

**To pay attention to an option allowed by law:
Comparative Legal Study of Adoption without
Parental Consent in Finland and Denmark**

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Abstract

In Finland, adoption as a child welfare measure is currently an unknown alternative that could provide stability and permanent relations to a child that has been taken into care. Bearing the paramount importance of the child's best interest in mind, the Finnish government now aims to pay attention to this option. The purpose of this study is to understand if and how the role of adoption as a child welfare measure may be strengthened in the future in Finland. In Denmark, recently a legal reform has been carried out to increase the number of adoptions without parental consent.

The objective of this study is to analyse the legislation and justifications presented by the legislators in the argumentation concerning the legislative changes enabling adoption without consent when in child's best interests and to assess their legitimacy in the context of the recent case law of the ECtHR. By using comparison as a method this study aims to create an understanding how through legislative changes adoption without consent could be facilitated and whether there are lessons that could be learned from Denmark.

According to the observations of this study, clear provisions stating the prerequisites of adoption without consent as well as regulatory guidelines to provide an alternative focus in the form of adoption to the child protection are needed. A clear obligation in the form of a legal provision, stating that adoption must be assessed when processing a case of out-of-home-placement would ensure the legal certainty and equity in initial evaluation of the cases. Further, providing national knowledge and special counselling to local competent authority would be beneficial as a measure of support as well as to ensure the predictability and equity at the domestic level.

Key words: adoption, best interests of the child, child welfare, comparative law

ON-työ/Tutkielma

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Abstract

Adoptio voi tarjota huostaanotetulle lapselle pitkäaikaista sijoitusta paremman vaihtoehdon, perheen, vakautta ja pysyviä ihmissuhteita. Suomessa adoptio ilman vanhempien suostumusta on tällä hetkellä mahdollinen mutta käyttämätön lastensuojelun vaihtoehto pitkäaikaiselle sijoitukselle. Pääministeri Orpon hallitusohjelman yhtenä tavoitteena on lapsen edun ensisijaisuus huomioiden helpottaa adoptioprosesseja ja kiinnittää huomiota myös tähän vaihtoehtoon. Tanskassa on hiljattain toteutettu uudistuksia, joiden johdosta ilman vanhempien suostumusta tapahtuvien adoptioiden määrä on kasvanut merkittävästi.

Tutkielmani tarkoituksena on ymmärtää, voidaanko, ja miten, adoption roolia lastensuojelutoimenpiteenä vahvistaa Suomessa ja tarvitaanko tämän toteuttamiseksi lainsäädännöllisiä toimia. Tutkimusmenetelmäni on funktionaalinen oikeusvertailu. Tutkielmassa analysoin aiheeseen liittyvää lainsäädäntömateriaalia ja Tanskan lainsäätäjien esittämiä perusteluja lakimuutosten taustalla. Lisäksi arvioin edellä mainittujen oikeutusta Euroopan ihmisoikeustuomioistuimen (EIT) viimeaikaisen oikeuskäytännön valossa.

Adoptio ilman vanhemman suostumusta tarkoittaa merkittävää julkisen vallan puuttumista perustuslain ja kansainvälisten ihmisoikeussopimusten suojan piirissä oleviin perusoikeuksiin. Tämä huomioiden suhtaudun varauksellisesti vaihtoehtoon, jossa muutettaisiin vallitsevaa oikeustilaa olennaisesti lainsäädännön tulkintakäytäntöä muuttamalla. Tämän ja voimassa olevaa oikeuttamme koskevien havaintojeni pohjalta katson, että Suomessa lainsäädännön muutokset ovat välttämättömiä ilman vanhemman suostumusta tapahtuvan adoption käyttöönottamiseksi. Havaintojen mukaan tarvitaan selkeitä säädöksiä, joilla veloitetaan harkitsemaan adoptiota huostaanoton vaihtoehtona, määrittämään ilman suostumusta tapahtuvan adoption edellytykset ja luodaan perheenyhdistämiselle vaihtoehtoinen lastensuojelullinen tavoite, adoptio. Näiden lisäksi Tanskan mallin mukaiset tuki- ja ohjaustoimet paikalliselle toimivaltaiselle lastensuojeluviranomaiselle paitsi tarjoaisivat tukea, edistäisivät oikeusvarmuutta ja varmistaisivat keskeisten oikeusperiaatteiden, kuten yhdenvertaisuuden, toteutumista kansallisella tasolla.

Avainsanat: adoptio, vertaileva oikeustiede, lastensuojelu, lapsen etu

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List of Abbreviations

CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights ECHR

Annex

This thesis has been written as an independent project based on the group assignment: The Child's Best Interest Principle in Jurisprudence Concerning Custody and Access Rights: A Comparative Legal Study of the Court Decisions in Finland, Germany and the Czech Republic by Johanna Mäkinen, Laura Kalaja, Theresa Möller and Lucie Tomkova. The parts in the chapters 1 and 2 of this thesis concerning the image of the child in family law, European consensus, functional method of comparative law and provisions of CRC and ECHR are based on the above-mentioned group assignment when applicable.

1 Introduction

1.1 Background and aims

This study presents adoption without parental consent as a child welfare measure under Finnish and Danish legislation. Adoption without parental consent is currently uncommon in Finland¹ although, under the paragraph 11 of the Adoption Act (22/2012), in exceptional cases adoption may be granted without consent when the child's best interests strongly support adoption. The situation is similar in many EU Member States that have the legislation enabling this intrusive measure in specific circumstances but only a few exercising this power.² Denmark, however, has recently implemented legislative changes with the aim to increase the number of adoptions instead of long-term placements. The reform has led to a sharp increase in the number of adoptions without parental consent.³

Over the recent decades, family law has undergone significant changes. There has been a shift from emphasising form (what family is) to prioritising function (what it does) and in this context, also the move away from a marriage-centred approach towards a child-centred perspective. Another significant shift has been the position of a child as an autonomous legal entity, an individual with entitlements, independent of the relationship of and with his or her parents. This has shifted the emphasis from the rights of the parents *over* the child to the parental responsibilities *for* the child,⁴ and established the primacy of the best interests of the child as the most central principle in both international and national legislations on childhood. According to the political discussions within the Danish parliament the legislators aimed to ensure that young children do not become pawns in an unfortunate game where the rights of the biological parents are more important than the best interests of the child.⁵ Child's health and development, right to care, continuity and stability are considerations supported by rules in Danish legislation. Thus, they also form the elements of the assessment of the best interests of the child in determining whether that could be achieved through adoption.⁶

¹ Eriksson – Pösö 2021, p. 103

² Adoption without consent, Update 2016, p 1

³ Ankestyrelsens talportal

⁴ Scherpe 2019, pp. 1089, 1090

⁵ Betænkning over Forslag til lov om ændring af adoptionsloven og forskellige andre love. 3.

⁶ L 121 Forslag til lov om ændring af adoptionsloven, lov om social service, forældreansvarsloven og lov om retssikkerhed og administration på det sociale område. Comments on section 1

Adoption without parental consent is an exceptional state intervention to the family autonomy, resulting in the child legally becoming a full member of the adoptive family instead of the biological one.⁷ The Article 9(1) of the United Nations Convention on the Rights of the Child (CRC) prohibits the involuntary separation of children from their parents “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”. The preservation of family unity is protected also by the Article 8 of the European Convention of Human Rights (ECHR). The Article 3(3) of the Treaty on European Union promotes, *inter alia*, “the protection of human rights, in particular the rights of the child”. Concerning adoption, however, according to the Article 12 of the CRC the best interests of the child is not the primary but the paramount consideration that the system of adoption shall ensure. State interference with and the balancing of these rights raises controversies on moral, political and legal grounds.⁸ The difficult task of balancing rights and assessing legal issues is guided by principles that can be described as optimization requirements.⁹ To determine the best interests of the child requires comparing different options and assessing the impact of these options to establish which option best serves the best interests of the child, a task faced by the courts and child protection authorities.

In Finland and Denmark, the emphasis in Child Welfare Acts and in the practises of child welfare authorities is in reunification of the child with the birth parents. However, there are several reasons that emphasise the need to rethink the current practices. Children rarely leave long-term care and adoption could provide a better basis for permanent relations and stability than subsequent care order placements. The present child welfare system is costly and insufficient in its outcomes.¹⁰ In addition to this, childlessness affects many families. This issue is now recognized also in the political action plan of the Finnish Government, the program, that outlines the government’s objectives and main areas of activity during the term in office. Subsequently, according to the program of Prime Minister Petteri Orpo’s Government “adoption processes will be facilitated and in the best interests of the child, attention will be paid to an option allowed by law: adoption of a child who has been taken into care.”¹¹ The situation is similar in Denmark where recently the Danish government

⁷ Adoption Act (22/2012), Chapter 3, Legal effects of adoption

⁸ Breen et al. 2020, p. 717

⁹ Alexy 2002, pp. 47-48

¹⁰ Pösö – Eriksson, p. 111

¹¹ Program of prime Minister Petteri Orpo’s Government, p. 35

carried out a reform to increase the number of adoptions without parental consent. The pressure to change in Denmark was the need to increase domestic adoptions and as part of the child protection system strategy to find better solutions, providing stability and better outcomes for children in out of home care.¹² The amendments in Danish legislation facilitated adoption without consent leading to a sharp increase in the number of these adoptions, from one or two per year prior to 2017, to 45 children adopted without consent in 2023.¹³

The aim of this study is to determine, through a comparative study, how the role of adoption as a child welfare measure promoting child's best interests can be strengthened in the future in Finland. The focus of this study is on the analysis of legal documents related to adoption without consent to evaluate the possibility and eligibility of transplanting solutions concerning adoption as a child welfare measure. This study intends to shed light on how to turn a "dead letter" of law, such as currently adoption without consent in Finland, into a true option and whether lessons could be learned from the legal reform and the solutions of Denmark in this context. The functional method of comparison provides an evaluative criterion, "better-law comparison" to give understanding whether there are judicial approaches which fulfil their function better than others. Specifically, in this study in determining the best interests of a child in a process concerning adoption without consent.

1.2 Structure and scope

This thesis is divided into six chapters. In this chapter I am "setting the stage", presenting an introduction to the topic as well as the aims and the scope of the study. In the second chapter I address the theoretical framework of the research methodology of this study. I aim at analysing differences and similarities in the legislative documents and their contributions to legal outcomes in Denmark and Finland. In the following parts, I describe the legislation *de lege lata* of these countries, as well as the recent amendments of Denmark and the political rationale behind the changes as well as the central human rights obligations and principles in the light of the recent case law of the ECtHR. This is to create an understanding of the human rights considerations involved when decisions on adoption without consent are made. In the discussion, I present the findings by focusing on analysing differences and similarities in the legislation and decision-making process. I conclude this study by summarising key points and identifying future research needs. Subsequently providing my understanding of the

¹² Adoption and Family in the 21st Century, A summary of events.

¹³ Ankestyrelsens talportal

considerations needed to advance the option of adoption without parental consent when in the best interest of the child.

Due to the limited scope of this thesis, aspects concerning regulations of the child welfare practices, financial support after adopting a child from care or intercultural and socio-legal aspects of adoptions without consent are outside the scope of this study. It is acknowledged that there is the strong emphasis on family preservation, thus to my knowledge, there are currently no proactive steps towards considering adoption as an option in the child welfare services in Finland. The possibilities of open adoption, contact after adoption or the birth parent's rights to receive information about the child after adoption are also only briefly mentioned.

2 Methodological approach and materials

2.1 Methods, orientation and approach

The research questions determine the method. I am using the functional method of comparative law and understand the comparative functionalism as interpretative.¹⁴

In constructivism, problems and institutions mutually constitute each other: we understand what a problem is only once we understand a law as a solution to it, and vice versa. This invites an understanding of comparative functionalism as interpretative: The functionalist comparative lawyer does not try to describe foreign law as an objective entity, but nor is she confined to the description that lawyers give of their own law. What she does is no more, but also no less, than offer an interpretation of the foreign law as performing a function.¹⁵

Norms are socially constructed objects, therefore, the route to legal comparisons is to approach similar questions through an empirical examination of all the elements that produce certain outcomes.¹⁶ In the Nordic countries, statutory law became the major instrument of “social engineering” at the end of the nineteenth century.¹⁷ Law can be described as social engineering as the effect of laws on society can be both measured and controlled. In this instrumentalist view lawyer’s job is to develop laws that meet the societal needs by fulfilling the desired function (social engineering). However, in order to succeed the “legal engineer” has to be sufficiently aware of the non-legal elements.¹⁸ As a consequence, meaningful and well-considered law reforms almost always draw upon the findings of comparative law. “The primary aim of comparative law, as of all sciences, is knowledge” as described by Zweigert and Kötz.¹⁹ “Comparative law can help compare the ability of different solutions to solve similar problems and spur similar degrees of progress.”²⁰ The “general use” of comparison is a practical one, to pursue and promote legal reforms. Comparative law serves as a research tool that allows us to explore legal knowledge and to enhance our understanding of law as a phenomenon.²¹

¹⁴ Michaels 2019, p. 371

¹⁵ Michaels 2019, p. 371

¹⁶ Gambaro–Graziadei 2023, p. 452

¹⁷ Husa–Nuotio–Pihlajamäki 2008, p. 25

¹⁸ Michaels 2019, p. 357 The theory of law as social engineering was first presented by Roscoe Pound, a comparative lawyer.

¹⁹ Zweigert–Kötz 1977, p. 15

²⁰ Michaels 2019, p. 356

²¹ Örtücü 2007, p. 46

Comparative law has demonstrated that the transplantation of legal principles or the adoption of foreign legal models results in a situation where various components, influenced by different factors, coexist and interact within a legal system. International human rights law has certain starting points including a commitment to ratify human rights obligations.²² However, human rights and their universal guarantees also need to be specified in each political and legal context, thus being open to different domestic and regional interpretations.²³ The comparative practice of the European Court of Human Rights (ECtHR) case-law and the practice of domestic courts and institutions relative to the ECtHR has led to the identification of the transnational or “European consensus”.²⁴ The ECtHR jurisprudence and reasoning are one of the key elements that effect, guide and harmonise the legal outcomes in legislative decisions on the national level. The above-mentioned evolution on children’s legal status is visible also in the ECtHR judgements, as the determinant of family life is not anymore limited to the rights of parents. Subsequently, the judicial reasoning has shifted towards considering children as subjects, whose best interests can serve to limit the right to respect for family life and even outdate the principle that all state interventions into the family should be temporary. Hence, state interference with biological family members’ right to respect for family life can be justified and, as such, even necessary in a democratic society.²⁵

Due to the duality of the domestic-international legal regime of human rights law, both vertical and horizontal comparisons are always involved. The term vertical has been used in comparative family law also to describe the legal relationships of adults and children, whereas horizontal refers to relationships between adults.²⁶ In this study, by horizontal legal comparison I refer to the comparison between the regulations of different states. I focus on the horizontal legal comparison between the national legislations and analyse it in the context of the vertical guidance of the domestic-international legal regime of human rights law and ECtHR. This is a micro-comparative study that concentrates on individual problems, how different legal systems have solved a similar challenge in enabling adoption without parental consent as a child protection measure.²⁷ The orientation and approach of this study is mainly

²² Sormunen 2021, p. 66

²³ Besson 2019, p. 1233

²⁴ The concept of ‘European consensus’ is the creation of the European Court of Human Rights (ECtHR). On of the first cases being *Tyrer v The United Kingdom*, App no 5856/72 also see presentation delivered at the CADHI conference ‘The Judge and International Custom’ in Paris on 21 September 2012. (The Judge and International Custom/Le Juge et la Coutume, International. Council of Europe 2012).

²⁵ Breen et al. 2020, pp. 737-738

²⁶ Scherpe 2019, pp. 1096, 1102

²⁷ Zweigert–Kötz 1977, p. 15

constructivist and pragmatist. The methodological framework is a classical problem comparison, involving legal norms which regulate a certain area (adoption as a child welfare measure) and offer solutions for conflicts between competing interests, as “even in a problem comparison, the problem is usually described to varying degrees by invoking legal concepts.”²⁸

2.2 Materials and limitations

The main sources of law in Denmark and Finland are legislation, preparatory legislative work and precedents/case law. My analysis is based on research of literature, national legislation and preparatory documents concerning adoption without consent as well as the central international obligations and principles under the CRC and ECHR. In addition to this I have studied the recent case law concerning adoption without consent of the ECtHR. I aim at understanding the rationale behind the contemporary adoption policies in Denmark and Finland. I also present the relevant human rights and constitutional principles as they are norms requiring something to be realized to the greatest extent possible and thus, are to be recognised as optimization requirements²⁹ in all decisions and at every level of the decision making.

I have a basic understanding of Danish and as an aid for the translations I have used DeepL.com (free version). Thus, language and the scale of original preparatory documents are to be acknowledged as limitations of this study. On the other hand, there are studies focusing on this legal reform and literature has been used to complement the analysis as stated in the references.³⁰ Also, comparative law, as a method, has its limitations. When comparing different legal systems, it is essential to describe and understand them as if they were one's own system. According to the contemporary criticism presented towards the functional method the major limitation is presented by the complexity of law as a phenomenon. The criticism presented has been used to improve the validity of the method by stressing the importance of taking into account not only the normative but all the elements of legal culture such as values, history and tradition.³¹ Nevertheless, the risk of only having an illusion of understanding the complex interplay of the elements involved should be recognized. Despite

²⁸ Kischel 2019, p. 162

²⁹ Alexy 2002, p. 47

³⁰ Mørk et al 2022, pp. 1-23 and Sehested Rom 2024, pp.1-14

³¹ Michaels 2019, p. 386

the limitations and the scope of this study, I believe it provides the reader with an understandable legal landscape of the decision-making in the context presented.

2.3 Research questions

The main purpose of this study is to determine, through a comparative study, how the role of adoption as a child welfare measure promoting child's best interests can be strengthened in the future in Finland. The focus of this study is on the analysis of legal documents related to adoption without consent to evaluate the possibility and eligibility of transplanting solutions concerning adoption as a child welfare measure. To reach the above-mentioned aim I have divided my analysis into three research questions:

1. What are the factors currently hampering the application of adoption without parental consent in Finland?
2. What components have contributed to the legal outcome, adoption without parental consent as a child welfare measure that serves the child's right to have her best interests as the paramount consideration?
3. Are there lessons to be learned from the legal reform and the solutions of Denmark in the Finnish child welfare context?

To answer the first and second question, I analyse similarities and differences of the provisions and spur degrees of progress. Thereafter, I provide explanations for the observed differences and similarities in order to evaluate the possibilities of strengthening the role of adoption as an option for long term out-of-home care. I also discuss the legitimacy of adoption without parental consent in the context of the recent case law of the ECtHR concerning adoption without parental consent when in the best interests of the child. In the functional approach concepts can be used as a yardstick, a common element searched and evaluated in the national legal systems under investigation.³² The concept of the best interests of the child and recognizing the child as an independent bearer of rights constitute the yardstick, *tertium comparationis*, the criterion which will drive this comparative inquiry.³³ To answer the third question, I summarize the results to compare the ability of provisions to contribute to the outcome and to ensure a high level of justice, thus offering an interpretation of the foreign law as performing a function in serving the child's best interests and recognizing the child as an independent bearer of rights.

³² Husa 2015, p. 147

³³ Kischel 2019, p. 6

2.4 Why compare Finland and Denmark

This study aims to shed light on the implementation of adoption as a child welfare measure and the balancing of rights involved by looking at how Denmark has done it and to analyse there is something to learn from foreign solutions. There is a risk in transplanting foreign solutions but it is useful if the legal institutions and the two functions are similar enough and as such also permit meaningful comparison.³⁴ Denmark and Finland are both democratic, Scandinavian welfare societies belonging to the Nordic legal family.³⁵ Both countries are members of the United Nations and European Union, and parties to human rights treaties such as the ECHR and CRC. In both countries the intention of the legislator is found in the preparatory works and these documents are used in the interpretation of legislation.³⁶ Both also have well-established child protection systems and similar basic principles concerning the family welfare and child protection measures: the paramount importance of the best interest and wellbeing of the child, an emphasis on family preservation, and the principle of least intrusion from the state.³⁷ It is the constitutional obligation of public authorities to ensure the well-being and support of vulnerable children and families. Specifically, in Denmark, this responsibility falls primarily on the municipalities, while in Finland, it lies with the counties of wellbeing services.³⁸

Denmark and Finland (as well as Norway and Sweden) are welfare states that despite having far-reaching social security networks demonstrate fairly high levels of children with social interventions. Children typically are in long-term care and permanent reunifications are rare. In these countries social problems, such as abuse of alcohol or drugs, mental health problems as well as families suffering from multiple problems is one explanation. However, the culturally customized norms of welfare states determine when a child is in need, and when the state must intervene and on which level, thus the reason can also be to some part cultural-normative.³⁹ There are also some differences between Denmark and Finland. The aspects concerning adoption history are briefly discussed in the next chapter.

³⁴ Zweigert–Kötz 1977, p. 37-42

³⁵ Nordic legal mind, see for example Letto-Vanamo–Tamm 2019, p.1-2 Characteristic to Nordic legal thinking is pragmatism, realism, absence of formality, transparency and equality.

³⁶ National legislation, Finland and National legislation, Denmark

³⁷ Pösö–Skivenes–Hestbæk 2014, p. 485

³⁸ Denmark, Servicelov and Forældreansvarslov

³⁹ Hestbæk 2023, p. 131

Finnish legislation does not differentiate adoption from care from other forms of adoption. Thus, there are no statistics on these adoptions but according to studies adoption without parental consent is an unknown alternative and adoption from care with parental consent is very rare. Of the domestic adoptions (N = 623) in 2015 and 2016 only 13 were adoptions of children that were adopted from care.⁴⁰ In Denmark the amendments facilitated adoption without consent leading to an increase in the number of these adoptions from one or two per year prior to 2017 to 30 children adopted without consent in 2020, 29 in 2021, 37 in 2020 and 45 children in 2023. Currently in Denmark, the majority of children adopted without consent are adopted by families previously unknown to the child.⁴¹

2.5 Human rights aspects

The ECHR protects the right to respect for family life. Both Finland and Denmark are dualistic thus the right is granted through the incorporation of the ECHR.⁴² The right to family life as such is not directly protected in the Danish or Finnish Constitution. Involuntary placement of a child into care is considered an intervention on the right to personal liberty under section 71.2⁴³ and the right to privacy under section 10 in respective countries.⁴⁴ In Finnish Constitution section 22, there is a reference to international obligations. Thus, it is a responsibility of public authorities to uphold both constitutional rights and international human rights obligations and to choose the option that best promotes these, inter alia the provisions of the CRC. As the Danish Constitution and the human rights catalogue are old, the protection provided by the ECHR and the ECtHR practice has become increasingly important.⁴⁵ The ECtHR has in several cases found that the Article 8 on the rights to respect for family life has been violated as fair balance between competing interests at stake has not been struck. A total deprivation of family life and abandoning the aim of reunification of the child with birth parents should “only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child’s best interests”.⁴⁶ Sufficient weight has to be given to the right to respect for family life, in particular to the mutual interest of the parents and child in maintaining their family ties and

⁴⁰ Laine et al. 2018, p. 203

⁴¹ Ankestyrelsens talportal

⁴² Researching Law in Denmark

⁴³ Adolphsen 2019, pp. 123-123

⁴⁴ PeVL 58/2006 vp, p. 3

⁴⁵ Krunke–Baumbach 2019, p. 279

⁴⁶ Jansen v. Norway, no. 2822/16, § 93; Aune v. Norway, no. 52502/07, § 66; Strand Lobben and others v. Norway, no. 37283/13 § 160

personal relations and hence the possibility for them to maintain contact. The issue of preserving cultural and religious ties of origin has been raised and consideration should be given to these aspects (concerning also provisions stated in the Article 9 of ECHR) when deciding, whether the ties to birth parents are to be completely cut.⁴⁷

2.6 The best interests of the child and recognition of non-biological family

The best interests of the child is a three-fold concept. Firstly, it is a substantive right, a primary consideration in actions concerning the child. Secondly, it is an interpretive principle, the interpretation which most effectively serves the child's best interests should be chosen. Thirdly, it is a rule of procedure, provisioning the legal representation, timely decisions and how the child's views are considered.⁴⁸ Regarding adoption the paramountcy of the best interests of the child dictates that child's right to family life and also the respect for the child's *de facto* family life has to be assessed. In this aspect ECtHR's discourse is changing according to a recent study by Breen et al. as recognizing the family increasingly entails a recognition and stronger protection of children's non-biological family life.⁴⁹ The Court has recognized the complexity and difficulty arising from the circumstances under which decisions concerning adoption without consent are made by the national authorities. The domestic decision-making process that complies with the requirements must have emphasis on presenting the facts, the circumstances of the case considered to be so exceptional that they justify the drastic measures, for reasons pertaining to the overriding requirement to protect the child's best interests. Thorough examination of the domestic proceedings must be done to ensure that there are no unjustified failures to reunify the child with biological family when assessed on what was required to secure the best interests of the child.⁵⁰

⁴⁷ Abdi Ibrahim v Norway no. 41803/22 § 19, 155

⁴⁸ CRC, General comment No. 14

⁴⁹ Breen et al. 2020, p. 734–736

⁵⁰ Abdi Ibrahim v Norway no. 41803/22 § 154, 155

3 Adoption without consent

3.1 Historical aspects of adoption without consent in Finland and Denmark

In Finland, the first Adoption Act was introduced in 1925 and adoption without consent was introduced into the Act practically in the current form in 1978.⁵¹ Adoption without consent is extremely rare in Finland and “the concept of ‘adoptions from care’ does not exist in Finnish legislation, policy or practice”.⁵² This might not always have been so. During the second world war, approximately 70,000 children were transferred to Sweden and Denmark as “war children” for their safety and about 15 000 of them were adopted or did not return for other reasons. After the War, more children were adopted than placed in foster families by care order decisions.⁵³ Also as late as the 1970s, Finland was a donor country from which children were adopted to foreign countries. At the same time, small numbers of children were adopted from abroad and Finland changed to a recipient country with respect to international adoptions.⁵⁴ In Denmark, the first Adoption Act was introduced in 1923. Adoption without consent was introduced into the Danish Adoption Act in 1972 but was only rarely applied.⁵⁵

Denmark has a colonial history including practices of forced adoption. While beyond the scope of this study, these historical differences and socio-legal aspects are to be noted. It has been suggested that these regulations are “intrinsic rather than foreign” to Denmark.⁵⁶ However, the observations presented in this study, such as the observed “practical threshold” of changing the municipal child welfare practises of this reform in Denmark, do not support this theory. In both countries adoption as such has been culturally accepted, morally as well as legally and politically, when based on the parents’ authority to make the decision of giving up a child even if due to poverty, health issues or moral shame⁵⁷ and, as such, most likely based on the idea of serving the best interests of the child in providing better life prospects at a time when social security was non-existent.

Prior amendments, the Danish provisions for adoption without parental consent could be met if the child had been in out-of-home care for a long time and the biological parents had failed

⁵¹ HE 47/2011 vp p. 49. The provision in subsection 2 corresponds in substance to the Act in force, HE 147/1978 vp

⁵² Eriksson-Pösö 2021, p.103-104

⁵³ Korppi - Tommola 2008 p. 445

⁵⁴ StatFin Adoptions

⁵⁵ Notat om mulighed for at adoptere et barn uden samtykke fra barnets forældre

⁵⁶ Sehested Rom 2024, p. 4

⁵⁷ Breen et al. 2020, p. 734-736

to maintain reasonable contact with the child. In the rare cases of adoption without consent prior to 2009 there had been none or very little contact between the child and the biological parents for 6–8 years due to the parents. The legislative changes that have led to the reform in adoption policy in Denmark have taken place in 2009, 2015, 2019.⁵⁸ The amendment in 2009 enabled adoption without consent of infants under 1 year and children who have been placed outside the home for more than three years, if the parents were *proven* to be *permanently* unable to care for the child, and if essential considerations of what is best for the child were in favour of it.⁵⁹

The amendment in 2009 was aiming to secure “stability and continuity” for the most vulnerable children, focusing on children's right to a full and complete life and to growing up in a safe and loving environment. The pressure to change was supported by scientific research that had shown better outcomes for adopted children compared to children who endured a troubled childhood - whether it's with their biological parents, in an institution or in foster care. It was also stated that interruptions in foster care placements increase the risk of criminality and behavioural problems. In other words: The earlier a vulnerable child is put up for adoption, the greater the chance that the child will achieve a healthy development of self-esteem, school skills, physical and mental health. The will of the legislator was to increase the possibility that a child can be put up for adoption if the biological parents are clearly unable to take care of it - and if necessary, against the parents' will.⁶⁰ Thus, justifications of the reform were based on scientific grounds, focused on serving the best interests of the child and recognised the child's independent right to stable family life.

However, the amendments did not fulfil the expected function, there were approximately only two adoptions without consent per year. This was due to practical difficulties, mainly in assessing and proving the permanent incapability of the parents to care for the child.⁶¹

3.2 Description of the legislation in Finland

The Finnish Adoption Act (Adoptiolaki 22/2012) encompasses all situations where the legal bond between an adoptive parent (or parents) and an adopted child is officially recognized

⁵⁸ Sehested Rom 2024, p. 1

⁵⁹ LOV nr 494 af 12/06/2009, Section 9

⁶⁰ Betænkning over Forslag til lov om ændring af adoptionsloven og forskellige andre love. 3.

⁶¹ Mørk et al 2022, pp. 6, Lovforslag nr. 121, 28.1.2015, comments on 2

and confirmed. The principle and the paramount importance of the child's best interests and wellbeing is visible in the section 2:

In all decisions and other measures concerning the adoption of a minor child, the best interests of the child shall be the paramount consideration. Particular attention shall be paid in assessments of the best interests of the child to how a child who cannot grow up in his or her family of origin can best be ensured a permanent family as well as balanced development and wellbeing.

According to the Section 11:

The adoption of a minor may not be granted in the absence of his or her parents' consent thereto. On very exceptional grounds, however, an adoption may be granted even if a parent has denied or withdrawn his or her consent *if the adoption strongly serves the best interests of the child and there are no sufficient grounds for the denial or withdrawal of consent, taking into account the degree of contact between the child and the parent and the nature of their mutual relationship*. If a parent cannot validly express his or her will due to an illness or disability or if the whereabouts of the parent are unknown, the adoption may, on very exceptional grounds, be granted if the adoption strongly serves the best interests of the child.

In the Handbook for Providers of Adoption Counselling, the Ministry of Social Affairs and Health provides guidelines to social workers who give adoption counselling. Adoption without consent is described by briefly presenting the paragraph 11 of the Adoption Act. Adoption from care by the child's foster family according to the handbook is possible in some cases. However, as a general rule, an adoption from care cannot be confirmed without the consent of the biological parents.⁶² According to the preparatory works, in these cases the emphasis on adoption counselling is to establish whether there is a bond between the child and the parent and whether the parent has made efforts to maintain contact with the child and to develop the relationship between them.⁶³ The Child Protection Handbook published by the Finnish Institute for Health and Welfare is intended for professionals to support development and client work. The Handbook of child welfare describes adoption as one form of family-based permanent foster care that can be considered in situations where the child will clearly need long-term placement and it has been assessed that adoption is in the best interests of the child.⁶⁴ As Eriksson and Pösö have pointed out, there are no criteria for considering adoption as an alternative to foster care in the handbook nor in the national guidelines.⁶⁵

⁶² Adoptioneuvonta: Opas adoptioneuvonnan antajille, pp.13, 22

⁶³ HE 47/2011 vp p. 49 and HE 147/1978 vp section 9

⁶⁴ Lastensuojelun käsikirja

⁶⁵ Eriksson-Pösö 2021, p.106

Adoption permissions are granted by the Adoption Board on application by adoption applicants. In all cases the district court makes the decision of granting adoption. However, as the goal of child welfare legislation is family reunion and preservation of biological family and no criteria for considering adoption as an alternative to foster care is presented, adoption is not considered. Therefore, no district court decisions concerning granting adoption without consent have been made to my knowledge. Thus, it cannot be assessed how the court would decide based on the current provisions.

In the light of the recent case law of the ECtHR presenting the European consensus more weight could be given to the best interests of the child and child's right to family life even if outside the sphere of biological family. This conclusion is supported by the fact that the situation where a young child is in custody usually results from neglect and/or abuse and, according to provisions of CRC article 9, separation can be necessary for the best interests of the child "in a particular case such as one involving abuse or neglect of the child by the parents." Also, in Finland "open adoption" is possible when agreed upon between the parties and not contrary to the best interests of the child. This would enable to support the mutual interests of the biological parents and the child to maintain personal relations even after the permanent dissolution of their legal family entity.

3.3 Description of the legislation in Denmark

In 2015, the Adoption Act was amended with the "overall purpose to strengthen the intentions of creating stability and continuity in the upbringing of children in care through adoption without consent." It was assessed that adoption without consent was not used to the extent that there was a real basis and need for. The conditions for realising an adoption without parental consent were amended so that the prerequisite was that it was "*made probable*" that the parents will be permanently unable to take care of the child - instead of "*proven*". Also, the specific rules for adopting children under the age of 1 year were to be abolished. In continuation, the rules for determining visitation with the original family after the adoption were to be amended to make it possible in very special cases to have visitation or other contact between a child and his or her original family.⁶⁶ The rules on adoption without consent were amended by Act no. 530 in 2015, which is still in force. In 2019, the legislation was further revised to make the decision-making procedure shorter. Further, in 2021, to

⁶⁶ Socialudvalget 2014-15, SOU Alm. del Bilag 10

promote adoption as a social services intervention adoption without consent even before the child is born was made possible under the Act of Barnets Lov in 2023.⁶⁷

According to the Section 9 para. 3 and 4 of the Adoption Act, adoption may be granted if the conditions for placement of the child outside the home of the Social Services Act are met and it has been *made probable that the parents will be permanently unable* to care for the child and that *adoption will benefit the child in terms of continuity and stability in the child's upbringing*. When the child has been placed outside the home in a foster family and the conditions for placement of the child outside the home of the Social Services Act are met, adoption may be granted to the foster parents *if the child's attachment to the foster family has assumed such a character that it would be harmful to the child to break this attachment, especially with regard to the continuity and stability of the child's upbringing and the child's relationship with his or her parents*. Finally, according to Section 9, para 2 a permission for adoption may be granted *“if parental consent to adoption is revoked, if the revocation, with special regard to the best interests of the child, is not reasonably justified.”* Thus, the best interests and the child's right to continuity and stability during the childhood form the starting point and ground for the assessment and balancing of the rights. Subsequently, in a case where significant considerations of what is in the best interests of the child indicate that adoption is beneficial for the child it can be granted even without parental consent.

The tasks of the authorities in connection with adoption are clearly stated in Section 69 of the Adoption Act. According to this, when a decision on the placement of a child outside the home is done and it is assumed to be for a longer-term, the local council must consider whether continuity and stability in the child's or young person's upbringing indicates that the child should be adopted instead. Thus, this creates an active obligation to assess the prospects early on. The Danish administration issues regulations in the form of vejledninger.⁶⁸ In the regulation for adoption of the Ministry of Social Affairs, Housing and Senior Citizens (Vejledning om adoption) the requirements to facilitate an adoption if a given consent has been revoked as if the consent was never given are described. In all cases of adoption without consent, it must be ensured that there is a clear basis for assessment, that it would be in the child's best interests to grow up in a new family that can ensure continuity and stability for the child growing up, rather than being placed in care throughout childhood.

⁶⁷ Barnets Lov, LOV nr 721 af 13/06/2023

⁶⁸ Researching Law in Denmark

According to regulations in all decisions on adoption without consent, the authorities must ensure that Denmark's obligations in relation to the best interests of the child and the right to family life under the CRC and the ECHR are obeyed. Also, it is stated that if a case of adoption without consent has been initiated and it turns out during the process that conditions for the adoption are not met, there is nothing to prevent reopening the case. The municipalities can request and have the right to receive national guidance, counselling, and assistance in preparing a recommendation for both adoption with and without consent.⁶⁹ In practice, social services are responsible for making a recommendation for adoption, thus cases are initiated by the municipal child welfare service and must then gain approval from the board of appeal (Ankestyrelsen) before the adoption can proceed.⁷⁰

To summarize, unlike Finland, Denmark has an alternative goal to family reunification in the legislative child welfare framework. The duty of the Danish child welfare authorities is to consider adoption and there are clear provisions setting the focus on the child's best interests in the form of continuity, stability and the probability of family reunification. Both countries have the possibility to open adoption. Subsequently, the relationship to birth parents is not necessarily completely and permanently to be cut if the continuation serves the best interests of the child.

Despite the recent rise on the number of adoptions without consent so far, no applications have been submitted to the ECtHR concerning these decisions in Denmark.⁷¹ In addition to Denmark, Norway is the other Nordic state that has had a more consolidated practice of adoption without parental consent and also has had several cases before ECtHR.⁷² In a recent comparative study concerning adoption without consent in Denmark and Norway it was observed that the ECtHR approach could be impeding the development in Nordic law recognizing the child as an independent bearer of rights.⁷³

⁶⁹ Vejledning om adoption, VEJ nr 10084 af 11/12/2023

⁷⁰ L 155 som vedtaget 2019 see also Adoption and Family in the 21st Century, A summary of events. The decision-making procedure concerning recommendation for adoption.

⁷¹ ECtHR Press Country Profile, Denmark.

⁷² Stein Helland–Skivenes 2021, p. 145

⁷³ Mørk et al. 2022, pp.1, 22

4 Discussion

4.1 Factors hampering adoption without parental consent in Finland

For both countries fulfilling the obligations under the CRC require them to ensure that children living under conditions that may harm their health and development have the right to receive the necessary help from the state.⁷⁴ In child caregiving and protection context a child rights-based approach is essential.⁷⁵ In both countries, decisions are reached with input from various child experts. Procedural legal certainty ensures that all parties involved in a case, including the children, have the opportunity to advocate for their interests effectively. Additionally, case processing is conducted in a child-friendly manner.⁷⁶

The current Finnish legislation and practice is similar to the Danish prior the reform.⁷⁷ Thus, lacking clear provisions concerning the conditions that must be met for adoption without consent.⁷⁸ Although, both state the best interests of the child as a determinant, the threshold to determine this in Finland is higher (only in “very exceptional” cases and if the adoption “strongly serves” the best interests of the child). The grounds for assessing the denial or withdrawal are currently similar in both legislations. The provisions enable adoption without consent to be granted when the best interests of the child justify adoption and there are no sufficient (Finland) versus “not reasonably justified” (Denmark) grounds for the denial or withdrawal of consent. Also requiring the assessment of the degree of contact between the child and the parent as well as the nature of their relationship. In the preparatory works, there are no explanations to “sufficient”. As a word, it implies to adequacy, whereas “not reasonably justified” implies to insufficient evidence or weak reasoning⁷⁹ with a stronger emphasis on balancing exercise to assess reasonability. In Finland, the child welfare policy can be said to still reflect the traditional family view. It is more focused on the rights of the biological parents than the Danish one, as the goal of family reunification and preservation of biological family implies that this is assumed to serve the best interests of the child. Therefore, adoption is not considered and there is no precedent concerning granting adoption of a child in out-of-home care without parental consent. Thus, it is unknown how the court

⁷⁴ CRC Article 19, see for example the Danish and Finnish Social Services Acts: Serviceloven section 46, para. 1. and Sosiaalihuoltolaki section 13.

⁷⁵ General Comment No. 13 (2011) Children should not be seen as victims but as rights-bearing individuals

⁷⁶ Finland see Tolonen 2019, p.225 and Denmark see Hartoft 2019, p.312

⁷⁷ HE 47/2011 vp p. 49. Corresponding in substance to the Act in force, see also HE 147/1978 vp section 9

⁷⁸ Eriksson-Pösö s.106

⁷⁹ the Oxford Advanced Learner's Dictionary

would assess the current provisions. The Finnish regulations concerning adoption without consent can be considered as rather conservative. Bearing in mind the principle of legal certainty, an alternative goal to family reunification and a clearer statement of the conditions that have to be met in order to carry out an adoption without consent as a child welfare measure should be created. Currently, these have not been stated in the legislation in Finland. Taken it all together, it is questionable whether the Finnish legislative framework in this context truly supports the current understanding of a child as an autonomous legal entity, an individual with own entitlements and independent of the relationship of and with his or her parents.

4.2 Serving the paramountcy of child's best interests

The components contributing to the legal outcome of serving the child's right to have her best interests considered even if resisted by the birth family can be described as systemic and legislative. In Denmark, the fundamental consideration is the opportunity of securing continuity and stability to the life of a child that has been placed into out-of-home care. The revocation of consent is not assessed as reasonably justified for example, in situations where the child, after consent has been given, has already settled well with the foster parents who are interested in adopting the child. Also, "not as much is required to facilitate an adoption if a given consent has been revoked as if the consent was never given." Consideration may be given to whether the reasons for the revocation are reasonable. However, even if this is the case, the best interests of the child, *inter alia* when the child has been with the foster parents for a certain period, may weigh heavily in favour of disregarding the withdrawal of consent.⁸⁰

In Denmark, adoption without consent can be granted when the intervention of taking the child into care is necessary and secondly, it is "made probable" that the parents will be permanently unable to take care of the child and thirdly, the child will benefit in terms of continuity and stability.⁸¹ According to my observations, probably one of the most effective incentives to equally initiate the process is the legislative provision stating that the municipality in connection with the processing of a case of out-home-placement of a child, must consider also the option of adoption.⁸² Further, in Denmark, the regulations on national adoption provide clear guidelines for the authorities to assess the case at hand, further

⁸⁰ Vejledning om adoption. VEJ nr 10084 af 11/12/2023

⁸¹ Servicelov § 58 stk. 1 nr. 1 og 2

⁸² Barnets Lov, LOV nr 721 af 13/06/2023

promoting the process.⁸³ Notably, the regulations ensure that when preparing a recommendation for adoption the municipality has the right to assistance in the form of national knowledge and special counselling.⁸⁴ Bearing in mind that this is the most intrusive and exceptional state intervention to the family autonomy it should never become a routine measure. Subsequently, it is encountered by the municipal authorities most likely only exceptionally. Therefore, I believe, to provide support for the municipal child welfare authorities in this process is essential. However, this counselling also promotes the proportionality, legal certainty, and equity of these decisions at the national level. In this way, both the initial evaluation and assessment as well as the decision of the municipal committee concerning the recommendation can be made on equal national grounds. As a summary, according to the observations of this study the Danish perspective is strongly child centred. The above-mentioned provisions guide and enable the Danish authorities also to pay more attention to children as individuals and place an obligation to assess the child's future prospects and recognise their entitlement to stable family life. Child's health and development, right to care, continuity and stability are considerations supported by rules in Danish legislation. Thus, they also form the elements of the assessment of the best interests of the child in determining whether that could be achieved through adoption. This can be seen to be in accordance with fulfilling the obligations of the CRC of having the best interests of the child as the primary consideration.

4.3 Are there lessons to be learned from Denmark

Does it take a law reform to pay attention to an option allowed by law? Certainly not. However, when changing the practice in interpreting the legislation, and especially legislation concerning the most intrusive child welfare measure a public authority can take, the question is more complicated. However, the current provisions concerning adoption without consent have not actually been interpreted as the child welfare legislation does not support the idea of adoption without parental consent. The situation was similar in Denmark and the legal reform took nearly twenty years and involved several amendments. In Denmark, the first hearing on forced adoption took place in 2003. However, although the political desires were stated, this did not change the practise. Also, the amendments in 2009 had only marginal effect, leading

⁸³ Vejledning om frigivelse af børn til national adoption

⁸⁴ Vejledning om frigivelse af børn til national adoption

to a more comprehensive legislative reform of the Adoption Act in 2015. This, finally, had the effect the legislator had wished.

However, considering that norms are socially constructed objects, it would be an oversimplification to assume that to make a legal reform all it takes is to change the wording of the law. Both Denmark and Finland are democratic countries that uphold a high level of justice with the culture of legal positivism.⁸⁵ According to the Finnish Constitution § 2 and 118, a civil servant is responsible for the lawfulness of his or her official actions and in all public activity, the law shall be strictly observed. One prerequisite for this is to develop rules and guidance applicable with the practical conditions of the local competent child welfare authorities. The task is to balance and determine the boundaries, rights and obligations for the municipal and county authorities that have the autonomy based on the self-government of their residents. At the same time the legislator should ensure equal treatment and access to services in equal cases. To make the puzzle even more complicated each case must be treated individually to ensure that the particular child's best interests are the paramount considerations determining the decision in the case at hand. The Danish model where the local competent authority has a right to national knowledge and special counselling would certainly be beneficial in promoting and ensuring the predictability and equity at the national level. An intrusive measure such as adoption without consent should be a process where a high level of justice is assured from the very beginning. Also providing clear soft law and/or regulatory guidelines and providing an alternative focus in the form of adoption to the child protection would be necessary for the legal certainty and equity.

Most importantly, a clear obligation in form of a legal provision, such as the one in Denmark, stating that adoption has to be assessed when processing a case of out-home-placement would ensure the legal certainty and equity in initial evaluation of the cases. Considering the assumed rarity of these decisions and thus the need for a special knowledge, also the decision-making process could be reviewed.

4.4 Conclusions

The aim of this study was to look at how Denmark has carried out a legal reform and to analyse whether there is something to learn from their solutions. The topic of this study,

⁸⁵ Husa–Nuotio–Pihlajamäki 2008, p. 13

adoption as a child welfare measure, is currently discussed in other countries as well.⁸⁶ Further comparative studies concerning the requirements for substitution of parental consent to adoption could be beneficial. Not just to learn from the implementation of the proposed legislation, but to study approaches and to possibly find theoretical models to determine yardsticks that could be used when assessing the inevitably intermediate concepts and in the action of striking a fair balance involved in these decision-making processes as well as determining thresholds such as probability that the parents will be permanently unable to care for the child.

The consensus created by the ECtHR provides a thorough decision basis for the national authorities. Following this guidance ensures that considerations are identified, properly examined, and assessed to strike a fair balance. The norms and the case law of ECtHR evolve together with the developing trends of the State parties, as the shift in focus in the family law towards the rights of the child has demonstrated.⁸⁷ The obligation of the CRC to act in the best interests of the child, should be visible in domestic legislation in setting an alternative focus to family reunion to ensure that the factual situations of children in out-of-home care reflect that obligation. Personally, I agree with the Danish view, clearly a greater weight should be given to the child's life prospects and the possibility to secure a family by *de jure* bonds.

⁸⁶ Meysen–Bovenschen 2021, p. 132

⁸⁷ Breen 2020, pp.741-742