

CHANGING FAMILIES, CHANGING FAMILY LAW IN EUROPE

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CHANGING FAMILIES, CHANGING  
FAMILY LAW IN EUROPE

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# WHEN FILIATION FAILS

## Adoption as a Fallback Mechanism for Modern Family Forms?

Christiane VON BARY

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### 1. INTRODUCTION

Adoption has long been used to create a legal parent–child relationship in order to help adults who cannot have biological children overcome childlessness and to provide care for children.<sup>1</sup> It is a legal mechanism which exists in most countries.<sup>2</sup> Historically, the focus was mainly on the needs and wishes

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<sup>1</sup> This chapter only addresses the adoption of children and does not discuss adult adoption, which is possible in many countries but concerns a different situation that is not determined by a child in need of day-to-day care.

<sup>2</sup> The exception being many countries with an Islamic legal tradition where adoption is forbidden for religious reasons. Instead, those countries provide for ‘kafala’, a functional equivalent without a change of full legal status. See P. OREJUDO PRIETO DE LOS MOZOS, ‘Adoption’ in J. BASEDOW, G. RÜHL, F. FERRARI and P. DE MIGUEL ASENSIO (eds), *Encyclopedia*

of the adults and allowing them to establish an heir through adoption.<sup>3</sup> This is for example reflected in the fact that the original German Civil Code only permitted the adoption of a child if the adult had no children of their own and was more than 50 years of age.<sup>4</sup> Today, the focus has shifted towards an approach which puts the needs of the child in the centre.<sup>5</sup> The primary purpose of an adoption now is to give a child a permanent home when the birth parents cannot fulfil this role. For various reasons on both the side of adoptive parents and birth parents the number of adoptions has been decreasing in Europe since the 1970s.<sup>6</sup> Amongst those reasons are decreased stigma regarding non-marital children, better access to birth control and the possibilities of fertility medicine. Legal hurdles have also had an effect, especially on the decline of intercountry adoptions. In particular the successful 1993 Hague Convention on Intercountry Adoption<sup>7</sup> has set up a restrictive legal framework to protect children and their families from child trafficking.

However, adoption still plays an important role today in ensuring that children can legally be fully integrated into a new family, which increasingly often is a stepfamily. Additionally, adoption has lately assumed a new function, which this chapter focuses on: contrary to the origins of adoption, it is under some circumstances used to legally integrate children into the family they are born into and were intended to be born into. Since adoption usually creates a legal parent–child relationship equal to the one established through parenthood,<sup>8</sup> it has emerged as a substitute in cases where the law does not allow for the allocation of legal parenthood at birth through any other way. This is true in particular for same-sex couples – provided that adoption is open to them – and couples using a surrogate mother to carry their child. The once clear line between adoption and parenthood therefore is becoming increasingly blurred.<sup>9</sup>

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*of Private International Law*, Edward Elgar, Cheltenham 2017, pp. 13–21, at p. 14; M. ROHE, *Das islamische Recht*, C.H. Beck, München 2009, p. 29.

<sup>3</sup> K. O'HALLORAN, *The Politics of Adoption*, 3rd ed., Springer, Dordrecht 2015, p. 6 f. See also for example the explanation to the draft of the German Civil Code: B. MUDGAN, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, 1899, Part IV, p. 952.

<sup>4</sup> See §§ 1741, 1744 German Civil Code 1896.

<sup>5</sup> J.M. SCHERPE, *The Present and Future of European Family Law*, Edward Elgar, Cheltenham 2016, p. 86.

<sup>6</sup> J. MIGNOT, 'Child Adoption in Western Europe, 1900–2015' <<https://halshs.archives-ouvertes.fr/halshs-02008838>> accessed 25.04.2022.

<sup>7</sup> Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. The convention has been adopted by 104 countries so far; for a status table see <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>> accessed 25.04.2022.

<sup>8</sup> For details, see below, section 3.1.

<sup>9</sup> Similarly for the distinction between surrogacy and adoption, K. TRIMMINGS and P. BEAUMONT, 'International surrogacy arrangements: an urgent need for legal regulation at the international level' (2011) *Journal of Private International Law* 627, 638.

This chapter explores when and how adoption is used to establish a legal parent-child relationship in modern family forms and whether adoption is a suitable mechanism to solve the problems these families face when having children. Initially, the situations in which adoption is used because legal parenthood cannot be acquired in any other way are discussed. Then, turning to national adoption law, this chapter explores how adoption law does and does not account for the circumstances of increasingly diverse family forms. After looking at the national context – albeit with a comparative perspective – the focus shifts to the problems in international cases, looking at questions of recognition and private international law. The chapter ends by suggesting criteria to determine how to delineate between adoption and acquiring parenthood by law.

## 2. THE ROLE OF ADOPTION IN MODERN FAMILY FORMS

Traditionally, creating a parent-child relationship through filiation has followed the pattern of what was considered the ‘normal’ family: a different-sex married couple and their children who are genetically related to them. Thus, the law was designed to allocate legal parenthood in these cases. A growing number of countries have started to adapt the law of parenthood to modern family forms. Other countries have resisted granting any protection to families outside of the traditional norm. This includes no legal recognition of same-sex partnerships and no possibility of adoption for these couples.<sup>10</sup> Sometimes this problem is circumvented by an adoption by a single person, even if they live with a same-sex partner.<sup>11</sup> In these countries, using adoption law in the way analysed in this chapter is especially difficult, if not impossible. Both ends of the spectrum – the most and the least progressive countries – mostly fall outside of the scope of this investigation. The focus instead is on

<sup>10</sup> J.M. SCHERPE, above n. 5, p. 87. In Italy, for example, adoption is not explicitly open to same-sex couples because this was rejected during the legislative procedure resulting in the Civil Partnership Act (Legge 20 maggio 2016, n. 76 *Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*), which introduced a registered partnership for same-sex couples (see A. PERA, ‘The “Law in Context” for (Stepchild) Adoption in Same-Sex Couples: The Italian Models’ in C. ROGERSON, M. ANTOKOLSKAIA, J. MILES, P. PARKINSON and M. VONK (eds), *Family Law and Family Realities*, Eleven International Publishing, The Hague 2019, pp. 187–202, at p. 191). However, Art. 44(1)(d) of the Adoption Act (Legge 4 maggio 1983, n. 184 *Diritto del minore ad una famiglia*), a provision on adoption in special cases, has been used by courts, including the Corte di Cassazione (22.06.2016, no. 12962), to allow for stepchild adoption for same-sex couples.

<sup>11</sup> See, e.g., C. FENTON-GLYNN, ‘Adoption in a European perspective’ in J.M. SCHERPE (ed.), *European Family Law Volume III*, Edward Elgar, Cheltenham 2016, pp. 311–40, at p. 329.

the many countries that still largely follow the traditional model but have started to adapt to modern family forms in some regards. Usually, same-sex partnerships are accepted but same-sex parenthood is only recognized to a limited degree. Some forms of artificial reproduction are possible but surrogacy is not permitted.

Although the details are more complex and vary between jurisdictions,<sup>12</sup> for the purposes of this investigation, a very simplified explanation of the traditional rules of allocating parenthood at birth, which the countries addressed in this chapter still follow, suffices. The legal mother is the woman who gives birth to the child.<sup>13</sup> Determining fatherhood has traditionally not been as straightforward and the law generally provides for more than one route to becoming a legal father. Many countries follow a so-called marital presumption, meaning that the husband of the mother is the legal father of the child.<sup>14</sup> Additionally, fatherhood can be established through either a declaration of recognition by the father,<sup>15</sup> sometimes only with the consent of the mother,<sup>16</sup> or by a court decision which often involves proving genetic fatherhood.

These general principles of establishing parenthood are facing challenges where assisted reproduction and modern family forms are concerned. While the traditional rules are modelled after the genetic ties most commonly present for children of married different-sex couples, a genetic connection is not always strictly necessary. When different-sex couples resort to assisted reproduction, in most cases with the exception of surrogacy, they can acquire legal parenthood under the traditional framework despite a lack of genetic ties: the woman giving birth after an egg donation is the legal mother, the man who is married to her will be the legal father even if donated sperm was used, and a recognition does usually not require a proof of genetic ties.

The same, however, is not equally true for same-sex couples who have children and couples who rely on a surrogate to carry their child. Despite the societal development towards a greater acceptance of diverse family forms, equal treatment is still a work in progress, especially concerning children in these families. Therefore, in these cases, the adults are often not able to acquire legal parenthood at birth even though they decided to have a child together and from the beginning intended to become parents of the child together. Although in many countries, laws are changing and increasingly offer protection for same-

<sup>12</sup> For an in-depth comparative approach to parenthood, see C. FENTON-GLYNN (ed.), *Comparative Parenthood*, Cambridge, Intersentia (forthcoming).

<sup>13</sup> See N. DETHLOFF, *Familienrecht*, 32nd ed., C.H. Beck, Munich 2018, §10 para. 105.

<sup>14</sup> P. REUß, *Theorie eines Elternschaftsrechts*, Duncker & Humblot, Berlin 2018, pp. 305 ff.

<sup>15</sup> N. DETHLOFF, above n. 13, §10 para. 107.

<sup>16</sup> N. DETHLOFF, above n. 13, §10 para. 105.



sex relationships, this is still not true in other countries.<sup>17</sup> And even if the relationship between same-sex partners is legally recognized, same-sex parenting is not necessarily equally accepted. Additionally, surrogacy, which is often used by male same-sex couples but also by other couples where a pregnancy by one of the partners is medically not possible or not desired, remains a controversial topic.

Following the traditional rules of acquiring parenthood, for female same-sex couples, only the woman giving birth to the child is a legal parent. Even if same-sex partnerships are possible, the marital presumption does not always extend to a female partner of the mother.<sup>18</sup> Male same-sex couples must rely on a surrogate to carry their child. If the surrogate is not married or if there is no marital presumption, one of the intended fathers can recognize the child as his own. The other partner, however, cannot acquire legal parenthood. The same applies if a different-sex couple uses a surrogate: the woman giving birth to the child, i.e., the surrogate, generally becomes the legal mother of the child and thus has to be replaced by one of the intended parents, which is usually not possible under traditional parenthood rules.<sup>19</sup> In all of these cases, at least one of the intended parents cannot become a legal parent under the traditional parenthood rules which only leaves adoption to achieve this result. However, this means that the respective national adoption law must be followed.

### 3. SUBSTANTIVE ADOPTION LAW

Looking at substantive adoption law and the effects and prerequisites of an adoption, it becomes clear why adoption plays a role in modern family forms but also why adoption usually does not provide for an appropriate fallback mechanism when filiation cannot be established through the law of parenthood.

<sup>17</sup> Only looking at EU Member States, there are still six countries without any kind of protection for same-sex couples: Bulgaria, Latvia, Lithuania, Poland, Rumania and Slovakia.

<sup>18</sup> E.g., in Germany, see BGH, 10.10.2018, XII ZB 231/18, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2018, 1919, although this might change soon due to a current challenge before the Constitutional Court. In Greece, a registered partnership is possible but the marital presumption does not cover these relationships. Extending the marital presumption to female same-sex couples is, however, increasingly common and exists, e.g., in Austria (§144 ABGB), Belgium (Art. 325/2 Code civil belge), Denmark (§27 Børneloven), England and Wales (Sec. 42 ff. HFEA 2008), the Netherlands (Art. 1:198 BW), Norway (§3 Barneloven), and Sweden (§9 Föräldrabalk).

<sup>19</sup> Countries which allow surrogacy usually provide for a mechanism to ensure that intended parents can become legal parents. For examples see the chapters on Greece, Israel, South Africa, New Zealand, Portugal and Iceland in J.M. SCHERPE, C. FENTON-GLYNN and T. KAAAN (eds), *Eastern and Western Perspectives on Surrogacy*, Intersentia, Cambridge 2019.

### 3.1. EFFECTS OF AN ADOPTION

Adoption can be used as a substitute for the rules of parenthood because the legal effect of an adoption is often the same as after the allocation of parenthood by law. In many countries, the adoption of a minor leads to the full integration of the child into the new family and the adopted child is treated like any other child of the family.<sup>20</sup> Additionally, all ties to the birth parents are severed, including succession rights.<sup>21</sup> However, one significant difference remains even with a full adoption: parenthood allocated by law is regularly established at the time of the birth or with a retroactive effect from this time. Therefore, the parent–child relationship exists from the beginning of the child’s life. This is not the case under adoption law: the effect of the adoption only starts with its finalization and generally does not have retroactive effect.

In some countries, the effects of an adoption can be more limited: the child gains new parents but a connection to the birth parents remains. Often, there are two different kinds of adoption:<sup>22</sup> a full adoption and a simple adoption. This is for example the case in France, where a simple adoption<sup>23</sup> does not sever the ties between child and birth family but grants additional rights to adoptive parents.<sup>24</sup> In Austria, the effects of an adoption are always limited. While the adoptive parents gain full legal status<sup>25</sup> the ties to the birth parents are never completely severed concerning financial interests:<sup>26</sup> the adopted child retains a maintenance claim against the birth parents and vice versa, although the liability is subordinate compared to the one of and towards the adoptive family.<sup>27</sup> The succession rights also remain intact.<sup>28</sup> When adoption is used to substitute the rules of acquiring parenthood at birth, the closer the effects of the adoption come to the full status established by legal parenthood, the better it is. Thus, a full adoption suits the needs of the family better.<sup>29</sup>

<sup>20</sup> See, e.g., Croatia (Art. 197 Obiteljski zakon), Denmark (§16 Bek af lov om adoption), Greece (Art. 1561 Civil Code), Ireland (Sec. 58 Adoption Act 2010), Italy (Art. 27 Legge 04.05.1983, no. 184 Diritto del minore ad una famiglia), Netherlands (Art. 1:229 Burgerlijk Wetboek), Portugal (Art. 1986 Código Civil), Spain (Art. 178 Código Civil).

<sup>21</sup> For an explicit regulation of the termination of succession rights, see, e.g., Croatia (Art. 199 Obiteljski zakon), Denmark (§16 Bek af lov om adoption).

<sup>22</sup> E.g., in France and Belgium.

<sup>23</sup> Adoption simple, Art. 364(1) Code civil français. The full adoption is called ‘adoption plénière’, Art. 356(1) Code civil français.

<sup>24</sup> Especially permanent parental responsibility, Art. 365 Code civil français.

<sup>25</sup> Art. 197 ABGB (Austria).

<sup>26</sup> C. VOITHOFER, ‘Eltern-Kind-Verhältnisse im Spannungsfeld genetischer und sozialer Beziehungen: Ein Streifzug durch das österreichische Familienrecht’ (2016) *Praxis des Familienrechts (FamPra.ch)* 422, 434.

<sup>27</sup> Art. 198 ABGB.

<sup>28</sup> Art. 199 ABGB.

<sup>29</sup> For Belgian law explicitly see G. VERSCHULDEN and J. VERHELLEN, ‘Belgium’ in K. TRIMMINGS and P. BEAUMONT (eds.), *International Surrogacy Arrangements*, Hart Publishing, Oxford 2013, pp. 49–84 at p. 72 f.

A common scenario in modern family forms is that only one parent can acquire legal parenthood at birth through the rules on parenthood. In this case, a stepparent adoption helps the second parent to gain legal parenthood: the child has and retains one legal parent but the second parent is added. Stepparent adoptions are usually full adoptions and therefore not undisputed in typical stepfamily situations where a biological parent is replaced by a stepparent.<sup>30</sup> However, in the case of modern family forms, where the second parent has always acted as and was always intended to be the second parent and only needs the help of adoption law to acquire this status legally, those concerns do not apply. This is reflected in French law where stepchild adoptions usually cannot be full adoptions to preserve the tie to the other biological parent. Exceptions apply – among other cases – when a child only has one legal parent either through the law of parenthood or through previous adoption by a single person.<sup>31</sup>

## 3.2. PREREQUISITES OF AN ADOPTION

Although the resulting parental status is the same or at least very similar through adoption and the law of parenthood, the prerequisites vary considerably. While adoption is used as a fallback mechanism to create legal parenthood under certain circumstances today, this development was not something intended originally. Therefore, the law is generally not adapted to these scenarios. Going through adoption and having to comply with the requirements raises questions of equality and discrimination.

### 3.2.1. *General Prerequisites*

The typical case of an adoption for which the law needs to provide an appropriate mechanism is a child born to birth parents who cannot care for the child and who therefore place their child with another family that they most often will not have known before. Usually, an agency – mostly run by the State or State approved to ensure child trafficking is ruled out<sup>32</sup> – will provide the service of facilitating the meeting between birth and adoptive parents.

Since an adoption, in essence, means choosing parents for a child, it is important to find people who can take care of the child and support the child's development emotionally, educationally and financially, at least until the child

<sup>30</sup> For reasons why stepchild adoptions can be criticized see, e.g., R. FRANK, 'Die Stiefkindadoption' (2010) *Das Standesamt (StAZ)* 324, 325 f.

<sup>31</sup> See Art. 345-1 Code civil français.

<sup>32</sup> See, e.g., for Germany §2 Adoptionsvermittlungsgesetz.

comes of age but ideally for a lifetime. Therefore, from a substantive point, there is a general consensus in Europe that an adoption is only possible if it is in the best interest of the child,<sup>33</sup> making this the main substantive prerequisite of an adoption in most countries. Relevant considerations concern the current situation of the child as well as the suitability of the adoptive parents. Since someone must decide what the best interest of the child is in each individual case, in most countries, adoption requires the involvement of a court.<sup>34</sup> Usually, the court will obtain information on the situation by hearing the adults concerned and – depending on the age – also the child. Additionally, social services are often involved. In Germany, for example, the court must obtain a statement from the youth welfare office.<sup>35</sup> To prepare this statement, the youth welfare office asks the adoptive parent(s) to provide documentation on questions such as health, financial situation, criminal history or living situation. Then, a social worker visits the family at home. In Spain, a declaration of suitability is required which includes a psychosocial assessment<sup>36</sup> where similar factors are considered.<sup>37</sup>

Although almost all jurisdictions agree on looking at the best interest of the child, this does not mean that there is a comparable consensus about what the best interest of the child is and how it is determined in practice. Thus, it can depend on the personal and professional experience and perspective of the person who makes the decision. Sometimes, personal prejudice against certain family forms may influence the procedure or a decision. Since the decision is based on a prognosis for the future it is necessarily based on a prediction. Thus, although the best interest of the child is a child-centred criterion and in principle appropriate, it also leads to a considerable amount of uncertainty and potential bias.

In some countries, an adoption requires a certain minimum waiting or trial period where the adoptive parents care for the child but the adoption is not yet formalized. Since there are very limited options to dissolve an adoption, a waiting period is intended to ensure that the adoption is successful. But a waiting period adds to the delay which the requirement of a court involvement

<sup>33</sup> J.M. SCHERPE, above n. 5, p. 86. See the explicit regulation, e.g., in §194 ABGB (Austria), §1741 BGB (Germany), Art. 1:227(3) BW (Netherlands).

<sup>34</sup> N. DETHLOFF, above n. 13, §15 para. 81.

<sup>35</sup> §189 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG).

<sup>36</sup> Art. 176 Código civil.

<sup>37</sup> The details are not regulated on the federal level and vary. For an example of the factors considered in Madrid, see Art. 58 Ley 6/1995, de 28 de marzo, de Garantías de los Derechos de la Infancia y la Adolescencia en la Comunidad de Madrid.

already entails. For example, in Italy, a waiting period of one year is mandatory.<sup>38</sup> In the Czech Republic, there is a trial period of at least nine months.<sup>39</sup> During this time, the child usually lives with the adoptive parents but since the adoption is not final, a change in circumstances – like a separation of the adoptive parents – can have serious consequences.<sup>40</sup> This leads to prolonged insecurity, which is especially problematic when the child has always lived with and was always intended to be a common child of a couple.

The further requirements of an adoption usually do not lead to particular problems for modern family forms. Usually, the consent of several parties is necessary: the birth parent(s), the adoptive parents and the child, depending on the age either through a parent or guardian or themselves. In modern families, usually all parties involved are in agreement about who the parents of the child should be, meaning the consent is given. Additionally, in some countries, there are age requirements, which can both be a minimum and a maximum age and/or an age gap. This is intended to guarantee that it is possible for adoptee and adoptive parent(s) to form a typical parent–child relationship. National laws also diverge on the question whether unmarried couples can adopt a child.<sup>41</sup> This usually applies to different-sex and same-sex unmarried partners who then cannot rely on adoption if the rules on parenthood do not allow them to acquire legal parenthood.

### 3.2.2. *Specific Rules for Modern Family Forms*

Some national adoption laws include provisions which lead to particular consequences for modern family forms or specifically take their needs into account. While this most often leads to less strict prerequisites, the opposite can also be true. For example, in Germany, §1741(1)2 BGB provides that a person who has participated in an illegal or immoral child arrangement or has mandated or rewarded a third person to do so shall only be allowed to adopt the child if adoption is necessary to protect the best interest of the child. This provision is intended to prevent child trafficking by imposing a stricter requirement on a subsequent adoption: it is not sufficient if the adoption is conducive to the best interest of the child but it has to be necessary to protect the child. Some courts have applied this standard to adoptions after surrogacy<sup>42</sup> and the official

<sup>38</sup> Art. 25 Legge Nr. 184 Diritto del minore ad una famiglia.

<sup>39</sup> The trial period itself lasts at least six months, Art. 829(2) Občanský zákoník, but can start at the earliest three months after the birth of the child, Art. 823(2) Občanský zákoník.

<sup>40</sup> See also below, section 3.3.

<sup>41</sup> J.M. SCHERPE, above n. 5, p. 87.

<sup>42</sup> AG Düsseldorf, 19.11.2010, 96 XVI 21/09; AG Hamm, 22.02.2011, XVI 192/08; LG Düsseldorf 15.03.2012, 25 T 758/10.

recommendations of the umbrella organization of youth welfare offices still argue for an application.<sup>43</sup> However, most courts<sup>44</sup> and academics<sup>45</sup> now – rightly so – do not support stricter requirements for an adoption after surrogacy.

In the Netherlands, however, female same-sex couples can rely on Art. 1:227(4) Burgerlijk Wetboek (BW) to grant them easier access to adoption in certain cases. This provision from 2009 still exists although co-motherhood was introduced in 2014.<sup>46</sup> If the child was born into a relationship between the legal parent and the ‘adopter’ after assisted reproduction with sperm from an anonymous donor, the adoption is granted unless it is evidently not in the interest of the child. The burden to show that the adoption is in the best interest of the child is therefore lower, giving female same-sex parents easier access to adoption.<sup>47</sup> Additionally, Art. 1:230(2) BW provides for the retroactive effect of the adoption to the time of birth if the adoption was requested before birth. This constitutes an exception to the general rule that an adoption takes effect on the day the court decision becomes final. Such a provision is especially important if the mother giving birth dies before or shortly after the birth of the child because the adoption can still go ahead in these cases.<sup>48</sup>

Differences can also concern the proceedings. For example, in Germany there is a requirement to undergo counselling before a stepchild adoption.<sup>49</sup> However, this requirement is waived for cases in which at the time of birth of the child the ‘adopter’ is either married to or in a stable relationship the legal parent of the child.<sup>50</sup>

<sup>43</sup> Empfehlungen zur Adoptionsvermittlung der Bundesarbeitsgemeinschaft Landesjugendämter, 7th ed. 2014, <[http://www.bagjjae.de/downloads/120\\_empfehlungen-zur-adoptionsvermittlung-2014.pdf](http://www.bagjjae.de/downloads/120_empfehlungen-zur-adoptionsvermittlung-2014.pdf)> accessed 25.04.2022.

<sup>44</sup> LG Frankfurt a.M., 03.08.2012, 2-09 T 50/11; OLG Düsseldorf, 17.03.2017, II-1 UF 10/16; OLG München, 12.02.2018, 33 UF 1152/17; OLG Frankfurt a.M., 28.02.2019, 1 UF 71/18.

<sup>45</sup> A. BOTTHOFF and A. DIEHL, ‘Voraussetzungen für die (Stiefkind-)Adoption eines Kindes nach Inanspruchnahme einer Leihmutter’ (2013) *StAZ* 211; N. DETHLOFF, ‘Leihmütter, Wunscheltern und ihre Kinder’ (2014) *Juristenzeitung (JZ)* 922, 931; M. LÖHNIG, in *BeckOGK*, C.H. Beck, Munich 2022, §1741 BGB para. 47; H. MAURER, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 10*, 8th ed., C.H. Beck, Munich 2020, §1741 para. 149. For an application of §1741(1)2 BGB see C. THOMALE, *Mietmuttertschaft*, Mohr Siebeck, Tübingen 2015, p. 16.

<sup>46</sup> For information on the introduction of co-motherhood in the Netherlands, see I. CURRY-SUMNER and M. VONK, ‘Dutch Co-Motherhood in 2014’ (2014) *International Survey of Family Law* 361.

<sup>47</sup> W. SCHRAMA, M. ANTOKOLSKAIA and G. RUITENBERG, *Familienrecht*, 4th ed., Boom juridisch, Den Haag 2021, p. 280.

<sup>48</sup> M. VONK, ‘Same-sex parents in the Netherlands’ in E. BOUVIER DE RUBIA and A. VOINNESSON (eds), *Homoparentalité? Approche comparative*, vol. 18, 2012, pp. 13–40, at pp. 34 f.

<sup>49</sup> §9a(1) Adoptionsvermittlungsgesetz.

<sup>50</sup> §9a(4), (5) Adoptionsvermittlungsgesetz.

### 3.3. ADOPTION PROCEEDINGS AS DISCRIMINATION

Whereas the effects of an adoption and acquiring legal parenthood through the rules of parenthood are usually the same, the requirements are markedly different. With an adoption, the prospective parents are evaluated and the State assesses whether the adoption is in the best interest of the child. Parents in traditional family forms do not have to undergo such an evaluation if they have biological children or if they resort to artificial reproduction with donor material. In fact, such an assessment – sometimes referred to as parental licensing – would likely violate constitutional and human rights.<sup>51</sup> However, families who must resort to adoption because the rules of parenthood do not currently apply to them have to accept such an evaluation. Additionally, an adoption requires judicial or administrative proceedings which means that it takes time for an adoption to be processed. Sometimes the costs associated with this process can also be significant.<sup>52</sup> Further, before the adoption is final, the person already assumes the role of a parent but has no legal rights. In return, the child does not have a maintenance claim. Especially problematic are cases where the parents separate or one of them dies before the adoption is final. In these situations, no parental connection has been established and in case of death it can no longer be established. This leads to the child not having inheritance rights or rights to potential benefits like survivor's pension or insurance. In the case of separation of the parents, a joint adoption might become legally impossible<sup>53</sup> or deemed not to be in the best interest of the child because of the less stable household situation. The necessity of an adoption thus places an additional burden on families who cannot rely on the law of parenthood. Because those families are ones which break from traditional norms relating to sexuality, family formation and gender, this becomes a question of equality and discrimination.<sup>54</sup>

However, not every different treatment also amounts to a violation of rights. While the European Court of Human Rights (ECtHR) repeatedly found an interference with the rights to respect of private and family life and freedom from discrimination under Articles 8 and 14 of the European Convention on Human Rights, this interference was regularly held not to be disproportionate. In connection with surrogacy, the Court has frequently affirmed that it is sufficient

<sup>51</sup> For a violation of Arts 2 and 6 of the German Constitution, see D. COESTER-WALTJEN, 'Überlegungen zur Notwendigkeit einer Reform des Abstammungsrechts' (2021) *Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW)* 129, 142 f.

<sup>52</sup> See, e.g., for the US D. NEJAIME, 'The Nature of Parenthood' (2017), 126 *Yale Law Journal* 2260, 2317.

<sup>53</sup> This was e.g. the case in the decision of the ECtHR, *Valdís Fjölnisdóttir and others v. Iceland*, 18.05.2021, no. 71552/17.

<sup>54</sup> D. NEJAIME, above n. 52, p. 2323 ff.

if legal parenthood can be acquired through an effective and sufficiently fast mechanism.<sup>55</sup> In practice, this mechanism usually is an adoption,<sup>56</sup> although in recent decisions, the ECtHR held that a foster care agreement<sup>57</sup> or parental responsibility<sup>58</sup> can also suffice. Thus, it seemed that the Convention only protects the lived reality of the family rather than the legal status of parenthood. However, in its latest decision, the ECtHR explicitly held that not recognising a legal parent child relationship by refusing adoption of a child born through surrogacy violates the right to private life of the child.<sup>59</sup> This change might pave the way for a violation of the Convention in other cases but is still built on adoption as a means of establishing a parent-child relationship. Additionally, the Court allows the States a wide margin of appreciation, which presents a significant hurdle to establishing a violation of the Convention. This wide margin of appreciation is based on varying views on the issues at hand and therefore at least partly on political reasons. The specific question of whether an adoption in itself can be a discriminatory requirement has not been examined by the court. While this is understandable from a pragmatic standpoint given the limitations of the power of the Court, it still falls short of a full consideration of the rights of people living in modern family forms.

However, it is possible that national constitutional law follows a stricter approach. In Germany, the Constitutional Court is currently considering such questions.<sup>60</sup> Lower courts have considered it to be a violation of the right to equal treatment under Article 3 to not allocate parenthood to married female same-sex partners. The question is whether it can be justified to treat spouses of women giving birth differently based on whether they are men or women. Under the current law, a husband of a woman giving birth can become the father of the child without adoption even if he is not genetically related to the child but the wife of the woman giving birth of the child cannot.

A justification previously brought forward for this difference in treatment was the best interest of the child, i.e., the consideration that a child would be better off having two parents of a different sex or a home where it was not in danger of being discriminated against because of traditional values pervading in society. However, there is no empirical evidence that

<sup>55</sup> ECtHR *Advisory Opinion*, 10.04.2019, request no. P16-2018-001, para. 54; ECtHR, *C and E v. France*, 19.11.2019, no. 1462/18 and no. 17348/18, para. 42; ECtHR, *D v. France*, 16.07.2020, no. 11288/18, para. 64.

<sup>56</sup> See especially the advisory opinion in a case involving surrogacy, *ECtHR Advisory Opinion*, 10.04.2019, no. P16-2018-001.

<sup>57</sup> ECtHR, *Valdís Fjölnisdóttir and others v. Iceland*, 18.05.2021, no. 71552/17.

<sup>58</sup> ECtHR, *C.E. and others v. France*, 24.03.2022, no. 29775/18 and 29693/19.

<sup>59</sup> ECtHR, *K.K. and Others v. Denmark*, 06.12.2022, no. 25212/21.

<sup>60</sup> Several courts have suspended proceedings and referred the problem to the Constitutional Court, e.g., OLG Celle, 24.03.2021, 21 UF 146/20; KG Berlin, 24.03.2021, 3 UF 1122/20; AG München, 11.11.2021, 542 F 6701/21.



these arguments are true,<sup>61</sup> excluding the best interest of the child as a justification.<sup>62</sup> Additionally, in modern families, the child usually already lives with the adult(s) who want to adopt the child meaning that waiting for the legal approval does not protect the child during this time even if this should in exceptional cases be necessary. On the contrary, the insecurity for parents and children persists in the meantime, which can have harmful consequences.<sup>63</sup> Relying on purely genetic ties is also not satisfactory because the marital presumption does not require the man to be the genetic father. On the contrary, in the case of reverse egg donation, the wife of the woman giving birth can be the genetic mother without this having any effect on her acquiring legal parenthood. Thus, a justification of this unequal treatment seems elusive, meaning that it violates the Constitution.

This exact question has not yet been considered by the ECtHR. In the case of *D v. France*, it was only brought forward at a later stage and was found inadmissible.<sup>64</sup> It will be interesting to see how this plays out in the future and it might provide a promising avenue to pursue before the ECtHR.

## 4. INTERNATIONAL CONTEXT

At a national level, using adoption as a fallback mechanism reveals certain problems. Looking at cases with an international dimension adds to the complexity but also reveals that in some cases, adoption can have advantages over acquiring parenthood by law. As a starting point, it is necessary to differentiate between three different situations: the procedural recognition of a foreign decision; a recognition based on EU law; and the assessment of a situation with a foreign element according to the applicable law.

### 4.1. PROCEDURAL RECOGNITION

If there is a foreign decision that can be recognized by procedural means, this takes priority and is usually easier because the standard of review is limited to

<sup>61</sup> R.H. FARR and C.J. PATTERSON, 'Coparenting Among Lesbian, Gay, and Heterosexual Couples: Associations with Adopted Children's Outcomes' (2013) 84 *Child Development* 1226; S. GOLOMBOK, *Modern Families*, Cambridge University Press, Cambridge 2015, p. 198 f.

<sup>62</sup> P. REUß, 'Das Abstammungsrecht auf dem verfassungsrechtlichen Prüfstand' (2021) *Zeitschrift für das gesamte Familienrecht (FamRZ)* 824; E. SCHUMANN, 'Elternschaft nach Keimzellspende und Embryoadoption' (2014) *Medizinrecht* 736, 745.

<sup>63</sup> See, e.g., for same-sex parents in the US, A. GASH and J. RAISKIN, 'Parenting without Protection: How Legal Status Ambiguity Affects Lesbian and Gay Parenthood' (2018) 43 *Law & Social Inquiry* 82.

<sup>64</sup> ECtHR, *D v. France*, 16.07.2020, no. 11288/18, para. 81 ff.

certain grounds of refusal. However, there needs to be a decision by a foreign court to go through this process. This is where differences between acquiring parental status through adoption and the rules of parenthood occur:<sup>65</sup> an adoption is usually based on a court order,<sup>66</sup> which means that a procedural recognition is possible. If parenthood is allocated by law, a birth certificate provides an official record of this status which is often also entered into a registry. Although a birth certificate is an official document, it usually is not recognizable by procedural means as it does not have the same binding legal effect as a court decision. This has often been a problem in surrogacy cases.<sup>67</sup> The country where the surrogacy takes place provides for the intended parents to become legal parents and issues a birth certificate. Upon return home, the intended parents aim for recognition of the birth certificate, which is not always possible. For example, in Germany, the provision<sup>68</sup> for procedural recognition of a foreign decision does not apply to birth certificates.<sup>69</sup> A similar differentiation exists in Belgium.<sup>70</sup> Other countries, for example the Netherlands,<sup>71</sup> recognize birth certificates through a separate procedure. In France, a transcription – which leads to the inscription in the birth registry and therefore resembles a recognition – of a foreign birth certificate used to be impossible.<sup>72</sup> In 2019, the *Cour de cassation* changed its opinion, allowing a transcription.<sup>73</sup> A change of Art. 47 Code civil,<sup>74</sup> which regulates the effect of foreign civil status documents in France, was intended to reverse the most recent decisions of the *Cour de cassation*, meaning that an adoption would once

<sup>65</sup> An illustrative example is a decision from the UK High Court of Justice Family Division, *Re Q (A Child) (Parental Order: Domicile)* [2014] EWHC 1307 (Fam): the adoption by the intended mother was recognized but the allocation of parenthood by law of the intended (and genetic) father was not.

<sup>66</sup> See above, section 3.2.1.

<sup>67</sup> However, there are cases where parenthood is based on a court decision after surrogacy, e.g., under the law of California, see BGH, 10.12.2014, XII ZB 463/13.

<sup>68</sup> §109 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG).

<sup>69</sup> BGH, 20.03.2019, XII ZB 320/17.

<sup>70</sup> G. VERSCHELDEN and J. VERHELLEN, 'Belgium' in K. TRIMMINGS and P. BEAUMONT (eds), *International Surrogacy Arrangements*, Hart Publishing, Oxford 2013, pp. 49–84, at p. 69 f.

<sup>71</sup> I. CURRY-SUMNER and M. VONK, 'The Netherlands' in K. TRIMMINGS and P. BEAUMONT (eds), *International Surrogacy Arrangements*, Hart Publishing, Oxford 2013, pp. 273–94, at p. 286.

<sup>72</sup> Cour de Cassation, 1st Civil Chamber, 06.04.2011, n°10-19053, n°09-66486 and n°09-17130; Cour de cassation, 13.09.2013, n°12-18315 and n°12-30138.

<sup>73</sup> Cour de cassation, 1st Civil Chamber, 18.12.2019, n°18-11815 and n°18-12337, recently confirmed by Cour de cassation, 1st Civil Chamber, 13.01.2021, n°19-17929.

<sup>74</sup> Art. 7 of loi n° 2021-1017 du 2 août 2021 relative à la bioéthique added a new last sentence: 'Celle-ci [l'acte de l'état civil] est appréciée au regard de la loi française', which translates to 'It [the civil status act] is assessed in the light of French law' (translation by the author).

again become necessary;<sup>75</sup> however, so far this legislative change only seems to have created further confusion because the wording of the new addition to the provision is incoherent.<sup>76</sup> It will be interesting to see how the *Cour de cassation* reacts to the new legislation.

That the recognition of an adoption is easier than accepting parenthood based on foreign law because an adoption is based on a court decision might seem arbitrary but can have far-reaching consequences. For example, in the Netherlands, female same-sex couples sometimes decide to use adoption rather than establishing co-motherhood and one of the reasons advanced is that they fear that the latter would not be accepted abroad.<sup>77</sup> One factor favouring this decision might also be that adoption for female same-sex parents is made easy in the Netherlands.<sup>78</sup> Some families have even asked the court to dissolve the recognition of co-motherhood to then go through a stepchild adoption. A child who was a minor at the time of the recognition by the co-mother can challenge this relationship if the co-mother – as is normally the case – is not genetically related to the child. A special guardian (*bijzondere curator*) can file an application for the minor child. The special guardian only files the application if it is in the best interest of the child but if an application is filed, the order is usually granted.<sup>79</sup> One reason for the application being in the best interest of the child is the better acceptance abroad of a subsequent adoption.<sup>80</sup>

If a procedural recognition is possible, the most relevant ground for a refusal of recognition for the purposes of this chapter, which exists in almost all jurisdictions, is a violation of public policy. However, the standard of review in a procedural recognition is still lower<sup>81</sup> than the full review under private international law. In Germany, for example, courts have not found foreign decisions allocating parenthood after surrogacy to violate public policy although

<sup>75</sup> C. BIDAUD, 'La force probante des actes de l'état civil étrangers modifiée par la loi bioéthique: du sens à donner à l'exigence de conformité des faits à la réalité «appréciée au regard de la loi française» ...' (2022) *Revue critique de droit international privé* 35, 36 f.

<sup>76</sup> C. BIDAUD, above n. 74, pp. 35, 38 ff.

<sup>77</sup> See the arguments brought forward in the cases cited below in fns 79, 80.

<sup>78</sup> See above, section 3.2.2.

<sup>79</sup> Rechtbank Overijssel, 19.05.2016, C/08/174066, ECLI:NL:RBOVE:2016:2134; Rechtbank Den Haag, 22.09.2016, C/09/503074, ECLI:NL:RBDHA:2016:5263; Rechtbank Noord-Holland, 10.10.2018, C/15/255549, ECLI:NL:RBNHO:2018:8762.

<sup>80</sup> Rechtbank Den Haag, 22.09.2016, C/09/503074, ECLI:NL:RBDHA:2016:5263. In another case (Rechtbank Overijssel, 19.05.2016, C/08/174066, ECLI:NL:RBOVE:2016:2134), it also sufficed to argue that the child should not later – after turning 18 – be forced to decide if they want to challenge the recognition and therefore an adoption would be preferable.

<sup>81</sup> This so-called *effet atténué* is based on the fact that a court decision already commands a certain trust and therefore rejecting the recognition must meet a higher threshold. For German law see, e.g., J. VON HEIN, in F. SÄCKER, R. RIXECKER, H. OETKER and B. LIMPBERG, *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 12*, 8th ed., C.H. Beck, Munich 2020, Art. 6 EGBGB para. 110 ff.

surrogacy is not permitted.<sup>82</sup> The German Federal Supreme Court has, however, not yet decided on a case involving surrogacy without a genetic connection of the intended parents to the child – the case that most closely resembles the situation of an adoption.<sup>83</sup> The higher regional court of Berlin did not see a reason to weigh the interests differently in cases without a genetic connection of the intended parents.<sup>84</sup> As a decision on public policy requires weighing the different interests and needs for protection in the individual situation, the best interest of the child – which regularly is to stay permanently with the intended parents – is of great significance. However, countries which do not accept modern family forms in any way will most likely also refuse recognition. The public policy exception is based on national values. Therefore, a varying acceptance of modern family forms can easily be justified.

#### 4.2. RECOGNITION BASED ON EU LAW

In the EU, there has been a discussion about the recognition of birth certificates based on EU law, namely on freedom of movement under Article 21 of the Treaty on the Functioning of the European Union (TFEU). In the *Pancharevo* case,<sup>85</sup> the Court of Justice of the European Union decided that, at least for purposes of free movement and family reunification, all EU Member States must recognize the parent–child relationship established in another Member State. So far, it is still unclear if this decision mandates a full recognition of the parent–child relationship in all areas of the law or if it remains limited to the ability to live and move together within the EU.<sup>86</sup> If EU law truly leads to a full recognition within the EU, which is unlikely, this levels the difference between the procedural recognition of adoption orders and the private international law treatment of birth certificates and acquiring parenthood through the rules of parenthood. In this case, in an intra-EU international context, there would be no advantage to adoption for this reason.

<sup>82</sup> BGH, 10.12.2014, XII ZB 463/13.

<sup>83</sup> T. HELMS, 'Co-Elternschaft im IPR' (2023) *Praxis des internationalen Privat- und Verfahrensrechts (IPRax)* 232, 236. A first decision by a lower instance court has now applied a best-interest-of-the-child-test and thus essentially the standard for an adoption in the case of a recognition after surrogacy without a genetic connection to either intended parent but recognised the foreign decision, AG Sinsheim, 15.05.2023, 20 F 278/22.

<sup>84</sup> KG Berlin, 21.01.2020, 1 W 47/19.

<sup>85</sup> ECJ, C-490/20, *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'*, ECLI:EU:C:2021:1008. Very similar also ECJ, C-2/21, *Rzecznik Prw Obywatelskich*.

<sup>86</sup> J.O. FLINDT, 'Anmerkung zu EuGH C-490/20' (2022) *FamRZ* 286, 288; A. TRYFONIDOU, *The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: A Critical View of the ECJ's V.M.A. ruling* <<https://europeanlawblog.eu/2021/12/21/the-cross-border-recognition-of-the-parent-child-relationship-in-rainbow-families-under-eu-law-a-critical-view-of-the-ecjs-v-m-a-ruling>> accessed 25.04.2022.

However, since surrogacy is most often accessed outside of the EU as it is prohibited in most of the EU Member States – only Greece and Portugal offer access to surrogacy under certain limited conditions – the differentiation remains relevant. The same is true for parents with a connection to a non-EU Member State who want to improve the likelihood of recognition in all relevant jurisdictions.

### 4.3. PRIVATE INTERNATIONAL LAW

If a recognition is not possible, the facts of the case are assessed anew in the country where the question whether a parent–child relationship exists poses itself. The first step is then to determine which law is applicable under conflict-of-law rules. This requires choosing the correct conflict-of-laws rule.

Since private international law is routinely concerned with foreign law and its different rules, the provisions and their scope of application need to be flexible. A functional analysis is necessary to ensure that foreign elements are evaluated correctly. Since adoption is used as a functional equivalent to allocating parenthood at birth in modern family forms, choosing the correct conflict-of-laws rule is not as easy as it might seem at first glance. It has been argued that foreign provisions on same-sex parenthood should fall under the conflict-of-law rules on adoption and only biologically possible parent–child connections should be qualified as parenthood.<sup>87</sup> In Germany, it was suggested that an explicit amendment with a similar effect should be included in the private international law of parenthood.<sup>88</sup> The classification on the private international law level (adoption) would then deviate from the classification in the country of origin (parenthood). As such, this is not entirely uncommon and follows accepted private international law methodology.<sup>89</sup> However, since classification has to follow a functional approach,<sup>90</sup> the question remains whether adoption really is the right category for all cases where parent(s) and child lack a genetic

<sup>87</sup> M. ANDRAE, ‘Die gesetzliche Zuordnung des Kindes nach ausländischem Recht bei lesbischer institutioneller Partnerschaft’ (2015) *StAZ* 163, 168 ff.; C. THOMALE, *Mietmuttertschaft*, Mohr Siebeck, Tübingen 2015, p. 90.

<sup>88</sup> This was suggested (and never implemented) as an addition to the private international law rule for parenthood in a new Art. 19(5) EGBGB, see H.-P. MANSEL, ‘Reform des internationalen Abstammungs- und Adoptionsrechts des EGBGB’ (2015) *IPRax* 185.

<sup>89</sup> A famous example would be the qualification of the statute of limitations as substantive law in civil law countries rather than procedural law as it is usually done in common law countries.

<sup>90</sup> See, e.g., J. KROPHOLLER, *Internationales Privatrecht*, 6th ed., Mohr Siebeck, Tübingen 2006, p. 126 ff. For a general overview on the problem of classification see also S. BARIATTI, ‘Classification’ in J. BASEDOW, G. RÜHL, F. FERRARI and P. DE MIGUEL ASENSIO, *Encyclopedia of Private International Law*, above n. 2.

relationship. This leads back to the necessity to distinguish between adoption and parenthood.

## 5. DISTINGUISHING ADOPTION AND PARENTHOOD

On a national level, distinguishing between adoption and parenthood is mostly a normative question because the rules are mandatory and if the prerequisites of parenthood are not met, only adoption remains an option. However, in private international law, the question of delineation arises in practice. Reproductive technologies have allowed people who are not genetically related to the child to become the original parents, making it challenging to distinguish clearly between situations where adoption is appropriate and where filiation should be established by law at birth. Situations involving same-sex parents and surrogacy show how adoption is used in cases where filiation might seem more appropriate. But the opposite can also occur:<sup>91</sup> if a child does not yet have a legal father, any man – in practice, usually the new partner of the mother – can recognize the child. A genetic relationship is not necessary and neither is an assessment of the best interest of the child although this situation is very similar to the typical case of a stepchild adoption.<sup>92</sup> Looking at surrogacy, the intended father also benefits from this situation as he can often recognize the child as his own, sometimes with the consent of the birth mother, i.e., the surrogate, which is especially remarkable if he is not the genetic father.<sup>93</sup>

To differentiate between the two phenomena, it is necessary to ascertain the core of what makes them distinctive. The biggest difference is that a careful evaluation of the prospective parents before an adoption is mandatory whereas nothing comparable exists in case of allocating parenthood by law at birth. In the end, this means that the law follows the rule rather than the exception: usually, genetic parents will take good care of the child. Therefore, the law is based on the assumption that this is the case. In turn, when parents are unable or unwilling to care for the child or if they endanger the welfare of the child, they refute this assumption. Consequently, the state has the right – and the duty – to intervene. Then, it is necessary to choose between different possible adoptive parents and the state has a duty to ensure the best interest of the child, which

<sup>91</sup> R. FRANK, *Grenzen der Adoption*, Metzner Verlag, Frankfurt a.M., 1978, pp. 98 ff. calls this ‘concealed stepchild adoption’.

<sup>92</sup> See R. FRANK, ‘Art. 8 EMRK und die Anfechtung wahrheitswidriger Vaterschaftsanerkennungen durch den biologischen Vater (§1600 Abs. 2 BGB)’ (2021) *Zeitschrift für das gesamte Familienrecht (FamRZ)* 1081, 1086.

<sup>93</sup> T. HELMS, ‘Co-Elternschaft im IPR’ (2023) *IPRax* 232, 236 f.

justifies a close assessment. Modern families, however, should be afforded the same assumption – the same trust – as traditional families because they can care for a child just as well as those families. Everything else comes back to a discrimination against modern family forms.

Therefore, the main difference between adoption and allocation of parenthood by law at birth lies in the timeline: adoptive parents become parents to a child without being involved in the conception of the child. The parent–child relationship only develops after the birth parents decide that they cannot take care of the child. The law of parenthood allocates parenthood for children whose parents have been party to the conception of the child, whether through their own biological or genetic contribution or through their wish to care for the child. Genetics play a role but in many of the critical cases, it is not the deciding factor. The marital presumption does not require a genetic connection and due to medical advancement, neither does giving birth to the child. Therefore, a genetic connection is only one way of being involved from the beginning.

Identifying the timeline as the relevant criterion fits well with the fact that the allocation of parenthood and an adoption usually take effect at a different time, reflecting this delineation. The law of parenthood regularly designates parents from the time of birth or with retroactive effect to the time of birth. This is true not only for the automatic allocation of parenthood by law but mostly also for a recognition or challenge of parenthood which requires a declaration.<sup>94</sup> Since the allocation of parenthood results in a permanent status which has consequences in many other areas such as parental responsibility, maintenance or nationality, it is of particular importance that this relationship is defined as soon as possible.<sup>95</sup> In contrast, adoption usually only has an effect for the future.<sup>96</sup>

From a normative perspective, this means that changing adoption law to fit modern family forms is not the best solution to the problem of legal recognition of parental status in these families.<sup>97</sup> On the contrary, changes should be made to the law of parenthood. Any reform of adoption law would have to consider the needs of the more typical situation of an adoption. In these cases, an evaluation of the best interest of the child is generally an appropriate solution because a child is brought into the family from the outside. In the end, there would have to be two different kinds of adoption: one for children born into the family with the same or at least very similar requirements to allocating parenthood

<sup>94</sup> P. REUß, *Theorie eines Elternschaftsrechts*, above n. 14, pp. 167 ff.

<sup>95</sup> See, e.g., the expert recommendations for a reform of the law of parenthood in Germany <[https://www.bmj.de/SharedDocs/Downloads/DE/PDF/Berichte/07042017\\_AK\\_Abstimmung\\_Abschlussbericht.pdf](https://www.bmj.de/SharedDocs/Downloads/DE/PDF/Berichte/07042017_AK_Abstimmung_Abschlussbericht.pdf)> accessed 25.04.2022, p. 24.

<sup>96</sup> See above, section 3.1.

<sup>97</sup> In contrast, C. THOMALE, *Mietmuttertschaft*, Mohr Siebeck, Tübingen 2015, p. 95 ff. argues for a change of the adoption procedure.

by law, and one for children where the birth parents cannot fulfil their role as parents, similar to today's provisions. While possible, this does not seem to be a very efficient and easily understandable solution. However, some changes to adoption law – such as ensuring a consistent, efficient and fast procedure – could be beneficial for all adoptions.

## 6. CONCLUSION

Since the law of parenthood is the more appropriate route for assigning parenthood also for modern family forms, adoption is only a stopgap in the absence of a reform of the law of parenthood rather than a good substitute. In many ways, using adoption creates the impression of a pragmatic temporary solution to the issues arising from children growing up in ever more diverse family forms. However, while it is better than nothing, even calling adoption a real solution seems inappropriate considering the discriminatory nature of the prerequisites and the potential danger for the welfare of the child due to a delay in the protection of the parent–child relationship.

Therefore, a reform of the law of parenthood must remain the primary objective. Such a reform is an ambitious and difficult project, which can only be discussed here very rudimentarily.<sup>98</sup> Solutions which address the needs of diverse families will have to give more room to the autonomy of the parents because the increasing diversity does not allow for a one size fits all generalization used by the law in the past. Considering that the welfare of the child is at stake, deregulation is not a solution either. Rather, parents will have to be able to choose between more different options.

Additionally, in many ways a more functional approach to parenthood seems to gain traction. Looking at parenthood from the perspective of the child and considering who is responsible for the day-to-day care and the actual task of raising the child leads to this approach: the person who fills the social and psychological role of the parent is entitled to protection by the law.<sup>99</sup> This could be a stepparent, a same-sex partner or any other primary caregiver, in principle regardless of a genetic connection. Especially in the US, the recognition of so-called de facto parents as full legal parents is increasingly common.<sup>100</sup> This

<sup>98</sup> See also the contributions of D. LIMA (Chapter 6 in this volume) and K. ROKAS (Chapter 5 in this volume).

<sup>99</sup> For a comparative approach on how this does and does not happen, C. HUNTINGTON, C.G. JOSLIN and C. VON BARY (eds), *Social Parenthood in Comparative Perspective*, NYU Press, New York 2023.

<sup>100</sup> Such a recognition originates in equitable or common law doctrines and varies from State to State. For a description of the requirements see, e.g., *Parentage of L.B.*, 122 P.3d 161, 176 f. (Wash. 2005); *Smith v. Guest*, 16 A.3d 920, 931 (Del. 2010). Some States have also codified



further blurs the line between parenthood and adoption – although in a different and more permanent way than addressed in this chapter. Rather than using adoption as a substitute, certain elements traditionally found only in adoption law like an evaluation of the individual case based on the best interest of the child,<sup>101</sup> are used to determine parenthood. Additionally, since being a parent depends on an evaluation of whether someone acts as a parent, it does not necessarily mean that parenthood is assigned at birth and remains the same throughout the entire life. Thus, this is to a certain degree at odds with a stable and permanent status of parenthood and instead follows the more flexible idea of parental responsibility. Nevertheless, looking at the function of a parent can provide a solution to the needs of modern family forms because it means looking at the lived reality of the family. However, it is necessary to be careful not to perpetuate the situation that only modern family forms need to go through an evaluation of their fitness to parent by adding this requirement to the law of parenthood, amounting to an indirect discrimination.

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rules on de facto parents, e.g., Delaware (Delaware Code title 13, §8-201(c)) or Vermont (Vermont Statutes title 15C, §501).

<sup>101</sup> See, e.g., Sec. 609(7) Uniform Parentage Act 2017.

