

For debate in the Standing Committee — see Rule 15 of the Rules of Procedure

Doc. 11381
24 September 2007

Draft convention of the Council of Europe on the adoption of children (revised)¹

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Jaume BARTUMEU CASSANY, Andorra, Socialist Group

Summary

The Committee on Legal Affairs and Human Rights welcomes the draft convention of the Council of Europe on the adoption of children (revised), which genuinely advances the cause of international standards on adoption. The amendments recommended by the Committee are principally intended to further the attainment of the draft convention's basic aim - harmonising substantive adoption law in the States Parties - and also to avert certain risks that the provisions of the draft convention may be interpreted in a discriminatory light.

¹ See Doc 11274 for the text of the draft convention.

A. Draft opinion

1. The Parliamentary Assembly welcomes the preparation of the draft convention of the Council of Europe on the adoption of children (revised). It regards this draft as a significant and necessary step forward, given the general recognition of the need to update the 1967 European Convention on the Adoption of Children (ETS No 58), not only in the light of jurisprudential and societal developments but also having regard to the other relevant international instruments.
2. Not only is the draft revised convention updated but, since it deals essentially with non-international adoption, it complements the relevant international standards, principally the Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Inter-country Adoption ("The Hague Convention of 1993"), whose provisions only apply to international adoptions.
3. The future revised convention is perfectly integrated with a well-established priority of the Parliamentary Assembly and the Council of Europe as a whole: building a Europe for and with children. It makes the concept of "the child's best interests" central to adoption procedures, in accordance with the well-established case-law of the European Court of Human Rights.
4. Concerning Article 27 of the draft convention permitting reservations, the Assembly considers this contrary to the basic purpose of the draft convention, which is to harmonise substantive adoption law in the States Parties. It further considers that the terms, or the actual substance, of the provisions in question render any reservation needless. Consequently, it recommends that the Committee of Ministers remove all possibility of expressing reservations. Failing that, it recommends that all member states accede to the convention without making any reservation, and calls on national parliaments to exercise vigilance in that regard.
5. The Assembly moreover advocates certain additions to the text regarding the natural father's place and the rights of different-sex couples living together in a stable relationship, in order to guard against any discrimination. In this context, the Assembly feels that, societal evolution being what it is, its proposals for amendments will not have the effect of making ratification more difficult for some states.
6. The Assembly therefore recommends that the Committee of Ministers amend the draft convention as follows:
 - 6.1. In Article 5, paragraph 5, replace "A mother's consent to the adoption of her child" with "The mother's and, where possible, the father's consents to the adoption of their child";
 - 6.2. In Article 7.1.a, add the following phrase "iii. who are living together in a stable relationship";
 - 6.3. in Article 7.2, delete "different-sex couples and";
 - 6.4. in Article 11.2., delete after the words "the spouse" the word "or" and after the words "registered partner", add "or unmarried partner, provided that the couple live together in a stable relationship,";
 - 6.5. In Article 27, replace the existing wording with "No reservations may be made to this convention".

B. Explanatory memorandum
by Mr Jaume Bartumeu Cassany, Rapporteur

I. Procedure

1. At their 993rd meeting on 11 April 2007, the Ministers' Deputies decided to ask for the Parliamentary Assembly's opinion on the draft convention of the Council of Europe on the adoption of children (revised), drawn up at the request of the European Committee on Legal Co-operation (CDCJ) by the Committee of Experts on Family Law (CJ-FA)².

2. On 20 April 2007, the Assembly referred the request of the Committee of Ministers for an opinion to the Committee on Legal Affairs and Human Rights for a report, and to the Social, Health and Family Affairs Committee for opinion.

3. At its meeting on 14 May 2007, the Committee on Legal Affairs and Human Rights appointed Jaume Bartumeu Cassany (Andorra/SOC) Rapporteur.

II. Substantive comments

i. General assessment of the draft revised convention

4. The Assembly congratulates the committee of governmental experts on its success in preparing this draft revised convention, which incontestably generates added value.

5. The future convention is perfectly integrated with a well-established priority of the Parliamentary Assembly and the Council of Europe as a whole: building a Europe for and with children³. Its revision constitutes a necessary update and complement to the international standards on adoption.

6. The Assembly is gratified that the principle of the child's best interests now features centrally in the revised convention (see Preamble). This brings it into line with the case-law of the European Court of Human Rights (hereinafter "the Court") and also with the United Nations Convention on the Rights of the Child, Article 3.1 of which provides that: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*"⁴.

7. The Assembly recommends that the possibility of entering reservations in respect of certain provisions be removed, for it is convinced that only a text entirely without scope for reservations will be capable of achieving the goal that it pursues, which is to harmonise substantive adoption law in the States Parties. The Assembly further suggests that fathers be placed on the same footing as mothers so as to avoid discrimination against them. Finally, the Assembly considers that different-sex couples living together in a stable relationship should not be subjected to discrimination in adoption procedures.

ii. Comments on specific articles of the draft revised convention

Article 5.1.b. – Consents to an adoption - consent of the child

8. The Rapporteur recalls at the outset the terms of the preamble to the European Convention on the Exercise of Children's Rights (ETS No 160): "*Recognising that children should be provided with relevant information to enable such rights and best interests to be promoted and that due weight should be given to the views of children*" (emphasis added). Furthermore, the United Nations Convention on the Rights of the Child provides in Article 12 that "1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*"

² See Committee of Ministers document CM(2007)44.

³ http://www.coe.int/t/transversalprojects/children/default_EN.asp?

⁴ Adopted and opened for signature, ratification and accession by the General Assembly in Resolution 44/25 of 20.11.1989; Entry into force on 2.09.1990; see <http://www.unhcr.ch/html/menu2/6/crc/treaties/crc.htm>.

9. The Rapporteur observes, however, that Article 27 allows a reservation to be made precisely in this matter of the child's consent (Article 5.1.b.). It seems to him absolutely essential that the states should undertake to seek the consent of the child where the latter is deemed to have sufficient understanding.

10. Moreover, the terms of Article 5.1.b. of the draft revised convention specify that the age of understanding prescribed by law "*shall not be more than 14 years*". The Rapporteur considers this already quite a high age limit; the legislations of many member states set the child's age of understanding at an earlier age. This article therefore seems framed in broad enough terms to permit compliance by all member states. The possibility of making reservations is thus superfluous and at variance with the spirit of the revision of the convention, which treats the child's interest as the central consideration.

Article 5.5. – Consents to adoption - validity of consent

11. The Rapporteur queries the expediency of reducing the scope of this provision to the mother alone. Not to extend this protection to the father is a discriminatory measure in his opinion. Fathers may also need time to reflect after their child is born, in order to decide as composedly as possible whether or not they consent to its adoption. It is therefore advisable that the father be added to this sub-paragraph and given the same time for reflection as the mother, and at all events that his possible consent before the birth should not be valid.

Article 7.1.a.ii. – Adoption by persons of different sex who have entered into a registered partnership

12. The Rapporteur does not understand the justification of the possibility provided in Article 27 for making reservations to Article 7.1.a.ii.

13. It would seem discriminatory not to permit two persons of different sex who have entered into a registered partnership to adopt under the same conditions as married couples, besides which the article is worded in such a way as to afford this possibility only "*where such an institution exists*". It therefore rests with the member states to settle this matter under their national legislation.

14. The Rapporteur also recalls the Court's well-established case-law, according to which the concept of "family" life referred to in Article 8 of the Convention is not confined strictly to relationships founded on marriage and can take in other ties that are *de facto* of a "family" nature where the parties cohabit outside marriage⁵.

15. Where adoption is concerned, this reasoning should be applied *mutatis mutandis* to the definition of "couples" so as to include, without discrimination, persons of different sex who have entered into a registered partnership and also persons of different sex living together in a stable relationship. Such an approach would be perfectly suited to the present state of society in a majority of member states.

16. The possibility of making reservations is therefore inexpedient.

Article 7.2. – Conditions for adoption - different-sex couples living together in a stable relationship

17. The Rapporteur welcomes the possibility provided in this article for member states to extend the scope of the convention to same-sex couples whether married, having entered into a registered partnership, or living together in a stable relationship. Indeed, the question of adoption by same-sex couples is still widely debated as things stand and there could definitely not be a consensus on it in the member states. National legislators can therefore make their own decision to extend the protection of the convention.

18. The Rapporteur is nevertheless surprised that the provisions of this article also apply to different-sex couples living together in a stable relationship. He does not see this issue as raising controversies of the magnitude of those concerning adoption by same-sex couples⁶.

19. Similarly, the Rapporteur observes with approval that any difference of treatment between children born in and out of wedlock has been eliminated throughout the revised convention. This confirms the clear tendency towards removal of discrimination between married and unmarried couples, and of course discrimination against the offspring of these unions.

⁵ See inter alia the judgment in the case of Johnston and others against Ireland, 18.12.1986, Application No 9697/82, § 55.

⁶ In this context, it will be of interest to analyse the decision to be taken by the Court in the case of Emonet and others v. Switzerland, Application No 39051/03, which relates precisely to the question of adoption by unmarried partners.

20. Consequently, and bearing in mind the relevant case-law of the Court mentioned above (see paragraphs 14 and 15), the Rapporteur makes a proposal for amendment to Article 7.

Article 7.1.b. – Possibility for one person to adopt children

21. While the Rapporteur considers it positive that the draft convention contemplates the eventuality of a single person wishing to adopt children, he is concerned about this provision being subject to reservation and thus admitting complete exclusion of persons not living as a couple. For example, this would prevent a child of deceased parents from being adopted by a single brother or sister of either parent, notwithstanding that adoption by the said brother or sister of one parent might clearly be in the child's interests.

22. The Court notes in the case of *Wagner and J.M.W.L. against Luxembourg* of 28 June 2007 that none of the forty-six member states of the Council of Europe absolutely prohibits adoption by single persons⁷. There are several categories: states permitting adoption by single persons in exceptional circumstances (like Iceland and Lithuania); states permitting adoption by single persons under certain conditions (like Armenia and Malta); states allowing adoption by single persons as a general rule but limiting their adoptive capacity to adoption which does not break the family ties with the family of origin (like Luxembourg, Georgia and Russia); states permitting adoption by single persons without restriction.

23. The Court also notes that in the area of adoption, the situation is at an advanced stage of harmonisation in Europe. Indeed, a study of the member states' legislation reveals that adoption by single persons is permitted without limitation in most of the forty-six member states⁸.

24. Recalling that the Convention is a living instrument to be interpreted in the light of present-day living conditions, the Court held that in the instant case the strict application to a single person of the relevant law of Luxembourg restricting full adoption to spouses could not be considered justificatory within the meaning of Article 8 § 2 of the Convention, and that Article 8 was violated⁹.

25. In this case, the Court unanimously found a violation of Article 8 and of Article 14 in conjunction with Article 8.

26. Having regard to this recent case-law and to the prevailing societal trend in most member states towards recognition of the possibility for single persons to adopt without limitation, the Rapporteur thinks that it would be appropriate to withdraw the possibility of making a reservation to Article 7.1.b. of the draft revised convention.

Article 11.2. – Effects of adoption

27. For the sake of consistency with the remarks made under Article 7 concerning different-sex couples living together in a stable relationship, the Rapporteur suggests that an explicit mention of them be added to the text of Article 11.2 and proposes that it be amended accordingly.

Article 22.3. – Access to and disclosure of information - information concerning the adopted child's origins

28. The Rapporteur realises that the question of access to information on the adopted child's origins is extremely sensitive. It may bring several rights into direct conflict. Some member states secure the possibility of giving birth to a child under the seal of strict anonymity. There would be considerable repercussions if these procedures were called into question by making access to information on the adopted child's origins generally possible. This is certainly why Article 27 provides that a reservation can be made to Article 22.3.

29. However, Article 22.3. is framed in sufficiently judicious terms to cover eventualities where the law would not permit disclosure of the information in question. Here the Rapporteur refers to the express phrase "*to the extent permitted by law*". Thus the law may very well contemplate situations where it proves impossible to disclose information on the adopted child's origins. The explanatory memorandum specifies, moreover, that "*the task of dealing with this sensitive question shall be entrusted to a competent authority*".

⁷ Judgment in the case of *Wagner and J.M.W.L. v. Luxembourg*, 28.06.2007, Application No 76240/01, § 66 (French only).

⁸ *Idem*, § 129.

⁹ *Idem*, § 135.

30. Thus there need not be any possibility of making a reservation to this provision.

Article 27 – Reservations

31. Strictly speaking, the Rapporteur is convinced that the basic aim of this draft convention – harmonisation of substantive adoption law in the States Parties – would be best served if there were no possibility whatsoever of making reservations. He realises, however, the difficulty of achieving a consensus on certain points and also wants all member states to be able to ratify the text. He therefore welcomes the fewness of the provisions in respect of which the possibility of making reservations has been provided.

32. However, after a case-by-case examination of the provisions included in Article 27 as subject to the reservations of States Parties, the Rapporteur has come to the conclusion that none of the possibilities for reservations are justified.

33. Consequently, he considers that Article 27 should be amended as follows “No reservations may be made to this convention”.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 11274, Reference No 3344 of 20 April 2007

Draft opinion adopted with 9 votes against and one abstention by the Committee on 11 September 2007

Members of the Committee: Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr György **Frunđa**, Mrs Herta **Däubler-Gmelin** (Vice-Chairpersons), Mr Athanasios Alevras, Mr Miguel Arias, Mrs Aneliya Atanasova, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Vidéc**, Mr Erol Aslan **Cebeci**, Mrs Pia Christmas-Møller, Mrs Ingrida **Circene**, Mrs Alma Čolo, Mrs Lydie **Err**, Mr Valeriy Fedorov, Mr Aniello Formisano, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Stef Goris, Mr Valery Grebennikov, Mrs Carina Hägg, Mr Holger Haibach, Mrs Gultakin **Hajiyeva**, Mrs Karin Hakl, Mr Nick Harvey (alternate: Mr Christopher **Chope**), Mr Andres **Herkel**, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Želiko **Ivanji**, Mrs Kateřina Jacques, Mr Karol Karski, Mr Hans Kaufmann (alternate: Mr Andreas **Gross**), Mr András Kelemen, Mrs Kateřina **Konečná**, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre Kucheida, Mr Eduard **Kukan**, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Tony Lloyd, Mr Humfrey Malins (alternate: Lord John **Tomlinson**), Mr Andrija Mandić, Mr Pietro **Marcenaro**, Mr Alberto Martins, Mr Andrew McIntosh, Mr Murat **Mercan**, Mrs Ilinka **Mitreva**, Mr Philippe Monfils, Mr João Bosco **Mota Amaral**, Mr Philippe Nachbar, Mrs Nino Nakashidzé, Mr Fritz Neugebauer, Mr Tomislav Nikolić, Ms Ann Ormonde (alternate: Mr Paschal **Mooney**), Mr Claudio Podeschi, Mr Ivan Popescu, Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Valeriy Pysarenko, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Armen **Rustamyan**, Mr Kimmo **Sasi**, Mr Ellert **Schram**, Mr Christoph Strässer, Mr Mihai Tudose, Mr Vasile Ioan Dănuț **Ungureanu**, Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis, Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Krzysztof Zaremba, Mr Vladimir Zhirinovskiy, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin