*Revocable International Adoption and Spanish Law**

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I. INTRODUCTION

Probably one of the acts in which the greatest degree of human liberality is, or should be, manifested is adoption.[1] Through this institution a person who belongs to a particular family by birth acquires new family links that are equivalent to, and replace, the aforementioned ties.[2] Adoption stems from an act

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* This paper is based on a lecture with the same title which was delivered at the conference on International adoption: practice and private international law, held in Pamplona on 26 and 27 April 2001 and is part of research project BJU2000-1173 entitled "Las nuevas fronteras del Derecho de Familia: matrimonio, filiación e instituciones de protección de menores en la perspectiva del tercer milenio" (The new frontiers of family law: marriage, filiation and institutions for the protection of minors from the perspective of the third millennium).

1 A. Polaino-Lorente, "Para una fenomenología de la adopción: adopción, derecho y libertad" in *Adopción. Aspectos psicopedagógicos y marco jurídico* (several authors), Barcelona, 2001, pp. 17–31, specifically p. 29. For an overview see S. Adroher Biosca, "La adopción internacional. Una aproximación general" in *El menor y la familia: conflictos e implicaciones* (several authors), Madrid, 1998, pp. 229–304.

2 According to the definition by Van Loon, "la pratique sociale institutionnalisée en vertu de laquelle une personne, appartenant par la naissance a una famille ou à un groupe familiale, acquiert de nouveau liens biologiques et qui se subsituent en tout o partie aux liens antériers", J. H. A. Van Loon, "Rapport sur l'adoption d'enfants originaires de l'etranger" in *Actes et documents de la Dix-septième session, Tome II, Adoption,* pp. 10–119, specifically p. 22.

Spanish Yearbook of International Law, Volume VI, 1998

of will on the part of a person or persons who file an application for adoption and after completing the relevant procedure see their wish to be an adoptive parent or parents fulfilled, on the understanding that in doing so they are playing an active part in an institution designed to protect a minor in need of a family.[3] It is from this perspective that we should consider the altruism which ought to guide these parents' actions, which should not differ in any way from those of biological parents.

Legally, full adoption entails creating a parent-child relationship equivalent to one deriving from nature as far as its effects are concerned, the only difference being that it is created by society. It is therefore logical that different legal systems should provide controls aimed at ensuring that the process is conducted ethically and that it safeguards the best interests of the minor[4] for whom adoption is designed; for example, it is required that the adopter or adopters be declared suitable for exercising patria potestas.[5]

Our current regulations on adoption are largely the result of two reforms which have shaped this institution according to two basic characteristics: the full integration of the adoptee into the adopter's family – since "simple" or less full adoption has disappeared as a result of law 21/1987;[6] and the idea of adoption as a means of protecting the minor. This is directly linked to law 1/1996 on the legal protection of minors,[7] which partially amended the Civil Code (hereinafter *Cc*) provisions on this matter.

We therefore have exhaustive regulations which have been developed to embrace both national and international adoptions. Section two of Chapter V

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[3] There is actually no such thing as the right to adopt, since adoption is not an institution designed to satisfy the desires of the parents-to-be; rather, through it "it is attempted to protect minors in need of permanent integration into a family environment allowing their overall development". On the possible existence of a right to adopt, and the subjective characteristics of adopters, see C. Martínez de Aguirre y Aldaz, "La adopción entre los derechos del adoptado y los deseos de los adoptantes" in *Adopción. Aspectos psicopedagógicos y marco jurídico* (several authors) Barcelona, 2001, pp. 177–193, particularly p. 184 *et seq.*

[4] A. Borrás, *El 'interés del menor' como factor de progreso y unificación del Derecho Internacional privado,* Inaugural lecture, Acadèmia de jurisprudència i legislació de Catalunya, Barcelona, 1993, pp. 7–59. For internal law see, in general, F. Rivero Hernández, *El interés del menor,* Madrid, 2000.

[5] See in connection with private international law P. Orejudo Prieto de los Mozos, "El certificado de idoneidad de los adoptantes en el marco de la prevención del tráfico internacional de menores (con especial referencia a las adopciones rumanas) in *ArCiv,* n. 12, Oct. 1998, pp. 13–26 and M. Aguilar Benítez de Lugo and B. Campuzado Díaz, "El certificado de idoneidad para las adopciones internacionales desde la perspectiva del Derecho Internacional Privado español" in *BIMJ,* March 2001, pp. 819–844.

[6] See N. Bouza Vidal, "La nueva ley 21/1987, de 11 de noviembre, sobre adopción y su proyección en el Derecho Internacional privado" in *RGLJ,* 1987 n. 6, p. 897 *et seq.*

[7] See A. Borrás, "Problemas de Derecho Internacional privado suscitados por la nueva ley del menor" in *Problemas actuales de aplicación del Derecho Internacional Privado por los Jueces españoles, CGPJ,* Madrid 1998, p. 159 *et seq.*

entitled "adoption and other forms of protection of minors" (arts. 175 to 180) is thus concerned with domestic adoption, whereas article 9.5 sets forth the rules of Spanish private international law governing intercountry adoption.

If we take a look at these two regulations, we might think that domestic adoption is more important as it is dealt with by a considerable number of articles compared to only one on international procedure. However, this impression does not reflect reality. The increase in international adoptions appears to be an unstoppable phenomenon to judge from the growing number of applications filed every year.[8]

The particular characteristics of adoptions of this kind require a tighter and more complex control than the one mentioned previously, since it is no longer a question of merely monitoring the procedure but ensuring that adoptions formalized beyond our boundaries provide the necessary guarantees. Therefore, all regulations governing this phenomenon must afford this control and be able to prevent situations such as the abduction, abandonment, sale of, or trade in, children.

Aside from conventional regulation – which is of vital importance in this field since cooperation between states is the best means of preventing irregular adoptions or those which are valid in the country of the adopter but not in that of the adoptee[9] – the aforementioned article 9.5 constitutes the response of our legislation, which ought to meet the foregoing objectives satisfactorily.

However, as this article sets out to analyze, the application of this precept has its problems. Legislation often places too many obstacles in adopters' paths, refusing to recognize certain international adoptions and thus creating considerable uncertainty regarding the situation of the minor adopted in his or her home country of origin; moreover, the concern with acting in the best interests of the minor has generated a rigid system that allows no flexibility and, paradoxically, may not fulfil these interests precisely because it does not allow a case-by-case approach.

II. STATEMENT OF THE PROBLEM

We should begin by pointing out that different legal systems regulate the institution of adoption differently; indeed, in some this concept is even unknown or prohibited, as occurs in Islamic law. The Koran bans the institution[10] and

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[8] The number of applications in 2000 amounted to 35,000.

[9] C. Espluges, "El 'nuevo' regimen jurídico de la adopción internacional en España" in *RDPP*, March 1997, pp. 33– 74, particularly p. 35.

[10] 33.3 "God did not give any man two hearts in his chest. Nor did He turn your wives whom you estrange (according to your custom) into your mothers. Nor did He turn your adopted children into genetic offspring. All these are mere utterances that you have invented. God speaks the truth, and He guides in the (right) path".
33.4 "You shall give your adopted children names that preserve their relationship to

legislations such as the Algerian Family Code establish this prohibition in their articles; article 46 thus states that adoption is forbidden by the Shari'ah and the law.[11]

When an international adoption occurs and there are points of contact with other, often very different, legal systems, problems arise that require the direct attention of private international law. This discipline attempts to provide specific answers to the problems arising from private international situations[12] of international adoption, which is what this article deals with.

The root cause of the problems we will be examining is the fact that different foreign legislations allow adoption to be revoked. There are rules which provide that adoption may be revoked[13] unilaterally at the wish of the adoptive parents. On some occasions different causes for revocation are established, such as ingratitude, ill-treatment, or abandonment of the adoptive parents and on other occasions it is specified that revocation must be in the child's interest.

This possibility of revoking the adoption found in certain legislations contrasts strongly with our own conception, which is based on the opposite principle of irrevocability. It stems from article 180 Cc, which establishes that "Adoption is irrevocable". This feature would be no more than a characteristic of different conceptions of adoption – which is of interest in particular to comparative law – were it not for the direct repercussions it may have on our legal system.

Indeed, the revocable nature of intercountry adoption is relevant insofar as it may constitute an impediment to what is currently one of the most commonly

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their genetic parents. This is more equitable in the sight of God. If you do not know their parents, then, as your brethren in religion, you shall treat them as members of your family. You do not commit a sin if you make a mistake in this respect; you are responsible for your purposeful intentions. God is forgiver, Most Merciful".

33.5 "Call them by (the names of) their fathers: that is juster in the sight of Allah. But if ye know not their father's (names, call them) your Brothers in faith, or your maulas. But there is no blame on you if ye make a mistake therein: (what counts is) the intention of your hearts: and Allah is Oft-Returning, Most Merciful"

33.6 "The Prophet is closer to the Believers than their own selves, and his wives are mothers. Blood-relations among each other have closer personal ties, in the Decree of Allah. Than (the Brotherhood of) Believers and Muhajirs: nevertheless do ye what is just to your closest friends: such is the writing in the Decree (of Allah)".

[11] An exception to this prohibition is the Tunisian law of 1958, which the Tunisian religious authorities nevertheless regard as contravening Muslim law. On adoption and other institutions of Islamic law see, in general, D. Pearl and W. Menski, *Muslim Family Law,* London, 1998, pp. 408–438.

[12] On the aim of private international law see above all S. Alvarez González, "Objeto del Derecho Internacional privado y especialización normativa" in *Anuario de Derecho Civil* XLVI, 1993 II, pp. 1109–1151.

[13] Examples of this are Chinese, Vietnamese and Nepalese legislation; see references in the following paragraphs.

used means of international adoption, namely formalization of the adoption by a foreign competent authority and, accordingly, pursuant to a legislation that differs from Spain's. It is the adoptive parents who travel to the child's country of origin to formalize the adoption there in accordance with that country's legislation and return to Spain with the adopted child. However, this adoption is not immediately effective in our country.[14]

In order for it to become effective it must be recognized, and this means that the adoption in question must necessarily be compatible with adoption as provided for in Spanish legislation (art. 9.5 *Cc*).[15] This will obviously not occur if the overseas adoption does not sever the legal ties between the adoptee and his or her previous family, since such a case will not be considered an adoption according to our conception of it (art. 178 *Cc*). But what happens if these ties are effectively severed and what distorts our conception is the fact that the foreign law allows revocation of the adoption? The question that now arises is whether the attribution of a right of revocation by the foreign law according to which the adoption has been formalized will prevent this adoption from being recognized.

The situation arising from possible non-recognition is a delicate one, since parents who believed they had adopted their child validly find that this adoption is not effective in Spain; however, the fact is that they have begun to live with this minor whom they regard as their child and have brought him or her back with them on that understanding. The solution of "regularizing" this situation entails

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[14] In order for this to occur, the effects of the adoption must be comparable to those provided for in Spanish legislation, which are specified in articles 178 and 189 of the Cc. Consultation of the DGRN, 3 September 1992, in *BIMJ* n. 1652, 1992, p. 56, and note by Rodríguez Gayán in *REDI* 1993, pp. 486–487. In general see Cámara de Ferrer, "Las adopciones internacionales y su reconocimiento en España", *Actualidad Jurídica Aranzadi* n. 351, 16 July 1998, p. 4 *et seq.*

[15] In the case of a simple international adoption the question arises of what happens when recognition is sought. Aside from the different possible solutions (subparagraph 9.5.4), it seems logical to think that such an adoption will not be recognized as it is not equivalent in content to Spanish adoption. See P. Rodríguez Mateos, " Artículo 9.6" in *Comentarios al Código Civil y Compilaciones forales* (several authors) I, vol. 2, pp. 242–259, specifically pp. 258–259. It should also be pointed out that 9.5.5. has been criticized, for example in the statement by C. González Beilfuss, "This regulation seems inappropriate, since it toughens the requirements for recognition which in many cases are not consonant with the best interest of the child and subjects different situations to the same treatment. While it seems correct to deny that institutions like the Kafallah of Islamic law which do not create a parent-child relationship between the child and the persons to whom his care is entrusted constitute full adoptions, it is not, on the contrary, appropriate to refuse systematically to recognize simple adoptions which do create a parent-child relationship between adopter and adoptee even though the latter maintains legal ties with his biological family", "La Ley orgánica 1/1996 de 15 de enero, de protección jurídica del menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil: normas sobre adopción internacional", in *REDI* 1996, 1, pp. 501–504, specifically p. 503.

formalizing the adoption ex novo, this time with the Spanish authorities. There is also the option of registering it as a fosterage.

As we will see, these adoptions are generally made in states which are not party to the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption.[16] Therefore, the solution to these problems should be sought in our autonomous private international law , namely the last subparagraph of article 9.5 *Cc*, which establishes that *the attribution by foreign law of a right to revoke adoption shall not prevent this adoption from being recognized if this right is renounced in a public record or by appearing before the senior official of the Civil Registry.*

Although in principle this appears to be an appropriate solution, it is not as satisfactory as it should be. In this connection I should point out that my observations will focus on what might be termed the "dark side" of the system, while recognizing the virtuality of the regulation of international adoption as a whole.

This article therefore sets out mainly to analyze article 9.5 insofar as it establishes a mechanism aimed at mitigating the possible repercussions of revocable international adoptions vis-à-vis non-recognition in Spain, based on a practical view provided by the most recent doctrine of the DGRN .

III. REVOCABLE FULL ADOPTIONS

In this type of adoption where ties with the biological family are severed, patria potestas is granted to the adopters; the adoptee thus acquires the surname of his or her new parents and is bound by the same obligations as a legitimate child[17] (this is why we call them full adoptions). However, they can be annulled under exceptional circumstances. It is this possibility, albeit unusual, of revocation that may prevent such an adoption from being regarded as equivalent to a Spanish adoption, even though strictly speaking it has the same effects of adoption as we understand it, that is, the severance of ties with the family of origin and effects comparable to those of a natural parent-child relationship.

This point is very important, as it should be stressed that some legislations establish "simple" or less full adoptions[18] which may also be revocable.

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[16] *BOE* n. 182, 1 August 1995. It entered into force for Spain on 1 November 1995.

[17] See the definition by J. H. A. Van Loon, "International co-operation and protection of children with regard to intercountry adoption", in *Recueil des Cours,* 1993, VII, pp. 191–456.

[18] On these adoptions see in general C. Espluges Mota, "Reconocimiento en España de adopciones simples constituidas en el extranjero (en tomo a la Resolución DGRN, de 27 enero de 1996, sobre inscripción de adopción salvadoreña) in *Aranzadi VI,* n. 250, 1996, pp. 1–3, A. Rodríguez Benot, "Eficacia en España de las adopciones simples constituidas al amparo de un ordenamiento extranjero. Una reelectura del art. 9.5 a la luz del Convenio de La Haya de 29 de mayo de 1993", in *Estatuto personal y multiculturalidad de la familia* (several authors), Madrid, 2000, pp. 181–202.

However, we will not be dealing with these adoptions, precisely because they are not full adoptions and even if the problem of revocation is solved, they would not be recognized in Spain.

An example which illustrates this question is Guatemalan adoptions. Article 247 of the Guatemalan *Cc* establishes the revocability of adoption in the following terms:

1. Adoption may be revoked when it threatens the life and honour of the adopter, the adopter's spouse and ascendants or descendants.
2. If it causes the adopter an estimable loss of his or her assets.
3. If the adopter is charged with or reported to have committed any alleged offence, except for in his own cause or in that of his ascendants, descendants or spouse.
4. If an adopter who is physically or mentally ill or in need of assistance is abandoned.

Aside from other considerations, the very fact that revocation is provided for hinders recognition of the adoption in Spain. However, this hurdle can be overcome if the adopter renounces this right in a public record or by appearing before the senior official of the Civil Registry, as established in article 9.5.6.

This is what a Spanish married couple did when they attempted to register the adoption formalized in Guatemala of a girl born in that country on 10 March 1996. For this purpose the adoptive parents renounced their right to revoke the adoption by appearing before the senior official of the Civil Registry, and considered that there were no further impediments to having the adoption recognized in Spain. However, they forgot that despite having removed this obstacle, the adoption still failed to meet the requisite of comparable effects for the following reasons:

- This type of adoption is only effective between the adopter and adoptee
- The former is not even the legal heir of the latter
- The adoptee and his or her birth family retain their rights of mutual succession
- and if the adopter dies an adoptee who is a minor reverts to the "care" of his birth parents

It is obvious that all these points are more than enough to confirm, as the DGRN does in its Resolution (2) of 5 April 2000[19] that "this adoption does not display characteristics in common with adoption as laid down in the Spanish *Cc* and cannot be deemed to be included in the list of registrable acts set forth in article I of the Law on the Civil Registry". I should point out that this is one of

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[19] *BIMJ* n. 1870, p. 118 *et seq*, 2000. Regarding the non-correspondence of effects with Spanish adoption, see also Resolution of 13 November 1998, *BIMJ*, 1851–2, p. 128 *et seq*.

the few Resolutions that analyzes renunciation of the revocation provided for in this article.

IV. DOES ANY KIND OF REVOCATION PREVENT THE ADOPTION FROM BEING RECOGNIZED IN SPAIN?

As stated earlier, our system considers adoption to be irrevocable; this seems logical bearing in mind that it is designed to resemble paternity and therefore should be afforded maximum stability. This is the reason why it excludes the possibility that the continuity of the adoption may depend on the wishes of the parties who may be involved.[20]

Other legal systems such as the French one also refer to the irrevocable nature of the severance of the legal parent-child relationship. In this connection it is interesting to note that Law 2001-111 of 6 February[21] on international adoption was recently enacted in France. This law establishes that Title VIII of book I of the French *Cc* is to include a Chapter III entitled "Conflict of laws on adoptive parent-child relationships and the effects in France of adoptions granted abroad". What is of interest to this paper is that article 370-5 establishes that "adoption formalized properly in a foreign country has the effects of a full adoption in France provided that this adoption irrevocably severs the preexisting parent-child relationship; otherwise it shall be a simple adoption. A simple adoption can be converted into a full adoption provided that the necessary consent has been given for such an adoption".[22]

The irrevocability of adoption is enshrined in our system as a general, wide-ranging principle that not only encompasses the irrevocability of consent but also of the institution itself. In this connection, it is appropriate to draw a distinction between "technical irrevocability" and "material irrevocability",[23] both of which are found in 180 *CG*.

The first type of irrevocability prevents the parties who agreed or gave their consent to the adoption from going back on their valid consent effectively furnished at the appropriate time, and also prevents the adoption from being

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[20] This is the argument used by R. Bercovitz Rodríguez-Cano, in *Comentarios al Código Civil y Compilaciones Forales* (several authors), Edersa, 1982, III vol. 2, specifically p. 396.

[21] *J.O.* n. 33, 8-2-2001, p. 2136, see Report by J-F Mattei on bill n. 2265.

[22] F. Monéger, "L'adoption internationale entre dans le Code Civil. L n. 2001-111, 6 févr. 2001" in *La Semaine juridique* n. 10, 7 March 2001, pp. 459–472; P. Lagarde, "La loi du 6 février 2001 relative à l'adoption internationale: une oportune clarification" in *RCDIP* 90 (2) April-June 2001, pp. 275–300.

[23] A text which clarifies this subject particularly well is the study by Carrasco Perera analyzing the technical and material irrevocability referred to in article 180. See A. Carrasco Perera, "Comentario al articulo 180", in *Comentarios a las reformas del Código Civil* (several authors, coord. Rodrigo Bercovitz Rodríguez- Cano), Madrid 1993, pp. 207–346.

terminated owing to subsequent events that make the initial consent valid in the country of the adopters but not in that of the adoptee.

Material irrevocability, however, refers to adoption as an institution and means that the adoption cannot be altered or terminated in any way. Nonetheless, this concept of irrevocability needs to be qualified, since the *Código Civil* establishes two exceptions: on the one hand, the termination provided by the same precept in the second paragraph and, on the other, nullity of the adoption. This is logical, because not to allow adoption to be contested under any circumstances, when fundamental rights such as those enshrined in articles 24 and 39 of the Constitution are involved, could be unconstitutional.

It is the first exception that is relevant to this paper, since by providing for the possibility of terminating the adoption, the legislator is in fact acknowledging an exception to its irrevocability. From this perspective it is reasonable to think that termination would apply to a case of material revocation leading to termination of an adoption that has already been formalized, though in very limited cases which meet a combination of very specific requirements:

- failure without cause of the progenitors to intervene in the process
- that the request be filed within two years of the formalization of the adoption
- and undoubtedly one of the most important requirements, that it will not cause the minor serious harm, although the precept does not establish specific criteria as to what serious harm entails.[24]

This procedure is furthermore a judicial revocation, as it can only be granted by a judge. All these features characterize this type of revocation-termination, which should be distinguished from another type which, although not allowed by our legal system, is recognized in different legislations. This is voluntary revocation, which is decided on by means of a statement from the adopter or adoptee,[25] or even from the biological family. As we can see, this type of revocation is specifically ruled out by the technical irrevocability laid down in 180 *Cc*. Therefore, the fact that there are two different types of termination or – what amounts to the same thing in this case –revocation of adoption makes it necessary to establish whether both will result in to non-recognition or whether allowance is made for any exceptions.

It is obvious that the judicial discretion established in article 180.2 entitles only parents to request the termination that must be decided by the judge; this means that neither they nor any of the other parties involved in the proceedings may terminate the adoption either by withdrawing their consent or by referring to a combination of events that has caused them to modify their initial consent.

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[24] This requisite was incorporated in the 1987 reform; see in general A. Carrasco Perera, "Comentario al Articulo 180 *Cc*", in *Comentarios a las reformas del Código Civil*, Madrid, 1993, pp. 208–246, especially pp. 223 and 224.

[25] J. E. Esquivias Jaramillo, *Adopción internacional*, Madrid, 1998, pp. 164–165.

It may therefore be said that stating the wish to revoke the adoption will not have any legally significant effect[26] and that a validly formalized adoption may only be terminated if the judge believes that it is in the best interest of the child to do so.[27]

This first conclusion is very important, as it confirms that voluntary revocation resulting in the termination of adoption is contrary to our conception of adoption in that it is contrary to the technical concept of irrevocability as established in article 180, and therefore an adoption formalized abroad pursuant to a foreign law that provides for this type of revocation will not be recognized in Spain. For recognition to be granted, it is necessary for this right to be renounced, as set forth in article 9.5.6 *Cc.*

However, the question arises of what would occur with the other type of revocation, that is, if a full overseas adoption providing for the possibility of material revocation involving termination of the adoption with judicial intervention came to pose problems regarding its recognition in Spain.

The issue has been dealt with indirectly in some of the resolutions of the DGRN. In this connection that of 11 March 1997 is significant.[28] This resolution decides whether an adoption formalized with the Venezuelan authorities in 1996 by a Spanish married couple in respect of a Venezuelan child born on 23 November 1993 may be entered in the Spanish Civil Registry.[29]

The problem stemmed from the fact that the Venezuelan adoption could be revoked or terminated by means of a final court judgment. Legal Ground III states clearly that this possibility "in no way invalidates the equivalence, and registration should only be refused in cases where the adoption does not sever the ties with the birth parents or can subsequently be revoked at any time at the wishes of the adopter or adoptee"; it ends by stating that "it is therefore voluntary revocation and not that which is a consequence of a judicial decision which must be taken into account, among other circumstances, when deciding whether a overseas adoption can be entered in the Spanish Civil Registry".

From the foregoing we may conclude that, as mentioned earlier, the problems of recognition that a full overseas adoption formalized with a foreign authority may pose relate to the acceptance by the regulating legislation of voluntary revocation subsequent to the formalization of the adoption. Overseas adoptions which can be registered without a great deal of problem despite allowing the possibility of revocation are those where revocation is decided on by judicial authority; as we have seen, termination under these circumstances is accepted by our *Cc.*

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[26] M. Garriga Gorina, *La adopción y el Derecho a conocer la filiación de origen. Un estudio legislativo y jurisprudencial,* Navarra, 2000, p. 37.

[27] Biological parents are entitled to exercise this action. See SAP Madrid, 30 May 1995, in J. Méndez Pérez, *La adopción,* Barcelona, 2000, p. 276.

[28] *BIMJ* n. 1823, pp. 101–103.

[29] We should bear in mind that the Hague Convention entered into force in Venezuela on 1 May 1997.

The question that needs to be settled is thus: is the renunciation provided for in 9.5.6 necessary given that revocation can only be granted judicially? In this connection we should not forget that this type of revocation may stem from the initiative of those involved in the adoption and that the judicial decision may merely lend "strength" to the revocation that has already been decided on; therefore, in these cases it is also appropriate to consider whether or not there is a need to renounce instituting this revocation procedure.

The line of argument followed so far should be examined in relation to article 9.5.6, since as I have pointed out earlier, it precisely provides for renunciation of the right of revocation as a means of allowing recognition of a revocable overseas adoption.

In principle it would seem logical that if only voluntary revocation poses problems, as it prevents an adoption formalized abroad from being considered as equivalent to a Spanish adoption, then renunciation of the right of revocation should refer to this and not to judicial revocation. Therefore, failure to renounce the right of revocation, even if this is eventually decided on by a judge, should not prevent the adoption from being entered in the Registry. Article 9.5.6 does not mention this, though the practice of the DGRN may shed some further light on this issue.

In this connection, it is particularly interesting to examine Vietnamese adoptions, as they are adoptions having effects that are comparable to Spanish adoption, and as such are full adoptions, but display one difference, namely the possibility of being revoked. Specifically, article 39 of the marriage and family law of the Socialist Republic of Vietnam of 29 December 1986 states that "the adoption may be terminated if the adopter or adoptee or both commit serious acts of mutual physical or moral violation or other acts that undermine the emotional ties between them", though in all cases termination of the adoption is decided upon by the court. We are therefore dealing with judicial revocation.

The resolutions of the DGRN regarding Vietnamese adoptions leave no room for doubt.[30] Continuing with the line of argument of the aforementioned resolution on the Venezuelan adoption – that only voluntary revocation and not judicial revocation is contrary to the Spanish concept of adoption and that "it is unthinkable that Spanish and overseas adoptions should be absolutely identical as to their effects, it must be sufficient for them to be comparable ..." (as occurs with this type of adoption in that it involves full integration of the child into the adoptive family, who treat him or her in the same way as a biological child) – registration is accepted without problems.

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[30] Resolution of 30 March 1999, *BIMJ* n. 1856, pp. 122–125, Resolutions of 1 June 1999 and 6 May 1999, *BIMJ* 1857, pp. 208–211 and 139–142 respectively. These two Resolutions state that Vietnamese adoption is revocable while the child is a minor at the request of the biological parents. They invalidate this possibility in Legal Ground VI, which states that "revocation on the part of the biological parents is unlikely in the case of an abandoned child"

From this we may conclude that cases of judicial revocation should not be classified as the right of revocation of adoption referred to in art. 9.5.6, since although they can spring from an initiative of the adopter or adoptee and, as such, have a certain voluntary origin (which supposedly would justify renunciation), they must ultimately be decided on by a judicial authority. The fact is that when it establishes renunciation of the right of revocation, the precept is referring to revocation in the technical sense which, as we have seen, is excluded owing to the principle of irrevocability, but not to material revocation which entails judicial termination as it is an exception to that same principle of irrevocability in the material sense. Furthermore, any other interpretation would amount to going against the repeated practice of this institution, which is maintained despite the entry into force of the current article 9.5.6.

Indeed, the first Resolution of the DGRN referring to the right to renounce that precept precisely relates to a Vietnamese adoption.[31] In this case it refers to the entry in the Central Civil Registry of an adoption of a Vietnamese minor born on 23 February 1999 formalized in Vietnam on 12 May 1999 by a Spanish married couple. The novel feature of this case compared to the previous ones is that the couple had renounced revocation of the adoption by appearing before the senior official of the Registry.

The basic arguments put forward by the Directorate General are the same as in the previous Resolutions; once again, it stressed that only voluntary revocation as opposed to judicial revocation is contrary to the Spanish concept of adoption. Only the last Legal Ground briefly mentions renunciation pointing out that, "Moreover, the parents have expressly renounced the right to revoke the adoption for the purposes set forth in article 9.5 of the Código Civil".

A different matter is the question of the possible effects of material revocation or judicial termination provided in the law under which the adoption was formalized. The causes of this possible revocation or termination may not coincide with those provided in the Spanish Code. Indeed, in view of the restrictive regulation of such cases, we might well venture that they are unlikely to coincide.

An example of the foregoing can be found in German or Portuguese law, which establish a list of closed causes of termination (1760 and 1763 *BGB*, 1990 Portuguese *Cc*).[32] German law furthermore includes revocation by operation of law, which is not found in our system. Article 1763 *BGB* provides that while the child is a minor, the children's court may revoke the relationship by operation of law if required to do so for particularly serious reasons relating to the child's welfare.

For its part, the family code of the Russian Federation distinguishes between

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[31] Resolution (2nd) of 6 May 2000, *BIMJ* n. 1847, pp. 104–107. See in particular Legal Ground VII.

[32] Eiranova Encinas, *Código Civil alemán comentado. BGB*, Madrid 1998. J. Rodrigues Bastos, *Código Civil português*, Coimbra, 1998.

annulment and revocation of the adoption.[33] The court can annul the adoption at the request of the parents, adoptive parents or the adopted minor from the age of 14, or at the request of the guardianship and patronage authority or the public prosecutor when the adoptive parents fail to meet their parental obligations, exploit the adopted child or punish him or her severely or if one of the parents is an alcoholic or drug addict, apart from other reasons, taking onto account the child's interests or wishes.

Nonetheless, these differences should not impede recognition of the effects of the adoption, since given the special characteristics of each system, it is excessively demanding to require such a degree of homogenization that not only the adoption but also the very reasons and requirements for terminating it coincide with those established in our system. As far as recognition is concerned, the line should be drawn at failure to act in the best interests of the minor or, more specifically, causing him or her harm.

Having established the de facto circumstance of the precept we are examining, it is interesting to analyze, albeit briefly, the praxis of the DGRN regarding revocable overseas adoptions before article 9.5.6. was included. This study will help us understand why the need for such a precept arose.

V. PRACTICE OF THE DGRN REGARDING REVOCABLE INTERCOUNTRY ADOPTIONS BEFORE THE NEW SUBPARAGRAPH OF ARTICLE 9.5 WAS INCLUDED

This practice refers to adoptions formalized in countries whose cultures are clearly different from Spain's.[34] In adoption matters these difference stem from

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[33] With respect to the marriage Code and family, the family Code distinguishes between annulment and revocation of the adoption. In the case of annulment, the adoption has been valid and effective up until the time of annulment, which can only be requested on the grounds established in art. 141 of the FC by the persons specified in art. 142 FC. However, revocation is only possible when the requirements of the adoption have been violated or the procedural rules have been infringed. In these cases, an appeal can be lodged in cassation. See federal law of 27 June 1998, *Officiel Journel* n. 94-LF.

[34] The fact that the adoptions take place within a multicultural society leads Jayme to underline the importance of respecting the cultural identity of the person, and this, according to the author, as far as adoption is concerned entails incorporating the free development of personality, extending it to the right to know one's own origins. This involves to an extent reassessing simple adoption. See this argument in E. Jayme, "Diritto di famiglia; società multiculturale e nouvi sviluppi del diritto internazionale privato", in *RDIPP,* 1993 2, pp. 299 and 300. Regarding respect for cultural identity see in general P. A. De Miguel Asensio, "Derechos humanos, diversidad cultural y Derecho Internacional privado", in *RDP,* July–August 1998, M. P. Diago Diago, "Respeto a la identidad cultural, derecho a la vida privada y familar. Una aproximación de Derecho Internacional privado", in *Inmigración y Derechos. Segundas jornadas internacionales sabre derechas humanos y libertades fundamentales* (several authors), 9–10 November 2001, Zaragoza.

the revocable nature of adoptions which are nonetheless full. This occurs particularly with adoptions made in China[35] and Nepal. It is precisely the acknowledgement that these adoptions reflect different cultural conceptions that triggered an important development in the doctrine of the DGRN which, upon this basis, eventually accepted the registration in the Spanish Civil Registry of adoptions finalized in these countries.[36]

The revocability of Chinese adoption is established in articles 25 and 26 of the adoption law of 29 December 1991. According to these precepts, while the adoptee is a minor the adopter and the person who has placed the child in adoption may agree to terminate the adoption; however, revocation must take place in the People's Republic of China. The second precept establishes that if the relationship between the adoptive parents and their adoptive child having reached legal age were to deteriorate "to the extent that living together in the same house became impossible", they may terminate their adoptive relationship by mutual consent.

The arguments used by this institution in all the Resolutions[37] which embody the aforementioned development revolve around the following ideas:

- The conditions required for the first case of revocation are unlikely to arise, since it is normally abandoned children who are adopted and it appears that revocation of the adoption must be agreed on by the biological and adoptive parents. Furthermore, adopters return with their adopted child to Spain, where they are domiciled, and this makes the possibility of "reviving the revocation referred to in article 25 so remote that it should not invalidate the effects that for the time being should be attributed to the formalized adoption".[38]
- The second case reveals the cultural difference I have mentioned, as it would seem to stem from an obligation that a child who has come of age should live under the same roof as his parents, "which is in no way compatible with the full freedom and independence which the coming of age affords children in Spain." Furthermore, the Resolutions acknowledge that "the vicissitudes

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[35] China signed the Hague Convention on 30 November 2000.

[36] This brings us to the question of international adoption and multiculturality. See the analysis by S. Álvarez González, "Adopción internacional y sociedad multicultural", in *Cursos de Derecha Internacianal de Vitoria-Gasteiz* (several authors), 1998, pp. 175–211 and J. L. Iriarte Ángel, "Adopción internacional. Últimas tendencias en el ordenamiento español" in *Estatuto personal y multiculturalidad de la familia* (several authors), Madrid, 2000, pp. 103–127.

[37] Resolutions of 29 May 1997, 9 June 1997, 11 October 1997, 28 October 1997 and 5 November 1997, *Anuario de la DGRN*, vol. 1, p. 1777 *et seq*, p. 1821 et *seq*, p. 2234 *et seq*, p. 2273 *et seq*, and p. 2370 *et seq*, respectively. See particularly the arguments set forth in Legal Grounds VI and VII of the first of these.

[38] Nonetheless, the DGRN recommends that in order to prevent this unlikely possibility of revocation while the parties are in China, "it will be preferable henceforth for the application for registration to be filed with the Central Civil Registry (art. 68 *RRC*) once they have returned to Spain".

which adoption may experience after the adoptee comes of age ... fall outside the fundamental regulations of Spanish legislation on adoption, which is conceived as an institution for protecting minors".

Regarding Nepalese adoptions,[39] the Nepalese legal code on adoptions empowers the parents to revoke the adoption merely at their wishes should the adoptive child fail to provide his adoptive parents with food and clothing, squander money, or ill-treat and abandon them.[40] This is therefore a case of voluntary revocation which in itself would prevent registration. However, by means of a curious construction of law,[41] the DGRN allows such adoptions.

The basis of this construction is that revocation is only possible in the case of adopted boys and does not refer to girls (who lack hereditary rights, which means that male children are the only ones who inherit and are the only ones obliged to protect their parents – whether adoptive or biological – physically and economically). Public order does not accept this discrimination with regard to the males as it goes against the principle of equality and non-discrimination for reasons of gender and "since it is the interest of minors which should be protected ... the irrevocability of adoption should be deemed to affect both sexes equally". Thus, since Resolution of 5 February 1998 was pronounced,[42] the DGRN has considered that Nepalese adoptions are equivalent to Spanish adoptions, despite the possibility of revocation.

This examination of previous practice shows the effort the DGRN made to recognize full adoptions displaying only one difference with respect to Spanish adoptions, namely the possibility of revocation, irrespective of how judicious the arguments used for this purpose were. It thus rendered these adoptions effective and made readoption unnecessary, recognizing in doing so that the best interest

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[39] On these adoptions see the study by R. Espinosa Calabuig, "Una nueva reforma en materia de adopción internacional en España", in *RGD* n. 667, April 2000, pp. 1–19, particularly pp. 10–15.

[40] Some of these reasons for revocation may surprise the reader, since they require the adoptee to have a certain income and even to have come of age. But, as the DGRN points out in the Resolutions (see reference in the following note), "it is no less certain that it is perfectly possible for a person to cause ill-treatment, squander money or abandon his parents before reaching legal age".

[41] Álvarez regards this argument as a striking juggling act and points out that "the favour it does adoption is praiseworthy in this case, but, once again, the path chosen does not seem to me the appropriate one", S. Álvarez González, "Adopción internacional y sociedad multicultural", in *Cursos de Derecho Internacional de Vitoria-Gasteiz* (several authors), 1998, pp. 175–211, specifically p. 208. Regarding other actions of the DGRN, see, by the same author "La adopción internacional" in *La protección jurídica del menor* (several authors), Salamanca, 1997, pp. 105–121.

[42] *BIMJ* n. 1827–28, p. 156 *et seq.* For the same line of argument see Resolutions of 14 February 1998 1st, 2nd and 3rd, 16 February 1998 1st, 2nd and 3rd, and 25 March 1998, 18 April 1998 and 21 May 1998

of the child lay in granting this recognition.[43] But to achieve this it was very often necessary to resort, as we have seen, to arguments that are not entirely convincing, and it was therefore important for a legal precept to allow for the possibility of recognizing these adoptions by proving a legal certainty that did not previously exist. This is precisely what the current 9.5.6 seeks to do.[44]

VI. THE LAST SUBPARAGRAPH OF ARTICLE 9.5 OF THE *CÓDIGO CIVIL* AND PROBLEMS IT RAISES

This precept stems from Bill 122/157 amending article 9, paragraph 5 of the *Cc*, which was submitted to Congress by the Popular Parliamentary Group.[45] As already stated, it was aimed at facilitating the recognition in Spain of international adoptions that are full but revocable, such as those made in Nepal or China. The precept thus clearly states what the future of these adoptions will be: they will be considered as having the same effects through renunciation of this right, though it raises considerable doubts regarding the exercise of this renunciation, the circumstances of revocation and its retroactive effect ...

These problems partly lie in the neutral and impersonal wording, which makes impossible to identify the subjects who must perform renunciation, and the failure to specify the type of revocation provided for in foreign law.

The subparagraph merely points out that *the attribution by the foreign law of a right to revoke the adoption shall not prevent recognition of the latter if this right is renounced.* In the light of the arguments set out above, it is obvious that the right of revocation attributed by the foreign law must refer to voluntary as opposed to judicial revocation, as the latter must be decided on by court, even if it is sought by the parties to the adoption process. This is logical if we recall that our system accepts material revocation or judicial termination, and this exception to the principle of irrevocability justifies not requiring renunciation in order to for the adoption to be considered equivalent to a Spanish adoption, even if the foreign legal systems have different regulations to ours and grant the parties a larger say. Therefore article 9.5.6 must be interpreted in this sense.

A case may thus arise of judicial revocation at the request of the adoptive parents if this is provided for in the foreign law according to which the adoption has been made, though this does not mean that it will always be allowed. It is obvious that if this revocation were not in the interest of the minor and were even

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[43] This is the view of Calvo Babío regarding the Nepalese resolution of 25 March 1998, which he describes as a "dubious argument, but the important thing is that it recognizes that the best interest of the child lies in granting recognition", (which may also be said of the resolutions on Chinese adoptions), see F. Calvo Babío in *REDI* 1999-1, pp. 235–236.

[44] See explanatory statement for Law 18/1999 of 18 May amending article 9 paragraph 5 of the *Código Civil*, *BOE* n. 119, 19 May 1999.

[45] *BOCG*, Congreso de los Diputados, 18 March 1998.

damaging thereto, it should not be accepted as it would be contrary to our public order, which may act accordingly. In this respect we should not forget that termination of the adoption as agreed by a judge must meet a number of requirements, but very particularly – and this is the basis for the rejection of the supposed revocation – that the requested termination should not seriously harm the minor.

A further complexity is the failure to specify the persons who should renounce. Irrespective of the fact that neither does it establish the moment when renunciation should take place (it should be interpreted that this will depend on the registration of the adoption, that is, it may be carried out at or before that moment but not afterwards),[46] the precept merely states that recognition shall not be prevented if renunciation is made, but who is supposed to renounce the right of revocation? It should be borne in mind that in comparative law the power of renunciation may be attributed not only to the adopter but also to the adoptee or even to the person or institution that has placed the child in adoption (such as in Chinese adoptions).

We should therefore ask whether in these cases it is sufficient for the Spanish adopter or adopters to renounce – as referred to not in the article but in the explanatory statement of the law.[47] It is true that, in principle, the article would allow other persons to renounce, but it is also easy to imagine the problems that could arise in practice.[48]

Furthermore, some cases could give rise to discrepancies that could possibly undermine the validity of the very renunciation. This would occur if the right of revocation were not renounceable in foreign law, for example. Moreover, a case could arise where, although the renunciation was performed in Spain, the adopters could nonetheless assert this right of revocation in the child's country of origin.[49]

On another note, continuing with the impersonal nature of this article, it

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[46] This seems logical, as it is when the adoption is to be registered that it is checked whether it meets the necessary requirements for registration if it has been effected overseas. In the case of adoptions of this kind, this calls for the aforementioned renunciation of the right of revocation, except for possible cases in which it can be renounced a posteriori owing to the retroactive effects of this subparagraph.

[47] This refers only to the possibility of renunciation by the Spanish adopter or adopters. Specifically, it states that "If, by appearing before the senior official of the Civil Registry or in another public record the Spanish adopter or adopters expressly renounce the right to revoke the adoption grated to them by the foreign law, there will be no further impediments to the recognition of the adoption in Spain and entry in the Registry with all the effects deriving from this registration"

[48] J. Iriarte Ángel, " Adopción internacional. últimas tendencias en el ordenamiento español" in *Estatuto personal y multiculturalidad de la familia* (several authors), Madrid, 2000, pp. 124–125.

[49] S. Álvarez González, "Adopción internacional y sociedad multicultural", in *Cursos de Derecho Internacional de Vitoria-Gasteiz* (several authors), 1998, pp. 175–211, specifically p. 280.

should also be considered that renunciation of the right to revoke the adoption is not exceptionable, though this would perhaps be necessary in the case of revocations allowed by foreign law, in which solely and exclusively the interests of the child are pursued.

Bearing in mind that it is the best interest of the child that should be protected, it does not seem very coherent that article 9.5.6 should require, in order for a overseas adoption to be effective in Spain, the revocation of a right that precisely seeks the interest of the child. It is obvious that revocation may stem from a variety of situations and different interests and if this is the case requiring renunciation in all cases may not be the best solutions.[50]

With respect to the procedure for renouncing the right of revocation, the precept establishes that this must be done in a public record or by appearing before the senior official of the Civil Registry. This literal sense provides for a broad range of instruments and manners in, or according to, which renunciation can be made. Thus, renunciation may be not only through a public record executed in Spain, but also abroad or by appearing before the senior official of the Civil Registry or before the senior official of the consular Registry.[51]

Another issue raised by this article, and one which can trigger serious problems, is its retroactive nature. The temporary provision of law 18/1999 establishes that this provision shall also be applicable to adoptions formalized before its entry into force. This exception to the principle of non-retroactivity of laws is surprising, particularly as the explanatory statement does not provide any concrete justification of its appropriateness.

A possible explanation of this measure may be that the legislator, striving to act in the interest of the minor, sought to facilitate as far as possible the recognition of adoptions that were still pending resolution in Spain.[52] From this perspective, the application of this precept is appropriate, since it is sufficient for adoptive parents to perform renunciation in order for these unresolved adoptions to be recognized.

However, difficulties arise with respect to cases that have already been settled. It is logical to think that in these cases, unless by error, the adoption has not been registered and, accordingly, is not recognized, since the possibility of revocation

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[50] E. Zábalo Escudero, "El artículo 9.5 del Código Civil y la adopción extranjera (modificaciones introducidas por la Ley orgánica 1/1996 de 15 de enero y por la Ley 18/1999, de 18 de mayo)", in *Anuario de la Academia Aragonesa de Jurisprudencia y Legislación,* 1999, pp. 271–282, specifically p. 280.

[51] On the understanding that a public record executed abroad must meet the related requirements for it to be formally regular. See J. L. Iriarte Ángel, "Adopción internacional. Últimas tendencias en el ordenamiento español", in *Estatuto personal y multiculturalidad de la familia* (several authors), Madrid, 2000, p. 125 and "Adopción internacional" in *Derecho Internacional Privado* (several authors), vol. II, Granada 2000, p. 155.

[52] R. Espinosa Calabuig, "Una nueva reforma en materia de adopción internacional en España", in *RGD* n. 667, April 2000, pp. 1–19, particularly p. 14.

enshrined in the foreign law made it incompatible with respect to its effects. In these cases the adopters could have readopted their child, in which case this precept would not affect them, or have opted for fosterage.

It is not clear, for it is not specified, how the retroactive nature of the article may affect this latter case. Many questions arise, and we should ask whether having renounced the right of revocation in respect of an adoption effected before the entry into force of the law would have any consequences in these cases and, if so, what these would be; could this forced fosterage then be in some way converted into a valid adoption through renunciation?

This and, as we have seen, many other issues are raised by this article which, in itself, fails to provide satisfactory solutions. We must wait to see how practice – currently still very scarce – remedies the aforementioned shortcomings and what solutions are chosen.

VII. THE NEED TO CONTROL ENTRIES IN THE REGISTRY, CONSEQUENCES OF POSSIBLE ERRORS AND OTHER DIFFICULTIES RAISED BY PRACTICE

As mentioned earlier, it is not sufficient for an adoption to be formalized abroad pursuant to foreign law in order for it to be effective in Spain. In order to become effective, it must be entered in the Civil Registry, though registration is not automatic; rather, the senior official of the Registry checks and therefore ensures that the effects of this adoption are compatible with those established in Spanish law.

It should be understood that it is precisely at this stage that it will be checked whether the foreign legislation allows the adoption to be revoked. If so, registration will not take place unless the parents (consider the aforementioned the provisions on who should renounce) renounce this right. Therefore, if there is no provision for renunciation, registration will be impossible. We have seen how, before this provision was included, in the absence of a favourable resolution as in Chinese and Nepalese adoptions, the possibility of revocation also prevented the adoption from being recognized.

Applications for registration are often submitted to the Consular Civil Registry of the relevant Spanish Consulate. In this case, the senior official of this Registry must do the checking, enter the birth in the Consular Registry of the domicile of the adoptee and the marginal entry of the adoption,[53] sending a duplicate to the Central Civil Registry as laid down in registry legislation.[54]

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[53] As is well known, these notes are so termed as they are written in the margin of the main entry to which they are related, in this case birth. Art. 130 RRC.

[54] See arts. 12, 16 and 46 of the Law on Civil Registry and 68 and 118 of the Regulations of the Civil Registry. See J. A. París Alonso, *Manual de Registro Civil para los Registros Civiles Consulares*, Madrid, 1996.

Whatever the means chosen, control must always be exercised. The Second Additional Provision of the Organic Law on the legal protection of minors states this: the senior official of the Registry must ascertain that the requirements laid down in article 9.5 *Cc* are met. This seems logical, since as article 2 of the Law on Civil Registry (hereinafter *LRC*) points out, this constitutes proof of the facts that are registered, and the Registry records are proof of civil status (art. 327 *Cc)*. It is furthermore appropriate to recall not only their value as proof but the recognition that they constitute "the official truth of the facts and circumstances to which each entry in the registry testifies",[55] which implies that until control and subsequent inscription take place, there can be no certainty of the validity of the act.[56]

In view of the importance of registration as the instrument for rendering intercountry adoptions effective in Spain,[57] it is useful to examine the problems which may arise if this registration is erroneous. The senior official of the Registry may not always verify correctly the requirements that must be met and, what specifically interests us here, may not notice that the foreign legislation according to which the adoption was made provides for renunciation of the adoption, in which case he should not have entered such an adoption in the Registry since it would not meet the requirement of equivalence of effects laid down by article 9.5 *Cc* regarding the irrevocability of adoption.[58]

Such errors are not so uncommon; an example is the Nepalese adoptions analyzed earlier, which were recognized in 1994 without any justifying argument, probably owing to faulty consultation of the legislation in force at the time.[59]

It is obvious that if the adoptive parents requested registration and it was performed albeit erroneously, this would not pose any problems in principle, since it is logical to think that the parents, having achieved their aim, would not request rectification. But it may occur that the mistake is detected in a case where

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[55] This is the opinion of De Castro owing to its influence on the explanatory statement of the Regulations. See *Elementos de Derecho Civil I. Parte general vol. 2. Personas* (several authors; edition revised and updated by Jesús Delgado Echeverría), Madrid, 2000, p. 41.

[56] As for whether the adoption is effectively formalized, particularly with respect to attribution of nationality, see RDGRN 13 December 1974 in *Anuario DGRN* 1974, pp. 389 and 390 and P. Rodríguez Mateos, *La adopción internacional,* Oviedo, 1988, pp. 180 and 181.

[57] Rodríguez Gayán points out very significantly that, "In adoptions made abroad, registration cannot be understood merely as the final stage in the adoption process, but as an activity that guarantees the effectiveness in Spain of that adoption which, having been considered valid by the senior official of the Registry, will be effective retroactively from the time it was formalized through the relevant public authority." E. Rodríguez Gayán, *Derecho registral civil internacional,* Madrid, 1995, pp. 181–182.

[58] We should recall the point made about the type of revocation that may interfere in the recognition of the adoption in Spain.

[59] RDGRN 28 April1994. See commentary by P. Rodríguez Mateos in *REDI,* 1995, pp. 236–240.

registration is regarded as a preliminary point or even that other circumstances of a particular adoption lead the adoptive parents to demand the registration be invalidated.

In the first case the solution is provided by article 9.5.6, since the parents have only to renounce the right of revocation in a public record or by appearing before the senior official of the Civil Registry in order to remedy this error so that there is no longer any impediment to the recognition of the adoption. Finding a solution to the second case is more difficult.

The presumption of truthfulness attributed to registrations means that they can only be rectified by a *final judgment in ordinary proceedings* (art. 92 *LRC*)[60] and that the registered facts must be contested in court at the same time as rectification of the entry is requested (art. 3 *LRC*). It is true that the law establishes a simpler system for rectification through administrative proceedings with or without the favourable opinion of the public prosecutor, depending on the case (arts. 94 –95 *LRC*) but this does not seem relevant to the case in hand, since the desired result is sufficiently important as to require a declaratory judgment.

Establishing the effects of non-recognition of the adoption is a different matter, even if it was mistakenly recognized for a period of time. A solution might be to consider that the child had been fostered, as a fosterage would not pose any problems regarding registration (art. 154.3 *RRC* v. 38.3 *LRC*) and can be terminated at the wishes of the foster parents (providing they notify the public institution art. 173.4 2 *Cc)* thus solving the material problem.

The issue of adoption is often approached from only the legal perspective, which leads to an analysis of regulations in pursuit of the best solution to the theoretical problems to which it gives rise. But this type of study is often out of touch with the reality of certain adoptions that illustrate the most dramatic facet of this institution and deserve greater attention.

These are extreme cases where the adoption has been made irregularly and the relationship between the child and the adoptive parent or parents is so deficient that all the parties wish to end it. These are undoubtedly extreme cases, but they do exist. There are currently several applications filed with several Spanish courts requesting annulment and, in other cases, the revocation of adoptions formalized specifically in Russia with the competent Russian authorities.[61]

The substance of these applications is indeed complex. It refers to misrepresentation of facts in the public records which were the basis for the adoption and led to error and defect in the consent of the adoptive parents, and

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[60] This precept establishes that "the appeal shall be directed against the department of public prosecutions and those to whom the entry refers other than the plaintiffs".

[61] Court of First Instance of Madrid, 17 November 1999, request for revocation of an adoption order, prosecution service of the TSJ of the Community of Madrid, 11 October 1999, complaint of irregularities committed in adoption, prosecution service of the TSJ Madrid, 15 March 1999. Documents provided by the Association for the defence, protection and guarantees in adoption and fosterage.

also adduces lack of consent of the adopted minors, which should have existed.[62]

The irregularities of these adoptions and their negative consequences on the minors (in some cases they were lied to about the adoption and have parents and brothers in their country of origin and therefore reject their new situation and ask to return to their country) lead the adoptive parents not to renounce their right to take necessary legal action. If this action is brought with the competent foreign authority, the question of recognition of its future decisions may arise.

As pointed out earlier, adoption is an institution that must necessarily be designed to protect minors. Therefore a series of control mechanisms are used to guarantee the regularity of the proceedings and these can only fail in extreme cases. However, on occasions, even though all these requirements are met and the whole procedure is correctly completed, the best interests of the minor are not guaranteed by the adoption, against all odds, owing to a number of factors that may endanger his or her welfare. In these cases it would be appropriate to allow revocation by a court decision. It should not be forgotten – and this calls for consideration – that in order to realize the principle of acting in the best interests of the adoptee it may be precisely necessary to revoke or terminate the adoption; however, our legislation does not provide for this course of action (except in cases of privation of patria potestas), and, curiously, this is merely an impediment to its achievement.

Ideally, our system should allow the necessary flexibility in this sphere in order to cater to the circumstances of specific cases, which is sometimes the only manner of truly acting in the minor's best interest. It would also be interesting to grant a bigger role to associations of adoptive families and adoptees, which could forward useful proposals regarding adoption.

This has already been incorporated into other systems such as the French one, according to which the Adoption Council[63] made up of representatives of such associations must be consulted on legislative and regulatory measures taken in this field.

VIII. CONCLUSIONS

From the foregoing we may conclude that what the legislator has established through the new art. 9.5.6 is merely a peculiar system for validating overseas

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[62] The fourth Legal Ground of the claim filed with the Court of First Instance of Madrid on 17 November 1999 specifies the misrepresentations of facts that caused information to be concealed on the family of the adopted minors, their state of health and their attitude towards adoption. In the application for revocation of the adoption order the department of prosecution of the TSJ of the Community of Madrid on 11 October 1999 also refers to misrepresentation of facts in the psychological-pedagogic and academic reports on the adopted girl.

[63] Established by a Decree of 16 July 1975. *Decret* 75-640. Its wording has been amended by the aforementioned Law 200 1-111 of 16 February 2001.

adoptions that only differ from Spanish adoptions in that the law governing them establishes the possibility of revocation. The term "particular" is a fairly accurate description of the nature of this mechanism, which has no equivalent in conventional rules on this matter.

Indeed, the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption[64] does not provide for a validation mechanism of these characteristics, though it does establish a much more open and deeper system of conversion than our autonomous private international law provides. Article 27 enables a "simple" adoption to be converted into a full adoption.[65]

An adoption of this nature does not therefore differ only slightly from adoption as established in our system; rather, the difference is "enormous",[66] since the former does not have the effect of terminating the pre-existing parent-child relationship; nevertheless, it is attempted to reconcile this difference by converting it into an adoption having such effects.[67] In order to achieve this, the law of the receiving state must allow this and the consent required for the adoption must have been or be granted.

Perhaps it would have been appropriate to include a similar conversion mechanism in our system.[68] This would mean an important reform, which would

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[64] See in general C. González Beilffus, "La aplicación en España del Convenio de La Haya de 29 de mayo de 1993 relativo a la protección del miño y a la cooperación en materia de adopción internacional", in *RJC* 1996, pp. 313–345. Parra-Aranguren, "An Overview of the 1993 Hague Inter-Country adoption convention" in N. Lowe, G. Douglas (ed.) Families Across Frontiers, The Hague, 1996, pp. 565–576. P. Ziccardi, "Ordine pubblico e convenzioni internazionali nel riconoscimento di attri straneiri di adozione di minori", in *RDPP* 1995, pp. 5–16.

[65] Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect:
a) if the law of the receiving State so permits; and
b) if the consents referred to in Article 4, sub-paragraphs *c* and *d*, have been or are given for the purpose of such an adoption.

[66] Though less than if it were an institution that did not create a parent-child link between the minor and the person who takes care of him or her. Such a relationship could not constitute full adoption.

[67] This enables it to be "incorporated" into the law of another state; as Bucher points out, "un rapport de droit familial né selon una loi déterminée doit pouvoir s'integrer pleinement dans le système juridique des autres Etats concernées et y produire ses effets ou, pour le moins, des effets similaires à ceux qui lui étaient initialment attribués." A. Bucher, "La famille en droit international privé", in *Recueil des Cours*, 2000, 283, pp. 13–177, specifically p. 115.

[68] Espinar points out clearly that, "The essential thing is consent to and suitability for a relationship, therefore, provision for the validation of the issue should have been made at registration by warning the adopter and adoptee of the legal consequences that would derive from this and requiring, if necessary, the solution of consents that were not sufficient to establish the parent-child relationship in the terms set forth in paragraph four of this article", J. M. Espinar Vicente, *El matrimonio y las familias en el*

be kept within the guidelines of the Convention and would facilitate the recognition of many of the "adoptions" which are conducted abroad nowadays. Article 9.5.6 fails to eliminate the difficulties they come up against, which finally make it necessary to readopt the child in Spain.

What might have marked a step forward in this matter results now in fact limited to a small opening in our system which, from now on, will accept adoptions that are practically the same as Spanish ones but continues to cling to a rigid idea that basically does not accept adoptions that differ from those established in the *Código Civil.* Not to mention the fact that such a mechanism is unknown from the general perspective provided by the Convention, probably because it is unnecessary. The lack of any regulations on this matter may furthermore give rise to problems on whether or not the last subparagraph of article 9.5 is applicable. When we examined the factual circumstances of this rule earlier on, we stated that the problems of this precept largely relate to adoptions made in states which are not party to the Hague Convention. However, they could also arise in this context. It would be sufficient for the legislation of the child's country of origin to allow revocation of the adoption.

As pointed out earlier, this case does not merit the attention of the Convention, which merely establishes the conversion procedure for "simple" adoptions, those which do not have the effect of terminating a legal parent-child relationship, and does not provide it for others in which such a relationship is terminated though subsequent revocation is possible. The question that then arises in such cases is whether article 9.5.6 should be applied as an autonomous rule as this matter is not regulated by the Convention.[69]

If so, the revocable overseas adoption would require validation, which is not mentioned in the Convention and would not be required by the legislation of other receiving countries. This thus breaks – unnecessarily perhaps – the uniformity of conventional regulation, which sets out to provide common provisions that take into account the basic principles that must inspire the regulation of this complex issue.[70]

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sistema español de Derecho internacional privado, Madrid 1996, p. 379. On the concrete proposal, see above all Álvarez González, who suggests the following idea, "rather like ... '... maintenance of ties with the biological family as provided in the foreign law shall not prevent recognition of the adoption if proof is furnished that the consent given by the persons, institutions and authorities whose consent is required contains a renunciation of the maintenance of such ties' ", in *Cursos de Derecho Internacional de Vitoria-Gasteiz* (several authors), 1998, pp. 175–211, specifically p. 202.

[69] Rodríguez Benot states that the conversion mechanism referred to in the last subparagraph of 9.5 "would be generally applicable as an autonomous regulation in the absence of a Convention applicable to the matter", "Ley 18/1999 de 18 de mayo de modificación del artículo 9 apartado 5° del Código Civil en materia de adopción internacional", in *REDI* 1999 2, pp. 810–818, particularly p. 816.

[70] The preamble to the Convention alludes to this: " Desiring to establish common provisions to this effect, taking into account the principles set forth in international

These observations on article 9.5.6 are intended to highlight the fact that although this precept should in principle be welcomed insofar as it attempts to facilitate the effectiveness of overseas adoptions in Spain by preventing them from having to be formalized ex novo, it may nonetheless have fallen short of this aim. By providing a validation mechanism which is only applicable to full revocable adoptions, it fails to solve the case of many other "simple" adoptions which could be converted into full adoptions, as the Convention shows.

It remains only to point out that the particular mechanism chosen for this task would not appear to be the most suitable one owing to the problems to which it may give rise, as stated earlier. In this respect, we will have to wait and see how practice, to which the task now falls, deals with these issues.

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instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986)".