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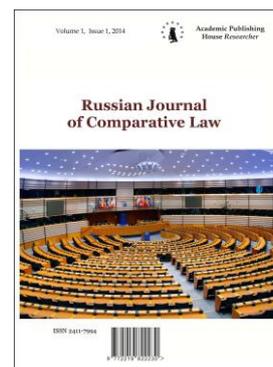
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## The Rights of the Child in Intercultural Marriage in the Context of Finnish-Russian Marriages

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### Abstract

This article examines separate legal aspects of observing the best interest of the child in the context of intercultural marriage. The author considers these issues on the example of Finnish-Russian marriages. This overview attempts to find answers regarding legal guidelines of settling disputes between the parents in intercultural marriage in the best interest of the child. The author takes into consideration situations of settling custody disputes between the parents also in cases of divorce. For these purposes the author analyses in detail the 2 November 1998 decision by the Supreme Court of the Russian Federation on the case No. 4-G98-16 that had not enforced the decision of the Finnish court regarding the custody of a child coming from the Finnish-Russian marriage which had been dissolved. This case is analyzed against the background of the Hague Convention on the Civil Aspects of International Child Abduction.

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**Keywords:** intercultural marriage, rights of the child, best interest of the child, custody of the child, the Hague Convention on the Civil Aspects of International Child Abduction.

### 1. Introduction

Shared border between the states accelerates migration processes, like in the case of Finland and Russia. Intercultural marriages, i.e., marriages between men and women who had grown up in different socio-cultural environments are among the consequences of such migration. As remarked by K. Goncalves, individual accounts of intercultural marriage “often invoke conflicting feelings about the way one is, acts, thinks or behaves with certain interlocutors and within different social contexts” [1; 12]. From the perspective of the rights of the child such marriages put at stakes the interests of choosing the language, religion, and upbringing style of the child, as well as ensuring stable family environment and the best interest of the child in case of divorce. Cultural differences and variations in legal regulation of child welfare systems in Finland and Russia are decisive factors potent to cause disputes regarding child protection in the context of Russian-Finnish marriages. The issues of child protection have already become inherent to agenda of official meetings between Finnish and Russian public authorities. Elaboration of working mechanisms enabling to observe

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the rights and interests of children born in intercultural marriages is a topical problem entailing the most important legal relationships concerning child protection and child welfare.

## 2. Methods and Materials

From a perspective of international human rights law we aim to overview legal mechanisms allowing to implement the best interest of the child both, in intercultural marriage and in cases when such a marriage is dissolved. This overview is based largely on the method of legal dogmatics when we analyze how legal norms regarding the rights of the child are implemented in the context of Russian-Finnish intercultural marriages. Such discourses entail comparative studies between Finnish and Russian law. Moreover, our studies also extend to international-national interaction when assessing how international law standards of children's rights are implemented nationally.

We base our discussion on publicly available materials, i.e., academic publications, international treaties and their interpretation by treaty bodies, case-law of international human rights bodies, as well as national statutory law coupled with its application by national courts.

### *Intercultural Marriages and their Effect on the Rights of the Child*

L. Lainiala and M. Säävälä completed a study entitled "Intercultural marriages and consideration of divorce in Finland: Do value differences matter?" for the Population Research Institute in Helsinki based *inter alia* on the 2012 intercultural marriage survey [2]. That survey revealed that the foreign-born spouses in Finland "originated in nearly 140 different countries" where "Russia was the most common single group of origin"[2]. This study as well as other studies on intercultural marriages found that such marriages end with divorce more often in comparison with marriages where both spouses came out of the same socio-cultural background [1; 2; 3; 4].

The effects of intercultural family environment on the rights of the child are manifold. To start with, the parents need to decide on the language spoken inside the family. This issue remains a discretion of parents as the practice of international human rights organs does not provide interpretations on how to solve this issue in the best interest of the child. Dealing with language rights of minors, the European Court of Human Rights gives guidelines only with respect of education. For instance, in Belgian Linguistic Case the Court stated that the right to education means the right to be educated in the national language and does not extend to ensuring the parent's linguistic preferences [13]. From the position of social sciences, bilingualism is a good yet not the only choice for a child living in intercultural family environment. In particular, social scientists argue for the benefits of the so-called "one-parent-one-language" approach. This approach was conceived by a French linguist, Maurice Grammont in his 1902 book entitled "*Observations sur le langage des enfants/Observations on Children's Language*" [1; 5] who claimed that "by strictly separating the two languages from the beginning the child would subsequently learn both languages easily without too much confusion or mixing of languages" [1; 5].

When each parent in intercultural marriage communicates with the child in own language the child not only avoids confusing languages but takes "an example of adult language use" and has "the opportunity to form a natural emotional relationship with the child through their language" [1; 5].

Intercultural marriage also requires from the parents more efforts to ensure stable family environment for the child. This follows *inter alia* from the provisions Article 18 of the UN Convention on the Rights of the Child stipulating that: "*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern*" [6].

If parents in intercultural marriage allow their disputes to disrupt implementing their parental duties exerting negative impact on children's wellbeing, schooling and general development it can be a ground for child welfare intervention. Child welfare services take consideration of the best interest of the child, reflecting the provisions of the UN Convention on the Rights of the Child, par. 1 of Article 3 of which provides that: "*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*" [6].

The laws in Finland are rather strict concerning the circumstances in which children are brought up. In particular, in accordance with the Finnish Child Welfare Act, the authorities responsible for social services must monitor and promote the wellbeing of children, eliminate and

prevent the emergence of disadvantageous factors concerning the circumstances in which they are brought up [7, Section 7].

#### *Facing the Divorce*

In absence of agreement between the parents in cases of divorce and when the child's residence is in Finland the authorities of Finland determine who of the parents should be the primary care-taker. Par. 1 of Article 9 of the UN Convention on the Rights of the Child provides that: "*States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child*" [6].

Observing the best interest of the child is a primary consideration of the authorities in determining this issue of primary custody of the child. Yet in some cases when family life is no more possible a parent who does not have the official status of a primary caretaker can attempt to take the child out of his or her familiar environment and even bring it abroad. Case-law of the Russian courts includes the case when a citizen of Finland had to appeal to the court in order to confirm the validity of a decision by the Court of Vaasa (Finland) on the basis of which he became a primary caretaker of the child whose mother is a citizen of Russia.

On 2 November 1998 the Supreme Court of the RF decided the case No. 4-G98-16 on the appeal of Mr. Yu., a citizen of the Republic of Finland who asked to recognize and enforce on the territory of the Russian Federation the decisions of the Court of Vaasa regarding the custody of a minor entrusted to him as a father [8]. Although after dissolution of marriage between the parents the Court of Vaasa entrusted the custody solely to the father, the child's mother took away the child from Finland to Russia. Yu. considered that event to be in violation of *inter alia* Article 11 of the UN Convention of the Child stipulating that: "[s]tates Parties shall take measures to combat the illicit transfer and non-return of children abroad." Yu. submitted an application to the Court of Moscow Oblast where he asked to recognize and enforce the decision in question. The Court of Moscow Oblast rejected the application of Yu. Appealing against that judgment, Yu. Reached the Supreme Court of the Russian Federation, invoking, in particular and argument that in consideration of this case the Court of Moscow Oblast did not apply Article 11 of the UN Convention on the Rights of the Child.

The Supreme Court failed to find grounds for nullifying the judgment of the Court of Moscow Oblast in question and rejected the claims of Yu. to recognize and enforce the decision of the court of Vaasa. And that was despite clear provisions of para. 1 of the Decree of the Presidium of the Supreme Soviet of the USSR of 21 June 1988 "On the recognition and enforcement of decisions of foreign courts and arbitration courts in the USSR," stating that: "*decisions of foreign courts are recognized and enforced in the Soviet Union, if it is provided by international treaties of the USSR. Those decisions of foreign courts which are not subject to special enforcement procedure are recognized in the Soviet Union, in accordance with the legislation of the Soviet Union or international treaties concluded by the Soviet Union. For the purposes of this Decree decisions of foreign courts imply decisions in civil cases and those parts of sentences in criminal cases which regard compensation for damages caused by crime, in accordance with international agreements of the Soviet Union, as well as acts of other bodies of foreign states*" [8].

The treaty between the Soviet Union and the Republic of Finland on legal protection and aid in civil, family, and criminal law [9] was concluded in 1978. This treaty became valid for Russia as the Russian Federation as a successor of the Soviet Union and carries out international legal obligation of the Soviet Union. True, the Supreme Court of the Russian Federation acknowledged the existence of the said treaty. It claimed that the 1978 Treaty between the USSR and the Republic of Finland "On Legal Protection and legal assistance in civil, family and criminal cases" "contains and exhaustive inventory of family matters where the decisions passed by the courts of the Contracting Parties are recognized on the territory of the other Party (Art. 21 and 23). Yet, the Court continued that "the disputes relating to determination of residence of the child (including the custody of the parents) are not enlisted by this Treaty". The Court, hence, concluded that the provisions of the said agreement between Finland and the USSR "could not be interpreted broadly," and any changes in the said inventory should be made via official procedures. Under the said circumstances, the Supreme Court upheld the decision of the Court of Moscow Oblast and rejected the claims of Yu.

### 3. Results

The main differences between Russian and Finnish child welfare systems culminate in the issue of early intervention by child welfare services. Finnish system based on the Act on Child Welfare No. 417/2007 rests on the principle of early intervention of social services that provide support for families in cases when children's rights and interests might not be fully observed. Although social services offer help to families with children in the mode of e.g., family counselling, cleaning services etc., not seldom Russian parents consider such actions as arbitrary intervention in their family life, which only aggravates possible conflicts.

### 4. Conclusion

This decision No. 4-G98-16 by the Supreme Court of the Russian Federation clearly favors the mother, a citizen of Russia, as a more potent custodian. It illustrates the differences in cultural norms in Finland and in Russia, reflected in the legislation. Although Art. 38 of the 1993 Russian Constitution declares that parents enjoy equal parental rights, the same article 38 puts "motherhood and childhood" under special state protection. This reflects the understanding that can surface in the Russian society, according to which the child should remain with mother after the divorce, although not in every case. Whereas the Constitution of Finland is gender neutral and targeted at the equality of gender rights.

Yet based on the provisions of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction [10] and assuming that the child was under 16 years of age (which is the limit set forth by Article 4 of this Convention) and the custody right were actually exercised, such removal of a child is wrongful because it is in breach of rights of custody attributed to a Yu. under the law of Finland in which the child was habitually resident immediately before the removal. True, this judgment by the Supreme Court of the Russian Federation is in violation of the Hague Convention. However, at the time of making this decision Russia has not yet joined this treaty unlike Finland that joined it in 1994 [12]. Russia joined the Hague Convention in 2011, and since then failures to implement the decisions of the courts of other contracting parties regarding custody of children amount to child abduction and cause legal responsibility. Since 2011 similar cases should be considered differently in order to implement the Hague convention which is targeted at returning the child to his or her legal guardian.

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