1965)

The States signatory to the present Convention,
Desiring to establish common provisions on jurisdiction, applicable
law and recognition of decrees relating to adoption,

Have resolved to conclude a Convention to this effect and have agreed
upon the following provisions:

Article 1

The present Convention applies to an adoption between:

on the one hand, a person who, possessing the nationality of one of
the contracting States, has his habitual residence within one of these
States, or spouses each of whom, possessing the nationality of one of the
contracting States, has his or her habitual residence within one of these
States, and

on the other hand, a child who has not attained the age of eighteen
years at the time when the application for adoption is made and has not
been married and who, possessing the nationality of one of the
contracting States, has his habitual residence within one of these
States.

Article 2

The present Convention shall not apply where—

- a) the adopters neither possess the same nationality nor have their
habitual residence in the same contracting State;
- b) the adopter or adopters and the child, all possessing the same
nationality, habitually reside in the State of which they are
nationals;
- c) an adoption is not granted by an authority having jurisdiction
under article 3.

Article 3

Jurisdiction to grant an adoption is vested in—

- a) the authorities of the State where the adopter habitually resides
or, in the case of an adoption by spouses, the authorities of the
State in which both habitually reside;

- b) the authorities of the State of which the adopter is a national or, in the case of an adoption by spouses, the authorities of the State of which both are nationals.

The conditions relating to habitual residence and nationality must be fulfilled both at the time when the application for adoption is made and at the time when the adoption is granted.

Article 4

The authorities who, have jurisdiction under the first paragraph of article 3 shall, subject to the provisions of the first paragraph of article 5, apply their internal law to the conditions governing an adoption.

Nevertheless, an authority having jurisdiction by virtue of habitual residence shall respect any provision prohibiting adoption contained in the national law of the adopter or, in the case of an adoption by spouses, any such provision of their common national law, if such a prohibition has been referred to in a declaration of the kind contemplated in article 13.

Article 5

The authorities who have jurisdiction under the first paragraph of article 3 shall apply the national law of the child relating to consents and consultations, other than those with respect to an adopter, his family or his or her spouse.

If according to the said law the child or a member of his family must appear in person before the authority granting the adoption, the authority shall, if the person concerned is not habitually resident in the State of that authority, proceed, where appropriate, by means of a *commission rogatoire*.

Article 6

The authorities referred to in the first paragraph of article 3 shall not grant an adoption unless it will be in the interest of the child. Before granting an adoption they shall carry out, through the agency of the appropriate local authorities, a thorough inquiry relating to the adopter or adopters, the child and his family. As far as possible, this inquiry shall be carried out in co-operation with public or private organisations qualified in the field of inter-country adoptions and the help of social workers having special training or having particular experience concerning the problems of adoption.

The authorities of all contracting States shall promptly give all the assistance requested for the purposes of an adoption governed by the present Convention; for this purpose the authorities may communicate directly with each other.

Each contracting State may designate one or more authorities empowered to communicate in accordance with the preceding paragraph.

Article 7

Jurisdiction to annul or to revoke an adoption governed by the present Convention shall be vested in

- a) the authorities of the contracting State in which the person adopted habitually resides at the time when the application to annul or to revoke the adoption is made;
- b) the authorities of the State in which at that time the adopter habitually resides or, in the case of an adoption by spouses, both of them habitually reside;
- c) the authorities of the State which granted the adoption.

An adoption may be annulled—

- a) on any ground permitted by the internal law of the State which granted the adoption; or
- b) in accordance with the national law of the adopter or adopters at the time when that adoption was granted in cases where the application to annul is based on failure to comply with a prohibition to which the second paragraph of article 4 applies; or
- c) in accordance with the national law of the person adopted at the time when the adoption was granted in cases where the application to annul is based on failure to obtain a consent required by that law.

An adoption may be revoked in accordance with the internal law of the authority exercising jurisdiction.

Article 8

Every adoption governed by the present Convention and granted by an authority having jurisdiction under the first paragraph of article 3 shall be recognised without further formality in all contracting States.

Every decision annulling or revoking an adoption granted by an authority having jurisdiction under article 7 shall be recognised without further formality in all contracting States.

If any question arises in a contracting State with respect to the recognition of such an adoption or decision, the authorities of that State, in considering the jurisdiction of the authority which granted the adoption or which gave the decision, shall be bound by the findings of fact on which that authority based its jurisdiction.

Article 9

When an authority having jurisdiction under the first paragraph of article 3 has granted an adoption, it shall notify this fact to the other State, if any, the authorities of which would have been empowered to grant an adoption under that article, to the State of which the child is a national and to the contracting State where the child was born.

When an authority having jurisdiction under the first paragraph of article 7 has annulled or revoked an adoption, it shall notify this fact to the State the authority of which had granted the adoption, to the State of which the child is a national and to the contracting State where the child was born.

Article 10

For the purposes of the present Convention, an adopter or a child who is stateless or whose nationality is unknown, is deemed to have the nationality of the State of his habitual residence.

Article 11

For the purposes of the present Convention if in the State of which either an adopter or a child is a national, there is more than one legal system in force, references to the internal law or to the authorities of the State of which a person is a national shall be construed as references to the law or to the authorities determined by the rules in force in that State or, if there are no such rules, to the law or to authorities of that system with which the person concerned is most closely connected.

Article 12

The present Convention does not affect provisions of other Conventions relating to adoption binding contracting States at the moment of its entry into force.

Article 13

Any State may, at the time of signature, ratification or accession, with a view to the application of the second paragraph of article 4, make a declaration specifying the provisions of its internal law prohibiting adoptions founded upon—

- a) the existence of descendants of the adopter or adopters;
- b) the fact that a single person is applying to adopt;
- c) the existence of a blood relationship between an adopter and the child;
- d) the existence of a previous adoption of the child by other persons;
- e) the requirement of a difference in age between adopter or adopters and the child;
- f) the age of the adopter or adopters and that of the child;
- g) the fact that the child does not reside with the adopter or adopters.

Such declarations may be revoked at any time. The revocation shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Any declaration which has been revoked shall cease to have effect on the sixtieth day after the notification referred to in the preceding paragraph.

Article 14

Any contracting State may make a declaration specifying the persons deemed to possess its nationality for the purposes of the present Convention.

Such declarations and any modification or revocation thereof shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Any such declaration, modification or revocation shall have effect on the sixtieth day after the notification referred to in the preceding paragraph.

Article 15

The provisions of the present Convention may be disregarded in contracting States only when their observance would be manifestly contrary to public policy.

Article 16

Each contracting State shall designate the authorities having power—

- a) to grant an adoption within the meaning of the first paragraph of article 3;
- b) to exchange the communications envisaged by the second paragraph of article 6 if it is intended to make use of the power conferred by the third paragraph of article 6;
- c) to annul or revoke an adoption under article 7;
- d) to receive information in pursuance of article 9.

Each contracting State shall supply the Ministry of Foreign Affairs of the Netherlands with a list of the foregoing authorities and of any subsequent amendments to that list.

Article 17

With a view to the application of article 5, each contracting State shall inform the Ministry of Foreign Affairs of the Netherlands of the provisions of its internal law relating to consents and consultations.

Any State making a declaration under article 13 shall inform the said Ministry of the provisions of its internal law relating to the prohibitions specified in that declaration.

A contracting State shall inform the said Ministry of any modification of the provisions mentioned in the first and second paragraphs above.

Article 18

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 19

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 18.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 20

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 19. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 21

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 22

Any State may, not later than the moment of its ratification or accession, reserve the right not to recognise an adoption granted by an authority exercising jurisdiction under sub-paragraph (b) of the first paragraph of article 3, when at the time of the application to adopt the child had his habitual residence within its own territory and did not possess the nationality of the State in which the adoption was granted. No other reservation shall be permitted.

Each contracting State may also, when notifying an extension of the Convention in accordance with article 21, make the said reservation, with its effect limited to all or some of the territories mentioned in the extension.

Each contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Such a reservation shall cease to have effect on the sixtieth day after the notification referred to in the preceding paragraph.

Article 23

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 19, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 24

The Ministry of Foreign Affairs of the Netherlands shall give notice to the State referred to in article 18, and to the States which have acceded in accordance with article 20, of the following—

- a) the declarations and revocations referred to in article 13;
- b) the declarations, modifications and revocations referred to in article 14;
- c) the designation of authorities referred to in article 16;

- d) the legal provisions and modifications thereof referred to in article
- e) the signatures and ratifications referred to in article 18;
- f) the date on which the present Convention enters into force in accordance with the first paragraph of article 19;
- g) the accessions referred to in article 20 and the dates on which they take effect;
- h) the extensions referred to in article 21 and the dates on which they take effect;
- i) the reservations and withdrawals referred to in article 22;
- j) the denunciations referred to in the third paragraph of article 23.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

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