



# The Controversy Surrounding the Intercountry Adoption

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The purpose of this article is to identify characteristics of the legal framework of intercountry adoption. This study is specifically concerned with the international and Hungarian legislation.

In the first part, the international conventions and the Hungarian rules are presented. These show that a considerable progress has been made in the last century in law-making.

A short statistical analysis illustrates the role of Hungary in intercountry adoption.

The final section considers possible risks and abuses in the process: exploitation, family tracing, loss of cultural heritage, over-representation Roma children, debate over closed or open adoption and adoption agencies.

On the basis of the results of this study, it can be concluded that the intercountry adoption gives rise to a great debate and serious cause for complaining about abuses which weaken the children's rights.

This dissertation hopes to offer a comprehensive view on the advantages and challenges of intercountry adoption.

## I. Introduction

I chose the presentation of the legal framework of intercountry adoption as a dissertation topic. Unfortunately, the issue of children's rights did not achieve an appropriate prominence in the education during my university years. However, I believe – as the CRC says – that the children are a vulnerable group, they have particular rights. The society has to recognize their special need for protection and help them expand their opportunities to reach their full potential.

My dissertation topic was inspired by a workshop held on March 31 2011 of the "Gyermekjogi Kör" formed by the law students of the University Eötvös Loránd. Considering the increasing trend of families consisting different nationalities, it is essential to know the international standards for an early career researcher.

This paper tries to analyze whether the legal framework helps the regulation of intercountry adoption, the tension between the theory and the practice and the most relevant issues threatening the best interest of the child.

First of all, I present the forms of appearance of intercountry adoption. The most relevant primary sources of international law are the United Nations Convention on the Rights of the Child (hereinafter referred to as CRC) and The Hague Convention on the Protection of Children



and Co-operation in Respect of Intercountry Adoption (hereinafter referred to as Hague Convention). In Hungary, the Act V of 2013 on the new Civil Code (hereinafter referred to as the new Civil Code) and the Government Decree No. 149/1997. on Guardianship Authority and Child Protection and Guardianship Proceedings (hereinafter referred to as Government Decree on Child Protection) contain the most relevant provisions in this topic.

After looking at how intercountry adoption is regulated under the international and Hungarian law today, a few statistical data might be of interest.

The intercountry adoption of children in a broad sense involves a variety of bad practices. The exploitation, family tracing, loss of cultural heritage, over-representation Roma children, debate over closed or open adoption and adoption agencies are the most popular problems which have to be addressed within this context.

## II. Terminology of intercountry adoption

According to the Article 20 of the CRC, every child who is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. This care could include foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. The CRC defines the intercountry adoption as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. The CRC highlights that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.

The preamble of the Hague Convention recognises that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin. The Hague Convention shall apply – so this is the definition for the intercountry adoption – where a child habitually resident in one Contracting State (“the State of origin”) has been, is being, or is to be moved to another Contracting State (“the receiving State”) either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

The old Hungarian Family Law Act did not expressly give the definition for the intercountry adoption. However, the Section 4:129 of the new Civil Code remedied this omission by expressing that intercountry adoption occurs when the child moves permanently to another country in consequence of the adoption, irrespectively of the adoptive parent's nationality and apart from the fact that the child's citizenship is changed.

Considering the definitions of the international conventions, the intercountry adoption is a subsidiary solution, because it only occurs if the national adoption is not successful. The relation between the national and intercountry adoption is characterized by the Section 4:129 of the new Civil Code. The intercountry adoption of a child is only allowed if the measures taken for the national adoption have failed.



The history of the adoptions suggests that the wide spread of intercountry adoption began in the 1950s, after the Korean War and was initially organised by religious groups. The number of intercountry adoptions has increased from the 1960s and more and more international efforts have been taken on the transparency of the procedures. Since the mid-1990s, the number of intercountry adoptions has almost doubled each year, from 22000 cases in 1995 to under 40 000 in 2006<sup>1</sup>.

### III. Possibility of the intercountry adoption

The possibility of the intercountry adoption gives rise to a great debate. However, most of the experts agree that the intercountry adoption may offer the advantage of a permanent family to a child for who a family in his/her country of origin cannot be found.

The UNICEF cultivated a policy position on the intercountry adoption in 2007<sup>2</sup>. Guiding the UNICEF's work, the CRC states that every child has the right to know and be cared for by his or her family and to grow up in a family environment. Recognising this, and the value and importance of families, they need assistance to care about their children's rights. Despite this assistance, when a child's family is unavailable, unable or unwilling to care for his/her, the family-based solutions should be sought to enable the child to grow up in a supportive environment. Intercountry adoption is one among of these options. According to the UNICEF, for those children, who cannot be placed in a family setting in their country of origin, the intercountry adoption may be the best solution.

Relating to the practice of intercountry adoption, there are the donor countries (for example Guatemala, China, the Central and Eastern European countries and many African countries), who cannot organise the internal adoption of adoptable children due to their economic situation, their national practice or during war, famine or natural disasters (Rétiné 2011).

Most of the host countries (such as the Scandinavian countries and the Netherlands) are more likely to adopt disabled children. Their health and education systems are sufficiently developed to integrate these children into society and these adopting families have different motivations. Generally the parents decide to adopt, because they cannot have a biological child (for example in Hungary), but the parents of the host countries have an intention to adopt to help. The host families often adopt after having already biological child/children, so it is less considered as a taboo (Hegedüs 2005).

<sup>1</sup> A Save the children iránymutatása a nemzetközi örökbefogadásokkal kapcsolatban (The policy brief on intercountry adoption of the Save the children), 2010. [www.savethechildren.org.uk/sites/default/files/docs/International\\_Adoption\\_FEBC\\_edit\\_18\\_01\\_10\\_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/International_Adoption_FEBC_edit_18_01_10_1.pdf) (Viewed 22 April 2013.)

<sup>2</sup> Az UNICEF állásfoglalása a nemzetközi örökbefogadásról (The UNICEF's position on intercountry adoption), 2007. [www.unicef.org/media/media\\_41118.html](http://www.unicef.org/media/media_41118.html). (Viewed 22 April 2013.)



#### IV. “The Bible of the children’s rights”, the Convention on the Rights of the Child

In 1900, a Swedish schoolmistress, Ellen Key wrote the bestseller “The century of the child” where she proposed that the twentieth century would be the children’s world<sup>3</sup>.

Unfortunately, the children’s rights are still being violated, but considerable progress has been made in the last century. As the first series of children’s rights provisions, the Geneva Declaration of the rights of the Child is drafted by the Save the children founder, Eglantyne Jebb in 1923. On 20 November 1959 (this date has been adopted as the Universal Children’s Day), the United Nations General Assembly adopted the Declaration of the Rights of the Child, which consisted of specific rights (for example the right to a name). During the 1970s, the United Nations set priorities for satisfying the children’s needs. On 20 November 1989, the Convention on the Rights of the Child was adopted by the United Nations General Assembly and it came into force on 2 September 1990, after it was ratified by twenty nations.

It is worth mentioning that this document has been ratified by every member of the United Nations except Somalia, South Sudan and the United States. Hungary promulgated the CRC by Act LXVI of 1991.

By signing the CRC, State Parties shall take all appropriate measures to ensure the guarantees and promotion of the rights set forth in the CRC. Contrary to adults, the children do not have the tools for enforcing their rights<sup>4</sup>.

According to Article 44, the State Parties make reports every five years on the measures they have adopted which give effect to the children’s rights and on the progress made on the enjoyment of these rights. Hungary submitted a report in 1998, 2006 and in 2013 to the Committee on the Rights of the Child. These reports may include an alternative view in the form of a shadow report. In September 2011, I participated in the edition of the Hungarian Alternative Report.

Article 3 contains the guiding principle of the CRC: the best interest of the child shall be a primary consideration.

The CRC emphasized the role of the family, as the most important unit of society. This is reflected by Article 9, which states that a child shall not be separated from his or her parents against their will, except when such separation is necessary for the best interests of the child.

The CRC sets out minimum requirements related to the system of adoption.

The point (a) of Article 21 highlights that the adoption of a child is authorized only by competent authorities who determine that the adoption is permissible. Regulating the process of intercountry adoption, the Government Decree on Child Protection serves the purpose of compliance with the CRC.

The point (b) recognizes the intercountry adoption as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner

<sup>3</sup> A 20. éves Gyermek Jogairól szóló Egyezmény (The 20-year-old Convention on the Rights of the Child), 2009. [www.ncsszi.hu/download.php?file\\_id=1112](http://www.ncsszi.hu/download.php?file_id=1112). (Viewed 22 April 2013.)

<sup>4</sup> A 20. éves Gyermek Jogairól szóló Egyezmény (The 20-year-old Convention on the Rights of the Child), 2009. [www.ncsszi.hu/download.php?file\\_id=1112](http://www.ncsszi.hu/download.php?file_id=1112). (Viewed 22 April 2013.)



be cared for in the child's country of origin. According to the principle of subsidiarity, the intercountry adoption shall be the last solution. The priority should be given to measures enabling the child to remain in the care of his/her biological family (Herczog 2007).

The point (d) calls attention to the measures to ensure that the placement does not result in improper financial gain for those involved in it. In addition, Article 35 requires that States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form. This principle is affirmed by the Hague Convention as well. Its Article 32 states that no one shall derive improper financial or other gain from an activity related to an intercountry adoption. Profiting from intercountry adoption is not allowed in Hungary neither. The Section 4:130 of the new Civil Code specifies that adoption shall not be authorized if it is likely to result in any financial advantage for the parties, other persons or organizations involved in the process.

In the point (e) the Committee urges actions on promoting the objectives of the CRC by concluding bilateral or multilateral agreements.

## **V. The basic requirements of the intercountry adoption, the Hague Convention**

The main aim of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption is to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with the respect for his/her fundamental rights as recognised in international law (Article 1). The Committee welcomes the ratification of the Hague Convention in its conclusions on national reports.

Hungary signed the Hague Convention in 2004 and promulgated it by Act LXXX of 2005.

As it is above-mentioned, the Hague Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

An adoption within the scope of the Hague Conventions shall take place only – among others – if the competent authorities of the State of origin (Article 4)

- have established that the child is adoptable;
- have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- have ensured that the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent.

An adoption within the scope of the Hague Convention shall take place only if the competent authorities of the receiving State

- have determined that the prospective adoptive parents are eligible and suited to adopt;



- have ensured that the prospective adoptive parents have been counselled as may be necessary;
- have determined that the child is or will be authorised to enter and reside permanently in that State.

The Contracting States shall designate a central authority to discharge the duties which are imposed by the CRC (Article 6). In Hungary, the Ministry of Human Capacities is responsible.

## VI. The relevant provisions of the new Hungarian Civil Code

The new Hungarian Civil Code entered into force on 15 March 2014. The new Civil Code introduced some important changes in the field of family law as well. It is a change in principle that the family law was incorporated into the new Civil Code as part of its Book Four on Family law. Before the new Civil Code, the family law rules were regulated in a separate act, in the Act IV of 1952 on Marriage, Family and Guardianship (Family Law Act).

The Book Four on Family law of the new Civil Code regulates the conditions and the legal consequences of the adoption. It defines the adoption as a basis of family relationships in direct line between parent and child (Section 4:97). The law adds that in the adoption process efforts should be made to ensure a degree of continuity in the child's upbringing, with particular regard to his/her family ties, nationality, religion, mother tongue and cultural background (Section 4:120).

The adoptive parent must be a major, be older than the child with minimum 16 years, but not more than 45 years and be in possession of legal capacity. The age difference is not necessary if a relative or the spouse of the adoptive parent adopts the child (Section 4:121).

The debates on the new Civil Code focused on the possibility of adoption by the couples living in a civil or registered partnership (by non-married couples including same sex couples). The Code rejects it, the guardianship authority shall give preference to married adoptive parents (Section 4: 120).

Any person whose parental custody has been terminated by judicial decision, or who has been prohibited from public affairs, and whose child is under foster care cannot adopt a child (Section 4:121). The prohibition of financial gain is expressed by Section 4:130 which states that adoption shall not be authorized if it is likely to result in any financial advantage for the parties, other persons or organizations involved in the adoption process, in excess of their justified expenses.

Unless the adoption of the minor child of the spouse occurs, a child can be adopted if his/her parents are not alive, or if his/her parents are unable to raise him/her. An adopted child can be adopted by the spouse of the adoptive parent during the term of adoption, or by others after the adoptive parent's death (Section 4:123).

It must be highlighted that the new Hungarian law extends the rights of young mothers. Accordingly, no consent is required for adoption from a parent who is legally incompetent for reasons other than being a minor (Section 4:127).



It seems very clearly that being a Hungarian citizen is not a condition for an adoptive parent, neither for an adopted child. A Hungarian child can be adopted by a foreign-born parent and a foreign-born child can be adopted by a Hungarian parent. This fact was confirmed by the ratification of the Hague Convention. The Section 4:129 gives the definition for the intercountry adoption saying that intercountry adoption occurs when the child moves permanently to another country in consequence of the adoption, irrespectively of the adoptive parent's nationality and apart from the fact that the child's citizenship is changed. The intercountry adoption of a child is only allowed if the measures taken for the national adoption have failed.

## VII. The role of Hungary in intercountry adoptions

As Hungary ratified the Hague Convention in 2005, the Hungarian central authority (the Ministry of Human Capacities) has managed the application for intercountry adoption since then.

The analysis of the entire database (from 2005 to 2012) is not the aim of my dissertation, as an accurate conclusion cannot be drawn from the lack of knowledge about the legal and institutional changes of the countries of origin and host countries.

According to the data from 2007 published in the archives of Ministry of Human Capacities, 135 children moved abroad by intercountry adoptions<sup>5</sup>. Next to the United States, Norway and Spain, the number of children located in Italy was really high (82 children).

During a national conference (Adoption as a second chance) the data from 2008 and 2009 were provided. In 2008, 86 adopted children from 126, in 2009 84 children from 122 travelled to Italy in the hope of a loving family (Ágoston 2010).

The data from 2011 was given by Zsuzsanna Ágoston, the senior counsellor of the Ministry. The increasing trend did not break, 97 children from 165 moved to Italy.

In 2007, mostly the children from 3 to 6 (53 children), and from 6 to 8 years old found foreign-born adoptive parents<sup>6</sup>.

In 2008 and in 2009 six to ten years old children were mostly presented in the procedures (55 and 66 children) (Ágoston 2010).

According to the Ministry's statistics, in 2011 the number of the children from 3 to 6 years old was the highest in case of intercountry adoption procedures.

The Ministry has determined the quality of the applications since 2009 because of the increasing number of requests sent by foreign-born adoptive parents<sup>7</sup>. In 2009, the experience of the previous years showed that the healthy children under 6 years old or suffering from mild disease were adopted in Hungary.

<sup>5</sup> Az országos és nemzetközi örökbefogadási nyilvántartás adatai 2007. évben (The database of the national and intercountry adoptions, 2007). [www.szmm.gov.hu/main.php?folderID=16503](http://www.szmm.gov.hu/main.php?folderID=16503). (Viewed 22 April 2013.)

<sup>6</sup> Az országos és nemzetközi örökbefogadási nyilvántartás adatai 2007. évben (The database of the national and intercountry adoptions, 2007). [www.szmm.gov.hu/main.php?folderID=16503](http://www.szmm.gov.hu/main.php?folderID=16503). (Viewed 22 April 2013.)

<sup>7</sup> Tájékoztató a külföldi örökbefogadók számára (Information for the foreign adoptive parents), 2009. [www.szmm.gov.hu/main.php?folderID=16497&articleID=40766&ctag=articlelist&iid=1](http://www.szmm.gov.hu/main.php?folderID=16497&articleID=40766&ctag=articlelist&iid=1). (Viewed 22 April 2013.)



The central authority also stated<sup>8</sup> that from 2009 it had not accepted any applications wishing to adopt a healthy child under 8 years old. The maximum limit of requests sent by an agency is 10 in case of wishing a child older than 8 years old and 5 in case of wishing a child under 8 years old suffering from a disease. As the new Civil Code prescribes that the guardianship authority shall give preference to married adoptive parents (Section 4: 120), the central authority does not accept any application by a single parent.

In 2010 the central authority confirmed that Hungary could offer only diseased children to adopt for foreign-born adoptive parents<sup>9</sup>. From 2010 the authority accepts an application for a child older than 10 years old requested by a single parent.

Italy is indisputably one of the most popular host country in case of intercountry adoptions. Next to it, the parents from Spain, Norway, the United States and the Netherlands are likely to adopt Hungarian children.

During the conference above-mentioned Maria Virgillito, the president of A.S.A. ONLUS (one of the most popular Italian adoption agency) welcomed the Hungarian-Italian relations. In Italy the juvenile court decides on eligibility of the adoptive parents. If the couple meets the general requirements, the court will ask the social services' report. Obtaining the decree of suitability, within one year, the couple have to approach an accredit agency which cooperates with foreign authorities (as the of A.S.A. ONLUS). These agencies handle the entire process and assist the couple with the procedure required by the foreign country. The president explained why the Italian families are so disposed to adopt children. In Sicily, the women usually do not work and have time for raising children. In addition, the families have close relationships, the relatives support the family which facilitates the integration of the minors. According to her, the Hungarian children are having fun in Italy, they can fit in the school environment, because the schools have been prepared for welcoming adopted children (Virgillio 2010).

## VIII. Problems with the intercountry adoption

Unfortunately, it is a common point of view that intercountry adoption gives serious cause for complaining about abuses which weakens the best interest of the child. If the legal provisions are insufficient, the child trafficking, the child abduction, the blackmailing and the bribery occur. My dissertation highlights several of these problems where a child can be a potential victim of a procedure.

### *a. Exploitation*

The Committee on the Rights of the Child expressed its worries several times about the lack of protection of the child from the sale of children, child prostitution and child pornography during the adoption procedure (Herczog 2007).

<sup>8</sup> Tájékoztató a külföldi örökbefogadók számára (Information for the foreign adoptive parents), 2009. [www.szmm.gov.hu/main.php?folderID=16497&articleID=40766&ctag=articlelist&iid=1](http://www.szmm.gov.hu/main.php?folderID=16497&articleID=40766&ctag=articlelist&iid=1). (Viewed 22 April 2013.)

<sup>9</sup> Tájékoztató a külföldi örökbefogadók számára (Information for the foreign adoptive parents), 2010. [www.szmm.gov.hu/main.php?folderID=16497&articleID=42013&ctag=articlelist&iid=1](http://www.szmm.gov.hu/main.php?folderID=16497&articleID=42013&ctag=articlelist&iid=1). (Viewed 22 April 2013.)



Remedying this omission, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography was published and Hungary ratified it in 2009. Each State Party shall ensure that improperly inducing consent for the adoption of a child in violation of applicable international legal instruments on adoption shall be fully covered under its criminal or penal law.

The adoptive parents of the host countries are more and more determined to adopt a young, healthy child of the same ethnicity. The trend has not changed: there are far more parents wishing to adopt than children like these. As a consequence, the child trafficking is still threatening the lives of children adopted abroad (Saclier 1996).

Albania, Bulgaria and Russia reported that the hospitals involved in illegal adoptions get financial and other support (medical instruments, pills) for cooperating (Neményi 2001).

There are some cases in which a pregnant woman becomes exploited: the mothers are abducted in order to get their newborn child or they are coerced and forced to surrender their babies for adoption purposes. The victims are usually single, vulnerable mothers who are under the pressure to give their child up for adoption. She is convinced by telling her about the disadvantages of being a single mother, the possibility of growing up in a wealthy family, giving false information about their child's death (Neményi 2001).

The ACT (Against Child Trafficking) as an international organisation against trafficking in children for adoption convinced of the importance and necessity of the European Union's work against trafficking<sup>10</sup>. They welcomed the strategy on trafficking in human beings (2012), but they have found many missing points in the legislation. The Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims contains a definition for trafficking in human beings (THB). It covers many forms of exploitation such as sexual exploitation, forced labour, removal of organs, forced marriage and illegal adoption. It is the first time that the illegal adoption has been explicitly mentioned as a form of THB. The preamble prescribes that it has to fulfill the constitutive elements of THB. The ACT thinks that the EU is urged to explore the links between the two phenomena. The lack of elaboration of the definitions "illegal adoption" and "exploitation" is one of the missing points of the Directive. Firstly, the regulation of adoption falls within the competition of the national civil law. As a consequence, the definition of illegal adoption differs among Member States. It creates an obstacle to a common approach to prevent and combat trafficking, which is contrary to the aim of the Directive. Secondly – as there is no definition for illegal adoption –, any adoption is legal, if it has been approved by a judge. Becoming the part of the *acquis communautaire*, the ACT recommends that all adoptions which violate the provisions of the CRC should be considered illegal.

#### *b. Family tracing*

The child adopted abroad could access information about their biological relations under the Hungarian law.

<sup>10</sup> ACT's commentary on the EU strategy towards the Eradication of Trafficking in Human Beings. [www.against-childtrafficking.org/wp-content/uploads/ACT-position-strategy-on-trafficking.pdf](http://www.against-childtrafficking.org/wp-content/uploads/ACT-position-strategy-on-trafficking.pdf). (Viewed 22 April 2013.)



According to Section 4: 135 of the new Civil Code, the adoptee has the right to request information from the guardian authority about the following questions: Was he/she adopted?, Does his/her biological parent alive?, Does he/she have any siblings?, Does he/she have access to the identification data of his/her biological parent and sibling (allowed for the child over the age of fourteen)?

A child over the age of fourteen years can submit this request without the permission of his/her legal representative. Before informing the adoptee, the biological parent and the sibling shall be interviewed. If the adoptee is a minor, the adoptive parent or other legal representative shall also be interviewed. If the biological parent is not alive at the time the request referred, his/her identification data can be disclosed to the adopted child, except if he/she already blocked the disclosure of his/her personal data previously. No interview is needed, if the biological parent, the sibling, the adoptive parent or other legal representative cannot be located, or if any insurmountable obstacles exist. The identification data of the biological parent or sibling cannot be released if:

- it was not possible to interview the biological parent, the sibling, the adoptive parent or other legal representative, because they cannot be located, or if any insurmountable obstacles exist;
- the biological parent and the sibling did not permit the disclosure of their identification data;
- it is against the child's best interest, particularly if the custody rights of the child's biological parents were terminated because of his/her wrongful conduct causing injury to or endangering the interest of the child, including the child's physical integrity, mental or moral development.

The Article 7 of the CRC states that the child shall have as far as possible the right to know his or her biological parents.

According to the Article 30 of the Hague Convention, the competent authorities of the Contracting State shall ensure that that the child or his or her representative has access to an information concerning his/her biological parent's identity, if it is permitted by the law of that States. Many Contracting States has made a reservation to this provision of the Hague Convention, referring to the anonymity of the biological parents or the protection of the biological mother.

Zoltán Navratyil has made a research (Navratyil 2012) on the incoherence between the right to know the biological parents (the right of the adoptee) and the protection of personal data (the right of the biological parents).

The new Civil Code protects more the right of the biological parents, because their identification data cannot be revealed if they did not permit their disclosure.

The decision 57/1991. (XI. 8.) of the Constitutional Court dealt with the right to family tracing correlated with the presumption of paternity. The Court found that the rules violating the child's right to family tracing were unconstitutional. The child's right to family tracing was defined as a part of the personality rights emphasizing the human dignity. The research states that this right can be limited or restricted, but the relevant Section of the new Code Civil denies it. As a result of the study, it is certain that the adoptee has not got any legal instruments if the biological parents refuse to disclose their data. It is really alarming, because – as the practice of the Court shows – the child's right to know their biological parents is a fundamental right.



### *c. Loss of cultural heritage*

Intercountry adoption is really unique, because it takes place when the adoptive parents live in another country and the child has to move to there. Leaving his/her place of birth, the child finds himself/herself in a different social and cultural environment.

The adoptive parents should be aware that a growing child starts a search for roots. Having no information about the biological family, the child can only be attached to the birthplace. The potential adoptive parents should focus on the child's long-term needs. The child should know the culture of the country of origin in order to develop his/her healthy self-concept (Pavao 2012).

The first wave of intercountry adoptions came when the Korean War left abandoned many Korean children. The parents hoped that they would never get in touch with their families. However, the 1988 Seoul Olympics attracted the attention about many aspects of Korean culture, especially the increasing number of children adopted overseas (Pavao 2012).

The studies based on the experiences of Korean and South Asian adoptees have shown that despite of the successful integration thousands of them are struggling with identity disorder and other difficulties. A young man involved says: *"I am a Norwegian soul in a Vietnamese body"* (Rétiné 2011).

It is undeniable that there was a time when a root searching seemed impossible. Today the progress is unstoppable with the development of genetic sciences and communication.

The Article 21 of the CRC states that intercountry adoption is as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. It indicates that those family-based alternatives serve the most the child's best interest which are in the child's country of origin. The intercountry adoption offers an opportunity to live in a family, but outside this territory.

The intercountry adoption as a last solution appears in the Article 20 of the CRC. Highlighted regard shall be paid to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background. The new Civil Code is completed with a new thought: During the adoption procedure, efforts should be made to ensure the continuity in the child's upbringing with a particular regard to his/her family relations, nationality, religion, mother tongue and cultural background (Section 4:120).

The "continuity in the child's upbringing" firstly means that a family with the same cultural background should be found for the child. Avoiding the risk of the behavioral problems, the state must do everything to prevent the child's move between the child care institutions (Rétiné 2011).

The Article 9 emphasizes that a child shall not be separated from his or her parents against their will except when competent authorities determine that such separation is necessary for the best interests of the child. The Article 19 creates a relevant obligation, as the States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence. The Save the Children UK explains<sup>11</sup> the

<sup>11</sup> A Save the children iránymutatása a nemzetközi örökbefogadásokkal kapcsolatban, 2010 (The policy brief of the Save the children, 2010). [www.savethechildren.org.uk/sites/default/files/docs/International\\_Adoption\\_FEBC\\_edit\\_18\\_01\\_10\\_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/International_Adoption_FEBC_edit_18_01_10_1.pdf). Viewed 22 April 2013.



link between the two Articles. They think that the state should make more effort to support and preserve families so that the families can avoid separation or recover their children if separation occurs.

The General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin highlights that the States must respect the provisions provided under Article 21 of the CRC as well as other relevant international instruments, including in particular the Hague Convention. The Committee proposes that the adoption of unaccompanied or separated children should only be considered when it has been established that the child is in a position to be adopted. In practice, this means that efforts with regard to tracing and family reunification have failed, or that the parents have consented freely to the adoption. The Comment underlines that the priority must be given to adoption by relatives in the child's country of origin. If there is no possibility for doing that, the preference will be given to adoption within the community from which the child came or at least within his or her own culture. The Committee adds that the adoption in a country of asylum should not be taken up when there is the possibility of voluntary repatriation under conditions of safety and dignity in the near future.

#### *d. Over-representation of Roma children*

The situation of Roma children should be reviewed, because they are the most concerned group in the intercountry adoption procedures.

The European Roma Rights Centre (ERRC) conducted a study in 2007 on the situation of Roma children in children's homes, in adoption and in institutions for the mentally disabled in Hungary. According to the research, the Roma children are over-represented in the Hungarian child protection system (Herczog 2013).

The Article 3 of the Act CXII of 2011 on the Right of Informational Self-Determination and Freedom of Information lists the personal data revealing racial origin or nationality as a special data. According to the Act, a special data can only be handled if the person concerned gives their written consent, if it is based on an international convention or prescribed by a law. Accurate data cannot be given because the Act XXXI of 1997 on the protection of children and guardianship administration do not authorise the child protection professionals to handle these special data. The restriction of publicity of ethnic data strengthens the prohibition of discrimination, but violates the child's right to know his/her origin.

According to the ERRC, the use of ethnic data in adoption process would make possible to match Roma adoptive parents with Roma children<sup>12</sup>. It would also be beneficial for the child if the adoptive parents knew his/her ethnic identity to foster knowledge of the child's background and a sense of identity.

Due to the identity disorders documented by results of researches, the international practice often supports the adoption by parents of the same ethnicity (Neményi 1996).

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<sup>12</sup> Fenntartott érdektelenség – Roma gyermekek a magyar gyermekvédelmi rendszerben (Dis-Interest Of The Child – Romani Children In The Hungarian Child Protection System). [www.errc.org/cms/upload/media/02/90/m00000290.pdf](http://www.errc.org/cms/upload/media/02/90/m00000290.pdf). (Viewed 22 April 2013.)



According to a study of ERRC in 2011, the majority of adoptive parents are not Roma and are unwilling to adopt Roma children for several reasons (racism, not being prepared to care for a Roma child, pressure from the environment). Beyond this, the proportion of Roma children categorised as mentally disabled or having special needs is really high. However, most of the Hungarian potential adoptive parents wish to adopt a healthy child. As a consequence, during the adoption process, Roma children suffer double disadvantage in finding an adoptive family (Herczog 2013).

*e. Debate over closed or open adoption*

The above-mentioned problems related to the family tracing and cultural heritage raise the question of the good practice of intercountry adoption. The dispute over open or closed adoption does not facilitate the process to find a solution.

The closed adoption has a great impact on the child's health. The mystery of adoption makes the child more sensitive and confused. If the child is not sure in the person of his/her parent, the anxiety will be his/her basic attitude. This anxiety is one of the main sources of growth disorders experienced in emotional life and performance (Hoffmann 1994).

According to the report of the American National Adoption Information Clearinghouse (NAIC) in the early 1950s the intercountry adoptions were mostly organised anonymously. A study of 1974 supported that the psychological problems emerged in the adoptees' adulthood could be accounted for the secret adoptions. The study confirmed that open adoptions should have been encouraged in order to protect the children (Pavao 2012).

Maria Herczog has been supporting the open adoptions, the importance of the adoptive parents' training and the examination of decision on giving up a baby for adoption since the early 1990s. In her point of view, the secret adoption violates the right to know our origin declared in the CRC. The preparation and monitoring of the adoptive parents are the remedies of the violated children's rights. If the adoptive parents were more informed about the effects of the adoption on the child, it would be easier to accept the existence of biological parents. The behaviour of the adoptive parents has a great influence on the relation between the child and his/her biological parents (Herczog 1993).

The countries where the child's best interest takes priority over the parental interest – such as New Zealand and Australia – prohibit secret adoptions. Noemi Bényey refuses this practice explaining the fact that it is contrary to the child's interest if he/she meets with the unconcerned birth parents (Bényey 2010).

Of course the arguments of parents choosing secret adoption should be taken into account: the fear of pressure of the birth parents, the fear of disappearing intimacy, the fear of disruption of the family.

The acceptability of open adoption depends on the society. While the Hungarians are suspicious and feel pity for adoption, the Swedes celebrate the adopted child by publishing a notification message in a newspaper (Hoffmann 1994).



### *f. Adoption agencies*

The ISS (International Social Service) and other NGOs agree that there is a gap in the Section 2 of the Article 22 of the Hague Convention. Any Contracting State may declare that the functions of the central authority may be performed to the extent permitted by the law and subject to the supervision of the competent authorities also by bodies or persons not accredited. In practice, it means that they do not have to do only non-profit activities, which weakens the fight against child trafficking. The Section 4 gives an option to refuse the application of the Section 2. What does happen if a Contracting State accepts intercountry adoption organised by a non-accredited body, but another State does not (Saclier 1996)?

Most of the States Parties of the Hague Convention take this chance and make the adoption process very expensive. According to the report in 2010 of the Save the children, the adoptive parents spend on average 20000 euros on adoption agencies (excluding travel and visa costs). Because of the high amount of money involved, the children and potential adoptive parents are at risk of being financially exploited. The US State Department reported that some 20 of the 40 countries listed as the main sources for intercountry adoption had halted (at least temporarily) adoptions due to serious concerns about corruption and procedural abuses.

Next to the agencies, a need for a hierarchy of care has to be mentioned. The intercountry adoptions reduce the development of national care services. Researches have shown that the poor quality of orphanages and institutions is significant in those countries where the rate of intercountry adoption has increased. Reducing the pressure on the national care services, these procedures act as a “safety valve“ in these countries<sup>13</sup>.

A hierarchy of care is needed, because the solution primarily used to social problems and child abandonment is institutional child care. The family environment emphasized in the CRC, the prevention and family mediation do not play an important role in decision-making (Saclier 1996).

### *g. Haiti, the problems in the practice*

According to the UNICEF's position on intercountry adoption, in case of children separated from their families and communities during war or natural disasters, the family tracing should be the first priority and intercountry adoption should only be envisaged if the efforts have proved fruitless, and national solutions are not available<sup>14</sup>.

The European Parliament resolution of 19 January 2011 on the situation in Haiti constates that the earthquake (7.3 on the Richter scale) which hit Haiti on 12 January 2010 left 222 750 people dead, affected the lives of 3 million people and displaced 1.7 million from their homes<sup>15</sup>.

<sup>13</sup> A Save the children iránymutatása a nemzetközi örökbefogadásokkal kapcsolatban, 2010 (The policy brief of the Save the children, 2010). [www.savethechildren.org.uk/sites/default/files/docs/International\\_Adoption\\_FEBC\\_edit\\_18\\_01\\_10\\_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/International_Adoption_FEBC_edit_18_01_10_1.pdf). (Viewed 22 April 2013.)

<sup>14</sup> Az UNICEF állásfoglalása a nemzetközi örökbefogadásról, 2007 (The UNICEF's position on intercountry adoption, 2007). [www.unicef.org/media/media\\_41118.html](http://www.unicef.org/media/media_41118.html). (Viewed 22 April 2013.)

<sup>15</sup> Az Európai Parlament 2011. január 19-i állásfoglalása a földrengés után egy évvel Haitin tapasztalható helyzetről: humanitárius segítségnyújtás és újjáépítés (European Parliament resolution of 19 January 2011 on the situation in Haiti one year after the earthquake: humanitarian aid and reconstruction). [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0018+0+DOC+PDF+V0//HU](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0018+0+DOC+PDF+V0//HU).



On 11 February 2010, the European Union has already dealt with the question of adoption Haitian children<sup>16</sup>. Catherine Bearder, an English politician submitted a question to the European Commission on the situation in Haiti and the threat of human trafficking. She outlined that the greatest horrors for the countless children left orphaned and unaccounted could occur after the earthquake. She asked the following: *“What steps is the Council taking to ensure that none of these children are trafficked into Europe or across European borders, and that children adopted in Europe have been subject to the usual safeguard procedures?”*

In its answer the Commission highlighted that the prevention of the sale and trafficking of children must have been a key priority in the response efforts. Referring to a report of the UNICEF, it indicated that in a disaster situation, efforts to reunite a displaced child with his or her parents or family members must have taken priority. Haiti is not a Contracting State of the 1993 Hague Convention. However, in 2000, the Hague Conference adopted a Recommendation to the effect that States parties should apply the standards and safeguards of the Hague Convention to the arrangements for intercountry adoption which they make in respect of States that have not yet joined the Hague Convention.

According to a UNICEF report in 2012, women and children in Haiti has been struggling to deal with a series of catastrophic emergencies that began in 2010<sup>17</sup>. Almost two years after the earthquake, approximately 600000 people, including more than 250000 children, were living in crowded settlements that increase vulnerability to health and nutrition problems as well as the possibility of abuse and exploitation.

## Conclusion

The history of adoption goes back high in the past. Since the ancient world, the adoption as a social institution has experienced a drastic change of meaning. Although we are still having my problems with this institution, the focus shifted from the interests of the adoptive parents to those of the adoptive child.

When I chose my dissertation topic, I imagined that intercountry adoption would be the best solution for a disadvantaged child who can not find a caring family in his/her country of origin. Originally, I would have liked to present the adoptive triangle which offers a better childhood. During my research I had to face bad practices to avoid and good practices to follow and at the same time it is pointed out that intercountry adoption is not considered to be the proper solution to the impending problems. Having experienced this change of meaning, my dissertation directly focused on the problems of the legal framework.

<sup>16</sup> Az Európai Parlament vitái, 2010. február 11. (The disputes of the European Parliament, 11 February 2010). [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20100211+SIT+DOC+PDF+V0//HU&language=HU](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20100211+SIT+DOC+PDF+V0//HU&language=HU).

<sup>17</sup> Humanitarian action for children, 2012, UNICEF. [www.unicef.org/lac/HAC2012\\_LOW\\_WEB\\_Final\(1\).pdf](http://www.unicef.org/lac/HAC2012_LOW_WEB_Final(1).pdf). Viewed 22 April 2013.



The consensus between and proponents of intercountry adoption has not yet been reached. I do not classify the intercountry adoption as a good or bad solution. It is seen as an alternative for a child to grow up in a family environment.

In recent decades, significant progress has been made on the development of the rights of the child and of the legislation of the intercountry adoption. While the intercountry adoption remained controversial for the authors of the CRC, the international human rights community opened up a new field of control and cooperation with the adoption of the Hague Convention. In my opinion, the principles presented of the United Nations and of the European Union is appropriate, but more attention should be paid on the national implementation. It is not only armed conflicts or natural disasters that contribute to the increasing number of abuses, but the legislation, administrative structures also play a major role in controlling bad practices.

The generation Z is given the possibility of changing their life by open European borders, for example they can be members of international organisations, they can marry a foreign citizen, they can study in an international environment. As I see, the intercountry adoption is also part of this possibility, which – like the examples – raises the unanswerable question: are there any limits and are they even necessary?

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