# THE RECOGNITION AND LEGAL EFFECTS OF FOREIGN ADOPTIONS IN SWEDEN

BY

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## 1. GENERAL REMARKS

### *1.1 The phenomenon of intercountry adoption*

One of the most topical questions concerning the rights of a child in international relations is the legal problems of *intercountry adoption*. Intercountry adoptions (also called "international adoptions") involve a child living in one country, the prospective adoptive parents living in another country and the transfer of the child to that country to live there with the adoptive parents.[1] The number of these adoptions has dramatically increased since the late 1960s, mainly because there are very few children available for adoption in the industrialized countries. Today, intercountry adoption is a worldwide phenomenon involving migration of children over great geographical distances, often to a very different type of society and culture.[2] The adopters are as a rule domiciled in an industrialized western country (the "receiving state"). The countries of origin of the children are a very heterogeneous group consisting of Asian, Latin American, African and European countries. The disappearance of the Iron Curtain in Eastern Europe has recently opened an "adoption market" in countries such as Rumania, Poland and even the former Soviet Union, including the Baltic States.

During the last two decades, legal problems of intercountry adoption have attracted the attention of several international organisations, including the United Nations.[3] There is general agreement that the legal safeguards and the standard of intercountry adoption procedures need to be improved and that intercountry adoptions should take place only in appropriate circumstances. It is considered best for the child to be taken care of by its biological family or be placed in a foster or adoptive family in its country of origin. An intercountry adoption is often considered to be preferable only to the placement of the child in an institution.

[1] See van Loon, *Report on Intercountry Adoption*. Hague Conference on Private International Law. Adoption. Prel. Doc. No. 1, p. 6.

[2] *Ibid.*

[3] Both intergovernmental organizations, such as the UN, the UNIDROIT, Council of Europe, as well as international non-governmental organizations, such as International Social Service (ISS), Defence for Children International (DCI) and International Law Association (ILA) have shown an active interest in intercountry adoption. *Ibid.*, pp. 10 ff.

In this connection especially the provisions relating to intercountry adoption in the UN Convention on the Rights of the Child (1989) and the UN Declaration on the Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption (1986) should be mentioned. Also, a preliminary Draft Convention on International Cooperation and Protection of Children in Respect of Intercountry Adoption was presented at the Hague Conference on Private International Law in February 1992. An aim of the Draft Convention, which with necessary revisions and completions will, it is hoped, be approved at the 17th session (and centenary) of the Conference in 1993, is to implement the solutions endorsed in the above-mentioned UN instruments.[4]

This international work is of great interest to Sweden, which in relation to its population of 8.5 million inhabitants is one of the biggest receiving countries in respect of intercountry adoption. From the mid-1970s till the end of the 1980s, some 1 500 children a year, arrived in Sweden for adoption, mostly from Asia and Latin America. In the last few years somewhat fewer children have arrived, since fewer have been available for intercountry adoption in such former major countries of origin as India and South Korea.[5] Another change is the considerable increase in the number of children coming from (Eastern) Europe. In 1990, of the altogether 965 children who arrived in Sweden for adoption, 174 came from Europe.[6] In 1991, these numbers were 1 113 and 247, respectively, *i.e.* almost one fourth of the children were from a European country.[7] It is estimated that there are about 35 000 Swedes who were adopted as children from other countries.

Against this background it is not surprising that Sweden, since the 1970s, has had comprehensive legislation concerning intercountry adoption.[8] A need has, however, been felt to reform this legislation to better

[4] A Draft Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption was adopted at the 17th session of the Hague Conference on 29 May, 1993. This paper, however, refers solely to the 1992 preliminary Draft Convention.

[5] Active measures are today taken by these countries to place children in adoptive or foster-families *within the country*. Restrictions have also been introduced with respect to intercountry adoptions.

[6] *NIA, Utomnordiska barn som invandrat till Sverige för att senare adopteras under 1991 och 1990.* (Extra-Nordic Children Immigrating to Sweden and Later Adopted during 1991 and 1990)

[7] *Ibid.*

[8] In 1988, Parliament passed an Act (1988:1463) which gives adoptive parents a right to state compensation up to a certain maximum for half of the cost of an intercountry adoption of a child under the age of ten. The Act was initiated as a result of increasing costs of intercountry adoption. It aims at making adoption possible for poorer families and to enable families to adopt more than one child. In 1992, the maximum amount of state compensation was SEK 24 000 (Act 1991:235).

meet the realities of today's intercountry adoption. In 1989, a Draft Bill was presented by the government-appointed legislative Commission on Guardianship (*Förmynderskapsutredningen*, SOU 1989:100). The Draft Bill aims in various ways at strengthening the legal position of the child in intercountry adoption. In 1992, a new commission was appointed by the Government to review the provisions relating to intercountry adoption assistance including the relation to the Hague adoption convention under preparation.[9]

Table 1. *Children arriving in Sweden for adoption in 1976–1991*[10]

| | Total number | Percentage independent adoptions |
|---|---|---|
| 1976 | 1 783 | 50 |
| 1977 | 1 864 | 47 |
| 1978 | 1 625 | 46 |
| 1979 | 1 382 | 41 |
| 1980 | 1 703 | 37 |
| 1981 | 1 789 | 29 |
| 1982 | 1 474 | 22 |
| 1983 | 1 651 | 15 |
| 1984 | 1 494 | 17 |
| 1985 | 1 560 | 12.5 |
| 1986 | 1 542 | 10 |
| 1987 | 1 358 | 14 |
| 1988 | 1 074 | 14 |
| 1989 | 883 | 21 |
| 1990 | 965 | 30 |
| 1991 | 1 113 | 30 |

### *1.2 Conflicting interests between the State of origin of the child and the receiving State*

Not unexpectedly, the interests of the country of origin of the child and those of the receiving country may conflict with each other especially concerning jurisdiction to grant adoption. The country of origin may require that the adoption decision is issued in that country, while according to the law of the receiving country an adoption decision must be given in the country to which the prospective adoptive parents are most closely connected. This, in turn, raises the question of what effect—if any—is to

[9] See Dir. 1992:69 (Ministry for Social Affairs), *Översyn av verksamheten med internationella adoptioner*. (Survey of International Adoptions).

[10] *NIA*, Annual Report 1990/91, p. 14, and *NIA, Utomnordiska barn som invandrat till Sverige för att senare adopteras under 1991 och 1990*, (above, note 6).

be given in the receiving country to an adoption decision issued in the child's country of origin. An additional complication is that the countries involved may have different concepts of adoption. It has not been unusual that the adoption granted in the child's country of origin creates only a *simple adoption* (weak adoption, *adoptio minus plena*), while legislation in the receiving country, *e.g.* Sweden, is based solely on the concept of *full adoption* (strong adoption, *adoptio plena*).[11]

### *1.3 The purpose and scope of this paper*

The purpose of this paper is to present the *Swedish model* concerning the recognition and legal effects of foreign adoptions. In what follows, attention will be drawn both to the prevailing provisions in the Act (1971:796) on International Legal Relations Concerning Adoption, and to the above-mentioned Draft Bill of 1989.

As far as present law is concerned, special attention will be given to the practice followed since 1982 by the *Swedish National Board for Intercountry Adoptions* (here referred to as *NIA*). Since then *NIA* has declined from approving foreign adoption decisions that involve simple adoption. The adopters must apply to a Swedish district court for a second adoption as if no prior adoption decision existed.

With regard to the Draft Bill, most interesting is the proposal according to which foreign adoption decisions, subject to some conditions, will be *automatically* recognized in Sweden as adoptions in accordance with Swedish law, *i.e.* full adoptions! This rather radical proposal is not free from objections.

It is not possible to deal here with the above-mentioned UN documents or the preliminary Hague Draft Convention. Swedish adoption legislation, including the 1989 Draft Bill, harmonises well with these instruments. There would seem to be only one major exception, namely that the policy followed at present in Sweden with regard to *independent adoptions* (private adoptions), is more liberal then the one stipulated in these instruments.

[11] *Full adoption* leads, as a rule, to complete integration of the adoptee into the new family and to termination of all legal ties with the original family. Characteristic of *simple adoption* is that certain legal relations remain between the child and the biological family. See van Loon (fn 1), pp. 110–112. Note that the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions is silent on the legal effects of adoption. Due to different concepts of adoption, no agreement could be reached on the question. See: Borum, The Scandinavian Countries and the Hague Conventions on Private International Law 1951–1964, 10 *Scandinavian Studies in Law* (1967), pp. 56–58. The 1965 Convention turned out to be out-of date soon after it had been adopted.

The Swedish policy is that intercountry adoptions through authorized organizations are to be preferred, but independent adoptions, *i.e.* adoptions without the mediation of a licensed organization, are not prohibited. The Draft Bill introduces no change in this respect. Characteristic of the above-mentioned international instruments is that they require the involvement of competent authorities in both countries from the very beginning, when intercountry adoption of a certain child is first considered, until the adoption is completed. The preliminary Hague Draft Convention also stipulates that there shall be no contact between the prospective adoptive parents and the child or its parents *until* a number of conditions laid down in the Draft have been met.[12] These conditions include that competent authorities in the state of origin have established that intercountry adoption is in the best interests of the child *after* other placement possibilities have been duly considered. At present, when private contacts are used Swedish law requires is a statement from *NIA* on the reliability of the form of mediation.[13] Consent to adopt can be granted only if the form of mediation the applicants plan to use is considered reliable. It is, however, possible that the prospective adoptive parents come in contact with the child through a private person and an authority is called in only thereafter. In such a case it is difficult to check earlier transactions between the parties. *NIA*'s statement concerns only the reliability of the authority.[14] It has also occurred that consent to adopt through an authorized organization has been used illegally to carry out an independent adoption.

[12] See Hague Conference on Private International Law. Preliminary Draft Convention on International Co-Operation and Protection of Children in Respect of Intercountry Adoption, drawn up by the Special Commission of February 1992, Arts. 4 and 5. In addition, Art. 14 of the Draft stipulates that persons habitually resident in a contracting state who wish to adopt a child habitually resident in another contracting state, shall apply to the Central Authority in the state of *their* habitual residence.

[13] Social Services Act (1980:620), sec. 25(4). This provision was added to the Act in 1984 (by Act 1984:1092) in order to improve the control of independent adoptions. Interestingly enough, also according to the terms of reference to the new government-appointed commission which is to review the prevailing provisions relating to intercountry adoption assistance, the possibility to adopt without the mediation of an authorized adoption organization is to be maintained. *NIA*'s control of private adoptions is, however, to be improved. See fn 9 above.— Concerning the rather vague concept of *independent adoption* (private adoption), see Note on the Question of "Independent" or "Private" Adoptions. Hague Conference on Private International Law. Special Commission on Intercountry Adoption. 3–14 February 1992.

[14] See Ekström, Privata adoptioner—hur kan man veta vad som är rätt? *Att adoptera* 3/1990, p. 14.

## 2. ACT (1971:796) ON INTERNATIONAL LEGAL RELATIONS CONCERNING ADOPTION

### *2.1 Introduction*

The Act (1971:796) on International Legal Relations Concerning Adoption (hereafter referred to as *the 1971 Act*) contains the generally applicable private international law provisions on (a) jurisdiction, (b) choice-of-law concerning an application to adopt, (c) recognition of foreign adoption decisions, and (d) legal effects of adoption. These questions were only partly regulated by the previous legislation (Act 1904:26 p. 1 on Certain International Legal Relations Concerning Marriage, Adoption and Guardianship).

Intercountry adoptions in Sweden date back to the end of the Second World War. At first, it was a question of adopting children who had come to Sweden during the war as foster-children from countries involved in the war, and who in many cases had lost their close relatives.[15] In the 1950s, initiatives for intercountry adoption were taken by private persons whose work abroad or personal contacts had put them in touch with children who needed parents. Intercountry adoption started on larger scale in the late 1960s, mostly because by then very few Swedish children were available for adoption.[16] At that time, the first intercountry adoption organizations were founded, and the first adoption contacts established with foreign countries. As the prevailing private international law provisions relating to adoption were out of date, a law reform was initiated. This resulted in the 1971 Act, and several years later in the Act (1979:552) on Intercountry Adoption Assistance. Provisions concerning consent by a social welfare committee as a precondition for intercountry adoption were thereafter inserted in the Social Services Act (1980:620, section 25).[17]

[15] See NIA, Adoption in Sweden. Solna 1985, p. 1.

[16] This is due to a general acceptance of family planning, a comprehensive system of social insurance, and a generally high standard of living. Unmarried mothers are socially accepted. In the last few years, approximately half the children born in Sweden have been born to unmarried, but in the great majority of cases, cohabiting parents.

In internal cases the adoption, as a rule, concerns adoption of a stepchild. This is indicated also by a study made by the Commission on Guardianship, concerning all the applications to adopt made to the Stockholm District Court in 1987. Of 149 cases, 82 (55 %) concerned intercountry adoption, and 67 (45 %) were internal cases; of these, 46 cases concerned adoption of a stepchild (and in no less than 39 cases, the stepchild was an adult!), 6 cases adoption of a foster-child without family relation to the applicants, 6 cases adoption of a related child, 3 cases adoption of a child between one and two years of age and 6 cases adoption of an adult who had neither been a stepchild or a foster-child to the applicant nor was related to him or her. SOU 1989:100, pp. 283 f.

[17] The 1979 Act and sec. 25 of the Social Services Act are commented upon by Jänterä-Jareborg in Swedish National Reports to the XIIIth International Congress of Comparative Law, Montreal 1990. Uppsala 1990, pp. 48 f.

The 1971 Act was influenced by the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions. Sweden is, however, not a party to this Convention. The 1971 Act applies in relation to all states with the exception of cases covered by the 1931 Inter-Nordic Convention on Marriage, Adoption and Guardianship.[18] Sweden is a party to the Council of Europe Adoption Convention of 1967.

### 2.2 *Jurisdiction of Swedish courts*

The 1971 Act is based on the view that an application to adopt should be examined in the state to which the *applicants, i.e.* the prospective adoptive parents, are most closely connected. Thus, the application shall be considered by a Swedish court of law if the applicant or applicants are Swedish citizens or habitually resident in Sweden (sec. 1). But according to the same section, the application may be considered by a Swedish court even when the applicants lack such connection, if the Government has given permission for this. The *travaux préparatoires* to the Act indicate, however, that the permission needed is to be granted only in special circumstances, *e.g.*, if the person to be adopted is a Swedish citizen or habitually resident in Sweden.[19]

With regard to the above-mentioned conflicting interests concerning jurisdiction to grant adoption between the state of origin of the child and the receiving state (1.2), the grounds for jurisdiction according to the 1971 Act are not exclusive in the sense that they prevent recognition of a foreign adoption decision in a case where a Swedish court would have been competent to consider the application. This is relevant, because in many cases an adoption decision has been given in the child's country of origin when the child leaves for Sweden, or such a decision is expected to be given there later on. But as will be pointed out later on (2.5), the existence of a prior foreign adoption decision has not been regarded as preventing Swedish courts from examining adoption applications.

[18] This Convention was concluded between Denmark, Finland, Iceland, Norway and Sweden. The adoption provisions of the Convention are applicable only when both the adopter(s) and the child to be adopted are citizens of the contracting states *and* the adopter is habitually resident in such a state. The application to adopt is examined in the contracting state where the adopter is habitually resident, in accordance with the law of that state. An adoption decision made under the Convention is automatically recognized in the other contracting states; these have no right to lay down conditions for recognition (Art. 22).—The Convention does not regulate the legal effects of adoption.

[19] Prop. 1971:113, p. 29.

### *2.3 Choice of law*

The 1971 Act explicitly prescribes that an application to adopt in Sweden must always be considered in accordance with Swedish law (sec. 2(1)). An adoption granted in Sweden by a Swedish court is always a full, irrevocable adoption.

The Code on Parenthood and Guardianship, Chapter 4, lays down the following conditions for the court's permission to adopt:[20]

a) The prospective adoptive parent(s) must normally be at least 25 years old; in special circumstances 18 is the minimum age. A married couple may adopt only jointly, and only married couples may adopt jointly.
b) The child's biological parents or legal guardian must have consented to an adoption.
(c) No payment or similar consideration has been given or promised for the adoption.

The court has a duty to examine whether the adoption is suitable. Permission is not given unless the adoption is found to benefit the child, and the applicant has brought up or wishes to bring up the child, or there is special reason for adoption because of the particular relation between the applicant and the child.[21] In Swedish law, the purpose of adoption is to establish a permanent parent-child relationship. A desire to improve the living conditions of a child is not in itself a sufficient ground for adoption.[22] If the application concerns adoption of an adult, or a person slightly under age, whom the applicant has not brought up, there is a risk of adoption being used as a means of circumventing immigration regulations, when a residence or work permit would not otherwise be obtainable. In such cases, there must be special reason for adoption because of the personal relation between the applicant and the person to be adopted. Normally, this rela-

[20] The court's adoption decision uses the language of permission to adopt, which indicates a prior legal act of adoption performed by the applicant(s). In practice, this "adoption" coincides with the filing of the application to receive permission to adopt.

[21] Code of Parenthood and Guardianship, Ch. 4, sec. 6.

[22] A number of cases, where a couple of foreign origin but habitually resident in Sweden have applied for adoption of a close relative (brother, sister, nephew) of age or slightly under age, living in the country of origin of the spouses or one of them, have been tried by Swedish courts of appeal after a refusal by a district court to permit the adoption. As a rule, the courts of appeal have also refused to grant permission to adopt, the reason being that the relation between the applicants and the person to be adopted could not be considered comparable to a normal parent-child relation. See Jänterä-Jareborg (fn. 17), p. 52.—In NJA 1991 s. 194, a case concerning adoption of the wife's 22-year-old niece from Sri Lanka, the Supreme Court found this condition to be fulfilled and permission for adoption was granted.

tion should be comparable to a parent-child relation.[23]

In drafting the 1971 Act it was considered to be of little importance whether a Swedish adoption decision concerning a child who has left its country of origin for Swedish adoption was recognized in that country or not.[24] The child would, as a rule, grow up in Sweden and there would rarely be reason to suppose that the child would in the future emigrate to its country of origin. Caution was, however, found necessary where there is a risk of such future emigration. Therefore sec. 2(2) of the Act provides for an exception from a pure *lex fori* approach. If the application concerns a child under the age of 18, regard shall in particular be paid to whether the applicant or the child is, through citizenship, habitual residence or otherwise, connected with a foreign state and it would involve considerable inconvenience for the child if the adoption were not to be valid there.[25] The law of the foreign state is considered by the court on its own motion. It follows that an application can be refused even when the requirements of Swedish domestic law are fulfilled, if invalidity of the adoption in another country would create serious difficulties for the child. But if the court finds the advantages of the adoption to outweigh the disadvantages of the adoption not being recognized in another state to which a party is closely connected, the adoption will be permitted.[26]

[23] See NJA 1989 s. 67, a case tried by the Swedish Supreme Court, where the application of a single Swedish man to adopt a young man from Gambia was granted. The applicant had come into contact with the young man during a visit to Gambia in 1980 when the latter was a boy of 12 years. Since then he had contributed to the boy's maintenance, financed his education, and been in regular contact with him. In 1982 he had adopted the boy in accordance with the local tradition. The boy had stayed with him in Sweden during summer holidays, and was also staying with him at the time of the court proceedings. The applicant had made his will in favour of the boy who was also the beneficiary of his insurances. In its decision, the Supreme Court emphasized that in a case like this there must be very strong reasons for adoption, to eliminate the risk of adoption being used as a means of circumventing other legal provisions. The circumstances must clearly indicate that there is special reason to create a family relation between the parties. In the opinion of the Court, contrary to lower Courts, the relationship in question was such that it could be compared to a normal relation between a father and a son. The aim of the adoption, which was deemed to be in the interest of the young man, was to strengthen this relationship rather than to give him a financially secure life in Sweden. See also NJA 1991 s. 194.

[24] See Prop. 1971:113, pp. 11, 30 f.

[25] Similar provisions are found in all the Nordic adoption acts. See also, *e.g.*, Art. 77(2) in the 1987 Swiss private international law code.

[26] In NJA 1985 s. 651, a case concerning permission to adopt a child from Tanzania, one problem was that a Swedish adoption would not be recognized in Tanzania where the child and one of the applicants (the husband) were citizens and where the child was habitually resident. The Supreme Court did not consider the invalidity of the adoption in Tanzania an obstacle to granting adoption since the applicants intended to remain in Sweden and bring up the child there. See Jänterä-Jareborg (fn. 17), p. 52.—In NJA 1991 s. 21 a Moroccan couple habitually resident in Sweden applied for permission to adopt the husband's 13-year-old

It is interesting to compare the 1971 Act with the previous law in this respect. A foreign citizen could be adopted in Sweden only if the adoption was recognized in the adoptee's country of origin (in the sense of country of citizenship). This rule was found to complicate and even prevent adoption of foreign children, even where the adoption as such was considered to benefit the child. In practice, naturalization of foreign children was used as a means of evading this obstacle.[27] After the child had acquired Swedish citizenship, the adoption could be carried out in Sweden without regard to the law of the country where the child had previously been a citizen. Such a dubious procedure is unnecessary under the 1971 Act.

### *2.4 Recognition of foreign adoptions in general*

The 1971 Act regulates only adoptions where a *decision* has been issued by a court or other authority.[28] A precondition is that the foreign decision creates a relationship comparable to a Swedish adoption.[29] Sec. 3 states:

> "A decision concerning adoption which has been issued in a foreign state shall apply in Sweden, if the applicant or applicants were citizens of or were habitually resident in the foreign state when the decision was issued and, where the adoptive child was a Swedish citizen or habitually resident in Sweden, the adoption has been approved by the Government or an authority designated by the Government.

nephew, habitually resident in Morocco. The child's biological parents, who were unable to take care of him, had transferred custody to the husband in accordance with Moroccan customary law. A Swedish adoption decision would not have been regarded as valid in Morocco. Although it was possible that the applicants would in future return to Morocco, permission for adoption was granted since according to Moroccan law the child formed part of the applicants' household. In RH 1989:86, the Spanish stepfather's application to adopt his wife's son, who was a Swedish national, was refused because the adoption would not have been recognized in Spain where the family was habitually resident.

[27] See Prop. 1971:113 p. 25.

[28] It is an open question whether other types of adoption, such as private adoption agreements between the biological parents and the adopters, may be considered valid in Sweden. There is no case law on the matter. In the legal writing recognition has been suggested by Bogdan on the condition that the parties had a close connection to the country where the adoption validly took place. See Bogdan, *Svensk internationell privat- och processrätt*, 4th ed., Stockholm 1992, p. 208. Bogdan's recommendation is based on analogy from statements on recognition in Sweden of private divorce agreements, made in *travaux préparatoires* to another Act—a question which in drafting that Act was intentionally left to be answered by case law.

[29] See Prop 1971:113, p.45.

> The Government or authority designated by the Government may also in other cases decree that a decision concerning adoption issued in another country shall apply in Sweden."

As already mentioned in connection with jurisdiction (2.2), the 1971 Act is based on the view that an application to adopt should be examined in the state to which the applicants are most closely connected. The competent authorities in that state are normally considered to have the best qualifications for examining an adoption application. It has been feared that the examination might be less thorough when adoption takes place in another country, *e.g.* the child's country of origin.

The main rule of sec. 3 is that a foreign adoption decision is recognized in Sweden if the applicant or applicants were citizens of, or habitually resident in, the country of issue. In such cases, the adoption is normally, subject to public policy considerations, regarded as automatically valid in Sweden, without any recognition procedure.[30] If spouses adopt, both must have had the required type of connection to the country where the decision was issued. It is not necessary that both of them have the same type of connection.[31]

The main rule is modified where a foreign adoption decision concerns a child who was a Swedish citizen or habitually resident in Sweden. In such a case a further condition for recognition is that the adoption has been approved by—in practice—the *Swedish National Board for Intercountry Adoptions (NIA)*.[32] If the child is under age, the conformity of the adoption with the best interests of the child is to be examined. If the child is of age at the time of adoption, a formal examination is usually sufficient. This procedure was considered necessary as a safeguard against negative effects of the general applicability, *i.e.* in relation to all states, of the 1971 Act.

In a typical Swedish intercountry adoption case, the adoptive parents lack such connection to the country of issue as is required for automatic recognition. Instead, the adopters are Swedish citizens, habitually resident in Sweden, which means that they, in accordance with section 3(2) of the 1971 Act, must apply for a declaration that the foreign adoption decision is

[30] A public policy provision is included in sec. 6 of the 1971 Act: "An adoption decision which has been issued in a foreign state may not be regarded as valid in Sweden if this would be manifestly incompatible with the basic principles of the Swedish legal order."

[31] See Prop. 1971:113, pp. 10, 12.

[32] *NIA* is an executive body under the Ministry of Health and Social Affairs. It was set up by the Government in 1973 (as the Swedish Council for Intercountry Adoptions) to act as a general public agency in charge of intercountry adoptions. In 1981, *NIA* acquired the status of a national board. See *NIA*, Adoption in Sweden. Solna 1985, p. 3.

valid in Sweden.[33] This raises the question on what conditions such a declaration is made.This question will be considered in the following.

### *2.5 Approval of foreign adoption decisions in accordance with sec. 3(2)*

The beginning of large-scale inter-country adoption in Sweden around 1970 coincided with a domestic law reform concerning adoptions.[34] The most important results of this reform were, first, that the possibility to revoke adoption was abolished, and, secondly, that previous "simple" adoptions were transformed into "full" adoptions (full adoptions were introduced in Swedish law in 1958).[35] Since 1971, full, irrevocable adoption has been the sole adoption form in Swedish law. A provision was inserted in the Code of Parenthood and Guardianship (Ch. 4, sec. 8), stating that an adopted child is legally considered as a child of theadopter (s) and not as a child of the biological parent(s). This means that an adopted child enjoys the same rights as children born within the adopter's family,[36] and that the legal ties to the child's biological family are completely cut off.

This development in Swedish domestic law forms, together with the purposes behind the 1971 Act, the background against which the application of sec. 3(2) must be studied. *Travaux préparatoires* to Swedish legislation are normally given much weight in the Swedish legal system, although they can hardly be considered as binding. As there is little Swedish legal materi-

[33] In addition, Swedish courts have the right to prejudicially examine the validity of a foreign adoption where it is no longer possible to apply for approval by *NIA*. This is the case *e.g.*, when the adopter(s) and the adoptee are dead, and the validity of the adoption is of importance, *e.g.*, in a succession case. If only one of the parties is alive, he or she still has the right to apply for approval by *NIA*. This is to be preferred to a preliminary examination, the legal effects of which are limited to the case at hand since the standpoint taken is not binding in other legal connections. For this reason the decision given by the Social Insurance Court, *Sof 2/1979 s. 30*, concerning the right of a five-year-old child adopted in Thailand to national (supplementary) orphans' pension after the death of the Swedish adoptive mother, can be criticized. The Thai adoption was neither automatically valid in Sweden, according to sec. 3(1) of the 1971 Act, nor had it been examined and approved in accordance with sec. 3(2). The Social Insurance Court, however, recognized the Thai adoption for the purpose of granting the requested pension, without requiring approval of the adoption in accordance with sec. 3(2). See Pålsson, *Svensk rättspraxis i internationell familje- och arvsrätt*, Stockholm 1986, p. 98 f.

[34] See Agell & Saldeen, *Faderskap, vårdnad, adoption*, 5th ed., Uppsala 1991, p. 79 f.

[35] Adoption was introduced into Swedish law in 1917 but existed until 1958 only in the form of "simple adoption". Thus, the legal effects were not the same as if the adoptee had been born as a child in wedlock to the adopter. Certain legal relations between the child and its biological parents remained, and the adoption could be revoked by court decision.

[36] In Swedish law, children born out of wedlock enjoy the same legal rights as children born in wedlock.

al on the topic, in what follows special attention will be paid to statements made in the *travaux préparatoires* to the 1971 Act.

From January 1, 1972 when the Act entered into force, until the end of 1976, the Government decided on the validity of foreign adoption decisions. From January 1, 1977, this task was delegated to the Swedish National Board of Health and Welfare. In 1981, *NIA* was detached from this Board, and became an independent governmental agency, in charge of approving foreign adoption decisions. A declaration by *NIA* may be appealed to the Government by the parties. After the adoption decision has been declared valid in Sweden, it is recognized for all purposes with effect from the date of issue in the foreign country.

According to the *travaux préparatoires* to the 1971 Act, a declaration on the validity of a foreign adoption decision in accordance with sec. 3(2) is to be preceded by an examination. This examination aims at checking, *first,* that the foreign decision creates a relationship comparable to a Swedish adoption. For this to be the case it is, however, not necessary that the legal effects of the foreign decision in the state where it was issued are the same as the legal effects of a Swedish adoption decision. But the foreign decision must create a relationship the essence of which is that the adopter has permanently taken the adoptee as his or her child. *Secondly,* it must be checked that recognition of the decision is not contrary to Swedish *ordre public*, and, *thirdly,* that the adoption is in the best interests of the child.

During the first ten years, a liberal attitude was taken. If the purpose of the adoption was comparable to that of a Swedish adoption and if recognition of the foreign decision was found not to be contrary to Swedish public policy, foreign adoption decisions were declared valid in Sweden without regard to whether they involved simple or full adoption.[37]

This practice came to an end when *NIA*, in 1982, decided not to approve foreign decisions that involved simple adoption. This practice is still followed. Adopters are advised to apply for a second (full) adoption at a Swedish district court, as if no prior adoption decision existed. As expressed in a circular letter to district courts and social welfare committees, the purpose of this change was to "eliminate certain minor legal risks" by requiring acquisition of a Swedish adoption decision.[38]

[37] See Hellberg, *Erkännande av internationella adoptionsbeslut*, Uppsala 1988, p. 119.

[38] *NIA*, Circular letter to Swedish district courts and social welfare committees. October 1982.

Table 2. *Foreign adoption decisions approved by NIA* in 1981–1992[39]

| | | | |
|---|---|---|---|
| July 1, | 1981– | June 30, 1982 | 694 |
| | 1982– | 1983 | 306 |
| | 1983– | 1984 | 186 |
| | 1984– | 1985 | 247 |
| | 1985– | 1986 | 278 |
| | 1986– | 1987 | 287 |
| | 1987– | 1988 | 311 |
| | 1988– | 1989 | 327 |
| | 1989– | 1990 | 361 |
| | 1990– | 1991 | 439 |
| | 1991– | 1992 | 443 |

*NIA*'s policy has been critized as being unfounded and contrary to the purposes of the 1971 Act.[40] It is also regarded as unclear what actually was meant by "minor legal risks" involved in the approval of foreign simple adoptions.[41] The countries of origin may have an interest in an originally simple adoption not being transformed into a full adoption by a new court decision in the receiving country. It has been argued that it is a completely different matter to consent to a form of adoption which maintains legal ties to the biological family than to consent to a type of adoption which cuts these. The expectations of the biological family should not be frustrated.[42]

Both the policy prevailing till 1982 and the one pursued thereafter can be seen as fully plausible interpretations of the 1971 Act. Sec. 3(2) does vaguely state that foreign adoption decisions "may" be declared by the Government or an authority designated by the Government to apply in Sweden, without establishing a duty to do so in any circumstances (see above, Sec. 2.4). Some guidance is given in the *travaux préparatoires*, but these are not binding, and in any case, they leave considerable room for discretion.

As mentioned above (2.3), in drafting the 1971 Act it was considered to

[39] The author is grateful to Cissi Schubert and Lars Bertil Svensson, *NIA*, for providing this information. See also *NIA, Annual Report* 1990/91, p. 11. The increase in the number of decisions approved by *NIA* is explained by the fact that an increasing number of the foreign adoption decisions create a strong adoption. For the total number of adoptions, see above (1.1) table 1.

[40] See Hellberg, *op.cit.* (fn. 37), pp. 120 ff.

[41] *Ibid.*

[42] The French Cour de Cassation ruled in two 1990 judgements that where the court in the country of origin (Brazil) had determined that consent has been given only for a simple adoption, that determination should be respected. In French law, both simple and full adoption are available.—Concerning the problem of the nature of the consent, see van Loon's interim report at the 64th Conference of the International Law Association at Brisbane, Australia, 19–25 August 1990.—The Hague Preliminary Draft Convention requires that the necessary consents for adoption have been given in full knowledge of the effects of the adoption in the receiving country (Art. 4).

be of little importance whether a Swedish adoption decision would be regarded as valid in the child's country of origin. Conversely, the existence of a prior foreign adoption decision has not been regarded as preventing Swedish courts from examining adoption applications, notwithstanding the availability of the administrative procedure referred to in section 3(2).[43]

In Swedish domestic law, adoption is irrevocable, and all legal ties to the child's biological family are cut. Since full adoption is considered to be in the best interests of the child, why should a simple adoption be accepted where the adoptive parents are most closely connected to Sweden, where the child will grow up? Intercountry adoption, it can be argued, is always a very dramatic event, since it means that a child leaves its country of origin to grow up in a foreign country, as a child to strangers, often in a drastically different culture. In most cases, the child will have no contact at all with its biological family. Nor is it unusual that the child has been abandoned, and thus the biological family is unknown. In such circumstances, there is no reason to uphold a legal relation between the biological family and the child.[44] In addition, the wording of section 4 of the 1971 Act which deals with legal effects of an adoption (see 2.6 below) surely makes it doubtful whether a declaration of a simple foreign adoption as valid in Sweden can be in the best interests of the child where a Swedish adoption decision is available. The present author considers full adoption the only suitable form of intercountry adoption.

It may be that *NIA*'s decision not to approve foreign simple adoptions was influenced by the restrictive practice of many other receiving countries with regard to decisions issued in the child's country of origin. In many receiving countries, a second adoption is regarded as necessary.[45]

The author is personally convinced that Swedish parents who have adopted a child from abroad, and the children concerned, would consider the present policy of *NIA* to be preferable, even though it means going through a double adoption procedure, *i.e.* an adoption procedure in two countries, and a time delay (a court decision takes longer than a decision from *NIA*). The court procedure in Sweden is simple, and from the

[43] This practice seems to have been in the beginning a result of the lack of reliable information on the nature and effects of foreign decisions. See Hellberg, Internationella adoptioner—aktuella problem mot rättshistorisk bakgrund, *SvJT* 1977, p. 733 f.

[44] On the other hand, it is important that the adoptive parents give the child their support if the child later on wants to find its biological parents and have some contact with them. In this respect, the adoption organizations, etc., have much educational work to do. It is also important that the child is informed early about the adoption. In Sweden, the Commission on Guardianship (SOU 1989:100) has proposed a legal provision that the adopter(s) shall inform the child of the fact that it is adopted as soon as it is suitable.

[45] See van Loon, (fn 1) p. 132 f.

applicants' point of view even inexpensive.[46] To have the child legally fully integrated in the adoptive family can emotionally mean very much to the parents (and later on also to the child) even if there is little risk of the adoption ever being revoked in another country, or of the child's biological family claiming legal rights in relation to the child.

### *2.6 The legal effects of adoption*

The 1971 Act, sec. 4 states:

> "When a decision concerning adoption which has been issued in a foreign state shall apply in Sweden, the adoptive child is to be considered as a child in wedlock of the adopter with regard to custody, guardianship and maintenance.
>
> With regard to the right of inheritance in adoptive relationships, there shall apply what is in general prescribed concerning applicable law on the right of inheritance, irrespective of what law was valid at the adoption. If the adoption has taken place in Sweden the adoptive child is, however, always to be regarded as a child in wedlock of the adopter.
>
> In cases where the adoptive child does not possess a right of inheritance after the adopter, it may in accordance with what is deemed reasonable be determined that a contribution towards the maintenance of the child shall be paid from the balance in hand of the deceased adopter's estate."

When an adoption decision issued abroad is recognized in Sweden, the child is considered as a child in wedlock of the adopter, with regard to custody, guardianship and maintenance, but not necessarily with regard to inheritance rights: here applies what is in general prescribed concerning law applicable to inheritance, irrespective of what law was valid at the adoption.

To consider the child to be born in wedlock to the adopter does not mean that the questions of custody, guardianship and maintenance must always be examined in accordance with Swedish domestic law. What law is to be applied is, instead, determined by the Swedish choice-of-law rules which, depending on the actual connecting factor, may refer to foreign or to Swedish law. But even if foreign law is applicable, the child must in the respects mentioned always be treated as the adopter's child in wedlock. If the applicable foreign law contains substantially different provisions for adoptive children and for children born in wedlock, the latter provisions are to be applied.[47]

With regard to guardianship, there are written choice-of-law rules that

[46] The court decides on the question on the basis of documents provided by the applicants and the local social welfare committee. Neither the applicants nor the social welfare committee need to be present at the court proceedings. In 1992, the costs to the applicants were 275 Swedish crowns.

[47] See Prop. 1971:113, pp. 35, 38

point partly to the law of the nationality and partly to the law of the habitual residence of the child.[48] As to custody and maintenance, the written choice-of-law rules are few and of limited scope. Case law reveals, however, that the law of the country of the child's habitual residence is normally to be applied.[49] Thus, if the child is habitually resident in Sweden, the legal effects of adoption on custody and maintenance will be determined in accordance with Swedish domestic law.

Sec. 4 of the 1971 Act is based on the view that *inheritance rights* are less important to the child than custody, guardianship and maintenance. It is accepted that the law applicable to succession, contrary to Swedish law, may deny an adoptive child the same inheritance rights in relation to the adopter or the adopter's family as those of the adopter's children born in wedlock. In present Swedish conflict-of-law rules, succession follows the nationality principle which means that the law of the country where the deceased was a national at the time of his death is applied.[50] A situation where the adoptee does not possess full inheritance rights can in Sweden occur only when the deceased is a foreign citizen.

The provision in sec. 4(3), according to which a contribution to the maintenance of the child can be paid from the balance of the adopter's estate, has become obsolete as a result of a domestic law reform (Act 1978:855).[51]

A provision which with respect to inheritance rights treats a foreign adoption differently from a Swedish one can be criticized. It must, however, be seen against the background of both the present Swedish choice-of-law rules relating to succession, and the differences in domestic succession laws concerning the effects of adoption, which have to do with different concepts of adoption. In drafting the 1971 Act, it was found unacceptable

[48] See Act (1904:26 p. 1) on Certain International Legal Relations concerning Marriage and Guardianship, Chapter 4.

[49] See Pålsson (fn 33), pp. 115 ff. and 158 ff.

[50] Inheritance rights in inter-Nordic relations, *i.e.* between Denmark, Finland, Iceland, Norway and Sweden, are an exception. They are specially regulated by an inter-Nordic Convention of 1934. The decisive connecting factor is the habitual residence of the deceased. In 1987, a legislative commission set up under the auspices of the Ministry of Justice, known as the Family Law Reform Commission, presented a draft bill concerning private international law questions in family law and succession law (SOU 1987:18). This proposal is clearly in favour of solutions essentially based on the domicile principle, *i.e.* habitual residence. If this proposal is adopted, it will have as a consequence that inheritance rights will in Sweden normally be determined in accordance with Swedish domestic law, since the deceased will be likely to be habitually resident in Sweden at the time of his or her death. It will then no longer matter whether the adoption decision was issued in Sweden or in another country. If the deceased was habitually resident in a foreign country, and the law of this state discriminates against adoptive children, this law should be set aside as being contrary to Swedish public policy, at least with regard to property in Sweden. See SOU 1989:100, p. 195.

[51] See SOU 1987:18, p. 293.

that an adoption that takes place in Sweden would not result in full inheritance rights in relation to the adopter.[52] It was also considered contrary to the Swedish outlook on adoption that a foreign national, habitually resident in Sweden, could maintain a succession relation to a child whom he or she had adopted away by decision of a Swedish court. A further aim was to prevent the child from maintaining double inheritance rights, *i.e.* in relation to both the adoptive family and the biological family. The contents of this provision, perhaps in combination with the fact that not all legal effects of adoption are regulated in the 1971 Act, is certainly an important reason for *NIA*'s 1982 policy decision (see 2.5 above).[53]

## 3. THE 1989 LAW REFORM PROPOSAL

### *3.1 Background and purpose of the proposal*

In 1989, a legislative commission, appointed by the Government and known as the Commission on Guardianship, presented a report including a draft bill ("Questions of Adoption", SOU 1989:100) which in different ways, including liberal provisions concerning recognition of foreign adoptions, aims at strengthening the legal position of the child in intercountry adoption. The Commission was especially concerned by the fact that, *in present law,* the legal position of children arriving in Sweden for adoption remains uncertain for a considerable period. This is the case both where an adoption decision has already been issued or is expected to be issued in the child's country of origin (in that case the decision is valid in Sweden only if approved by *NIA,* section 3(2) of the 1971 Act) and where the adoption is to take place at a Swedish court.

Questions of custody and duty to maintain the child, for example, remain open until there is an adoption decision which is valid in Sweden. Swedish case law holds that foreign decisions on custody and maintenance are recognized only where an international convention requires this.[54] It has also been held that until the adoption is final, the Swedish rules concerning adoptive parents' duty to maintain an adopted child are not

[52] See Prop. 1971:113, p. 36 f.

[53] See Hellberg (fn 37), pp. 120 ff. See also SOU 1989:100, p. 194 and Bogdan, (fn 28), p. 209 f.—The Swedish Citizenship Act (1950:382) has recently (by Act 1992:392) been changed with the effect that adoption by a Swedish citizen of a child under the age of twelve *automatically* confers Swedish citizenship upon the child, if (a) the child is adopted in Sweden, Denmark, Finland, Iceland or Norway, or (b) the child is adopted through a foreign adoption decision which is recognized in Sweden in accordance with the Act (1971:796) on International Legal Relations Concerning Adoption.

[54] See *Pålsson* (fn 33), pp. 122 ff. and 181 ff.

applicable. Also inheritance rights after the adopters are dependent on an adoption decision valid in Sweden. Especially problematic is it if the planned adoption for some reason is not carried out, *e.g.*, because the prospective adoptive parents divorce or die before the adoption is final. Here a *probationary period,* the successful completion of which many countries of origin have specified as a condition for adoption, has advantages but is also problematic in that it postpones the finalization of the adoption.

*NJA 1977 s. 358,* a case tried by the Swedish Supreme Court, concerned the duty of a prospective adoptive parent to pay maintenance to a child where this person, because of divorce, no longer had the child in his care. A Swedish married couple had received a one-year-old child from the Philippines for adoption in Sweden, after approval by the social welfare committee and after having accepted an offer mediated by the Swedish National Board of Health and Welfare to adopt this child.[55] A couple of years later, the spouses divorced, and the planned adoption could not be carried out. In connection with proceedings for legal separation preceding the divorce, the wife was appointed legal guardian of the child, and maintenance was, on behalf of the child, claimed from the husband. The provisions in the Code of Parenthood and Guardianship concerning the duty of adoptive parents to maintain their adoptive child were found not to be applicable. The Supreme Court stated, however, that in principle the spouses were to be considered to have bound themselves to support the child until the adoption was carried out. On the other hand, they had assumed that the child would be their mutual foster child, later to be adopted by them jointly, and after the divorce this could not occur. After the legal separation, the wife alone had been foster parent and legal guardian. In these circumstances, the husband was considered not to have a duty to pay maintenance to the child.[56]

To mitigate the negative effects of a lengthy adoption procedure, the Commission proposes that prospective adoptive parents shall be regarded as the child's guardians, and have a legal duty to maintain the child. A decision giving the prospective adoptive parents custody of the child, issued in the child's country of origin, shall be automatically recognized in Sweden. Where there is no such decision, a custody order by a Swedish court must be obtained. Further, receiving a child from abroad for adop-

[55] Until the Act (1979:552) on International Adoption Assistance entered into force, persons wishing to adopt a child from abroad could turn directly to this Board (of which *NIA* then formed a part) for adoption assistance. By the 1979 Act, this function was transferred to authorized adoption organizations. See Prop. 1978/79:108, p. 7.

[56] For comments on this decision, see Agell, *Underhåll till barn och make* (Maintenance to Child and Spouse), Uppsala 1979, p. 13 f.

tion creates a legal duty to maintain the child. The Commission found it unnecessary to connect other legal effects, such as inheritance rights, to a planned intercountry adoption.

### *3.2 Jurisdiction of Swedish courts*

The question of conflicting interests between the state of origin of the child and the receiving state in the granting of adoption has been touched upon earlier (1.2). A closely related question is the effect in the receiving state of an adoption decision issued in the former state.

According to the proposal, an application to adopt may be considered by a Swedish court if the applicant or applicants or *one of them*, or the person to be adopted, is habitually resident in Sweden. If an applicant, or the person to be adopted, is a Swedish citizen habitually resident abroad, the application may be considered by a Swedish court on condition that the authorities in the state of habitual residence lack jurisdiction.

As in present law, the existence of a ground for jurisdiction of a Swedish court does not prevent recognition of a foreign adoption decision. On the contrary, the proposal pays special attention to the fact that many countries of origin require that the child is adopted there before it leaves the country or later on.[57] If adoption proceedings are already pending in another state, *i.e.* normally the country of the origin, an application to adopt made to a Swedish court must be dismissed or stayed. Only if it would be contrary to the best interests of the child in such a case to await a foreign decision, or if there is other special reason to do so, may the application be considered by a Swedish court. The case where proceedings in a foreign state take a very long time is mentioned as an example.[58]

### *3.3 Recognition of foreign adoption decisions*

#### *3.3.1 General remarks*

The most interesting part of the Draft Bill is the proposal according to which foreign adoption decrees, subject to some conditions, are automatically recognized in Sweden as adoptions in accordance with Swedish law.

The Commission proposes that as a main rule, a final adoption decision given by a foreign court or other authority shall automatically be regarded as valid in Sweden, if

[57] Most Latin American countries, several Asian countries such as Sri Lanka and Viet Nam, and several European countries such as Poland, Romania and former Yugoslavia, belong to this group.

[58] SOU 1989:100, p. 253.

(a) the decision has been issued or is regarded as valid in the state where the adopter, the adopters, or the child, were habitually resident at the time of the decision, or
(b) the court or authority otherwise, because of the child's previous habitual residence, had reasonable ground for deciding on the matter.[59]

Irrespective of whether the decision created a "full" or a "simple" adoption in the state where the decision was given, the adoption shall be regarded as an adoption in accordance with Swedish law, *i.e.* as a full adoption. No condition of reciprocity is laid down, and it is considered irrelevant what law has been applied. Instead a purely jurisdictional test is carried out.

This proposal is remarkable in many ways. First, it greatly enlarges the scope of automatic recognition of foreign adoption decisions by covering all the typical cases of intercountry adoption where a decision has been issued abroad. Secondly, it means that there is no longer considered to be a need to have foreign adoption decisions examined by a Swedish administrative authority (*NIA*). Thirdly, where a foreign adoption is considered valid in Sweden, it is always regarded as a full adoption. This solution aims at making a further adoption procedure in Sweden unnecessary.

Also the 1971 Act provides for automatic recognition of foreign adoption decisions, on condition that the applicant or applicants were citizens of or habitually resident in the foreign state when the decision was given there, and the child was neither a Swedish citizen nor habitually resident in Sweden (see 2.4 above). This rule is based on a traditional view, prevailing in many receiving countries, according to which the authorities in the state to which the *applicants* are connected have the best qualifications for considering an application to adopt.[60]

As already mentioned, the proposal aims at strengthening the legal position of the child. In cases where an adoption decision is issued in the child's country of origin before the child leaves that country, or a decision is issued there shortly thereafter, an automatic recognition is, indeed, an

[59] It is not altogether clear whether this rule is meant to cover contractual adoption approved by a court. The Commission emphasizes that the rule deals with adoption decrees issued by a court or other authority. Purely privately administered adoptions fall outside, even if they have been registered by a notary public. See 1989:100, p. 249. In the present author's opinion, the purpose of the proposal to widely recognize adoptions granted abroad supports the notion of regarding a court approval of an adoption as equal to a court decision on adoption.—Recognition of adoption where there has been a citizenship connection to the state where the adoption was granted, was considered to lack practical significance. See SOU 1989:100, p. 190.

[60] It is interesting to note that the generally liberal 1987 Swiss Private International Law Code (Art. 78(1)) only provides for recognition in Switzerland of adoptions granted in a state where the adopter or adopters (= spouses) were domiciled or citizens.

improvement. As a result, the child will in principle immediately enjoy all the legal rights that an adoption creates, and no custodian needs to be appointed in Sweden for a provisional period.

### *3.3.2 Drawbacks of automatic recognition*

Large-scale *automatic recognition* of foreign adoption decisions also means that *NIA* will no longer examine decisions issued in the child's country of origin.

The Commission states that automatic recognition is justified only where the interests of the child and other persons involved have been properly attended to in connection with the adoption decision.[61] In the opinion of the Commission, such safeguards exist, at least in the major countries of origin. A further safeguard, the Commission points out, is that according to Swedish law, the prospective adoptive parents habitually resident in Sweden must apply for consent to adoption from their local social welfare committee, also when the adoption is carried out abroad. Such consent can be granted only if the applicants are found to be suitable as adoptive parents, *and* the form of mediation (to find a child) which they intend to use is regarded as reliable. (Social Services Act (1980:620), sec. 25(4).) With respect to the latter, the social welfare committee should obtain a statement from *NIA* if the applicants intend to use a private contact unless this is found to be manifestly unnecessary. If the investigation shows that there is reason to fear that the form of mediation is not reliable, no consent can be granted.

In this respect, the present author disagrees with the conclusions of the Commission, not least because the proposal does not prohibit independent adoptions.[62] As Table 1, above, shows, the number of independent adoptions has increased significantly during the last few years. The explanation given is that fewer children are today available for intercountry adoption. This has resulted in a very time-consuming adoption procedure, when a child is mediated through an adoption organization, also with increased costs. To avoid these drawbacks, applicants prefer to adopt independently.[63] In addition, political development in the former socialist Eastern

[61] See SOU 1989:100, p. 188.

[62] The number of independent adoptions decreased from about half of all adoptions to less than one fifth when the Act (1979:552) on Intercountry Adoption Assistance entered into force. A further decrease took place when sec. 25(4) was added to the Social Services Act in 1984.

[63] *NIA, Verksamheten med internationella adoptionsfrågor.* Memorandum addressed to the Government 1991-05-29, p. 3.

European countries has greatly facilitated independent intercountry adoption from these countries. Thus, in 1991 at least 180 children came to Swedish adoptive families from Eastern Europe without the mediation of a Swedish adoption organization.[64] It is possible that this trend will continue.

As critics have pointed out, it is often extremely difficult to judge the reliability of the form of mediation involved in an independent adoption, especially in situations where the adopters have come in contact with the child through a private person—or a lawyer—and an agency or an authority is called in only thereafter.[65] What is needed, but seldom available, is thorough information of the child's background and the mediation procedure as a whole. It has been suggested that the form of mediation should be regarded as unreliable as soon as a private person or a lawyer is acting as an intermediary.[66] The Commission seems to be over-optimistic in concluding that the interests of the child and other persons involved are already properly considered in connection with the adoption decision. It seems to ignore the lack of balance between the parties, the enormous work load of the authorities in the countries of origin who may have to deal with thousands of cases annually, and the low priority adoption decisions have in many of these countries.[67]

Further, the intended general applicability of the proposed Act, *i.e.* in relation to all countries, may prove problematic. According to the preliminary Hague Draft Convention, *e.g.* an adoption must be certified by the competent authority of the state of adoption as having been made in accordance with the Convention, before it can be recognized in the other *contracting states* (Art. 22). What is the point of giving up such an uncomplicated procedure as sec. 3(2) of the 1971 Act offers, where *NIA* for all legal purposes decides on the validity of foreign adoption decisions in Sweden? The small delay this procedure causes for the adoption to be

[64] *NIA, Utomnordiska barn some invandrat till Sverige för att senare adopteras under 1991 och 1990* (above, note 6).

[65] See the dissenting opinion of an expert attached to the Commission, Elisabet Sandberg, representing the biggest authorized adoption organization in Sweden; SOU 1989:100, pp. 287 ff. In Sandberg's opinion, independent adoptions should as a rule be prohibited by law, and consent to intercountry adoption be granted only where the adoption takes place through mediation by an authorized adoption organization. Also the memorandum by *NIA*, fn 63, points out that under the present regulation it is difficult for *NIA* to control the form of mediation when independent adoptions are concerned. It has, *e.g.*, happened that social welfare committees have granted an adoption consent in spite of objections, or failed to obtain a statement by *NIA* when this, according to the law, should have been done.

[66] SOU 1989:100, p. 290.

[67] See Sandberg's dissenting opinion; *ibid.*, p. 287 f. See also: Defence for Children International & International Social Service, Romania. The adoption of Romanian children by foreigners. Report of a Group of Experts on implementation of the Convention on the Rights of the Child regarding intercountry adoption. April 1991.

considered final in Sweden is a minor drawback compared to what could follow from the proposal.

The Commission suggests that the question whether there is an obstacle to recognition of a foreign adoption decision may be examined in *any* connection where the validity of the adoption is relevant.[68] In the first place, the Swedish National Immigration and Naturalization Board, and the national registration authorities, will have to decide on the validity of foreign adoptions, as well as the local social insurance offices responsible for payment of public benefits to which children are entitled. The validity of an adoption can also be of relevance in a case tried by a Swedish court. What a court or other authority has decided in this respect will not be binding upon any other authority. But since there may exist an interest in an authoritative, binding decree on the validity of the adoption, it is proposed that a party to the adoption, somebody else whose rights the adoption concerns, or a Swedish authority, may apply to the Svea Court of Appeal (Stockholm) for such a decree. Such an application is justified, *e.g.*, where there is doubt as to whether the foreign decision creates a family relationship comparable to adoption.

The proposal states the following grounds for non-recognition of a foreign adoption decision:

(a) a person who should have been heard has not been given the opportunity to give his or her opinion although this could reasonably have been done;
(b) a Swedish decision has been given concerning adoption of the same child;
(c) the decision concerns the same child as another foreign adoption decision, valid in Sweden, issued in proceedings which were initiated earlier than the proceedings resulting in the decision examined;
(d) proceedings concerning adoption of the same child are pending in Sweden; or
(e) proceedings concerning adoption of the same child are pending in a foreign country, and these proceedings were initiated earlier than the proceedings that resulted in the decision examined and can be assumed to result in a decision which is valid in Sweden.

Finally, a foreign adoption decision will not be recognized if to do so would be manifestly incompatible with Swedish public policy.

In a typical intercountry adoption context it is of utmost importance for the child and the adopters that there is nothing unclear about the validity

[68] SOU 1989:100, p. 192.

in Sweden, for all purposes, of the foreign adoption. Such is the effect of a declaration by *NIA* in accordance with the 1971 Act, section 3(2), and in the present author's view such a procedure should be preserved when Sweden is under no contractual obligation to recognise the foreign adoption by operation of law. The parties to an intercountry adoption are not best served by an arrangement which admits that the validity of the adoption may be tried every time the question is legally relevant.[69] (This could, indeed, be sufficient ground for applying to a Swedish court for a second adoption.) Such a solution also involves a risk of inconsistent decision-making. Considering the far-reaching legal effects of a full adoption (remember that all valid adoptions are to be regarded as full adoptions!) and the large group of persons whose rights and duties are affected (the child, its biological parents and their relatives, its adoptive parents and their relatives) it must be regarded as very unfortunate if the Svea Court of Appeal, maybe after several years, decrees the adoption to be invalid in Sweden.

As regards the proposed grounds for non-recognition, ground (a) is likely to be most important. Normally, only Sweden and the child's country or origin are involved, which means that proceedings will rarely be initiated and decisions issued in a third country.[70] Occasionally, a question may arise whether it would be manifestly incompatible with Swedish public policy to recognize a foreign "adoption" as constituting adoption, *e.g.*, in cases which indicate that the purpose was not to create a parent-child relationship. It can also happen that someone, perhaps after several years, claims that the adopter(s) illegally bought the child. Such questions should be examined immediately after issue of the foreign decision, and not years later, when it is difficult to obtain evidence, and the child is well adjusted to its new family.[71] "Trafficking in children" is a much discussed international problem, and it would be hypocrisy to believe that Sweden is completely

[69] Also the vague habitual residence concept in Swedish conflict of laws can cause difficulties. An example of this is NJA 1977 s. 706, where the (automatic) validity of the adoption was dependent on whether the adopters at the time of the adoption had been habitually resident in Liberia where the adoption took place.

[70] Such a situation can, however, occur in Sweden, *e.g.*, when a foreign couple living in Sweden has adopted a child in a state where they were habitually resident at the time of the decision, after which an adoption decision is issued in the state of the origin of the child. Which decision is recognized in Sweden will depend on where the adoption proceedings were initiated first. This question can turn out to be difficult to judge.

[71] Today, when an adoption has been mediated by an authorized Swedish adoption organization, this organization has a duty to ensure that the adopters promptly take the steps necessary to make the adoption valid in Sweden.

untouched in this respect.[72]

*NIA* must certainly be considered better qualified for deciding on the validity of foreign adoptions (as well as on the nature of the alleged "adoption") than Swedish authorities in general. What makes the question even more difficult is that children are today adopted to Sweden from approximately *70* countries![73] Conditions in many of these countries are in a state of flux. Even detailed instructions can soon be out-of-date.

In fact, the Commission mentions that different authorities may need to consult *NIA* or the Ministry for Foreign Affairs before deciding on the matter. All this strongly speaks for a procedure where foreign decisions issued in the child's country of origin should be approved by *NIA*. This arrangement should be preserved if nothing else follows from an international Convention ratified by Sweden (i.e. the Hague Adoption Convention under preparation, if Sweden joints it), at least with regard to independent adoptions granted in a country where the adopters were not habitually resident.[74] It also seems well-founded to try to make the check

[72] "Trafficking in children" is a broad concept and covers all illegal transfers of minors. See Lucker-Babel, Intercountry adoption and trafficking in children: an initial assessment of the adequacy of the international protection of children and their rights. *International Review of Penal Law* 1991, p. 800. See also van Loon (fn 1), pp. 84 ff.

[73] *NIA*, Utomnordiska barn som invandrat till Sverige för att senare adopteras under 1991 och 1990 (above, not 6).

[74] The rules on recognition in the proposal of the Commission on Guardianship bear a certain resemblance to the Finnish Adoption Act of 1985 and the Norwegian Adoption Act of 1986.

The Finnish Act (sec. 38) provides for automatic recognition of a foreign adoption, if (1) at the time of granting the adoption, the adopter or adopters were habitually resident in the foreign state or were citizens of that state, or (2) the adoption is regarded as valid in the state where the adopter or adopters were habitually resident at the time of the adoption, or (3) permission for adoption has, in accordance with the Act, been granted by the Finnish Council of Intercountry Adoption Affairs. Such permission is required when the adopter is habitually resident in Finland and the person to be adopted is younger than 18 years and not habitually resident in Finland. In other cases, a foreign adoption decision is valid in Finland only if it is confirmed by the Helsinki Court of Appeal.

According to the Norwegian Act (sec. 19) an adoption granted abroad is automatically valid in Norway if (1) the adopter or adopters at the time of granting the adoption were habitually resident in the foreign state or citizens of that state, or (2) the adoption is regarded as valid in the state where the adopter or adopters were habitually resident at the time of adoption. A person who is habitually resident in Norway may not adopt abroad without advance permission from the Ministry of Justice. An adoption in accordance with such permission is automatically valid in Norway (sec. 22).

There is, however, a significant difference between Sweden, on the one hand, and Finland and Norway, on the other. In the latter countries, but not in Sweden, all adoptions must be handled officially at both ends, either through governmental authorities or through officially authorized agencies. This also means better protection of the child's interest. In Finland, the number of intercountry adoptions is still very small. During the period 1985–1989, altogether 210 children have arrived in Finland for adoption, *i.e.* on average 40 per year. In Norway,

by *NIA* more thorough than it is today.

The Commission's proposal has, however, also to be seen against the background of a new trend in Swedish family conflicts of law to provide for recognition of foreign decisions by mere operation of law. This system has been adopted in the Act (1985:367) on International Questions of Paternity. The basic rule in this Act is that, subject to some conditions, a foreign judgement declaring a person's paternity or non-paternity of a child is automatically recognized in Sweden if, in the light of a party's domicile or nationality or some other connection with a foreign country concerned, there was reasonable ground for adjudicating the case in that country.[75] The validity of a foreign paternity order can be tried by the Svea Court of Appeal after application by a person who has been a party to the foreign proceedings or a Swedish authority. The advantage of the system is that double proceedings are avoided.

With regard to adoption decisions, this type of system appears unsuitable. To explain why, one might compare adoption decisions and paternity decisions, of which the latter in Swedish conflict of laws are already subject to such a system. Although an adoption decision in many respects resembles a paternity decision (or an acknowledgment of paternity), there is an essential difference. As regards a child available for adoption, *suitable* parents should be *chosen*, and there should be effective safeguards to ensure that the adoption takes place only in the best interests of the child and in appropriate circumstances. This type of reasoning is, in Swedish law, not applicable with regard to establishing paternity. The aim is to establish a *biological relation*, which means that choice and suitability are out of consideration.

It would be contrary to the purposes of the proposal if adoptive parents frequently, in order to achieve certainty once and for all, were to apply to the Svea Court of Appeal for a validity decree. To avoid this, and for other reasons mentioned above, *NIA* should remain in charge of validating foreign adoption decisions although—in the spirit of the proposal—it should no longer matter whether the foreign decision involved a simple or a full adoption. Such a system cannot be considered to be contrary to the interests of the countries of origin, since a second adoption will, as a rule, be avoided in Sweden.

since 1981, approximately 400 children have annually been received from abroad. See Buure-Hägglund, in *The Finnish National Reports to the XIIIth Congress of the International Academy of Comparative Law*, Montreal 19–24 August 1990. Helsinki 1990, p. 36, and the Finnish Government Bill, Prop. 1984:107, p. 6.

[75] See Pålsson, Rules, Problems and Trends in Family Conflict of Laws—Especially in Sweden, *Recueil des cours*, Volume 199 (1986-IV), p. 356 f.

### *3.4 Legal effects of foreign adoption decisions*

The proposal to treat foreign adoptions that are valid in Sweden as full adoptions is ingenious in many respects. It is a brilliant compromise where the concepts of adoption are different in Sweden and in the country where the adoption was granted. The state of origin may consider itself to have an interest that an originally simple adoption is not transformed into a full adoption by a new court decision in the receiving country. In Sweden, on the other hand, it is a basic legislative principle that the legal position of all children should be the same.[76] The proposal aims at guaranteeing full legal rights in Sweden to children adopted abroad.[77] A consequence must be that foreign provisions which discriminate adoptive children cannot be applied in Sweden. The solution also reflects a realistic view of how far the effects of Swedish law can reach. Hence, it is said that the adoption shall *in Sweden* be regarded as an adoption in accordance with Swedish law. How the adoption is characterized in the country where it was granted or in a third country, as well as what legal effects are attributed to it abroad, is irrelevant. On the other hand, it should be advisable to require that the persons, institutions and authorities whose consent is necessary for adoption have been duly informed of the effects of the adoption in Sweden.[78]

It can, of course, be argued that the legal position of the child is weaker

[76] The Finnish Adoption Act of 1985 is less explicit in this respect. The position in Finnish law seems, however, to be the same, since the principle of equality of all children is regarded as pertaining to the public policy of the Finnish legal order. See Buure-Hägglund (fn 74), p. 44 and Prop. (fn 74), p. 14.

According to the Norwegian Adoption Act of 1986, the Ministry of Justice may decide that a foreign adoption valid in Norway shall have the same legal effects as a Norwegian adoption (sec. 22).

A reflection on the German law may also be made. Although the private international law reform of 1986 introduced a special rule on the recognition of foreign decisions, adoption decisions included, German courts allow Germans who have adopted a child abroad to apply for a second adoption decision in the Federal Republic. This procedure has been motivated by the uncertainty concerning the legal effects in Germany of foreign adoptions and by the lack of a special recognition procedure. See van Loon (fn 1), pp. 134 ff., Jayme, International Adoption in German Law. *Report presented to the XIIIth International Congress of Comparative Law*, Montreal 1990, pp. 23 f., and Klinckhardt, *Zur Anerkennung ausländischer Adoptionen. Praxis des internationalen Privat- und Verfahrensrechts*, 1987, pp. 157 ff.

[77] It is interesting to compare the solution in the Swedish proposal with the solution adopted in Art. 78(2) of the Swiss Private International Law Code of 1987. According to the latter, foreign adoptions or similar measures which have effects substantially different from a parent-child relationship in Swiss law, are recognized in Switzerland only with the effects given to them in the country where they were granted. The purpose is to prevent recognition in Switzerland from leading to other effects than follow of the law in the country where the adoption was granted. Thus, recognition has no revaluating or correcting function but is limited to maintaining what has been created abroad. See Botschaft zum Bundesgesetz über das internationale Privatrecht (IPR-Gesetz) vom 10. November 1982. Zürich 1983, p. 111.

[78] This is a requirement in the preliminary Hague Draft Convention, see Art 5(c).

under the Commission's proposed scheme than after a new Swedish adoption decision replacing a "weak" foreign adoption decision. First of all, there is the theoretical risk that a simple adoption may later be revoked in a country where the law provides for such revocation. (According to the Commission's proposal, the revocation of an adoption shall be automatically recognized in Sweden if it is decided by a court or other authority in the country where the child was habitually resident at the time of the decision.[79]) Secondly, the adoptive family can leave Sweden and emigrate to a country where the adoption only has limited effects. The legal effects of an adoption may also otherwise come to be examined in such a country, *e.g.*, succession rights where the adopter at his or her death was habitually resident abroad. It is, however, an open question what effect, if any, a second Swedish adoption decision would have in such a country. Therefore there is, in the present author's opinion, no reason to blame the Commission for not having considered these types of complication.

[79] The 1971 Act does not regulate revocation of adoption at all.