FOREWORD

Clive GERADA (President)

and

Gaynor SALIBA (Publications Officer)

Marking the fiftieth anniversary from the amendments to the Civil Code, which amended the provisions relating to the law of adoption, the Law Students Society (Ghaqda Studenti tal-Ligi), in collaboration with the Faculty of Laws held a symposium at the Aula Magna, Valletta.

We would like to especially thank all the members of the panel who honoured us with their knowledge and expertise on the subject, particularly Dr Ruth Farrugia, who was the mastermind behind this symposium. Not only would we like to thank Dr Farrugia for her input to hold the final event, but also for her interventions on the subject in our radio programme, Minn Lenti Legali, aired on Campus FM.

Our distinguished speakers addressed the different facets of Adoption Law. Judge Giovanni Bonello aptly outlined the interaction between adoption and human rights. Dr Sandra Hili Vassallo, on the other hand pointed out several bilateral agreements which Malta had in relation to other countries vis-à-vis children for adoption. In this regard she also mentioned the Central Authority’s role in order to safeguard the said bilateral agreements whilst all the adoption procedure is followed, with the aim of protecting the best interest of the child.

Both the representative of the Ministry for Justice, Dialogue and the Family and the Opposition’s spokesperson for Social Policy reiterated the importance of the social and humane aspects of adoption law, whilst maintaining that the institution necessitated significant amendments in order to satisfy societal development. Dr Joe Micallef Stafrace outlined the changes to the law on adoption through an interview, whereas Professor Kevin Aquilina outlined the influence of Roman Law on the Maltese law on adoption.

The Law Student Society seeks to pose important suggestions in this ambit. In our view, time is ripe to introduce a Family Code as separate and distinct from the Civil Code, which would incorporate adoption law amongst other family related laws. Moreover, legislators should depart from the traditional definition of family and sort out the present anomaly in our law whereby a single person is able to adopt child, whereas an unmarried couple, whether homosexual or heterosexual, is precluded from adopting. Finally, unnecessary bureaucracy in the adoption procedures is to be eradicated and the authorities should seek to facilitate the adoption process, as this is ultimately in the best interest of the child.
INTRODUCTORY SPEECH

by

Ruth FARRUGIA

Dr Ruth Farrugia is an advocate and senior lecturer in the Faculty of Laws at the University of Malta. She studied at the University of Malta, University of Strasbourg, Mediterranean Academy of Diplomatic Studies and Metropolitan Ecclesiastical Tribunal. She has served as consultant to the deputy Prime Minister and Minister for Social Policy, Minister for Family and Social Solidarity and the Social Affairs Committee in Parliament, presenting Malta’s report before the UN Committee on the CRC.

She is legal advisor to the Commissioner for Children and country expert on a number of international academic commissions as well as independent expert within the EU, Council of Europe, the Commission for European Family Law, the International Juvenile Justice Observatory, and the EuroMed Human Rights Network. Her most recent work has been as member of the expert drafting team to the Council of Europe Guidelines on Child Friendly Justice and as Council of Europe expert on Violence against Children. She is coordinator of the Human Rights Programme of the University of Malta and has published widely in the field of family law, child law, refugee law and human rights.

This year marks the fiftieth anniversary from the coming into force of the amendments to the Maltese Civil Code, which brought about adoption law as we know it today. It is only fitting that as a Faculty of Laws, we should be observing the introduction of legislation, which has affected a large number of children and their parents, both biological and adoptive, over the past fifty years.

This is a time to look back to the reasons for the introduction of the law and to examine its development and the sequence of amendments that have rendered it so vibrant and so meaningful. Obviously a short evening dedicated to adoption cannot do the topic justice. Equally, owing to time constraints the number of speakers has been reduced and their choice reflects our focus on the purely legal aspect. It would have been wonderful to delve into the social, psychological, cultural and religious aspects of the topic and to invite more persons who were key contributors at the inception and progress of the law. However, this will have to be addressed on another occasion or by some other convenor. That said, we are extremely fortunate to have had all our invitations accepted and to be about to listen to a distinguished panel, each member playing a highly significant role in the law on adoption.

When I started teaching twenty years ago, the late Professor Rene Cremona who was responsible for Law of Persons at the Faculty of Laws had until then, entrusted lecturing on Adoption Law to Dr Joseph Micallef Stafrace and I am delighted that he agreed to give a contribution to this evening’s proceedings by way of an interview. As one of the first advocates, together with the late Dr Joseph Ciappara, to be hands on when the new adoption amendments came into force, Dr Micallef Stafrace represented numerous clients seeking to adopt and was instrumental in the fine tuning of the law when particular issues rendered further amendments crucial. As a newly graduated lawyer, I was fortunate to watch both these lawyers in action during my time as
registrar of the Second Hall (Court of Voluntary Jurisdiction) and to learn from them and from other lawyers and judges dealing with adoption cases, watching the law evolve. I am confident that the recorded interview with Dr Micallef Stafrace will shed light on a number of issues in this development and will help us contextualise the progression of the law over the past half-century.

It is also a time to study the way globalisation and cultural issues have affected adoption by looking to the international aspects and the procedures involved in adoption of children from outside Malta, regulated by specific legislation from the Hague Committee, which now forms part of our domestic law. I am very proud to present my former student, now Director of Social Welfare Standards, Dr Sandra Hili who is best placed to tell us about the Central Authority she heads and the way international adoption has affected adoption practice and policy in general and the lives of many families in particular.

We are also fortunate to be able to learn from the cases decided by the European Court of Human Rights, which has delivered judgment in a substantial number of proceedings relating to adoption in the context of Article 8. These decisions continue to form and lead the way in our understanding and interpretation of adoption and sharpen the focus on the child at the centre of study. We are indebted to Judge Giovanni Bonello who has kindly agreed to share his analysis of some of the leading judgements of the Strasbourg Court and his memories of a number of those cases in which he played a vital role, either in conjunction with the decision given or by his equally elucidating dissenting opinions.

Finally we can also look to the future and listen to the politicians’ plans for changes to adoption law and practice. This will undoubtedly be based on past experience and aimed towards consolidating the notion of adoption as a means of alternative care which best suits children who cannot live with their birth parents and whose future well-being rests in a permanent alternative placement with a new adoptive family. The Minister responsible for adoptions and his counterpart have both agreed to join us and to share their vision for adoption law in the next decade. They will be looking at the current state of the law and hopefully giving us a privileged glimpse into any changes they foresee as necessary to better the prospects of the child in adoption, acknowledging the rights and duties of her new parents and the birth family that gave her up.

I take this opportunity to thank the Għaqda Studenti tal-Liġi who responded to my idea to hold this symposium with enthusiasm and energy. They have taken on a substantial part of this evening’s preparations and are to be commended for their sense of commitment and their professional delivery. GhSL have also undertaken to publish the proceedings of this symposium so we can thank them in advance for a written record, which we will soon be able to enjoy.

Thanks also to the administration at the Faculty of Laws for their support, the conference organisers at Valletta campus and Rector who kindly facilitated our use of the premises. My sincere gratitude also to the Head of Department of Civil Law, Dr David Zammit, who supported the initiative and for agreeing to finance the event out of departmental funds. Heartfelt thanks also to the Dean; Professor Kevin Aquilina for his
invariable support and for agreeing to close the proceedings with what I feel sure will be his usual insightful and erudite contribution.

It is with great pleasure that we can now start to listen to our distinguished panel of speakers, learn from their knowledge and experience and start to comprehensively appraise the law on adoption.
ADOPTION WITHIN THE CONTEXT OF HUMAN RIGHTS

by

Giovanni BONELLO

Giovanni Bonello has for 12 years been judge of the European Court of Human Rights in Strasbourg (1998 – 2010) after a long career as a lawyer specializing in human rights litigation; he defended 170 human rights lawsuits in the domestic and international fora. He drafted the European Convention Act which made the European Convention on Human Rights part of the internal law of Malta.

He was Malta’s first representative in the European Commission for Democracy through Law (the Venice Commission). He is Companion of the National Order of Merit of Malta, Cavaliere of the Italian Republic, knight of the Sovereign Military Order of Malta, and was awarded the special Gold Medal of the Malta Society of Arts, Manufacture and Commerce, the insignia of Merit by the Russian Federation for outstanding achievement and the extraordinary gold medal by the Judiciary of the Republic of Moldova. He was voted ‘Man of the Year 2008’ in The Johnnie Walker Award.

Good evening ladies and gentlemen,

I must admit that when I was first invited to address this conference, I was a bit hesitant and questioned whether there is enough Human Rights Law that relates to adoption to fill in a ten minute speech. However, soon after I have researched extensively the subject, I realised that I was wrong.

I always get the impression that everybody mentions human rights, but not everybody is focused enough to know what human rights are. There is a very easy definition; human rights are those basic rights, without which a person would not be a human being. Human rights are not given by the State; they are given by the very fact that you are born a human being. That is a facile definition of what human rights are, but one has to keep in mind that these are the minimum which are granted to a person by the very fact that he is a human being. Therefore, the European Convention of Human Rights is a few pages long because the really basic rights, the ones you can’t do without are very few. All the other right man-made; the law (the civil law, the administrative law) gives you rights, nature gives you human rights.

If one wants to be cynical and have an empiric definition of what human right are, the final answer would be that they are what the European Court of Human Rights in its wisdom or lack of it considers to be human rights. If Strasbourg declares a particular right to be a human right, then it is a human right. If Strasbourg says no, all the rest is pure theory!

How do human rights and adoption interact? The question as to whether adoption is a human right is very ambiguous, since it could have different meanings. It could simply mean that the very fact that adoption is not recognised or not regulated by a

---

1 This is a transcribed extract of a longer speech delivered by Judge Giovanni Bonello.
State is a breach of human rights. It could also possibly mean that the State must provide children for people who want to adopt, or that the State has an obligation to facilitate adoption, or that a person or a couple who has fostered a child have the right to adopt it legally.

Today the answer is quite straightforward, but up till the late 1990s the European Court of Human Rights in Strasbourg refused to recognise adoption as a human right. The Court argued that adoption may be a domestic right under domestic law but is not a right under the Convention.

In *X vs Belgium and the Netherlands*, the applicant challenged the domestic law of Belgium and the Netherlands, claiming that the domestic law on adoption fell foul of the European Convention of Human Rights. The Strasbourg institutions held that adoption is not a fundamental right within the Convention and therefore the Court should not deal with the issue. Moreover, in *Lazzaro vs Italy*, the applicant was an unmarried Italian man who challenged the law of Italy which only allowed adoptions by married couples. The Court didn’t go into the merits as to whether Italian law on adoption was discriminatory; it just held that adoption is not part of the Convention and thus Mr Lazzaro was sent home with costs.

But that was at a time when the approach to the Convention was very restrictive. Thankfully, today adoption cases regularly come up for decision before the Strasbourg Court, and the Court has gone round the prohibition or rather the lack of mention of adoption in the articles of the Convention in a constructive way. The main issue is discrimination in the ambit of any of fundamental rights – the Convention prohibits discrimination in the enjoyment of the other fundamental rights. The Court held that since adoption is in the ambit of family life and Article 8 provides protection to family life, then the discrimination on the basis of adoption constituted a breach of fundamental rights under Article 8.

There have been a number of interpretations as to what constitutes family life. The first trust was that the Convention protects existing family ties and the applicant had to establish that there was already a family relationship. Eventually this changed and today the Convention protects also legal family relations or possible family relationships. Once this relationship is established, Article 14 comes into play and the next question to ask is whether discrimination between couples who want to adopt and singles who want to adopt or between heterosexual couples is allowable.

Since the Convention is dynamic, its case law has evolved. Recent judgements are an absolute contradiction of earlier judgements which did not even recognise adoption as a right. When going through the Court’s case law it is manifest that whenever the Court decides a case without keeping as a preeminent interest the best interest of the child - that is when the funny judgements from Strasbourg emerge.
INTERNATIONAL ASPECT OF ADOPTION

by

Sandra HILI VASSALLO

Dr Sandra Hili Vassallo graduated as Notary Public in 1991 and obtained her doctor of laws in 1993. Her doctoral thesis addressed issues relating to illegitimate children and adoptions. She then furthered her studies with a Masters in European Law. After having obtained her lawyers' warrant, she joined Malta’s diplomatic service within the Ministry of Foreign Affairs and over a span of 12 years she had the opportunity to work on bilateral, multilateral and EU affairs issues. Dr Hili Vassallo also served for three years at the Permanent Representation of Malta to the United Nations in New York where she dealt mostly with international humanitarian and social matters. On her return to Malta she worked at the Protocol and Consular Affairs Directorate where she was responsible for consular affairs.

In 2007 Dr Hili Vassallo joined the Department for Social Welfare Standards as legal officer. During this time she drafted the regulatory law for the department and represented the latter at the Law Courts on abductions cases. Dr Hili Vassallo was also involved in negotiating adoption agreements with foreign central authorities and was also responsible for the administrative proceedings for both abductions and adoptions cases. Dr Hili Vassallo served as Acting Director at the Department for Social Welfare Standards and was appointed Director on the 16th July 2010.

Hon Judge Bonello, distinguished guests, colleagues,

It is indeed a great honour and pleasure to be addressing such an assembly on a topic which is one of the major functions of the Department for Social Welfare Services.

Allow me first of all to introduce the Department as the Central Authority for local and intercountry adoptions as designated by the Overseas Adoption (Definition) Order,2 in line with the requirements of the 1993 Hague Convention. This role was further strengthened by the Adoption Administration Act (‘the Act’).3 This Act apart from amending the Civil Code provisions dealing with adoption (articles 113 to 130), also establishes the functions of the Central Authority as listed in Parts III and IV.

The international framework for all this is the Convention of the 29th May 1993 on the Protection of Children and Cooperation in intercountry Adoption. Malta acceded to this Hague Convention in 2004 and it came into force in 2005. The Convention was transposed in the Maltese Civil Code through the above mentioned Legal Notice.

One of the functions of the Central Authority is in fact to accredit agencies.4 There are at present four accredited agencies in Malta and the list was published Government Gazette dated 27th April 2012. The accreditation procedure was further facilitated by publication of the Agency Accreditation (Amendments) Regulations (2012).

---

2 Subsidiary Legislation 16.05, Legal Notice 398 of 2004
3 Chapter 495 of the Laws of Malta
4 Ibid, Article 7
Article 8 of the Act also lays down as a function of the Central Authority to ‘monitor all proceedings for an intercountry adoption which shall be processed upon the approval in writing of the central authority in accordance with this Act’.

Article 26 of the same Chapter 495 lays down that all adoptions, local and intercountry, are to be carried out with the authorisation of the Central Authority and through the accredited agencies. This article is very clear about adoptions carried out without the authorisation of the Central Authority and its aim is to prevent unauthorised and unregulated adoption arrangements.

Furthermore the Act gives a legal framework to the regulation of intercountry adoptions; it delineates the respective roles and functions of the Adoption Board, the Appeals Board, the Central Authority and the Accredited Agencies. In the best of interest of the minor’s children to be adopted, Cap 495 provides a system of checks and balances also for the prospective adoptive families who decide to adopt locally or internationally.

The provisions of accreditation for accredited agencies in the Convention were in fact inspired by the 1989 United Nations Convention on the Rights of the Child (UNCRC) and the requirements in Article 21 (a):

- ensure the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in the view of the child’s status concerning parents, relatives, and legal guardians, and that if required, the person concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

This provision refers to the ‘competent authorities’ which include accredited agencies. In 1990, the Van Loon report identified the many abuses in intercountry adoption at the time and noted the link between these abuses and the prevalence of private and independent adoptions and the absence of supervision by public authoress as well as the absence of involvement of professional licensed agencies.\(^5\)

The terms ‘private’ and ‘independent’ adoptions are defined in *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice (No. 1)*. Private adoption refers to one where arrangements for adoption have been made directly between a biological parent in one Contracting State and prospective adopters in another Contracting State, while independent adoption refers to those cases where the prospective adoptive parents are approved as eligible and suited to adopt by their Central Authority or accredited body. They then travel independently to a country of origin to find a child to adopt, without the assistance of a Central Authority or accredited body in the State of origin.

---

One of the earliest definitions of adoption is a term used to describe it as a personal and legal act as well as a social service. The Child Welfare League of America (1978:7) defines adoption as:

the method provided by law to establish the legal relationship of parent and children between persons who are not so related by birth.

Adoption is shaped by cultural forces and it exists in many different forms in different cultures. Amongst the forms this act takes is intercountry adoption, a type of adoption which involves the transfer of children for parenting purposes from one nation to another.

Intercountry Adoption is not a new phenomenon. In recent years, close to 40,000 children were sent from their country of origin to one of 22 receiving countries to be adopted (Peter Selman 2008:9). While the history of adopting children from countries outside those of their adoptive parents can be traced back to hundreds of years ago, the phenomenon became much more widespread after World War II.

The world after World War II was characterised by an unequal distribution of orphaned children and adoptive homes. This global conflict brought about the disruption of families in war-torn countries and left behind a considerable number of orphans and abandoned children.

Even more recently than that, in the 1980s, war, political turmoil, natural disasters and poverty have guaranteed a steady supply of children from developing countries to be adopted by developed countries.

The 1990s were characterized by intercountry adoptions from Eastern European countries. Media coverage of Romanian children living in large residential institutions provoked a range of reactions in many Western countries. Similar to other European countries, Maltese prospective adoptive families immediately sought to ‘rescue’ these children through intercountry adoption. Adoptions with Romania happened mostly throughout the 1990’s. In there was an Agreement with Albania. In 2009, an Agreement with Slovakia was signed with Slovakia.

There are at present two pending draft agreements: with Russia and with the Philippines. The Central Authority’s role is in fact also to set up working agreements or Memoranda of Understating with countries of origin, apart from falling back of course on the Hague mechanism.

In the past decades the International Community made various attempts to regulate intercountry adoption such as way back in 1965 and then again three years later, and on a European level, the 1968 European Convention on the Adoption of Children. While the European Convention has enjoyed more success than the 1965 Hague Convention, it has still been widely criticised. One main criticism is that it did not respect the adoption laws of other States and that it failed to adequately address the needs of all concerned in the adoption triangle (i.e. the child, the natural parents and the adoptive parents).
Since the social reality of intercountry adoption had changed dramatically by the early 1980s, due to factors discussed above, the former 1965 Hague Convention and the 1968 European Convention on the Adoption of Children could never cope with the new global realities.

The need for a new Convention on intercountry adoption became apparent in the 1980s when it was recognised that there had been a dramatic increase in international adoptions in many countries from the late 1960s. Intercountry adoption had increased to such an extent that it had become a worldwide phenomenon involving migration of children over long geographical distances and from one society and culture to another very different environment. It was also recognised that this phenomenon was creating serious and complex human and legal problems and the absence of existing domestic and international legal instruments indicated the need for a multilateral approach.

Two significant subsequent international documents recognising international adoptions were the 1986 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally and the 1989 United Nations Convention on the Rights of the Child. However, the need continued to be felt for an international Convention that goes beyond the general principles incorporated in these treaties.

Intercountry adoption is practised in various countries, all with their different legal and administrative systems, so a collective agreement that determines and establishes a common platform for the practice was opted for. This resulted in the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The role to draft this new was assigned to The Hague Conference on Private International Law. To date, the number of Contracting States party to The 1993 Hague Convention adds up to 89.

The 1993 Hague Convention was designed to facilitate the intercountry adoptions process, by establishing a legal framework that would maximize the potential for cooperation among different countries and reduce irrational barriers to the placement of children across borders, reduce the risk of sale, abduction and trafficking and to oversee that intercountry adoptions are carried out in the best interest of the child to be adopted. The objectives and scope of the Convention as defined in Chapter 1 are:

a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;

b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;

c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Therefore, the aims pursued are restricted to establish certain safeguards to ensure that intercountry adoptions take place in the best interests of the child, to provide a system of international co-operation amongst the States and to secure in
Contracting States the recognition of adoptions made in accordance with the Convention:

By obliging Contracting States party to the Convention to abide by the minimum standards set by the Convention, the said Convention aims to eliminate the abduction, the sale of, or traffic of children.  

The Hague Convention sets clear and specific regulation which Contracting States party to the Convention must abide to. Chapter II determines the duties of the sending countries regarding the adoptability of the child, respect of the subsidiarity principle; the necessary consents of other persons besides the child, and the wishes, opinions or consent of the child. On the other hand, the receiving countries shall be responsible to verify that: the prospective adoptive parents are eligible and suited to adopt, the prospective adoptive parents have been counselled as may be necessary, and the child is or will be authorized to enter and reside permanently within its territory.

In Chapter III the Hague Convention obliges Contracting States to designate Central Authorities to discharge the duties which are imposed by the Convention upon such authorities (Chapter III, Article 6 (1)).

Chapter IV deals with the procedural requirements in the practice of intercountry adoption. These requirements also include: preparation of reports on the prospective adoptive parents and the child in the adoption process, and coordination of emigration and immigration laws and the smooth transfer of the child from one Contracting State to another.

Chapter V, on the other hand outlines the recognition and effects of the adoption requires Contracting States to establish recognition of an adoption made in one State. The Convention also specifies some of the effects of the recognition which extend in all cases to the legal parent-child relationship and the vesting of the parental responsibility on the prospective adoptive parents.

In implementing the Convention a State is to be guided by the main principles of the Convention, ensuring that an intercountry is carried out in the best interest of the child to be adopted, the protection of families through combating abduction, sale and trafficking in children and securing the recognition of adoption between Contracting States made in accordance with the Convention.

The Convention calls for the creation of a Central Authority to facilitate the operation of the Convention in each Contracting States. The concept behind establishing a system of co-operation between States through their respective Central Authorities helps in implementing the Convention’s procedures and co-operating to prevent abuse and avoidance of the Convention. This final principle of the Convention is to guarantee that intercountry adoptions, in conformity with the Hague Convention’s requirements,

---

are recognized in both States. Implementation of the Convention requires a Contracting State to undertake an internal assessment of its current adoption and child protection system, review the requirements and principles of the Convention and develop a progressive implementation plan.

Allow me to now to present trends in intercountry adoption published by the Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat,⁷

- There are over a quarter of a million adoptions every year. The United Nations Population Division estimates that some 260,000 children are adopted each year. In Malta the number is roughly about 60 adoptions per year.
- The consequences of an adoption for the rights of adopted children differ considerably among countries. In some countries, adopted children acquire the same rights as birth children, including the right to inheritance, and adopted children sever all legal ties with their birth parents. In other countries, the termination of natural ties between birth parents and children is viewed as culturally unacceptable.
- Domestic adoptions far outnumber intercountry adoptions. However, the number of intercountry adoptions has been increasing. Both the number of intercountry adoptions and their share among all adoptions have been increasing. In many European countries, intercountry adoptions now account for more than half of all adoptions.
- The United States, France and Spain, in order of importance, are the major countries of destination of children adopted internationally. Other countries that experience large inflows of children adopted from abroad are Canada, Germany, Italy, the Netherlands and Sweden. Each of these countries has recorded over 1,000 foreign adoptions annually in recent years.
- Asian and East European countries are the major sources of children adopted through an intercountry procedure. Relatively few children adopted internationally originate in Africa or Latin American and the Caribbean. The countries of origin accounting for most international adoptions are China, Guatemala, the Republic of Korea, the Russian Federation and Ukraine. More than half of the children adopted abroad originate in those five countries.
- The dwindling supply of children available for domestic adoption may partially explain the increase in the number of intercountry adoptions.
- Despite the perceived shortage of adoptable children domestically, the number of children in foster care or in institutions generally far exceeds the number of children who are being adopted. This paradox arises because many children in foster care or in institutions are older or have health problems and are not, therefore, easy to place among prospective adoptive parents who prefer younger and healthy children. In addition, because many children in foster care or in institutions still have ties to their biological parents, they often are not formally adoptable.
- Many countries have ratified multilateral, regional or bilateral agreements on intercountry adoption aimed at addressing conflicts of jurisdiction and protecting the welfare of children. As the purpose of adoption has changed over time, so have adoption laws. New issues and concerns are likely, therefore, to lead to further

⁷ United Nations Economic and Social Division, Child Adoption: Trends and Policies (New York, 2009)
changes in adoption practices, especially in areas concerning permanency planning, intercountry adoption, adoption by step-parents and other relatives, inter-racial adoption and the right to have access to information on the birth family.

In order to be up to date and better informed as well as to act always within the spirit of the Hague, Malta’s Central Authority shall continue to update its data and knowledge, seek assistance from the Hague Conference and from the counterpart Central Authority’s or competent authorities. One of the avenues used is to gather information and data by email amongst the Central Authority’s. Malta’s Central Authority is also exploring cooperation with the International Social Service in order to be better equipped to deal with its international obligations.

The Central Authority also firmly believes that continuous cooperation in particular with other Ministries and entities in particular Health, the law courts and the office of the Attorney general as well as Foreign Affairs (both with regard to bilateral and consular issues as well as visa and citizenship issues) is crucial. The many different aspects of the adoption process merit such cooperation local and at an international level. We all have different roles and different competences and ultimately we are all connected through the hope of one end result: a smile on a child’s face running into the arms of a loving family.
SPEECH FROM THE MINISTRY FOR JUSTICE, DIALOGUE AND THE FAMILY

by

Frans BORG

(on behalf of Minister Chris SAID)

Distinguished guests,

I am very proud to be speaking today at this symposium marking landmark developments in the field of adoptions in Malta.

My Ministry has proposed a number of amendments to the laws surrounding the adoption process, with the aim of making this process more accountable and ensuring that it meets the needs of the various service-users in an effective manner, but most of all giving paramount importance to the best interests of the children who are or may be adopted.

We are proposing that open adoption, which is presently only available for children aged 11 years or older, be extended to younger children because we believe that every child who needs this type of adoption should have the opportunity to benefit from it. Open adoption is in keeping with the principle of knowledge of one’s identity: one’s birth parents and origins.

Along the same lines of reasoning, children in out-of-home care, who do not have the possibility of returning to their family of origin, need to be given the opportunity of permanence through an adoptive family, by being freed for adoption. Should attempts at reuniting the child with the family of origin fail or prove to be more harmful than beneficial, then these amendments would make it easier for that child to be adopted within another family.

The law also needs to highlight the principle that correct matching between children and adoptive parents is of paramount importance and that such matching should always focus on the child’s needs. Matching should not be allowed to be carried out in an unregulated manner. Thus, it is to be left in the hands of accredited agencies or authorized persons in cooperation with the Central Authorities or competent authorities in the countries of origin of the child. This applies to both intercountry and local adoptions in order to lessen the chances of children being trafficked for other purposes or children ending up in the hands of person who are not legally eligible or suitable to adopt.

Adoption by foster carers should continue to be possible. Although the ultimate aims of fostering is totally different from that of adoption, adoption by the foster carers allows the child who has been freed for adoption more continuity of care.

As regards the presence of a child’s advocate to represent the children during the adoption process, at present, a child advocate needs to be present when the child is over
a certain age. It is being proposed that a child advocate is always involved, not just with children above a certain age. This would also be consistent with the Draft Children’s Policy launched last year for public consultation and which it is hoped to be concluded formally.

At the moment Post Adoption Reports are a requirement and each country of origin has its own obligations with regards to the frequency with which these need to be carried out. Although Post Adoption Reports are presently a requirement for Maltese children there is no formal obligation regarding the frequency of such reports.

It is being proposed that Post Adoption Reports for Maltese children are to be carried out every 6 months for 2 years. It is of paramount importance that Post Adoption Reports be done well and in a timely manner to ensure that children are adjusting well to their new family.

In Malta, open adoption is not very common. In open adoption, adopted adults (who are over eighteen years of age) may look up and find information about their biological family and about the reasons that led to their adoption. This includes ensuring that all agencies keep pertinent registers and files which are updated regularly. Information may also be sought by adoptive parents, this is however limited to information about the case and the birth certificate of the adopted person.

Additionally, we must ensure that the process for seeking and obtaining such information is not overly bureaucratic, while it is carried out in a manner which is respectful and supportive to all parties concerned. This also applies to adopted adults who wish to meet members of their birth family.

The reasons that lead children to be put up for adoption (either voluntarily by the biological parents or through state intervention) are several. Sometimes children can be kept within their biological families if their biological parents are supported through improving their social situation or their parental skills. The Hague and the National Standards for Out-of-Home Care (2009) as well as the National Standards for Adoption Procedures (currently being drafted) are also based on the principle that the child should remain with his family of origin and within his country of origin wherever possible.

Additionally, birth parents will benefit from all the necessary support (including counselling) so that all decisions they take which affect their children are informed decisions, which are not taken hastily, but are taken in their children’s best interests. Thus, efforts must be made to ensure that birth families are not coerced or influences when taking the important decision of whether to put their children up for adoption.

Another amendment being suggested is that step-parent adoption should be possible without the need for the biological parent (i.e. the parent who was and will continue to be responsible for the child) to renounce his/her parental authority. At present the birth parent has to adopt his or her own child jointly with the step parent.
We must help members of the birth family seek information and/or make contact with adopted relatives and we must ensure that these are carried out in a way that respects and provides support (including counselling) all parties concerned.

The next batch of proposed amendments which I shall be elaborating upon deal with the various entities involved in adoption namely the Central Authority, the Adoption Board and the accredited agencies.

The functions of the Central Authority need to be extended so that all its functions are backed-up by law. In this way the Central Authority can carry out its responsibilities in a more effective manner, thereby ensuring that no entity and no individual abuse the adoption services.

The present adoption legislation outlaws private adoptions and this needs to be strengthened. The aims of this are multiple:

- Birth parents should not be pressured into giving their children up for adoption: consent should be given freely, without promise of financial gain;
- Birth parents should be supported to take the decision about whether to put their children up for adoption after the child is six weeks old, as already indicated in the law;
- Child trafficking is avoided;
- Children are placed with persons who are able to meet their needs, and, in particular, children are not placed with persons who have yet to be approved as prospective adoptive parents by the Adoption Board; and
- No child remains stateless, namely that there is continuity between the decree issued by the court of the country of origin and the decree issued by the Maltese courts.

The second entity dealing closely with adoptions is the Adoption Board which was established by the Adoption Administration Act of 2008. Previous to that there was only a panel administratively appointed with no possibility of formal appeal. There are various amendments proposed to facilitate the work of the Adoption Board and render it more transparent and accountable. These include written procedures which should be published to ensure transparency and accountability.

The movement of prospective adoptive parents from one agency to another is allowed, but we must ensure that it occurs in such a way that respects the professionalism and seriousness of the adoption process, while respecting the prospective adoptive parents’ confidentiality. This also applies during the closure of an adoption agency.

Adoption Agencies need to be financially transparent so that service users will know of financial costs that they will incur throughout the adoption process and have proof of any financial transactions made. Additionally, the Central Authority would be able to check the Agency’s financial transactions in order to ensure that profit is not made from Adoption. This is keeping with another Hague principle that adoptions are to be non-profit transactions, with no aim of financial gain. Finally, it is imperative that the various entities mentioned communicate amongst themselves and that the role of each one of them is definitely and separately laid out.
Amendments to laws also came about through case law. One such landmark case was the judgment delivered by the Constitutional Court on the 3 April 2000 in *Ruth Debono Sultana u Silvio Debono vs Dipartiment għal Standards fil-Harsien Soċjali u Ministru ghall- Politika Soċjali*.

The clauses in the Civil Code requiring three years of marriage for married couples were considered discriminatory. It was proposed to change the wording from ‘who have been married for not less than three years and are living together’ to ‘who have been married to each other and are living together’. The choice of words showed the importance that the Government still gives to families who were still living together. Furthermore, articles 113 to 130 of the same Code have undergone changes through the Adoption Administration Act, as well as through other legal instruments. The Foster Care act has also had a definite influence on Chapter 495, and they are inter-related in that foster carers have been facilitated in adopting the children in their care.

Legal Notice XX of 2010 did away with the requirement of a three month period for the parents to file the application with Maltese Courts for intercountry adoptions. The three months of continued care and possession remain for local adoptions. This ensures that the parents can file an application the Maltese courts immediately upon arrival of the child from the country of origin and lessens the possibility of stateless children. It is being proposed to strengthen the enforcement of filing this application so that the parent may not delay or even refuse to file such application leaving the child stateless and without a family.

Other changes were done with respect to minimum and maximum age difference between adopter and adoptee. The law as it stands requires a minimum of 45 year age gap between adopter and adoptee. In the case of a married couple, it is sufficient if one of the couple fulfils this requirement.

Adoption has come a long way, it is responding to the needs of today's world, and it is moving along with the increased knowledge and awareness of certain issues such as the importance of knowing and appreciating one's heritage and background, the removal of the stigma of adopted children, as well as responding to the new trends in technology and social communications.

My Ministry is working tirelessly towards ameliorating the adoption process as a whole. The adoption process has moved away from being a secretive procedure done behind closed doors. We are fully committed to continue working towards ensuring that this process is carried out in a transparent manner, which supports those who really need it without making it needlessly bureaucratic.

It is providing a family to a child who otherwise would live in care; it is substituting the term legal guardian with the term parent. It is not giving a child to a family or rather, not giving a child to the applicants in order for them to become parents, but it is an act of love towards the child.

---

8 Chapter 16 of the Laws of Malta  
9 Chapter 495 of the Laws of Malta  
10 Adoption Administration Act
First of all let me say that I am delighted to be here with you to share some thoughts about this important and humane subject. Congratulations to you all for finding the time to organise this symposium to mark the 50th Anniversary since the Adoption Law came into force.

I believe that this law and the need for our country or for any other country to legislate on adoption has a dual meaning. The first one is that I find it sad that the mother and the father of a born child for different reasons are not capable to bring up their own child. In some or most cases we should thank God that this is not the case since the children will not benefit at all if they had to be brought up by their natural or biological parents. The second meaning however is a positive one, since we have people who are so generous that they feel they should adopt a child even if they are not the biological parents. We know that these parents give all their love and care to these children. The reasons for these parents to adopt might vary from one couple to another but in every circumstance I believe they do it with joy and a great sense of responsibility.

Since I am the odd one out because I am not a lawyer, I believe we must not only see the legal implications in adoption but we must also be sensitive for the social and human aspects. Of course the law, like every law needs to be adjourned to today's needs and also to amend the shortcomings. Along the years the law was amended several times especially to guarantee as much as possible the easiest and the most efficient way for adoptions. We all know that to adopt is not easy and it is also costly. Trends in society have changed. We have those who opt to have children at a later stage for a number of reasons which I do not have the time to delve into. This fact is creating problems when the couple decides to have children since the fertility problem will arise.

There is another issue which comes into the picture and this is IVF. We know that a number of couples are opting for IVF and the number might increase when the law passes from Parliament. May be most couples that opt for IVF do not consider adoption or fostering. The reasons for this can vary but my guess is that they look more at the difficulties and the hurdles that they have to overcome rather than the benefits. It might be the case that they have lack of knowledge about the issue of adoption and fostering. It also might be that there is the need for legislation to be amended.

When the discussion in Parliament starts about the draft bill of IVF we need also to see whether there will be any collision between the proposed IVF law and the Civil Code or any other related legislation. I am saying this since it is being contemplated a situation where embryos can be adopted.

One of the main hurdles is the excessive financial expenses related with the procedure at the Law Courts and all this after that the couple would have passed
through a lengthy process that is very expensive especially for adoptions from abroad. To avoid some of the legal expenses one suggestion which can be taken on board can be that the report of the Courts will be an update of the social worker report instead of going through the process of nominating a court expert.

Administratively we also have other abuses. We have couples that are taken in foreign countries for open adoption. Some of these couples pay a lot of money and finally end up without an adopted child.

Going back to legislation, in one instance there was a case which was challenged in court and it was decided in favour of the married couple. This was a case where the three years of marriage requested by law were declared superfluous. The court sent this sentence to Parliament to amend this requisite. Subsequently, after 2 years this was amended. Another condition made by law is that in order to adopt one has to be more than 28 years of age. But does this make sense anymore? Shall we reconsider this as well?

For sure what does not make sense is amending the law in 2008 to introduce ways and means to facilitate the process for adoption but only four years later exactly on the 24 April 2012 by means of Legal Notice 125 these amendments came into force. Whether these amendments even though so late had a positive effect in facilitating the process and offer more help to the adopting parents we still have our doubts. In respect to local adoptions, we need to facilitate the possibility for children to be free for adoption especially those who have been living in an institution. These children are being hindered from living in a family which after all is their right because their biological parents are refusing to give their consent. The care and love that these children can be blessed with within a family cannot be matched in an institution even though I am sure that those responsible do their utmost.

Apart from amending legislation, which up to a certain extent is the easiest part although it is taking time, we need to provide services. These services need to be timely and through the whole process. Preparation beforehand is essential but likewise is the follow up to ascertain that family life is going well. I don’t think that with 5 social workers in charge of the whole process can cater for all the demands. In fact couples who applied before May of this year were informed that the first available course is going to be held in January 2013 and this is the course prior to starting the adoption process. Until October of this year we have 41 persons who are on the waiting list to start the process for adoption and as such the preparatory course.

Considering that according to the National Statistics Office ‘The average number of child adoptions per year between 2004 and 2008 climbed to 71, from an average of 49 adoptions every year for the previous 5 years’. Also we are aware that in 2011 we had a total of 61 applications while until September 2012 we had a total of 47 applications. More so, the government agency received applications from fifteen foster parents to adopt their fostered children. While a number of foster carers are considering this option too. By implication the numbers speak for themselves and as such 5 social workers definitely cannot cope with these numbers and may be with other commitments too. Not to mention that the budgetary allocation for Adoption Services within the Appogg Agency is of €82,000.
An anomaly exists when foster parents apply to adopt their fostered children. Notwithstanding that these are under the scrutiny of the social worker these are still requested to go through the whole process of adoption and this when the studies and reports will be ready.

In all this process, all parts concerned and involved should keep in mind the best interest of the child. This may has become a cliché, but truly it should be an integral part of our programme. Procedures of the process should keep in mind the best interest of children who most of the time and in all circumstances are the least heard and the most hurt due to their vulnerability. Adopted children deserve and have the right for a family life and for a decent quality life. With more care, attention and commitment, we can make this happen.
Dr Joe Micallef Stafrace is a lawyer, a journalist and a politician. He has for several years lectured Adoption Law at the University of Malta, and helped various individuals while practicing in this ambit.

Until 1962 the law on adoption, as enacted in 1942, was part of the Maltese Civil Code. Under this law, the whole purpose of adoption was to provide an heir to those couples without an offspring. In fact the adoptive parent could not have his/her own children, whether natural or legitimated, s/he needed to be of a certain age, and was only allowed to adopt once, with the possibility of adopting more than one person in the same adoption decree.

At the time the form of adoption was referred to as adoptia minus plena, meaning that it was not a complete adoption as the adopted would still maintain ties with his/her biological family. The law of succession at the time contemplated that the adopted child would still inherit his/her biological family even though he was legally adopted, and at the same time the law held that such child was only able to inherit from his adoptive parents and not their respective extended families. So there was no complete detachment of the adopted child from his/her biological family.

In 1962 the law on adoption was revamped and so was the basis and the reason behind such law – the focus of the law shifted and the law’s concern was the welfare of the adopted. The new law contemplated that the adopted child was to completely detach him/herself from his/her biological family and would start forming part of the adoptive family for all effects and purposes of the law. Thus, the biological family no longer had power on the child given on adoption and the adopted child could no longer inherit his/her biological family. The whole patria potestas, in all its functions, rights and obligations, were taken away from the biological family and placed in the hands of the adoptive family, to the extent that lawyers in the field used to be very careful that the identities of the biological family and adopters remained unknown. This was the will of the parties involved at the time – the biological family entrusted its child to the lawyer or to the authorities, who found such child an adoptive family; and the adoptive parents were not concerned with the origins of their adopted child.

Before 1962, especially after the Second World War there were a lot of orphaned children throughout the world, and the need of adoption was evident. At the time in Malta the mentality was that if a woman could not bear a child, then it was God’s will and adoption was not encouraged since it was very often associated to illegitimacy or sin. Fortunately, this attitude changed and the new situation was that there were fewer

\[11\] This is a transcribed translation of a video interview conducted in Maltese by Mr Clive Gerada.
children given out for adoption then there was demand. Accordingly, parents who wanted to adopt started looking for children abroad. An issue which arose and which was irritating was the fact that people used to distinguish between ‘private adoption’ and ‘non-private adoption’. Nonetheless, private adoption never existed as adoption was always done through the Court. The only difference was that there were cases whereby the mother wanted to give away her child for adoption and thus she would seek a lawyer’s advice. The lawyer would look for a couple who wanted to adopt, but to do so they had to file an application to the Court. The Court would then appoint a curator and notify the prescribed authority (which in 1962 was not even defined under our law), which at the time was the Ċentru Hidma Soċjali, which would investigate and draft a report.

Judge Wallace Gulia, who at the time was the Republic Attorney and from Fr Gejt Zammit, who was one of the founders of the Catholic Adoption Society (later on renamed as Adoption Society) gave a significant contribution to the drafting of the 1962 adoption law. Fr Gejt, after being awarded the warrant of a lawyer, became a clergyman and continued on this work in this field, where he used to liaise a lot with myself and parents and adopters who used to seek my advice. At the time, I was occasionally appointed as a curator and also spent some time lecturing on adoption at the University of Malta. Indeed, adoption fulfilled my profession with a lot of satisfaction.

I have always believed that when a child is placed for adoption, he should preferably (emphasis added) be placed with a married couple. Although our law allows single individuals to adopt, it is in the best interest of the child to grow up with both a maternal as well as a paternal figure.

When recent developments in the law of adoption were taking place, I had contacted two members of the Cabinet and warned them that they ought to be careful and try not to encumber the process by a lot of bureaucracy. Back in time, when a lot of impregnated young girls sought my advice, they wouldn’t want to proceed with adoption whenever I stated that the authorities ought to be involved, as they thought that their identity would be disclosed. There were numerous instances whereby women were having second thoughts due to the bureaucracy involved, and they even thought that it would have been easier had they committed abortion. Therefore, I stress on the fact that authorities should not seek to introduce excessive bureaucracy, although control is necessary, this should be limited.
1. Introduction

It has been enlightening to attend this conference and we have all benefitted from the papers and interview presented here. By way of conclusion, I would like to add to this discussion by offering some comments on the Maltese Law of adoption from a different perspective namely from the point of view of the Maltese Legal System. Essentially, the sources of Maltese Adoption Law are twofold, civil law and common law. Please permit me to expand upon this statement.

2. The Roman Public Law Institute of Adrogation and the Civil Law Institute of Adoption

Adoption is a very old legal concept surely dating back to the Greek period but it is more known to us through Roman Law. In Roman Law adoption comes in two forms – *adrogatio* (adrogation) and *adoptio* (adoption).

2.1 The Roman Law of Adrogation

*Adrogatio* was an institute of public law. In adrogation, one acquires *potestas* (authority) over another person who was *sui iuris* (that is, legally competent to manage one’s affairs and therefore not subject to the *potestas* of another person). Thomas states that the ‘effect of *adrogatio* was to place the *adrogatus* and all his *familia*, if any, in the *potestas* of the *adrogator*: if he had any children, they became, like himself, *filii* of the adrogator and his property vested in the new *pater*, an instance of universal succession *inter vivos*.’

12 It involved the intervention of the assembly of the people and the *Pontifex Maximus*. *Adrogatio* was, in the words of Barry Nicholas,

achieved by an act of the *comitia curiata*, preceded by an investigation by the

*pontifex maximus*.13 The reason for the legislative form and for the

---

investigation was that **adrogatio** made possible the continuation of one family and its **sacra** at the cost of the extinction of another. The **pontifex** must be satisfied on religious grounds, and the **comitia** had an interest in the political consequences of the merger of two powerful families... In particular, since the justification for **adrogatio** was the desire to continue the family, the person adrogating must have no children, either natural or adoptive, and must either be over the age of 60 or for some reason have no prospect of begetting children. And the person to be adrogated must not be older than the person adrogating.\(^\text{14}\)

### 2.2 The Roman Law of Adoption

On the other hand, **adoptio** was an institute of private law, deriving from the Twelve Tables.\(^\text{15}\) It ‘allowed the transfer of a person **alieni iuris** (that is, a person under **patria potestas**) from one **potestas** into another.’\(^\text{16}\) The philosophy behind this institute is as follows: ‘The cardinal principle of adoption was that it followed the rules of nature (**adoptio naturam imitator**) so that, though he need not be married, he has to be potentially capable of begetting issue and old enough to be father of the adoptee – under Justinian, at least eighteen years older.’\(^\text{17}\)

There are, of course, Roman Law adoption provisions which we have not inherited into our law. For instance, in the Roman institute of **adoptio**, a woman could not adopt except when she lost all her children and was allowed to adopt as a solace but following the permission of the emperor; the adoption affected only the adoptee himself and not his children unless adopted as well; the person adopted retained his rights of succession in his old family and did not pass into the **potestas** of his **adoptor**, though he acquired the right of intestate succession to him; slaves could also be adopted by their own masters.\(^\text{18}\)

### 3. The Influence of the Roman Law Institute of Adrogation on English Statutory Law of Adoption

When the Civil Code was promulgated its provisions on adoption echoed substantially Roman Law. Indeed, the Civil Code adoption provisions were based principally on the old French and Italian Civil Codes. Following Roman Law, under these two Codes, adoption produced limited effect and left the legal ties with the natural family of the adopted person unaffected. However, the amendments to the Civil Code made by Act No. XXI of 1962 regarding adoption have departed from the continental model and are based on common law. As Barry Nicholas puts it:

\(^\text{13}\) The head of the priestly ‘college’ of pontifices.
\(^\text{15}\) **Adrogatio** preceded the Twelve Tables. See HF Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn Cambridge University Press, Cambridge 1972) 120
\(^\text{16}\) Thomas (11) 439
\(^\text{17}\) Ibid 440
\(^\text{18}\) Ibid 441
... the Common Law knew nothing of such an institution. It was not until 1926 that adoption was introduced (by statute) into England, and then it created little more than a special kind of guardianship: it was confined to children under 21, conferred no rights of succession, and created no relationship which would be a bar to marriage. In the last two respects English law was brought much nearer to Roman ideas in 1949, but adoption of adults, common in Rome, and still practised in, for example, Germany, remains unknown.\textsuperscript{19}

The first English law regulating adoption is the Adoption of Children Act 1926 which entered into force on 1 January 1927. In terms of English statutory adoption law, broadly speaking the effects of an adoption order were to deprive the natural parents of their rights and duties in regard to future custody, maintenance and education to vest them in the adopters and to enable an adopted person to obtain a birth certificate in the name by which he was known.\textsuperscript{20}

Adoption statutory law in the United Kingdom – contrary to adoption statutory law in the civil law system – has not reached one hundred years of age. In this respect, it can be said that British statutory law on adoption – when compared to Roman Law – is still in its infancy.

4. The confusio\textsuperscript{21} of adrogatio and adoptio in the Maltese Law of Adoption

What has therefore happened is that the post-1962 institute of adoption can be considered to be a cross-breed between the Roman Law institutes of adrogatio and adoptio. Hopefully, we have taken the best of both Roman civil law institutes. Whilst in adrogatio, the adrogated person severed all his family ties with his previous family which now became extinct, thereby joining the new family and enjoying all the rights the law granted to such a child – and when I refer to a child I am not necessarily referring to a minor – in the case of adoption under Roman Law this was not the case. What we have taken from Roman Law is the element of adrogatio which has since 1962 formed part of our Civil Code institute of adoption.

5. Legitimation versus Adoption

A distinction was made in Roman Law – and continues to be made even in our Civil Code – between legitimation and adoption. In the case of legitimation, J.A.C. Thomas states that it concerns 'the acquisition of potestas over a man's own natural children: adoption made possible the obtaining of potestas over those who had no blood-tie with the acquirer.'\textsuperscript{22} It is, however, possible to adopt one's own natural offspring. This is made very clear in article 114(2) proviso of the Civil Code:

\textsuperscript{19} Nicholas (13) 79
\textsuperscript{20} Report of the Departmental Committee on the Adoption of Children (London 1954) 7
\textsuperscript{21} Confusio is a mixture of two separate and distinct elements into one.
\textsuperscript{22} Thomas (11) 437
... where the person to be adopted is the natural offspring of either of the spouses then the adoption decree may be made notwithstanding that the application is made only by the natural parent of the person to be adopted.

In this case such offspring is still considered to be an outsider from the perspective of adoption law. In the case of legitimation, one's natural offspring acquire full rights as one's own children; in the case of adoption, the natural offspring acquires full rights as children through a legal fiction.

6. The Legal Fiction

Evidence of this legal fiction is found in the following two provisions of the Civil Code:

(a) Article 113(2)(a) of the Civil Code reads as follows:
   any reference to a person or persons related to another person in any line or degree shall, in respect of an adopter or an adopted person or in tracing the relationship through an adopter or an adopted person, be construed as a reference to the person or persons who would be so related to him if the adopted person were the child of the adopter born to him or her in lawful wedlock and were not the child of any other person, and without prejudice to the generality of this provision, any reference to the name, names or surname of the parent or parents of an adopted person shall be construed as a reference to the name, names or surname of the adoptive parent or parents...

(b) Article 121(a) of the Civil Code reads as follows:
   the person in respect of whom the adoption decree is made shall be considered with regard to the rights and obligations of relatives in relation to each other, as the child of the adopter or adopters born to him, her or them in lawful wedlock and as the child of no other person or persons, relationship being traced through the adopter or adopters...

An adopted person can be subsequently legitimated in terms of article 126 of the Civil Code. In such case the adoption decree will be cancelled. If both parents die he can be re-adopted.


The old law on adoption, that is, the law as obtaining in the Civil Code before 1962, was faithful to the Roman Law institute of adoption, where it continued to recognise the ties which the adopted person had with his or her natural family. On the other hand, the

---

23 Article 90(1) of the Civil Code provides that: "The parent who has acknowledged a child conceived and born out of wedlock shall have in regard to him all the rights of parental authority other than the legal usufruct."
new law of adoption of fifty years ago departs from the previous law as it substitutes the adoptive family for the natural (biological) family. In essence, the 1962 law has ditched the Roman Law provisions of *adoptio* in favour of the Roman Law provisions of *adrogatio*. However, the new post-1962 law has left out all the public law elements of Roman Law *adrogatio* consisting in the extinguishment of the cult, the so-called *sacra*, of the old family, the investigation by the *pontifex maximus* and the involvement of the *comitia curiata*.

8. Adoption Law under the Old Law

- Section 131 of the Civil Code stated that ‘the word ‘adoption’ shall include the act which in the previous law was termed adrogation’.24 No reference is made to adrogation in the post-1962 adoption provisions.
- No person could adopt more than one child unless they were adopted by the same act (section 133).
- The adopters had to be husband and wife (section 134). It was not possible for one person alone to adopt.
- Not all illegitimate children could be adopted. Those illegitimate children mentioned in sections 12925 and 13026 of the Civil Code could not be adopted by either of their parents (section 135).
- The adopted child assumed the surname of the adopter and added it to his/her own (section 138). S/he did not lose his/her natural (biological) surname.
- The liability for maintenance was reciprocal as between the adopter and the adopted person (section 142).
- The adopted person acquired the same right of succession of the adopter, as a child born in wedlock but not to the succession of other members of the adopter's family (section 143(1)). This is because the relationship was restricted to the adopter and the adopted person. The adopted person’s children have the same rights as the adopted person to succeed the adopter where the adopted person dies before the adopter (section 143(2)).
- The adopted person retained all his/her rights of succession vis-a-vis his natural (biological) family, that is, s/he acquired two rights of succession (section 148).
- Adoption did not operate the transfer of *patria potestas* unless this transfer had been stipulated in the Act of Adoption, with the consent also of the mother, or by any other public deed, or unless both parents were dead (section 149).

The Italian Civil Code still continues to be faithful to the Roman Law institute of adoption (rather than that to adrogation) as can be evidenced, for instance, from these provisions:
- Article 291: ‘L’adozione e’ permessa alle persone che non hanno discendenti legittimi o legittimati, che hanno compiuto gli anni trentacinque e che superano almeno di diciotto anni l’eta’ di coloro che intendono adottare.’

25 Where one of the parents was at the time of the conception of the child united in wedlock with another person or under a legal impediment to contract marriage.
26 Where the child is born of persons between whom no marriage could be contracted by reason of consanguinity or affinity.
Article 299: ‘L’adottato assume il cognome dell’attottante e lo antepone al proprio’.

Article 300: ‘L’adottato conserva tutti i diritti e i doveri verso la sua famiglia di origine, salve le eccezioni stabilite dalla legge’.

9. Future Reforms of the Institute of Adoption

From the above it is clear that adoption law will still continue to undergo change in Malta. According to article 114(2) of the Civil Code, adoption is permitted only in the case of two spouses who are married to each other and are living together or by one such spouse. As the law stands, the adopters have to be spouses living together. What about partners who are cohabiting together in terms of the Civil Partnerships and Rights and Obligations of Cohabitants Bill?\(^27\) Will they be allowed to adopt? The said Bill does not make any consequential amendments in this respect. This therefore means that cohabitants living together cannot adopt. Possibly adoption law will have to develop from a human rights perspective bearing in mind the case law of the European Court of Human Rights in so far as the said bill does not treat cohabitants on the same line as spouses.

10. Conclusion

English Adoption Statutory Law is inspired by the Roman Law institute of adrogatio. So although the 1962 amendments to the Civil Code are inspired from English adoption law, these latter provisions are, in turn, influenced from the civil law legal system. This is undoubtedly a case where the civil law and the common law legal systems have converged in the Maltese legal system. This is also a case where the two components of Maltese Law (the civil law and the common law legal systems) prior to EU accession have influenced legislative development. Essentially, what has happened in Maltese Adoption Law is that we incorporated into our Civil Code the Roman Law of adoptio, moved on to adopt English statutory adoption law in the Civil Code in lieu of the previous Roman Adoption Law provisions but, as a matter of fact, ended up with a merger of the Roman Law institutes of adoptio and adrogatio, at least in so far as the effects of adrogation are concerned. Maltese adoption law has taken on board certain elements from the Roman public law principles of adrogatio which were not hitherto included in the Civil Code prior to the 1962 adoption law amendments and applied them to the Maltese private law institute of adoption in such a way that there is a natural blend between the adrogation and adoption provisions in Maltese Family Law.

I would like to conclude this short intervention by thanking the Department of Civil Law at the Faculty of Laws, in particular Dr Ruth Farrugia, our Family Law Course Coordinator. I also acknowledge the contribution of the Ghaqda Studenti tal-Ligi who have teamed up with the Civil Law Department in organising this symposium. I am indebted also to our learned guest speakers who have shed light in their contributions on Adoption Law namely Judge Dr Giovanni Bonello, Dr Sandra Hili Vassallo, Mr Frans

\(^{27}\) Bill No 120 published in The Malta Government Gazette of 16 October 2012
Borg, Permanent Secretary in the Ministry of the Family, Justice and Dialogue on behalf of the Hon Minister Dr Chris Said, and the Hon Mr Carmelo Abela M.P. I remain grateful to Dr Joseph Micallef Stafrace who consented to be interviewed on the topic of Adoption Law. May I please remind you that Dr. Micallef Stafrace has taught Adoption Law for several years at the Faculty of Laws of the University of Malta. Finally I thank you all for having attended this symposium and for having engaged in a lively discussion with the panel.