

Spanish Literature in the Field of Private and Public International Law and Related Matters, 2004

This survey, prepared and compiled by B. Arp and Dr. E. Crespo Navarro (Assistant Lecturers in Public International Law), and Dr. M. Guzmán Peces and J.I. Paredes Pérez, (Associated Lecturers in Private International Law), under the direction of Dr. I. García Rodríguez (Lecturer in Private International Law at the University of Alcalá – Madrid), is designed to provide information for international lawyers and law students on matters concerning Public International Law, International Relations, Private International Law and Community Law published in Spain or by Spanish authors.¹

PUBLIC INTERNATIONAL LAW AND RELATED MATTERS

1. Essays, Treaties and Handbooks.

BERNARD Y ÁLVAREZ DE EULATE, M., *et al.*, *Textos básicos de Organizaciones Internacionales*, (Basic Texts on International Organisations), Zaragoza 2004, 559 p.

FERNÁNDEZ TOMÁS, A., SÁNCHEZ LEGIDO, A. and ORTEGA TEROL, J. M., *Manual de Derecho Internacional Público*, (Handbook on Private International Law), Tirant lo Blanch, Valencia 2004, 636 p.

This work is one of the new handbooks intended for university instruction of public international law recently published in Spain. The main author is Antonio Fernández Tomás, Public International Law and International Relations Professor at the *Universidad de Castilla-La Mancha* and collaborating in the project were two of his disciples, Ángel Sánchez Legido and Juan Miguel Ortega Perol, both tenured professors at the same University.

Written with the clear objective of serving as a teaching instrument of Public International Law at the initial stage of university studies, this book covers the most important themes of the general aspects of the material in its 636 pages. For example it covers the fundamental characteristics of international society and its

¹ The enormous volume of works published on EC Law has made it necessary to select only those focusing on general Community Law. We have been careful to include the works of authors who lecture in the fields of Public International Law, International Relations, and Private International Law.

legal system; the process of creating regulations in international law; the legal statute of the subjects of the legal system; international treaties; relations between international law and domestic law; international responsibility and diplomatic protection; State competencies regarding territory; the Law of the sea; the United Nations; the principle of the prohibition of the use of force and the pacific settlement of disputes. It likewise focuses on some subjects selected from specific aspects such as the international protection of human rights (*Lesson 19*) as well as a lesson which is very current dealing with crimes with international repercussions (*Lesson 20*). It should be pointed out that all of the subjects addressed are accompanied by footnotes where bibliography and fundamental related documentation can be found; very useful for anyone interested in delving further into the study of any one of them.

It should also be mentioned that most recent practice in Spain was taken into consideration in the drafting of all of the lessons of this handbook. Special mention should also be made of the fact that an assessment approach is employed by the authors when addressing the different subjects such as the chapters focusing on the international protection of human rights or crimes with international repercussions. In short, this work offers the reader an updated and modern vision of International Law and is written in a clear and easily understandable style making it a very useful reference handbook among the already abundant collection of general works in our discipline published in Spanish over the last twenty years. – J.F. and B.A.

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2. Books in Honour of

3. Monographs and Collective Works

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AZNAR GÓMEZ, M. J., *La protección internacional del patrimonio cultural subacuático con especial referencia al caso de España*, (The international protection of sub-aquatic cultural heritage with special focus on the case of Spain), Tirant lo Blanch, Valencia 2004, 661 p.

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1. Essays, Treaties and Handbooks

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ÁLVAREZ GONZÁLEZ, S., *et. al.*, *Legislación de Derecho Internacional Privado*, (Legislation in the area of Private International Law), 7th ed., Comares, Granada 2004, 694 p.

BORRÁS RODRÍGUEZ, A., *et. al.*, *Legislación básica de Derecho internacional privado*, (Basic legislation of private international law), 14th ed., Tecnos, Madrid, 2004, 1201 p.

CALVO-CARAVACA, A.L., and CARRASCOSA GONZÁLEZ, J., *Derecho Internacional Privado. Vol I*, (Private international law. Vol I), 5th ed., Comares, Granada 2004, 568 p.

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FERNÁNDEZ ROZAS, J. C., and FERNÁNDEZ PÉREZ, A., *Ley de extranjería y legislación complementaria*, (Immigration Law and complementary legislation), 3rd ed., Tecnos, Madrid 2004, 808 p.

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IRIARTE ÁNGEL, J. L., *et. al.*, *Código de Derecho internacional privado*, (Code of private international law), 2nd ed., Aranzadi, Navarra 2004, 949 p.

2. Books in honour of

3. Monographs and Collective Works

ADAM MUÑOZ, M. D. and GARCÍA CANO, S., (Dir.), *Sustracción internacional de menores y adopción internacional*, (International child abduction and international adoption), Colex, Madrid, 2004, 254 p.

This work is based on the Conference on the International Protection of Minors held at the Law Faculty of the *Universidad de Córdoba* on 25–26 April 2003 addressing the two subjects in this sector which, in my view, have the greatest legal relevance in light of their relevance today and the number of ongoing problems leading legislators to undertake continuous legislative reforms in these fields.

The book is structured in accordance with the aim of the work, i.e. to address, from both a theoretical and practical standpoint, the most significant issues related to the international abduction and adoption of minors. Concerning contributions, the introduction entitled “Globalisation, multiculturalism and the international protection of minors” written by Dr. García Cano is the prelude and common theme of all of the studies featured in the book. Special accent is put on deficiencies in the enforcement of the Spanish domestic proceeding concerning the restitution of minors in the work of Adam Muñoz on the “Self regulation of the proceeding concerning the return of minors transferred illegally” which addresses possible solutions. Also participating in this collective work are Calvo Caravaca and Carrascosa González addressing the subject of the international abduction of minors from a conventional perspective and analysing the enforcement of the 1980 Luxembourg Convention and the Hague Convention of the same year undertaken by the Spanish authorities. The contribution made at the conference by C. González Beilfuss focused on the protection of minors with a comparative analysis of the regulations of the Hague Conference and the European Union (1980 and 1996 Hague Conventions and the 1980 Luxembourg Convention, the 2003 Council of Europe Convention, the Brussels Convention II and Brussels II bis and the Community regulation on matters of parental responsibility.

The book includes some contributions which help provide a global, practical and interdisciplinary vision of the issues addressed. This is the case of the study carried out by the Technical Department of the Deputy Directorate-General of International Legal Cooperation of the Ministry of Justice (E. Pías García) who analyses the Spanish Central Authority’s enforcement of the Conventions on the international abduction of minors. In his contribution, Mr. Alonso Carvajal, lawyer of the *Asociación para la recuperación de niños sacados de su país* (Association for the recovery of children taken from their country), addresses the problems arising on a daily basis concerning the abduction of minors. And Padilla Alba focuses on the criminal aspects of the illicit transfer of minors basically circumscribing his analysis to Organic Law 9/2002 of 10 December on the amendment of the 1995 Spanish Criminal Code.

The second part of the work focuses on the international adoption of minors and includes four theoretical and two practical studies. The practical part starts off with the contribution made by Adroher Biosca who takes a look at the causes contributing to the growth in international adoptions in a number of different countries, particularly Spain. This article specifically refers to each one of the problems arising in the legal recognition of adoptions consummated abroad and the progressive change in criteria applied by the Directorate-General of Registries and Notaries Public (simple adoptions done in Paraguay, Mexico, the Dominican

Republic or Guatemala and adoptions which do not envisage the same legal ramifications as those laid down in our legal system such as those done in China, Nepal and Vietnam. The operation of the 1993 Hague Convention on international adoption and especially the mediation role played by the so-called Collaborating International Adoption Organisations (Spanish initials *ECAI*) is addressed by Dr. González Martín, professor at the *Universidad Autónoma de México* who examines the processing of Mexican adoptions highlighting the need for coordination between the states party to the Hague Convention in order to prevent illicit practices and related unlawful benefits.

The most negative aspects of international adoption were outlined by Herranz Ballesteros in his work on secret adoptions and trafficking in children. As a solution to these types of undesirable practices he suggests the strengthening of the cooperation systems in place between States in the conventional field. In his presentation Diago Diago also addresses Fictitious or self-interest adoptions highlighting how foreign adoptions of legal-age persons have proliferated over the last several years for the purpose of gaining nationality and other immigration-related benefits in the host country along the same lines as "fraudulent marriages". This second part concludes with the participation of the Deputy Director-General of Child and Family Affairs of the Ministry of Labour and Social Affairs (A. Marina Hernando) whose contribution addresses the role played by the central Spanish authorities in the enforcement of the 1993 Hague Convention and likewise the participation of the President of ADECOP (*ECAI*) (Mr. Góngora Bernícola) who took a close look at the role played by the *ECAIs* in the adoption proceeding both within and outside of the framework of the 1993 Hague Agreement. – M.G.P.-

ADAM MUÑOZ, M. D., *La mutilación genital femenina y sus posibles soluciones desde una perspectiva del derecho internacional privado*, (Genital mutilation of girls and women and possible solutions from the perspective of private international law), Universidad de Córdoba, Córdoba, 2004, 176 p.

AGUILAR GRIEDER, H., *Acumulación de procesos en los litigios internacionales*, (Overlapping of proceedings in international litigation), Tirant lo Blanch, Valencia, 2004, 384 p.

Professor from the Universidad de A Coruña, Dr. H. Aguilar Grieder addresses an especially urgent topic of international civil procedural law in her work, that of *Acumulación de procesos en los litigios internacionales* (Overlapping of proceedings in international litigation). In this work she analyses the specifics of the international connectivity of the procedural institute not as a criteria for assigning competence but rather as an autonomous mechanism the purpose of which is to circumvent the risk of contradictory or irreconcilable decisions each time that two (or more) proceedings are pending before jurisdictional bodies of different States. In this regard, in light of the lack of a specific regulation from the said institute in our autonomous system and the fact that it is impossible to turn to the *legis*

analogy for the application of the domestic regulation regarding the overlapping of proceedings in the international arena, the value of Dr. Aguilar Grieder's monograph lies in her proposal to span this gap by formulating a proposal regarding guidelines under which *lege ferenda* should admit the said institute, especially the effects and conditions on which its admissibility and procedural treatment would be contingent.

In order to achieve this objective, from a formal point of view, the author divides her work into five parts while, from a substantial viewpoint, the overarching methodological plurality employed is plain to see. Although the intention here is not to assign a specific method to each chapter, four methods can be distinguished throughout the work and these comprise the line of topics, *topoi* in the Aristotelian sense, paving the way of doctrinal construction: legal mechanisms and their conditioners (suspension or stay of proceedings); the optional or compulsory nature of legal mechanisms; activation of legal mechanisms (allegation of officio or upon request by the party); criteria of dispute settlement between the connected proceedings (time priority principle or logical priority principle).

The dogmatic method can be observed in the *Introduction* and in *Part one* in which the author constructs the theoretical framework on which her work is based, delimiting the aim of the study with respect to concepts and similar (connectivity and competence; connectivity and *lis pendens*) and the peculiarities that the said connectivity present in our domestic regulation in respect of the topics highlighted.

Parts Two and Three of the work are examples of the teleological method thanks to the pertinent considerations made by Dr. Aguilar Grieder with a view to determining the admissibility of the international connectivity in Spain's domestic system. To this end, the author thoroughly scrutinises the constitutional rules to which the procedural institute under study, *de lege ferenda*, is subject and seeks justification for regulation in the autonomous system guaranteeing uniform international judicial protection preventing the risk of irreconcilable judicial decisions and meeting the demands stemming from the international principle regarding the harmonisation of solutions.

Once verifying the need for specific regulation and identifying the interests at stake and their limits, in *Part Four* Aguilar Grieder examines the legislative solutions offered by Spanish Private International Law and by comparative law in cases of *lis pendens* and connectivity. And especially, on this occasion taking the compendium of topics as a *leitmotiv*, the author makes use of two new methods different from the ones indicated above. On the one hand she uses the inductive method to analyse the existing international legal reality where she alludes to the guidelines that will allow her, in the last chapter, to formulate relatively universal rules. Of special interest is the thorough examination that professor Aguilar Grieder makes of connectivity within the scope of the "community" and on the "multilateral", "bilateral" and "global" level. On the other hand, she employs the comparative method focusing particularly on the study of two neighbouring countries (Switzerland and Italy) that have expressly regulated the effects produced in the forum of a foreign proceeding.

Following this detailed analysis, *Part Five* proposes a suitable solution *de lege ferenda*. In this connection, having illustrated the cases of international connectivity included within the decision-taking scope of the autonomous Spanish system, Dr. Aguilar Grieder then acknowledges, in terms of the modality of the stay of proceedings, that international connectivity constitutes a limit to the jurisdiction of Spanish courts and therefore, in the future, must be accompanied by a regulation at the Organic Law of the Judiciary level. Quite distinct from what should take place, in the view of the author, in the case of a suspended hearing because given that the said limit is not constituted in this case, international connectivity could be regulated by a rule at the level of an ordinary law. Similarly, from a substantial point of view, the thoroughness of the work is highlighted by the scrupulous care taken by the author in the regulation of each one of the topics studied with a view to conciliating the values at stake with the rights laid down in article 24 of the Spanish Constitution. Thus, on the one hand, in light of the risk of defencelessness that could arise in the case of a stay of proceedings (lack of international jurisdiction of the foreign courts to hear the connected case, excessive delay of the proceeding abroad, difficulties encountered in acknowledgement of the foreign judgement in Spain), Dr. Aguilar Grieder proposes extending the expiration date of the action so that the claimant is able to gain legal protection of his legitimate rights and interests by means of lodging a new claim before the Spanish courts. On the other hand, to prevent violation of the right to a hearing without undue delay, in the case of a suspended hearing of a proceeding pending in Spain, the author proposes making this procedural condition contingent upon certain deadlines, the limits of which would be the deadlines envisaged in domestic civil law proceedings leading to her intended public order character. And lastly, the same conciliatory nature can be observed in the condition or cases in which international connectivity is subject *de lege ferenda*, especially in the compulsory nature of the suspension or stay of proceedings, in the operability of the principle of temporal and logical priority and in the observation of the international connectivity of officio or petition by the party.

In short, this is a provocative work in terms of its aim and the results obtained and from our view it is recommended reading. – J.I.P.-

ARENAS GARCÍA, R., *Crisis matrimoniales internacionales: Nulidad matrimonial, separación y divorcio en el nuevo Derecho internacional privado español*, (International marriage crises: marriage annulment separation and divorce under the new Spanish private international law), Universidade de Santiago de Compostela, Santiago de Compostela, 2004, 585 p.

CALVO-CARAVACA, A. L. and CARRASCOSA GONZÁLEZ, J., *Derecho concursal Internacional*, (International bankruptcy law), Colex, Madrid, 2004, 295 p.

– *Derecho de familia internacional*, (International family law), 2nd ed., Colex, Madrid, 2004, 452 p.

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CALVO-CARAVACA, A. L. and CASTELLANOS RUIZ, E. (Dir.) *El Derecho de familia ante el siglo XXI: aspectos internacionales*, (Family law in the 21st century: international considerations), Colex, Madrid, 2004, 854 p.

CALZADILLA MEDINA, M. A., *La adopción internacional en el Derecho español*, (International adoption in Spanish law), Dykinson, Madrid, 395 p.

This monographic study by Dr. Calzadilla Medina based, on her doctoral thesis directed by Dr. De Pablo Contreras, touches upon a subject that, although analysed by the greater part of civil and international private doctrine, pays special attention to adoptions constituted abroad in simple terms and which produce effects which are different from those envisaged in the Spanish legal system.

The work is divided into three chapters: The first, an introduction of sorts, analyses the principles which inform the legal institution of adoption both on the domestic and international levels. In the second chapter, in turn divided into two sections, the author delves deeper into the overall legal framework beginning with the conventional regulation (the 1993 Hague Convention and Bilateral Protocols) and then looks into the autonomous sector (9.5 Civil Code) wrapping up with the legal capacity and consent necessary for the constitution of adoption. In the second section the author focuses basically on the accredited organisations (also referred to as collaborating organisations in international adoption (Spanish initials *ECAI*) constituting, in my opinion, the most original and thorough part of her research. And lastly in chapter three, broken down into four sections, she addresses the constitution of adoptions by foreign authorities and recognition problems arising in Spain in those cases in which they were not constituted properly or not in accordance with the proceeding laid down in the Convention. However, in this connection we have to differ with the affirmation that the 1993 Hague Convention, in its material scope, also envisages simple adoptions because, from our viewpoint and based on the *ex lege fori* qualification (article 12.1 of the Civil Code) the adoptions that establish ties of filiation (Convention article 2.2) are full adoptions and, once recognised in Spain, have the effects envisaged in our legal system thus rendering meaningless the effects that the original State of the minor could attribute to the adoption.

As for the constitution of the adoption by another type of authority, the author focuses on the processing of the proceeding when a Spanish authority intervenes, drawing a distinction between those cases in which the cooperation mechanisms of authorities envisaged in the Convention have been followed and those others outside of the framework of the said Convention without losing sight of the *ex novo* constitution of adoptions denied recognition pursuant to paragraph five of Civil Code article 9.

Continuing with this logic of the adoption proceeding, Dr. Calzadilla addresses

the birth registry phase and dedicates the last two sections of her work to identifying the legal effects of the legal relationship validly constituted and duly registered, especially in terms of nationality and lastly takes a look at aspects concerning the extinction and nullification of the legal relationship.

In terms of criticisms, it should be pointed out that this work could have been enriched by addressing certain issues such as the historical development of adoption as an institution, analysis of this concept in the 1958 law and that of 1970 from the perspective of domestic Spanish law or by going into greater depth on the issue of suitability within the scope of each Autonomous Community or from the perspective of Comparative Law with some legislative notes regarding the principle states of origin of minors as well as the host states (using conventional terminology). However, the exhaustive bibliography and the practical knowledge of the adoption procedure are more than reason enough to consider this a compulsory reference work. – M.G.P.

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