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“THE CASES OF ‘STOLEN CHILDREN’ IN SPAIN AND IRELAND:  
Curtailling the most suitable legal framework on the fight for ‘real’ identities”

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*“Truth never damages a cause that is just.”*

— Mahatma Gandhi



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## **ABSTRACT**

*As the public acknowledgment and understanding increases due to the vast number of 'stolen children' cases exposed in today's realm, new methodologies must be developed to effectively proportionate them a specific legal status in which the violations of their basic human rights will be elaborately accounted, and promote a very large scale integration on the International and National spheres. Babies and children who were 'taken-away' from their biological mothers and given up for 'illegal' adoption, are the main protagonists on the situations occurred in Spain and Ireland in the last decades. These 'stolen children' will bring the question of those 'stolen lives', the reasons why those offences were perpetrated and the influence of social, cultural and religious dogmas within them. The protection on the children's human rights should be a primarily focus point in the International and National laws and the right to an identity should be protected as vital for the own recognition of the individual. Are those cases victimless? With the help of this thesis, hopefully more people might be aware of the size of the problem and the necessity for a further development to assess the issue and to find solutions to achieve the necessary Truth, Justice and Reparation of those stolen lives.*

Key words : 'stolen children', 'development', 'human rights', 'law', 'stolen lives'

## LIST OF ABBREVIATIONS

AI	Amnesty International
ANADIR	Asociación Nacional De Afectados por Adopciones Irregulares
ARA	Adoption Rights Alliance
GM	Grandmothers of Plaza de Mayo
GRETA	The Group of Experts on Action against Trafficking in Human Beings
ICCPED	2006-2010 International Convention For the Protection of All Persons from Enforced Disappearances
JFMR	Justice For Magdalenes Research
OP-CRC	2000-2002 Optional Protocol on the Convention of the Rights of the Child: Optional Protocol on the sale of children, child prostitution and child pornography
OTHB	Observatory of Trafficking in Human Beings
THB	Trafficking in Human Beings
THE HAGUE CONVENTION	The Hague Convention on Intercountry Adoptions (1993)
UN	United Nations
UNCAT	United Nations Convention Against Torture (1984)
UNCRC	United Nations Convention on the Rights of the Child (1989)
UNCTOC	United Nations Convention on Transnational Organized Crime (2000)
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
USA	United States of America



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## INTRODUCTION

In the last fifty decades, Spanish and Irish cases of 'Stolen Children' for the ultimate purpose of illegal adoption, have brought the necessity of a better acknowledgement of underestimated violations on the children welfare and security. The climate of shortage on the accountability and consciousness of those practices will forge the problematic basis in which this thesis will centralise.

Not only the necessity to raise global awareness of the performed practice, but also the intrinsically linked facts of Truth, Justice and Reparation ascribed to those suffering victims, should be bearing in mind in order to prevent those situations to occur in the future. This demand on urgent public understanding and public response, is owed to the exacerbated practice that was accomplished by church and civil servants and the present growing number of cases that are shedding light on the issue.

A clear understanding of the interaction of both victim's rights, stolen families and stolen children ones,<sup>1</sup> is from an utmost importance in order to appreciate the dissimilar interpretations on the 'best interest of the child'. It has been a complicate issue to comprehend how severely those cases lead to the sudden loss of real identities and moreover, the struggle for the basic rights in tandem with it caused by a sustained defencelessness.

This study has been concluded thanks to the argumentative contributions of academic specialist on the topic of 'stolen children' as Mike Milotte, Mary Raftery, Enrique Vila Torres, Natalia Junquera, Piero Badaloni among some of them. However, this study goes further covering the necessity of urgent proposals within the Irish and Spanish domestic and international spheres in order to find the most suitable legal framework to those vulnerable targets, the 'stolen children'.

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<sup>1</sup> Fernández Fouce, 2009.

Are those `Stolen Children` victims of a proper trafficking crime as numerous documentaries and newspapers stated<sup>2</sup> ? Or are they considered only illegally adopted but through a purchase-and-sale act?<sup>3</sup> .Furthermore, does it worsen the situation the fact that civil and church servants perpetrated the offences? And the remained question of if it is the welfare of those children already protected and properly gathered in the national and international legislation? These mindful questions all have significant implications that should be taken into account for the better understanding of the size of the problem.

It is within the scope of this thesis, a clear attempt to provide answers to these questions always based on previous investigations and specialist thoughts on the matter; and in addition, to establish some hypothetical starting points for a many-years-to-come discussion on the legal consideration of those cases of `Stolen Children`. Nevertheless it is necessary to bear always in mind that these arguments are simply hypothetical solutions proposing further and deeply rethinking on the legal sources to prevent those situations to happen in the future; if not in those two countries, in others worldwide considered.

Unfortunately, it is beyond the scope of this study, due to time and resources constraints, a further investigation on those civil and church servants who were supposed to commit those offences and to deepen further in the psychological and social repercussions. However, it is hoped that the appraisal of this academic paper on the Spanish and Irish cases of `stolen children` will emphasize the need to continue the investigation on new ways to deal with these necessary principles of Truth, Justice and Reparation<sup>4</sup>, under the provision of the most suitable legal framework.

In the first Chapter of this study, there will be introduced a preliminary approach to the different crimes in which, according with the fundamental characteristics and circumstances of the illicit act, might be categorized the offence of those illegal purchase

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<sup>2</sup> Adler, Documentary GRTV 2011.

<sup>3</sup> Smolin, 2007 pp. 1-57.

<sup>4</sup> Amnesty International, 11 June, 2007; A/HRC/24/42 28 August 2013 Special Rapporteur.

and sell of children by the means of adoption. In the second and third chapters, it will be proposed a further investigation on those Spanish and Irish cases respectively; meanwhile in the last Chapter, it will be suggested, after an analysis of the domestic and international legislations, hypothetical custom solutions in order to tackle those violations of human rights to prevent them from remaining in a limbo of non-legislated offences.

As the Doctor in Psychology José Guillermo Fouce Fernández stated “ the victims are attended by not only the Law and Justice, but also by the necessity to reconstruct their truncated identities, their broken lives, the necessity to rip the acquired defencelessness, the impotence, the fear, the duplicated frustration, and so therefore they are attended by the necessity of being addressed and accompanied from a psychological and social point of view in their situation and in their biologic repercussions- psychological and social ones- that should be valorised in each pertinent case”<sup>5</sup>

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<sup>5</sup> Fouce Fernández, 2009. ( Free translation of the author).



## **Chapter 1. Concerning a relatively new concept: drawing a nexus between human trafficking, smuggling and illegal adoptions**

*“Perhaps by retelling the story in these changed times its impact will be greater and the taboo on naming adoption as part of the spectrum of Church-State abuse will be broken. In the interest of all those who suffered- the children and their natural mothers- it is certainly to be hoped so.”* <sup>6</sup>Mike Milotte

### **1.1 Highlighting the concept of “Banished Babies” and the International protectoral regulation on the Rights of the Child.**

During the last century, offences against children welfare have resulted in being taken into consideration as one of the most vulnerable targets; they have been bearded in mind as “vulnerable victims” of specific crimes, such as Trafficking in Human Beings (hereafter THB), with the correspondent sexual or labour exploitation, and Child abuse crimes, but unfortunately slightly recognized within the huge scope of those crimes. Moreover, they have often been considered ‘easy scapegoats’<sup>7</sup>, as for example, the illegal recruitment of children compelling them to join armed forces under certain age.

Equally significant, in comparison with the examples mentioned above, are the crimes regarding defenceless children under the age of one, who were taken away from their biological family, or mother, against their will. What is even more alarming is that they were ultimately sold or given to other unknown families, following accepted ‘understandable’ cultural, personal or monetary reasons which this thesis will examine in a greater detail in the coming chapters.

There is a need to clarify that within the forthcoming sections, I will introduce the Spanish and Irish cases as cases on ‘Stolen Children’. Due to the diversity of wording

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<sup>6</sup> Milotte, 2012, Note in the updated and expanded edition xiv.

<sup>7</sup> Smith, 2007, Preface.

relating to this topic and the difficulty to qualify the offences accomplished, I will considered hereinafter in this chapter both `Banished Babies´ in Ireland and `Niños o Bebés Robados´ in Spain under the general wording of `Stolen Children´ in order to avoid any sort of misunderstanding as they both comprehend the final same reality.

It is enshrined in the Article 7 on the United Nations ( hereafter UN) Convention of the Rights of the Child (hereafter UNCRC), and adopted by the Resolution 44/25, 20 November 1989 of the UN General Assembly (UNGA): “*1. The child shall be registered immediately after birth ... and as far as possible, the right to know and be cared for by his or her parents ...*”<sup>8</sup>. Besides this, article 8 of the same UNCRC, sets forth “*...the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference*” and calls for the protection of those who were “*... illegally deprived of some or all of the elements of his or her identity ...*”<sup>9</sup>.

In addition to that, the article 9 of the UNCRC stresses a provision for defenseless children preventing them of being “*...separated from his or her parents against their will, except when competent authorities subject to judicial review determine ...*”. Furthermore, it states in the third paragraph that there is a duty on the “*... respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis ...*”. This statement, coupled with the article 11 of the UNCRC, illustrate the noteworthy duty of States to “*... take measures to combat the illicit transfer and non-return of children abroad. ...*”<sup>10</sup>.

Unfortunately, children under the age of one have not yet widely thought to be the sole holders of their inherent rights, despite the fact that they are taken into consideration as

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<sup>8</sup> UNCRC, 1989, Art.7.

<sup>9</sup> Ibidem. Art 8.

<sup>10</sup> Ibidem. Art 9 and 11.



‘innocenti’<sup>11</sup> victims. Consequently, there has been a nearly total absence of joint action in the process of appointing a global duty to respond, provoking the loss of a key piece in the whole puzzle. This situation called and keeps calling upon the *prima facie* necessity of highlighting the case law on banished babies or ‘stolen children’ perpetrated by Nuns and Church-State institutions. However, there is still no gesture of compliance for the elucidation of a more comprehensive future definition and so, therefore, those cases still remain in the limbo of the underestimated sort of cases seeking for an utterly embedded recognition as such in the legal sphere.

It shall be from an utmost importance to start this analysis bearing in mind the article 35 of the UNCRC, which undergirds for the States Parties the obligation to “... *take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.*”<sup>12</sup> It is essential to realise that all kind of sale of children should be considered illegal aside from the diversity on the sort of purposes that could lead the action of sale.

It is precisely to name that internationally, conforming to that article 35 UNCRC, exists the publicly recognised second Optional Protocol to the UNCRC named Optional Protocol on the Sale of Children, Child prostitution and Child pornography ( hereafter OP-CRC)<sup>13</sup> and it is also primordial the work of the correspondent UN Rapporteur on those matters. Regarding the sale of children, the article 2 OP-CRC settles that “(...) (a) *Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration*”<sup>14</sup>

Personally I believe that this Protocol contributes to guarantee the situations in which there is a primary abduction, sale or trafficking carried out, and an ultimate kind of exploitation (sexual or labour one); but it keeps failing regarding the sale of children

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<sup>11</sup> See UNICEF Innocenti Office of Research.

<sup>12</sup> Cfr. Supra note 8, Art 35.

<sup>13</sup> OHCHR- Optional Protocol OP-CRC by Resolution A/RES/54/263 of 25 May 2000.

<sup>14</sup> Ibidem, Art 2.

based on other intentions different from exploitation, or at least, not exploitation understood as such in the OP-CRC. Though there is a recognition of the cases of illegal adoptions within the Protocol, what about those cases in the midst that occur when adoptions are not even carried through but the sale is still perpetrated by profitable means? Could it be considered as another form of exploitation with still its same old self?

The concept on ‘Stolen Children’ can be encompassed into a phenomenon called by David M. Smolin as “*children laundering*”. His work is centred on a different sort of exploitation in which children “*are illicitly obtained by fraud, force or funds, and then processed through false paperwork into "orphans" and then adoptees. Child laundering thus involves illegally obtaining children by abduction or purchase for purposes of adoption*”<sup>15</sup>

The prior interest nowadays should fall on the necessity of a certain and widespread legal concept with its correspondent legal framework in order to raise awareness and enlightenment. Thus, both will guide us finally into a rethinking of the actions already carried out; but first of all, there is a requirement to come to accept the past, to deal and face it, establishing a historical basement in which it is paramount to rely on those cases where the babies integrity and dignity were in play.

## **1.2 Making a clean sweep from the past, rethinking previous concepts and promoting a rights reality.**

### **1.2.1 The possibility offered by the legal framework of Trafficking in Human Beings (THB)**

Rethinking trafficking as Kevin Bales (2007) called, the ‘modern-day slavery’, help us to understand why Fitchelberg (2008) in his book highlighted that human trafficking is “*the third most profitable crime in the world*”, after drugs and arm trafficking, and “*one*

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<sup>15</sup> Smolin, 2007, p.3.

*for which there no easy solutions”* under the UN statistics; so therefore, it constitutes one of the massive violations of the inherent Human Rights. In addition, the Observatory on Trafficking of Human Beings (hereafter OTHB) stated that *“in the case of children, this phenomenon constitutes the worst violation of their right to grow-up free and in a safe and welcoming environment”*<sup>16</sup>.

The THB acts *“victimizing the most vulnerable of the global community- young women, children and young adolescents as well as boys and men from impoverished countries”*<sup>17</sup>. The crime of THB can be spilt in three main parts: the process or the action, the method or the means and the final goal or objective. The OTHB and the Finding Freedom (2005) classifies the different assumptions sustaining on this three elements:

Process // Action	Method// Means	Goal// objective
Offer	Violence	Sexual exploitation
Deliver	Kidnapping	Labour exploitation
Entice	Serious threat	Removal of organs
Receive	Deception or fraudulent act	Begging
Transport	Abuse of power	Forced illegal activities
House	Taking advantage of mental Disabilities /Vulnerabilities	(e.g.: forced robbery, debt Bondage, etc...)
Harbour		

\*OTHB website – European Commission: Together against trafficking in Human Beings

<sup>16</sup> Observatory on Trafficking in Human Beings OTHB website, European Commission.

<sup>17</sup> Winterdyk, Perrin and Reichel, 2012 p.8.

The central treaty provided by the UN on this topic, the one which motivated the enactment of new or the rethinking of previous national laws on the purpose of criminalizing the trafficking on persons, was the `UN Protocol to Prevent, Suppress and Punish Trafficking in Persons´ more known as `Palermo Protocol´ on November 15, 2000<sup>18</sup>(attached to the UN Convention Against Transnational Organized Crime UN CTOC).

In the article 3 (a) of the Protocol, it is enshrined a definition on Trafficking in persons as: *“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. (...)*”

Not only have International Organizations, as the one for Migration (IOM) or the International Committee on the Rights of the Child, followed the provisions stated on the Palermo Protocol, but also a large number of known Non-Governmental Organizations (NGO´s) such as Amnesty International, Free the Slaves, La Strada International Association, Stop the Traffik, Human Rights Watch (HRW), Save the Children, etcetera...

Alongside with this treaty, we might find the `Trafficking in Persons Report´<sup>19</sup> of the same year stressed by the US Department of State, which, as Winterdyk, Perrin and Reichel (2012) stated, represents “a key document in the fight against modern day

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<sup>18</sup> UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, 2000. Palermo Protocol.

<sup>19</sup> For further information: Trafficking in persons Report 2000.

slavery”<sup>20</sup>. The UN Office on Drugs and Crime’s Global Report on Trafficking in Persons (UNODC 2009) appeared as a response to some breaches in the transposition of the THB among the national laws in the matter of the conduction of anti- trafficking criminal proceedings.<sup>21</sup>

The so-called crime THB encompasses a paradigm known by the scholars as the four Ps (4Ps): “*Prevention, Protection, Prosecution and Partnership*”<sup>22</sup> defined already in the Palermo Protocol<sup>23</sup> as well as in the European Union Council Framework Decision on Combating Trafficking in Human Beings. The Directive 2011/36/EU of the European Parliament and the Council on 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing the framework Decision 2002/629/JHA, dedicate its own articles from number 13 to 16 to those children ‘innocenti’ victims of trafficking.

Noticed by the Europol the existence of an increasing threat on the security of the European Union (EU), threat brought by the development of those organized crimes during the ultimate past years of worldwide economic crisis, it launched in 2013 a new European platform called SOCTA, ‘EU Serious and Organized Crime Threat Assessment’ to disrupt and finally eradicate the illicit act of THB. Herewith Europol, numerous efforts have come from Eurojust with its ‘Strategic Project and action plan against Trafficking in human beings (TBH) from 2012 to 2016 and directly from the European Commission such as the project ‘THB: Coop to fight’ and its ‘European strategy towards the Eradication of trafficking 2012-2016’.

Among the various context in which this criminal typology is regulated, the prevailing document in the European arena, that brings some eloquence to the Europe’s legal framework is the “Council of Europe Convention on Action against trafficking in

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<sup>20</sup> Winterdyk, Perrin and Reichel, 2012, p.1.

<sup>21</sup> Ibidem, p.2; UNDOC. UNGIFT toolkit.

<sup>22</sup> Winterdyk, Perrin and Reichel, 2012, p.11.

<sup>23</sup> Ibidem, p.12.

Human Beings”<sup>24</sup> that proposed a scope for the consideration of this Convention “...whether national or transnational, whether or not connected with organised crime”<sup>25</sup>. Additionally, it sets up a monitoring system that relies on the creation of a Group of Experts on Action against Trafficking (GRETA: consisting on 15 independent and impartial experts) that evaluates the implementation of that specific legislation as a way to contribute to spread the knowledge of THB within the European context and the Committee of the Parties.<sup>26</sup>

By introducing the legal concept on human trafficking, it is relevant to emphasize that alongside with the previous mention of exploitation for mainly purposes of sex or labor, their definitions are not considered innately exploitative *per se*. Smolin ( 2007) also contemplated that consideration and replied in his article that “when labor and sex are accompanied by the commodification of the human person, they become unjust uses of a person for the benefit of another”<sup>27</sup> and that’s the reason why they are considered ‘exploited’. But the notion of exploitation is structured in the base of three cardinal characteristics that also Smolin brought up in his text about ‘children laundering’; the injustice or the impropriety of an action, taking advantage of or abuse from its ‘innocenti’ condition in order to obtain any sort of beneficial compensation.<sup>28</sup>Therefore, there are still some less preponderant or less evident assumptions of human trafficking not enclosed in the definition proposed in the legislation or by the academia.

The International Labor Organisation (ILO) exposes in the article 3 of the Worst forms of Child Labor Convention (C183, 1999) that the sale and trafficking on children, along with child prostitution and child pornography, are one of the most widespread among

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<sup>24</sup> Council of Europe website (COE) Council of Europe Convention on Action against trafficking in Human Beings.

<sup>25</sup> Ibidem, article 2.

<sup>26</sup> THB: Cooptofight European Commission Project.

<sup>27</sup> Smolin, 2007 p.12.

<sup>28</sup> Ibidem, p.11.

this inhuman category that describes to what degree those practices are prejudicial to the child's capacity of development.

Despite the fact that all those International and European mechanisms were created due to the necessity of control and prosecution of the crime of trafficking on human beings, the reality fails into the huge breach brought by the lack of unanimity in the definition of THB and in the 'protectoral' measures proposed among the States, by the not-empowered legislation to enact<sup>29</sup> and by a clearly lack of cooperation between the parties which obfuscates any possibility of diffuse of information.<sup>30</sup>

Worse yet, problematic realm is that the majority of the victims "*remain "invisible" and unidentified*"<sup>31</sup> due to the existence of a broad assortment of prototypes in the scale of victims of trafficking and their refusal of being helped or even of being considered victims as such. Rather than global mechanisms, the need is for disposal, cooperation and empowerment and States should be willing to join efforts in order to expose those crimes in a more similar or identical way.

### **1.2.2 Providing a plausible nexus among international adoptions and human trafficking.**

Regulating the adoption area, we encounter the article 21 of the UNCRC, enlightened above, and the '*The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry adoption*' 1993 (the Hague Convention) as a reply to the must to prevent the children from abduction and sale based on purposes of adoption. As noted by Anna Ruzik (2008, p.2) the Convention "*(...) was the effect of reports and international concern on child trafficking and unofficial payments for the newborn babies.*" So therefore, we have to ask to ourselves if it is included in The Hague

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<sup>29</sup> Brysk; Choi-Fitzpatrick, 2011, p.81.

<sup>30</sup> Dandurand, 2012. See Section in the book of Winterdyk, Perrin, Reichel, 2012, p. 223.

<sup>31</sup> Copic, Simeunovic-Patic. See Section in the book of Winterdyck, Perrin, Reichel 2012 p.280.

Convention an implicit protection of those babies illegally adopted or abducted for the mean of adoption with an economic sum on exchange.

The foregoing analysis stresses the chance of an admissible nexus in the case observed by Smolin (2007, p.14) where “*if an individual literally kidnaps a child, taking the child without any consent whatsoever, and then sells the child for profit to an organization that will place the child for adoption, this constitutes an exploitative adoption*” . The tendency to discern the notion of adoption as a mainly “*act of kindness by selfless individuals towards unfortunate children*”<sup>32</sup> has brought the primarily consequence of the immanent qualification of adoption as ‘good practice for the child’ when we discuss about that matter.

Needless to say, that in disagreement with those scholars as Smolin (2007) or Siegal (2012) who believe in the necessity of considering the exploitative and harmful illegal adoptions as a part of the typology on THB, there are those, who trust in the possibility of studying those cases as equivalents; in a sense that, even though both lead to the birth of a new parental relationship (new family-child), it does not correspond with the reality.

Bearing always in mind that there is no place to an analogy ‘against reo’ or ‘contra reo’<sup>33</sup> the interpretation rules should be miraculously careful or, when adequate, the cases could bring the chance to propose different legal reviews and reforms over those articles related to change of parental relations within their own national laws.

As Michael J. Dennis observed in his text “*Newly adopted protocols to the convention on the rights of the child*” (2000, p. 793-794), the Article 4(c) (3) of the Hague Convention requires that an adoption within the scope of the Convention shall take

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<sup>32</sup> Milotte, 2012 p.xii.

<sup>33</sup> Email from Prof. Luz Puente Alba, Penal Law, University A Coruña (Spain) date: 26 May 2014. Free translation of the author.



place only if the competent authorities of the state of origin have ensured, inter alia, that consent has not been induced by payment or compensation of any kind.<sup>34</sup>

One of the biggest opponents to the establishment of such a nexus among the two concepts is the United States. In its Department appears a clear defence position of the fact that the sale of children based on means of adoption cannot constitute a child trafficking's act, due to the fact that children are not exploited during the processes of creating a new parental relationship against their parent's will or under their scarcity of knowledge. Furthermore, the US Department maintains that those situations do not constitute a 'proper' harm to their developing skills and their welfare.<sup>35</sup>

### **1.2.3 The apple of discord: Smuggling vs Trafficking**

While recognizing that both crimes contain different assumptions of facts, it often sets up a problematic dichotomy between the translation from English language to others such Spanish, that leads into the confusion of both legal frameworks, considering trafficking as 'tráfico' not 'trata de personas' and smuggling on migrants as 'trata' and not as 'tráfico'.

Following the indications provided by the United Nations Office on Drugs and Crime UNODC Toolkit we may see the reasons why there is a realistic problematic in the differentiation of both crimes, either way, the perpetrator could be at the same time smuggler and trafficker, or the act of smuggling can ultimately lead to an act of trafficking when the mean of exploitation appears in the real situation and the difficulties that appear on the discern of the non-forced consent. Differences are summed up in this scheme of the UNODC Toolkit:

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<sup>34</sup> Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, The Hague Convention. 29 May 1993; Murphy, Contemporary practice of United States, 1998, pp.734-735.

<sup>35</sup> State Department, 2005 Trafficking in Persons Report; Smolin, 2007 p.2.

	<u>Trafficking in Human Beings</u>	<u>Migrant Smuggling</u>
Victim's age	Below 18	Irrelevant
Mental element	Intention	Intention
Material element	Act : Exploitative purpose	Act: procurement of an illegal entry.  Purpose: for financial or other material benefit
Consent of	Irrelevant; means do not need to be established	The smuggled person consents to the smuggling
Transnationality	Not required	Required
Involvement of an organized criminal group	Not required	Not required

The legal framework of 'Smuggling in migrants' is stressed in the 'UN Protocol against the Smuggling of Migrants by Land, Sea and Air' 2000 and "(...) *shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident*" (UN 2000 article 3)<sup>36</sup>. While this crime establishes a

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<sup>36</sup> Pearce, Hynes, Bovarnick. 2013 p.19.

violation of state sovereignty, the THB is a violation of the inherent and personal's human rights (e.g. freedom or abuse of its dignity as human being).<sup>37</sup>

A wide range of documents for the fight against the entrance or irregular migration has been posed by European Organisations such as Frontex for the purpose of control the borders of the space Schengen, or the Single European Act (SEA) and numerous programmes have been launched in order to prevent and prosecute this crime nowadays in the European level.

## CONCLUSION

After the analysis on the possible legal frameworks existent nowadays, the paradigm is: Does out there exist a place for those cases on banished babies that remain unclear and not taking into such a prior consideration as the trafficking for other purposes? Is there a possibility of rethinking the legal framework of these three different crimes introduced above in order to create one, specific and unique, that dovetails perfectly with these suppositions of facts?; and if those questions are answered in a negatively manner, would it be any chance on the review of the parental rights law and filial relationships within its own national law where the cases have been perpetrated?

Is it really a victimless crime?

Hereinafter I will introduce an academic review on the cases of banished babies taken place in Ireland and Spain since the 60's and as we shall see in the last chapter, there will be a comparative legal analysis of both situations along with a call-for-action in order to prevent them to remain unpunished.

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<sup>37</sup> João Guía, Conference on Human Trafficking (Coimbra) 11 April 2014.



## **Chapter 2. Facing- up to reality of the Spanish cases on “Stolen Babies”: a real violation of Human Rights in the nearly beginning of the XXI Century**

### **2.1 Tackling some brief introductory considerations.**

Different practices and stances have been taken into consideration in Spain since the wording ‘stolen babies’ was brought to light and, therefore, it has appeared an imminent necessity of shedding some light on an issue that relentlessly was and still keeps on being either one of the loudest parts of the Spanish history, or at least, one of the most dark and unknown pieces of it. An issue which unfortunately strove for making a place itself in the late forties and continued, until the late nineties in Spain. So therefore, welcome to the Spanish fiction of the 21<sup>st</sup> century.<sup>38</sup>

We can understand that due to the fact of the tangible absence of acknowledgment by the victims that they were suffering those violations on their rights (until recently there were mere suspicions), or even given the lack of endorsement of those acts from the governmental side in the recent years, those cases on ‘*niños robados*’, as the Spanish wording refers to them, have not yet been weighed as a national global problem, but as a particular and isolated one. Fact that in my modest opinion, interpose a huge obstacle in the path for an ultimate expected reparation based on truth and justice.

The primordial fact to bear in mind in this chapter, is that thousands of new- born children<sup>39</sup> in Spain were stolen by fraud or deception from their biological mothers with means that are a long way from political-ideological ones from the years of the post-war era. These situations evoked huge traumatic experiences that forced separation normally brings up to novice mothers, and even if it also depends on the contexts in which the

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<sup>38</sup> Vinyes; Armengou; Belis, 2003.

<sup>39</sup> Dunbar, Daily Mail UK, 16 October 2011; Estes Poves, 2012 p.35

mother got birth and the conditions of the pregnancy, the final and total absence of that mother or parent's figure provokes in those children (and now adults) an irremediably snaking suspicion of having lost their real identity.

As Luigi Contadini stated in his article "*the flow of disrupted lives based on lies and the desperate search for one's own relatives are represented*"<sup>40</sup> in books such as the ones written by the Spanish lawyer, and also victim of the conspiracy of 'stolen babies', Enrique J. Vila Torres (2010-2011-2012) or reports as the one brought by Natalia Junquera and Jesús Duva in 2011 as well as the one published by Piero Badaloni in 2012.

By introducing these cases taken place in Spain during the last 50 years, it is relevant to highlight that meanwhile there is no need to believe that there were and regrettably still subsist some 'bad apples' in the Church, among the Lord's servants (formed by nuns, priests, bishops etc..), and in the practices of the medical public-private services, it would be improper to stigmatize the entire institutions for the acts perpetrated by those who placed his or her own interests as primordial ones.

Although the exploitation of God's name in order to obtain trust and commit this sort of crimes of baby abductions, with the ultimate purpose of adopting them illegally, should be penalized; most of the Catholic Church and numerous maternities still continue to do an immense amount of good and altruistic charity work and provide assistance worldwide to those in need of care without any other ultimate mean<sup>41</sup>.

The main issue here is that some scholars believe that a church who disrespect its own people has not to be respected. This feeling, provoked by the cover up during the past and still in the present, of those violations that happened beyond the reach of the public scrutiny and their active role independent from the judiciary, brings the necessity of enshrine that no one can be allowed to be above the law and especially when it comes to the abuse of the weak and minors.

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<sup>40</sup> Contadini, 2014 p.119.

<sup>41</sup> Comments to the Documentary GRTV 8 November, 2011.

These underestimated cases should be thoroughly investigated so therefore the pain that seems not to have an end for those `niños robados`, ultimately finds a way to proportionate them the truth about their origins, providing them the realization of their fundamental human right to have an identity, a real and truly one. Enrique J. Vila Torres wrote a book in which he calls himself, and enclose in this term all the similar cases to his one, as a mere “*bastardo*” and “*expósito*”, a `bastard`, an `illegitimate son`<sup>42</sup>, branded for life as such due to the fact of get born as a result of those parents who succumb to the temptation, and as he stated “maybe too premature for being accepted by the hypocritical society”<sup>43</sup>

## **2.2 From the roots of the illicit and sinful gain: First step in covering up a crime on forced disappearances and abductions of minors.**

*“The nationalist not only does not disapprove of atrocities committed by his own side, but he has a remarkable capacity for not even hearing about them” (George Orwell, 1945)*

The starting point of the misappropriation of children or, most of the cases, babies, by others, different from their own families or biological lineage, bring us the necessity for a backward glance to the early years right after the Spanish Civil War ( 1936- 1939). In these years the fascist doctrine of General Franco became, as a matter of fact, widely spread; and a totalitarian regime as such, grounded on numerous models given by the one of Hitler in Germany or Mussolini in Italy, lead into a Francoise- ultraconservative perception of race and identity.<sup>44</sup>

The violations of inherent and basic human rights, as vastly the majority of totalitarian dictatorships, were events that repeatedly succeeded under the Francoist regime. There was a plot, a conspiracy perfectly hatched, a work widely coordinated and arranged neatly compounded by: the legalized abduction of children, the necessary sell of babies from republican mothers, the `required` change of identities, illegal adoptions covered under the

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<sup>42</sup> Free translation of the author.

<sup>43</sup> Vila Torres, 2010 p.20. Free translation of the author.

<sup>44</sup> Vallejo Nájera, 1937; Gónzalez Duro, 2008.

assumption that nothing would stop them to act with complete impunity and they will even brag about how great it is.<sup>45</sup> The Spanish society became at some point, a State of `fear`, frightened by any retaliation from the Government if they were failing to comply with the rules exacted.

By introducing these practices, it is relevant to highlight that those repeated performances were recognized and legally covered by the General Franco and his government from the 40's and ahead up. The `endemic` problem of the `gen rojo`, politically talking, the `red gene or Marxist gene`<sup>46</sup> ( that enclose Marxists, republicans, socialists and communists), was in need to be solved, in the climate of opinion of those affiliated to the regime, such as militaries, falangists, the well-off and upper-class people, and the police alongside with all the government's sympathisers.<sup>47</sup>

The repatriation and subsequent adoption of children of republican mothers, was brought about with the excuse of their `good faith` of protecting them from the devastating war but with the ulterior motive of promoting forced separations from their biological mothers in order to prevent them to be `infected` by that *red gene* that it was considered by those supporters as one of the worst illnesses in that time, a gene that should be eradicated in some way.<sup>48</sup>

Those children, those babies, posted abroad to other `friendly with the regime` countries by means of adoption, were considered undoubtedly legal ones by the Order of March 30<sup>th</sup>, 1940 and later on with the approval of the Law of December 4<sup>th</sup> 1941 for the inscription of Repatriated and Abandoned children in which expressly it appeared the possibility of changing the names and surnames in the Civil Register of the children of those massively

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<sup>45</sup> Fouce Fernández,2009.

<sup>46</sup> Free Translation of the author.

<sup>47</sup> Badaloni, 2012 pp. 82-84; Estesó Poves, 2012, pp.23, 24.

<sup>48</sup> Duva; Junquera, 2011 p.13.



and systematically imprisoned, exiled or executed by firearms, without necessity of any sort of consent from the biological mother or relatives.<sup>49</sup>

So therefore, those new-born were adopted after being ‘taken away’ from their mothers because they deemed to be politically harmful to the regime’s future plans<sup>50</sup>, and, subsequently, a bunch of new filiation proceedings were created by new adoptions from ‘more adequate’ families; relationships in which those new-born were registered with a different surname and occasionally with different names due to prevent the biological mothers to search for them in the future.

The documents as a result of the forgery, considered legal during that time, allowed civil servants and to religious servants to get the assumption of the guardianship of those children and babies who were born in prisons and institutions under the mandate of the Catholic Church, always accepted and recognized by the Regime.<sup>51</sup> “*Every political regime sustain themselves in ideological precisions or ideas that give meaning to everything they do. One of the most important bastion of the Francoist regime was the Catholic Church, institution that proportionated a religious foundation to all the regime (...)*”<sup>52</sup>

These forced disappearances and abductions from the biological mothers were far from economic reasons at first sight; the primary purpose in that time, which lead into those actions, was a political and ideological one, based in the certainty that they were doing a good job in the “*race cleansing*”<sup>53</sup>, as any fascist dictator would have promoted. However, the doctors, lawyers, civil servants and members of the Catholic Church who perpetrated these ‘legal’ acts, were also moved by economical ‘help’ from the Regime.<sup>54</sup>

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<sup>49</sup> Vila Torres, 2011 p 32-33; ‘Orden de 4 Diciembre de 1941’ (BOE n. 350 de 16/12/1941, pág. 9819-9820).

<sup>50</sup> Dunbar, Daily Mail Online 16 October 2011.

<sup>51</sup> Idem.

<sup>52</sup> Estesó Poves, 2012 p.23. Free translation of the author.

<sup>53</sup> Vallejo-Nájera, 1937. Free translation of the author.

<sup>54</sup> Cfr. Supra note 49, p.44.

In addition to this, all the legally binding plot of forced disappearances, legal abductions and adoptions, were strongly supported by the theories of the psychiatrist Antonio Vallejo-Nájera “ Eugenesia de la Hispanidad y Regeneración de la Raza” 1937(“ *Eugenics of the Hispanic feeling and the Regeneration of the Race*”). His theory was centered in the “*segregation of individuals since their infancy that might release the society from a fearsome plague*”<sup>55</sup>

The forced disappearances, as a method of terrible repression against those Republicans who did not support the fascist regime, can be considered rooted under the Spanish ‘Law on Politic Responsibilities’, in which, the offence of forced disappearance was enshrined as a licit act.<sup>56</sup> These forms of francoist repression should have been taken into consideration, as Miguel Angel Rodríguez Arias (2008) highlighted, as proper “crimes against humanity”.

Following his view, it is established in the Art.5 of the United Nations (hereafter UN) Convention for the Protection of all Persons from Enforced Disappearances (hereafter ICCPED) that “*The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law*”.

It is from an utmost importance to bear always in mind that as the article 2 of the ICCPED enshrined “enforced disappeared” is considered the “(...) **abduction** or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”<sup>57</sup>. This is the precise framework on which the cases of “niños robados” under the fascist regime could be allowed to have a proper space of recognition and could be enclosed.

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<sup>55</sup> Duva; Junquera, 2011 p.14. Free translation of the author.

<sup>56</sup> Esteso Poves, 2012 p.17.

<sup>57</sup> OHCHR International Convention for the Protection of All persons from Enforced Disappearances 20 December 2006.

### **2.2.1 Has the State recognized the cases of “niños robados” as forced disappearances in this first stage (40’s to 70’s)? Different reaction in Argentina: The Grandmothers of the Plaza de Mayo’s reply.**

Unfortunately in Spain, these important cases have been slightly recognized in the *Ley de Memoria Histórica de España* (Law on the Historical Memory of Spain)<sup>58</sup>, but this law neither enshrine the importance of the ‘Right to Know’ nor propose an exhaustive research for the truth as a deep concern. The ‘Amnesty Law’, the ‘prescription of the violations’ and the ‘Principle of legality’ became the most inalterable obstacles for achieving some judgment on these cases.<sup>59</sup> Furthermore, the European Court of Human Rights has rejected the suits as invalids due to the belated lodging of the suits.

Although the Resolution 1736 of the European Council in March 17<sup>th</sup> 2006<sup>60</sup> reaffirmed its importance and condemned all these cases during the Franco regime, it still calls upon Spain to grasp the hand offered by this resolution and urges the State to act according to its obligation as such in a transparent and committed way. However, until now, the Spanish Government has not yet recognized the rights for Truth, Justice and Reparation<sup>61</sup> of the victims of those crimes; additionally, the State remains uncommitted, failing in its duty to pursue those goals, provoking an era of impunity ( against the Statute of Rome, Preamble).

*“That investigation, opened by a magistrate, Baltasar Garzón, may pull down the wall of silence over this painful subject”*<sup>62</sup> The proposal by Baltasar Garzón came up as the result of a great deal of effort; after years of hard work and joint action with the victims, the magistrate brought to the National Audience , in October 2008, a proceeding with more than 30,000 cases, against the violations of human rights pursued in the Franco regime alongside with the request of the removal of the mass graves. The National Audience

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<sup>58</sup> Free translation of the author.

<sup>59</sup> Amnesty International, June 2013. Free translation of the author.

<sup>60</sup> Rodríguez Arias, 4 December 2011.

<sup>61</sup> Cfr. Supra note 56.

<sup>62</sup> The Economist, 25 September, 2008.

refrained itself to investigate, and declared itself incompetent in favour of the territorial jurisdictions.<sup>63</sup>

He highlighted that “*when the justice forgets about the victims, it ceases of being justice*”.<sup>64</sup> The effort was in vain as the result consisted in shelving the presented cases. The sentence given by the Supreme Spanish Court in February 27<sup>th</sup> 2012, (STC 101/2012)<sup>65</sup> denied any sort of competence for the Spanish judges or magistrates to investigate about those crimes, claiming for a lack of legal foundations for considering it as a crime against humanity and the prohibition of no retroactive nature of the laws.<sup>66</sup> Baltasar Garzón ended up accused for breach of trust or corruption, charged and suspended from his magistracy.

Among the various States where those cases have been openly admitted under the Principle of Universal Jurisdiction, in Spain still there is a lack of will for any prompt strategy to enquire in order to verify the existence of those ‘lost children’, due to the fact that the courts provide an alibi, sheltering themselves in the exercise of the right of declaring not to be competent to act for clarifying those cases.<sup>67</sup> Those reactions have turned into an endless ‘merry-go-round’ and the situation calls upon a long-standing engagement that still is inexistent.

For instance, the formal speech given by the First Minister Kevin Rudd in the Federal Parliament (2008) about the Stolen Generation cases occurred in Australia, show us a clear example of an official apology as a first step to deal with the past and to reach the truth; as he stated, “*We apologise for the laws and policies of successive parliaments and*

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<sup>63</sup> Amnesty International June 2013.

<sup>64</sup> Badaloni, 2012 p.40. Free translation of the author.

<sup>65</sup> STC 101/2012 Supreme Spanish Court 27 February 2012.

<sup>66</sup> Idem.

<sup>67</sup> Cfr. Supra note 60.

*governments that have inflicted profound grief, suffering and loss on these our fellow Australians”<sup>68</sup>*

The examination stemming from the Argentinian cases of those forced disappearances of children “niños robados”, due to the strength of political reasons throughout the years of the military national Reorganization movement of General Videla (1976- 1983), emphasizes the idea of the creation of a national association as the well-known “Grandmothers of Plaza de Mayo” (Abuelas de la Plaza de Mayo) as a mean of willingness to achieve the covered truth, justice and reparation. These Grandmothers (hereafter GM) worked for the ultimate and necessary creation of a National Bank of Genetic Data of families of those disappeared children.<sup>69</sup>

Even when, in the early beginning the cases which the GM brought to the court, were rejected, they kept on doing an enormous effort to prevent those cases to remain unpunished and not recognised. The GM were trying to accomplish a process of ‘reconstruction’ based on historical facts “*that consists on the recovery of the identity*”, a “*Restitution as an act psychically foundational, based on the articulation of a nexus among the truth and justice which its comprehensive sense is simply to cease being disappeared*”<sup>70</sup>

In May 1987, the DNA Genetic Data Bank was created as one of the new methods for preventing the impunity to be longer protected by law. The GM were able to include, after an infinite number of useless attempts, in the UN Document Declaration on the Rights of the Child, the right to have an own and real identity that belongs to them, to their individual stories, to a family life and the right to a revealed truth in the articles 7 and 8.<sup>71</sup>

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<sup>68</sup> National News Australia, Kevin Rudd Speech. 13 February 2008.

<sup>69</sup> Golombek; Penchaszadeh Genetics Videos Abuelas Plaza de Mayo.

<sup>70</sup> Arditti; Brinton Lykes, 1997.

<sup>71</sup> Ídem; UNDRC GA 44/25 Art. 7,8 , 29 November 1989.

The primary difference of those Argentinian solutions, is that in Spain there is no protection laws for that Public Genetic Data Bank, so therefore, as Mar Soriano ( Coordinator of the platform S.O.S Bebés Robados)<sup>72</sup> transmitted to me, there is a huge climate of distrust in those who have the obligation of that important protective duty. Is there any intention or will on reparation?, but what is irrefutable, is the urgent need to understand the sense of identity as something inalienable, inherent to every single human being.

Recently the daily journal `La Ley´ has included the declarations of the Director of the State Agency for Data Protection, José Luis Rodríguez Álvarez, that stated “*the competencies of his department are very `limited´ in order to enshrine the right to information for the affected victims on the `stolen children ´ cases, due to the fact that the spheres in which the associations wants to investigate , are far from the application of the law that admits the access to that information”*<sup>73</sup>. This spheres will include the birth and death certificates, hospital and church congregations files, among others.

In the wording of Miguel Angel Rodriguez Arias “*(...) alongside with the violation of the human right to a familiar life of all these persons who are still waiting for their lost member to come back and from which still nothing have been said, and with the violation of other articles of the European Convention of Human Rights, it is being perpetrated a degrading and cruel treatment towards the family members (...) and also a `cruel, inhuman and degrading´ treatment to those lost children who are living deprived of a name and an identity (...)*”<sup>74</sup>

### **2.3 Preservation of the Status Quo: a terrible truth in the last years of the XX century that causes an undoubted effect nowadays.**

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<sup>72</sup> Interview in Spanish Mar Soriano (Coordinator of the Platform SOS Bebés Robados) 7 April 2014; Estesio Poves, 2012 p.135.

<sup>73</sup> Diario La ley 78903/2014 3 April 2014 (Free translation of the author).

<sup>74</sup> López Arnal, 2009, pp. 133-143 . Interview to Miguel Angel Rodríguez Arias.(Free translation of the author).

The majority of the cases of “*fictitious identities*”<sup>75</sup> as Roberto González García (March 2011) referred to, were carried out between 1963 and 1970 meanwhile the fascist regime still operated in a commonly-held basis. Those thefts of identities, should be considered still imprescriptible rights until those identities will be retrieved in a hopefully near future.

In contrast to those previous ‘legal’ crimes that in the early beginning were gestated exclusively for political and ideological reasons, the situation seemed to be about to cease, since the 70’s- 80’s due to the fact that Spain was already introduced as a democratic society. Rather, those offences turned into acts committed taking advantage from economic and social inequalities; turning the necessary call of aid from ones into a lucrative business of others. It is not a political repression anymore, it is a mere question of strongly-rooted social, cultural and economic interests in play.<sup>76</sup>

The fact that it keeps being repetitive in both periods of time, is the presence of the Catholic Institutions in which those ‘bad apples’ devised a rule.

### **2.3.1 Two modalities towards the same ultimate goal: to rectify “the God’s Crooked Penmanship”<sup>77</sup>**

The challenge of this thesis, rather than the difficulties that the compilation of information can bring, was how to distinct academic impartiality and detachment from individual embitterment towards the reaction of the judiciary facing those cases, a mixture of great disillusionment with personal indignation. All the historical and factice information enclosed in this section has been gathered together from the different investigations realized by Enrique J. Vila Torres, Natalia Junquera, Jesús Duva, M.José Estesó Poves and Piero Badaloni, alongside with the numerous documentaries already filmed about the topic.

The fate of unmarried women who got pregnant in those years was further ahead of their time; whether if they descended from a high-status, accommodated and wealthy families or

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<sup>75</sup> Free translation of the author.

<sup>76</sup> Interview in Spanish with Antonio Barroso (President of ANADIR) 31 March 2014.

<sup>77</sup> Odette Canivell , Review 1982.

if they did not, their future would never be the same after those institutions came to their assistance.

In one hand, there were the cases in which the biological mothers, from the lowest status of the society, with an evident lack of resources, easy to handle due to the fear, resorted to those institutions basically catholically rooted created in Spain in that period of time in order to have a place to give birth owing to their scarcity of supplies.<sup>78</sup>

Those mothers could consent to give up their child for adoption after being suffering different sorts of pressure and coercion applied by the morality of that time, by those catholically rooted institutions and even by their own families, who considered them at some point as 'impure', coercing them with fake hypothesis of a future stigmatization from the society. They ultimately considered themselves not enough deserving, not dignified enough to rear a child.

Young, unmarried women or prostitutes who became pregnant, were pleasantly sheltered by benign people in who they used to trust and who inspired them confidence due to the respect aroused by that authority or their faith in determined religion or ideology. As those future mothers were in a helplessness situation, they used to pay their stay working for the institution created at that effect, and within those cases some mothers ended agreeing and consenting the adoption, after the early and proper "mind-washing", convincing them that the new-born will only provoke a disgrace to their lives if they do not give those babies in adoption.<sup>79</sup>

On the other hand, there were other cases in which the mothers from the middle-high status of the community were considered as a scourge in their well-known families due to the fact of expecting a baby without being married, for succumbing to the temptation. The parents concocted a plot in which, joining action with those 'cradle-homes'<sup>80</sup>(Casas-Cuna, as the

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<sup>78</sup> Duva; Junquera, 2011 p.17.

<sup>79</sup> Ibidem. Exnun Mercedes Sánchez p.45.

<sup>80</sup> Free translation of the author.



one in Valencia or Tenerife), the children were given in adoption with or without the consent of that biological mother and the adoptive papers were fulfilled *ex profeso* in order to prevent the biological mother to search for them in a near future.<sup>81</sup>

One of the most known cases of these baby-homes, 'pisos-nido' as they were known in Spain, was the one established in the northern part of the Peninsula, in Bilbao, and it was run by a woman called Mercedes Herrán de Gras throughout the foundation called 'Mother Mary'. During their stay, if the mother could not pay the outrageous high fee monthly, she asked the mother to work for her, being in charge of the maintenance and housekeeping of the place. If, at the moment of give birth, the mother refused to give her children on adoption, they were kicked out of the establishment, "*You have not seen anything, you do not know anything, don't talk!*"<sup>82</sup>

But the most bloodcurdling cases in Spain, were the ones carried out into the Maternities wards and clinics, such as the ones in Madrid, Clínica Santa Cristina and Clínica San Ramón, in which some Catholic-church servants, alongside with a number of well-known doctors and nurses, were hatching a plan to 'steal' those new-born children, making the mothers to believe that they had died during the childbirth.<sup>83</sup>

Those authorities, respected and trusted by those parents who came to their establishments, blindly believe that they were doing a role of a good Samaritan, 'taking away' those babies from their biological mothers and given to rich and infertile couples providing them a proper amount of money in exchange of their service. Woefully, that perception has been seen as a clear misunderstanding of the meaning of the word charity<sup>84</sup>.

Unfortunately, those couples in visible need of a new-born in their lives, were not even aware of those purchases and selling on babies; hence, their only thought was that they

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<sup>81</sup> Duva; Junquera 2011 pp.53-57.

<sup>82</sup> Duva; Junquera, 2011 pp.57; Estesó Poves, 2012 p.47. Free translation of the author.

<sup>83</sup> Duva; Junquera, 2011; Estesó Poves, 2012; Vila Torres 2011; Badaloni, 2012.

<sup>84</sup> Duva; Junquera 2011 p.43-47.

were just handing over that ridiculously big amount of money in order to cover all the expenses of the childbirth. They were told that the mother abandoned the baby or she didn't want to bring him up so as a charitable solution they processed the paperwork for the adoption.<sup>85</sup>

Uncountable journalistic investigations have reached the necessity to highlight a realm in which those practices were accomplished. Without prior notice, the mothers were told that their babies had died owe to 'incomprehensive' complications after the birth, causes such as epidemics of otitis, malformations, respiratory insufficiencies, etc... However, in any of the cases, neither a death certificate was delivered in order to verify that death presumption nor a dead body was returned to their biological parents for a private and particular burial.<sup>86</sup>

Thanks to the conversation and the facts provided by Mar Soriano, who is the present Coordinator of the platform S.O.S Bebés Robados and also the sister of one of those 'stolen babies', I could realize that those epidemics caused by otitis were used in a vastly spread manner as an excuse for numerous parents who were told that their children had died for that medical reason.<sup>87</sup>

In the hard research of her own stolen sister, Mar Soriano has discovered that, as María José Estesó Poves describes in her own book, in base on the opinion of the podiatrist María José Santos Muñoz , *"in any case the otitis can be the cause of death. A death cannot have that justification. Another thing is that the otitis bad treated can degenerate in an infection that could end up becoming meningitis, but the cause of the death would had been that, not for otitis. The death caused by otitis is pretty strange."*<sup>88</sup>

But what was the reaction of those inexperienced mothers when suddenly received the news of the prompt and unexpected death of a baby that apparently was utterly healthy the

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<sup>85</sup> Ibidem pp.65, 98-99; Estesó Poves, 2012 pp.96-98.

<sup>86</sup> Duva; Junquera, 2011, p.149; Estesó Poves, 2012 pp. 45,46, 63, 83,84.

<sup>87</sup> Interview in Spanish with Mar Soriano ( Coordinator of the Platform SOS Bebés Robados) 7 April 2014.

<sup>88</sup> Estesó Poves, 2012, p. 53. – Free translation of the author

day before? The denial of such a painful possibility is the first reaction of those novice mothers, who, confused still by the dozens of feelings petted against each other, agreed to let the clinical doctors and other church servants “to be in charge of everything”, including the death certificate and the burial expenses.<sup>89</sup>

When they realized about their wrong decision it was far too late, they had been deceived; after so many years, it was discovered that a proper register of the death of those babies was totally inexistent, but, on the other hand, it was found out that a new process of filiation was created, by means of illegal adoption, with the name of the mother as ‘unknown’ in the part of the signature: the same date, the same new-born baby, different families and different lies told to each one.<sup>90</sup>

As affirmed by Maria Antonia Iglesias in her journalist report in the *Interviú Magazine* in 1981<sup>91</sup> and supported by the photographs taken by Germán Gallego, to those mothers who insisted in seeing the baby at least once, before those peoples in charge of ‘everything’ take the new-born to an unknown destiny, the medical and church servants would show them a dead baby, but not a normal new-born baby with its warm colour as it could be still expected to have. The skin, cold as ice, it brought to think that there were not possibility to match with the same baby that had died some hours before: it was taken from the cold storage unit of the clinic. It was the same frozen new-born baby for every novice mother, it was used as a ‘test-tube frozen baby’. So therefore, the questions are, what happened with those babies who were still alive? and whose funerary remains are buried then in the place where those babies should had been buried?

Not only those people yield a profitable business based on the research of a tender and desperate mother, as a perfect victim to ‘help’, but also those perpetrators were in charge of

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<sup>89</sup> Duva; Junquera, 2011, p. 95.

<sup>90</sup> Estesó Poves, 2012 pp.119, 130; Duva- Junquera, 2011 p.134.

<sup>91</sup> *Interviú Magazine* 1981 Maria Antonia Iglesias; cited by Estesó Poves p.42, 49 and by Montero, 26 May 2012.

the market research for the ‘perfect accommodated and catholically educated’ family. It was an authentic “baby-factory”<sup>92</sup>

Those ‘niños robados’ possess their birth certificates in a Civil Register in which are stated the names of women who never gave birth, but affirmed to be their biological ones, with no signal of legal adoption meanwhile. The conspiracy was facilitated by easy pickings strategies in which the same day of the childbirth, in two adjacent clinical rooms, there could be found the pregnant woman in one and the adoptive in the other, in pretty much unison, waiting for the same baby; ones waiting for their wished biological son or daughter, others waiting for that gift that the nuns promised them.<sup>93</sup>

It is equally significant to clarify that those adoptive mothers were “captured” by those clerical servants and enlisted after having been approved the arrangement, after passing an appropriate interview and having fulfilled all the requirements for becoming an enlisted couple. In any of the most known cases, the adoptive mother was unaware of the commitment of this crime, they were barely informed about the sum paid to cover the childbirth expenses but not conscious of the rest of the unprecedented plot.

In other cases, additionally, those adoptive mothers were taught by those ‘bad apples’ to pretend a fake pregnancy.<sup>94</sup> *“Inés Pérez, 89, has confirmed that a priest and a doctor in Madrid encouraged her to fake a pregnancy so she could be given a child due to be born at the city's San Ramón clinic in 1969”*<sup>95</sup>

The net of illegal adoptions throughout the act of ‘taken away’ those babies was in an inter-communitarian system; reliable nuns were obliged to pick up those babies from other autonomous community’s maternities, as they were dispatching any other sort of merchandise, with the formal and superior banning of asking any questions about it. The

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<sup>92</sup> Duva, Junquera 2011 pp.67-73.

<sup>93</sup> Estesó Poves , 2012 pp. 43,44.

<sup>94</sup> Duva, Junquera, 2011 // Estesó Poves, 2012 // Vila Torres, 2011// Badaloni 2012.

<sup>95</sup> Tremlett, 27 January 2011, The Guardian.

mother had renounced to the baby, there is no need to know more information about it; however, any document was entrusted or accompanied the `delivery of the baby´.<sup>96</sup>

In a State where the lack of sexual education was tangible, where the reputation and honor were predominant in the social life, and the fear to be marginalized prevailed in the ethics of the period, it could be considered even likely the fact that all the mothers who are registered as the ones who consented adoption were `unknown mothers´ that abandoned them. Until the promulgation of the Reform on the Adoption law of 1978 in which the contraceptive pill is taken into account as a safe method of birth control and the Reform of the enacted law about `Parto Anónimo´ (`Law on Anonymous Birth´) in 1997 ( 21/1997)<sup>97</sup>, there still existed a right which was from an utmost importance to protect, the right to the mother´s anonymity, right to her privacy, allowing her (or them in charge of her fate) not to provide her real identity.

Although the investigation on the issue of `Stolen babies´ is considered as fairly reasonable one, still fails in the act of attainment in front of the National Audience, who already declared itself incompetent to know about the cause. The research is at a standstill due to the scarcity of documents provided by those maternities or hospitals; institutions that excuse themselves in the loss of documents on provoked fires or which were destroyed under the orders of their `superiors´ who want them to disappear<sup>98</sup>. Why would they do that if there were doing nothing to feel ashamed or to feel guilty about?

Names as the one of Doctor Eduardo Vela Vela, José Botella Llusía, and the ones of the nuns Sor Juana Alonso (baby-home Tenerife) and Sor María Gómez Valbuena (Santa Cristina-San Ramón) were pretty well-known by a wide range of professionals of that time. The nun Sor María was finally brought to the Court in the past year by a denounce posed by the General Public Prosecutor ( Fiscalía General) , but she sheltered and protected herself

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<sup>96</sup> Esteso Poves , 2012, pp 47, 54.

<sup>97</sup> Interview in Spanish Mar Soriano 7 April 2014. Free translation of the author.

<sup>98</sup> Duva, Junquera 2011 pp.72,73.

under the umbrella that proposes the principle of the right of silence based on the presumption of innocence, that has to be respected. This nun, who was first charged for implication in the plot of ‘Stolen Children’ and after that, for illegal detentions, meanwhile she allegedly disclaim to have been played a significant role of the conspiracy, died in 2012 with all the remained unanswered questions.<sup>99</sup>

### **2.3.2 Conclusions and Future Retrospective**

As we shall see in the legal analysis of the facts in the IV Chapter, these cases could be considered as ‘abduction of minors’ or ‘steal of minors’, but as the Spanish Penal Code was not reformed until 1995, the old ones dating from 1944 and 1973 had nothing to say about those crimes.<sup>100</sup> The crimes of presumption of childbirth or fabrication of evidence could be rejected as proofs due to the declaration of the prescription of the offence. But the possibility of considering the crime on forced disappearances of those ‘stolen children’ as illegal detentions, avoiding therefore the frustrating prescription, or prolonged abduction or illegal adoptions (recognized internationally) joining action with others as the fabrication of evidence, bring us a hopeful light over all this darkness of an inexistent legal framework that would cope with those cases, more than 1,500 already denounced.<sup>101</sup>

Numerous associations have been created, calling for an action, such as “ANDAS” (“Association for the recognition of right to know”) “ANADIR” (“the National Association of the Affected persons for Irregular Adoptions”)<sup>102</sup>, or “SOS Bebés Robados”, or “Plataforma Afectados Clínicas de toda España : Causa Niños Robados”; also a large number of TV programs such as the one presented by Paco Lobatón ‘¿ Quién Sabe Dónde?’ (“Who knows where?”) and different documentaries from newspapers as Diagonal ( 2009), from TV as the one of the BBC (This World: Spain’s Stolen Babies) or the Global

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<sup>99</sup> Estesio Poves, 2012 p.155 Diagonal 16 March 2012.

<sup>100</sup> Plataforma Afectados Por Clínicas de toda España. Causa bebés robados.

<sup>101</sup> Estesio Poves 2011 p. 156; Junquera 27 Junio 2012 El País.

<sup>102</sup> Free translation of the author.

Research TV in 2011 (Spain's Stolen Babies: Catholic Church Caught Child Trafficking ) or the one of Richard Vynes in 2002(“ Los niños perdidos del franquismo”).

As the testimony of one of the victims Liberia Hernández stated, “*they were treated as a purchase-selling contract in where the consent of the mother was unlikely to appear*”.<sup>103</sup>

M.José Estesó Poves 2011 also stated in her book that the explanation for the commission of such illegal act is justified for those perpetrators in the promise of a ‘*greater good*’, the one of the salvation of the new-born, sorting them from a wayward family, ‘*better*’ than the biological one.<sup>104</sup>

The lawyer Carlos Jiménez Villarejo admitted that under his opinion “*the Amnesty law is not applicable to the cases of the stolen children*”<sup>105</sup>. But still there is a need of recognition of that Right to Identity, enclosing those crimes as part of the historical memory, to fight for their recognition as a crime against humanity in the international sphere, the prescription would ended up disappearing as an obstacle if it is finally determined and prosecuted as an organized crime and not only as individual and private isolated cases.

There's no point crying about and condemning the past if we are not going to treat human beings with basic respect and dignity today. A vast number of mothers have already died without knowing that their children are still alive, or even being aware of that fact, without the possibility of finding and meeting them again. Nowadays is not enough with a mere declaration of intentions.

On January 27<sup>th</sup> 2011, the reckon by the General Public Prosecutor of the joint demand (260 cases) presented, supposed for those families and those ‘*niños robados*’ a big step forward. So therefore, it is irrefutable, the importance of the imputation of the nun Sor

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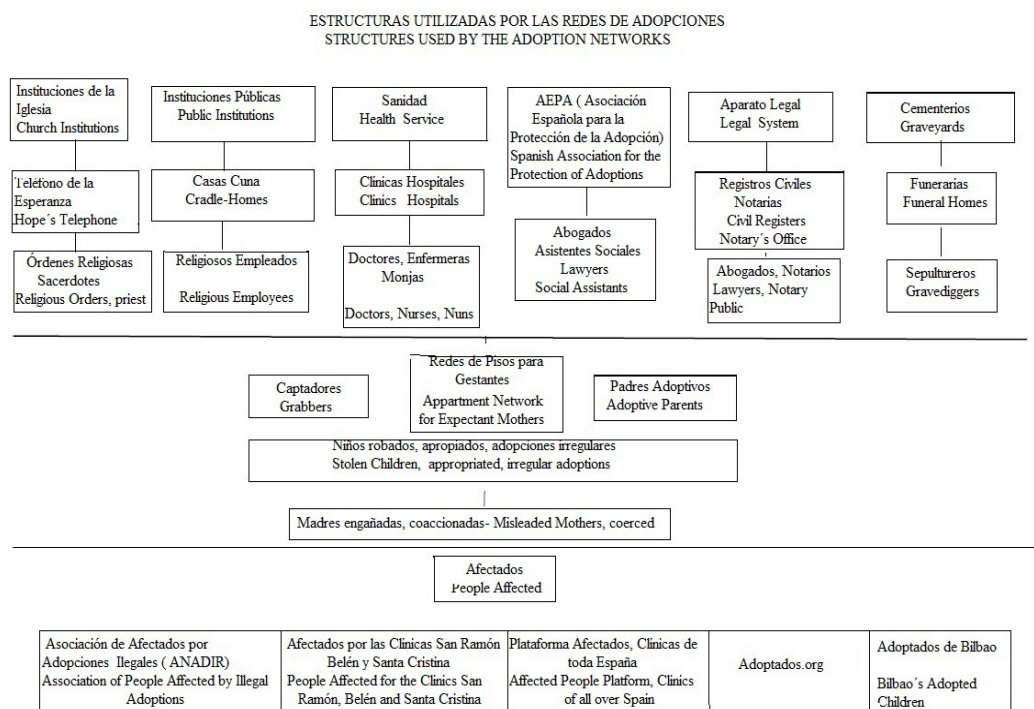
<sup>103</sup> Duva, Junquera, 2011 p.37. Free translation of the author.

<sup>104</sup> Estesó Poves, 2012 pp. 18,19, 125. Free translation of the author

<sup>105</sup> Ibidem pp. 90,91. Free translation of the author.

Maria Gómez Valbuena for the cases until the 80's and the consequent reopening of the archived cases.<sup>106</sup>

Recently, after the recall made by the UN Committee on the Rights of the Child in February 2<sup>nd</sup> 2014 for the recognition of the abuses carried by the Catholic Church, the President of the Spanish Episcopal Conference, Ricardo Blázquez, has recognized openly to the public scrutiny, the existence of those crimes and the necessity to investigate. *“I reject the grave immorality that suppose the fact that the children were snatched from their parents without their consent” sharing “the pain and the suffering of all the victims affected”*<sup>107</sup>



- Table of the conspiracy in the Spanish Cases on Stolen Children, Jesús Duva , Natalia Junquera 2011 p.160. Free translation of the author.

<sup>106</sup> Público/ EFE 24 January 2013.

<sup>107</sup> Daily Journal LA LEY 120368/2014, 24 May 2014.



## **Chapter 3: Cases on the so-called “Banished Babies” in the last century of Ireland’s history; Considered as a shameful realm to deal with?**

*“Injustice anywhere, is a threat to Justice everywhere”* Martin Luther King, Jr.

### **3.1 Tackling some brief introductory considerations.**

In this chapter, the differences between the Spanish cases to which we referred in the last second section of this piece of work, will be highlighted; but further on, it will be extoled with empirical evidences, that we are talking about the same sort of illegal act stemming from alternative systems of methodology. The final touch, which is paramount to address in both cases, Spanish and Irish ones, is the ‘illegal sale’ and forced separation of those vulnerable human beings from their own mother, the lack of interest on the matter to remain accountable and the no light provided at the end of the tunnel.

From this point forward, it called upon the need to underscore the barely publically known ‘dark side’ of the destiny of Irish children in the past century. Based on a supra catholic-moral code exacted in the Irish population and society, those ‘illegitimate’ children as they were called, were victims of massive violations on their human and basic rights since they were born. These cases, unfortunately, emerged up to the public scrutiny not before the late 90’s.

Regardless of whether the current policy on protection on Irish children is now taking the precise steps to achieve an accountability that lacked within the Irish legislation, numerous texts as the ‘Child Care Act’ (1991-2001), the ratification of the UN Convention of the

Rights of the Child and the creation of a bunch of Associations related to family rights (naming Tusla, for Children and Family Agency or FTAI, Family Therapy Association of Ireland)<sup>108</sup> ; from the moment when it comes the controversy that entails to face the alleged truth of those events occurred in Ireland in the past forty decades,<sup>109</sup> the basic social welfare for those children seems to me that gets blurred and disappears into an underrated gap in the security of those vulnerable targets.

First to name that one of the biggest differences between both situations Spanish and Irish one, was the fact that the 'banished babies' plot, as how it was known the removal of Irish babies that provided the main source of 'legal' adoptions in Ireland was in its vast majority resulted on transnational adoptions to United States (hereafter USA)<sup>110</sup>; as a matter of fact, both the Catholic Church Institution and the Government ( represented by the Minister of Foreign Affairs in these topics) were fully conversant with the existence of all those apparently 'legal' adoptions. Furthermore, they tolerated and eased those practices for the considered 'well-being' of the children.

The two pillars in which the Irish state has always laid its foundations, naming the successive Irish Governments and the Irish Catholic Church, have been working alongside in the last century to pretend giving some legality to those acts by the enactment of the Adoption Act in 1952;<sup>111</sup> but what about those non-regulated adoptions carried before that specific date in 1952? Under which scope and until which extent should be them taken into consideration?

The ancient Catholic roots and the peerless powerful figure of the Catholic Church within the Irish State makes conspicuous the transcendental esteem that the successive Irish Governments have had towards its influence. However, the recognition of the acts performed by both pillars in the detriment of those vulnerable human beings during the past

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<sup>108</sup> Citizens Information Ireland Website.

<sup>109</sup> Milotte, 2012 pp.7, 204.

<sup>110</sup> IrishCentral Staff Writers. 5 February 2013.

<sup>111</sup> Irish Adoption Act 1952.

century should not be forgotten. The creation of a conspiracy were those new-borns were taken away from their 'libertine'<sup>112</sup> mothers, and afterwards given into adoption miles away from them without a proper and licit consent, should not be concealed anymore. It is time for recognition and will of reparation for the damage caused by their moral-based mould.

Further, in Ireland, those unmarried mothers arrived to those mother-and-baby homes, well-known institutions run by the Catholic Church, whether as their only possibility of survival after being condemned by the society or as a result of being forced to do so by their own families, feeling already repudiated by them. As it is going to be enshrined further on, those mothers were coerced and pressured by those in charge of the Institution to give their children up for adoption, children who were later declared "orphans" and who, of course, most of them they were not.<sup>113</sup>

*"Women slaved away, unpaid, bullied, often underfed, and basically unappreciated. This because they had children out of wedlock, or were prostitutes or girl children considered 'at risk' - their families couldn't control them or didn't want them- and first offenders were sent to laundries rather than reformatories. Many lived and died there in these institutions unmourned, relatives never notified, buried in unmarked graves."*<sup>114</sup>

Although there were matching contexts and circumstances within the Irish cases and the ones occurred in Spain, it is precise to point out that in the Irish State, it was more obvious the previous acknowledgment of the commitment of those 'legal' adoptions by the Irish Government and the Church Institutions. That attitude of 'laissez-faire' towards the offences accomplished demonstrates that in more or less all aspects of the Irish life were imbued by those catholic roots.<sup>115</sup>

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<sup>112</sup> Foucault, 1990.

<sup>113</sup> Milotte, 2012 p.7.

<sup>114</sup> Jones, 14 October, 2011 National Catholic Reporter.

<sup>115</sup> Milotte, 2012 pp.19-21.

Bearing in mind the attitude showed by the Irish authorities when it came the time to admit and recognize such offences accomplished, Austin Currie, Junior Minister responsible for the care of the children stated “ *that no official records exist of Irish Children who were sent abroad for adoption in the past as no such records were required to be kept by public authorities* ” <sup>116</sup> and demonstrates that still there were no will and a total absence of means in disposition of those mothers or babies (now adults) who keep seeking for information from whichever hint they find in their research.

The junior Minister said “ *I do not see how it would be practicable at this stage to conduct an investigation into a practice which was widely known at the time and which does not appear to have been considered unacceptable* ” <sup>117</sup> .The secrecy of those acts in the past and the reluctant attitude over the public scrutiny in the near present, showed the defensive positions ( e.g Mary Hanafin and her Non- Fatal Offences Against the Person Act 1997) <sup>118</sup> and the ongoing refutation that they still claim even when currently most of the evidences have been proved and undisputed.

As numerous scholars such as Mary Raftery, Eoin O’Sullivan, Mike Milotte, and other specialists on the topic such Susan Lohan have noted, I came to the conclusion that not only has Ireland had a reprehensible behaviour towards children in the legality of intercontinental adoptions, fact that this thesis pretends to address properly; but also the Irish state along with its indissoluble catholic-moral during the past century has been accused of ‘whitewashing’ some other abusive performances that massively violated the children rights and held unaccountable. <sup>119</sup>

Numerous and worse charges were engaged to those religious institutions, from sexual abuses and sexual harassment, exploitation and forced labour to starvation in the Industrial Schools, have been brought to public scrutiny in the recent years. These horrible situations

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<sup>116</sup> Ibidem, p.206.

<sup>117</sup> Ibidem, p.207.

<sup>118</sup> Irish Statute Book - Non- Fatal Offences Against the Person Act 1997.

<sup>119</sup> Raftery, O’Sullivan 1999 p.3-10 June 2001.

in which those 'illegitimate' children were treated as mere objects for some means, being casted aside the society and so therefore, relinquished of any kind of right as human beings. All these crimes had overcloud the importance of the trade and sale on new-borns in Ireland over the past forty years.<sup>120</sup>

Presently there have been protests against the covered up testing on babies from the mothers-and-baby homes in Ireland with mottos like 'Born to a poor family or born with disabilities or born to a protestant mother - no labels justifies violence'. The medical research conducted on children was allowed meanwhile the mothers were powerless<sup>121</sup> against it as we shall see in the forthcoming sections.

Furthermore these recent days, at the beginning of June it came up the case of the 'Tuam Babies' in which according with Amnesty International "*Disturbing revelations about an unmarked "mass grave" of up to 800 babies and children found in Tuam, County Galway, must prompt urgent answers from the Irish Government about the wider issue of past child abuse in religious-run institutions*"<sup>122</sup>

*"Their babies were neglected, crowded into communal nurseries where infection and disease ran unchecked. The result was a shamefully high death rate, with measles and dysentery killing hundreds"* declared Martin Sixsmith in a Special Report the last June 7<sup>th</sup> 2014 for the Daily Mail UK.<sup>123</sup>

This poem about the latest occurrence encompasses one, among other more, of the biggest burdens that the Irish State and the Irish society carry when it comes to debate the fact of facing the hard past and to learn how to deal with it:

"800

I was born.

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<sup>120</sup> Vatican crimes website 30 May 2013.

<sup>121</sup> Documentary "Anatomy of a Scandal" 10 June 2014.

<sup>122</sup> Amnesty International website 5 June 2014.

<sup>123</sup> Sixsmith, Daily Mail UK, 7 June 2014.

Breathed my first breath. And cried like everybody ever born.  
Harsh voices, my mother's tears.  
My hunger to be held as tightly and as warmly as the womb I had just departed from.  
I wasn't held, even though I screamed. Constantly  
crying, my body shaking from exertion.  
No, I was placed in a cold cot, in a cold room. Among others, just as alone. Doomed to  
their fate.  
I didn't get to know my mother nor see me. I was untouchable. I was a crime.  
I never saw a smile nor felt the warm embrace a loving touch could bring.  
Endless hours, spent lying in filth.  
Clothes thread bare, my body constantly cold and hungry.  
After that I didn't cry, it was futile.  
I became weaker by the day. Bones  
visible through skin for all to see.  
Fingers swollen, constantly gnawed.  
Constantly staring, caught in a miserable trance. Eventually,  
my heart gave out and I breathed my last breath.  
There was much less noise going out of this world than coming in.  
Less people too.  
I as ever alone,  
cold, hungry and deprived of a loving touch. Deprived of dignity.  
When I passed out of this world my year old body was taken.  
Thrown into a septic tank, like the rubbish I was to that cold heartless place.  
There in that dank dark hole I lay, among other criminals.  
The starved, the sick, the broken.  
My crime?  
I was born."<sup>124</sup>

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<sup>124</sup> O'Meara, Posted poem Justice for Magdalenes.

*“The ‘Tuam babies’ case is another example why the Ryan Commission did not go far enough. It highlights the need for Ireland to deal comprehensively with its past, and, where, institutional human rights abuses are found, provide victims with truth, justice and reparation”* said Colm O’Gorman author of *Beyond Belief* and creator of the NGO ‘One in Four’.<sup>125</sup>

Already considered by some scholars, such as Conall O’Fatherta as ‘the secret baby trail’ to America, those practices constituted a method of erase, as a “*punitive remedy*”<sup>126</sup> to those ‘illegitimate’ members from a ‘legitimate’ and ‘pure’ roman catholic-based society. But were they already guilty before their birth and be considered such as an ‘illegitimate son or daughter’? They were not given the chance to choose, as, unfortunately, neither were their mothers.

### **3.2 Different sides of the evident cruelty of the system: ‘There is NO option to keep your baby’**

*"When daughters became pregnant, they were ostracized completely,"* stated the local historian and genealogist, Catherine Corless for the Washington Post *"Families would be afraid of neighbours finding out, because to get pregnant out of marriage was the worst thing on Earth. It was the worst crime a woman could commit, even though a lot of the time it had been because of a rape."*<sup>127</sup>

#### **3.2.1 Out of sight, out of mind: The Magdalene Laundries and Mother-baby homes as places of confinement of ‘wayward women’.**

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<sup>125</sup> Cfr. Supra note 115.

<sup>126</sup> See website [www.irlandando.it](http://www.irlandando.it) Attualità 4 June 2014.

<sup>127</sup> McCoy, the Washington Post, 3 June 2014.

The Magdalen laundries as James M. Smith, an associate professor at the English department and Irish studies program at Boston College, explains in his book 'Ireland's Magdalene Laundries and the Nation's Architecture of Containment', were actually those 'workhouses' where a few too many of the so-called 'fallen women' resorted to. The old-fashioned term referred precisely to those women "*who had lost their good reputation by having sex with someone before she is married*"<sup>128</sup>. Considered as such by those in charge of the educational and social frame of the Irish society, they were confined in those 'homes' as a pre-emptive integral solution of the menace that their sexual libertinage could instigate in the morally-caste society.

Agreeing with all the helpful information provided by Susan Lohan, Coordinator of Adopted Illegally Ireland<sup>129</sup> in our interview, she led me to think that those woman were locked away because for some reason, they were thought as something that would contaminate the Church community.

Baptised as Magdalen's within an oppressed nation, owe to the 'Bible's redeem prostitute' Mary Magdalene<sup>130</sup>, those 'sinners' were compelled to be locked away in such institutions as Tracy Clayton stated "*both as a punishment for becoming pregnant out of wedlock and to spare their families the shame of an illegitimate child*"<sup>131</sup>. Those women sent to them were mostly "*incarcerated against their will at the request of family members or priests for reasons such as prostitution, being an unmarried mother, being developmentally challenged or abused. Even young girls who were considered too promiscuous and flirtatious were sometimes sent to the Magdalen Asylum*"<sup>132</sup>

Among the various decades during which those Institutions were run by different orders of the Roman Catholic Church, these Magdalene Laundries proliferated and bear an obvious

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<sup>128</sup> Cambridge Advanced Learner's Dictionary and Thesaurus. Definition Revised: June 2014.

<sup>129</sup> Interview with Susan Lohan (Coordinator of Adopted Illegally Ireland) 12 May 2014.

<sup>130</sup> Cooper, The Telegraph 4 February, 2013.

<sup>131</sup> Clayton, BuzzFeed news 3 June, 2014.

<sup>132</sup> Abandoned Ireland documents website. Revised May 2014.



and vast spread message with the later objective of enforced reformation and rectification, getting those women sorted out all around the Irish State, as they were mere mistakes of the society. What is even more alarming is the fact, that the cultural wounding was so deeply rooted, that entailed the prolongation of the practices carried out on those institutions of confinement (counting ten main ones within the territory), startling jails for those defenceless girls and women, until they ceased in September, 25 of 1996<sup>133</sup>.

By that time, the orders of nuns who once run and were responsible of some of the most well-known Institutions in the country had already got rid of those Convents and buildings in favour of the largely State's property, so therefore, there were no record retained nowhere to look at or investigate at as start point of the violations which were carried out behind those walls.<sup>134</sup> This act of property transfer, called upon the need to address these situations of the women placed in such institutions on the occasion of the shocking disgrace brought to light in that time in which "*the remains of 155 inmates who had been buried in unmarked graves on the property were exhumed*"<sup>135</sup> and deeded into a mass grave.

Their crime was to stand against the Constitutional-religious basis of the concatenated motherhood-marriage status (as stated in the Carrigan Report of 1931 and the Criminal Law Amendment Act of 1935); just tended to be labelled as sinners for being sexually active instead of behaving following the pattern of caste and morally pure women. Furthermore, their crime was to result victimized of sexual harassment and rape by men who remained innocent, out of the punitive sight.

Among the testimonies of the personal undergoing of those 'fallen women', some point converged in the description of their unpaid forced and hard labour on washing laundry in cold water under deplorable conditions and using heavy irons, of their restraining contact with the other women who were sharing the same fate, and the fear, the despondency that

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<sup>133</sup> *Idem*.

<sup>134</sup> Smith, 2007.

<sup>135</sup> Smith, Book Description 28 September 2007.

used to bring the unlikely possibility of escaping from those places in their near future.<sup>136</sup> Some of them suffered physical punishment in the case they placed themselves out of the lawn.

Besides this, those women considered as 'moral-standards transgressors' who were jailed inside those institutions were vastly deprived of their rights, their name (as they were just known by their imposed code-name), their identity, their basic human dignity for those orders who count with the large support of the State's public judicial, legislative and financial representatives.

By introducing the Magdalene's laundries, it is relevant to highlight the importance of the Mother-and-baby homes, which were run alongside with those primary institutions. Even though both were places of confinement of those 'fallen women', the most noticeable differences between the two Institutions are that, contrarily to the Magdalen's laundries, they were run by the nuns (orders such as the one of Sisters of Mercy or Sacred Heart ones) but regulated and inspected by the State; and the work for the religious institution accomplished by those 'sinners' had nothing to do with commercial means.<sup>137</sup>

Behind the walls of the Mother-and-baby homes, women were forced to work while they were pregnant in order to cover the payment of their stay in the Institution and they were released for a forward 'illegal' adoption or sale of their babies when they got birth. They worked as 'asylums' for those 'fallen women' who were convinced to be a burden and a shame for the catholic- moral society in which they were born, and who were already judged for the sorrow and the burden of their sin.

One of the most piercing life-experiences in the Mother-and-baby home of Bessborough in county Cork, is the one narrated by June Goulding in her book "The Light in the Window", she was told during her stay that "*all the girls in here are first offenders and they are very*

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<sup>136</sup> Cooper, The Telegraph 4 February, 2013.

<sup>137</sup> Sawyer, The Huffington Post 30 December, 2013.

*lucky to have such a place to come*”<sup>138</sup> The rules established in those places were appalling for the unlucky women who were sent or came there in search of shelter, they were taught not to complain and to hear with approval the reproach of their sins.

The instructions in those homes were utterly limp to the nurses and the nuns who worked there *“You are not to get familiar with any of the girls and you most certainly will never post a letter for them”*<sup>139</sup>

Those women lived terrified, with an unceasing fear to disappoint those domineering superiors who accepted them under their care, leading them to think they owe those superior nuns their submissiveness and their dignity, obliged to believe that their own salvation was on play. They were not allowed to have access at any kind of antibiotics or painkillers for the infections acquired during their stay, not even during the childbirth to appease the pain or at least to reduce the suffering during the interventions; they were sinners, so therefore, they learnt that they should tolerate the inhuman soreness without any complaint in this regard.<sup>140</sup>

*“The most well-known ‘Homes’ were located in places such as Bessborough in Cork, Castlepollard in Westmeath, Stamullen in Meath, St Patricks in Dublin and “Sean Ross” abbey in Roscrea”*<sup>141</sup>

Silent lives as penitence, in which the motto was to comply with the rules without complaints as it was what they truly deserved, neither visits nor contact with the outside were authorized by the nuns. Their reproachful rules had clearly exacerbated these practices over those institutions.

*“ (...) By the early part of the century unmarried mothers who were pregnant for the first time began to be catered for in a harshly run, large mother-and-baby institutes*

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<sup>138</sup> Goulding, Edition 2006 p.24.

<sup>139</sup> Ibidem p.19.

<sup>140</sup> Ibidem p.28.

<sup>141</sup> O’Brien, The Sunday Times 17 November 2013 ( cited by FTAI Family Therapy Association of Ireland)

*administered by religious orders, and designed to isolate them in anonymity from society at large. Those with second pregnancies or 'fallen women' were placed in even more severe closed religious institutions or asylums. Widows were left to their own devices and were expected to take employment to support their children in contrast to unmarried mothers who were expected to leave the country or give their children away and stay at the home. The development of mother-and-baby homes was one of the responses to the 1906 report on Poor Law Reform”<sup>142</sup>. Is it plausible that those Institutions have been supported by the Government and the society for nearly a century?*

Far from reality, some of the children who were brought up in those mothers and baby homes until the age of three, were subjects in medical trials for testing new vaccines against the illnesses that were appalling the society in those years. As Mary Steed, one of the children who was sent to America for adoption, stated in the Documentary of the RTE “Anatomy of a Scandal”, that even those in charge of the trials didn't have the children's medical background or even seek for the mother's permission or consent on those practices. Following the data reported by that documentary, between 1960 and 1973, there were considered 200 children<sup>143</sup> as vulnerable targets for the trial.

Even there was a Commission Inquiry into Child Abuse for those practices, the professors who were performing those investigations for the enterprise GlaxoSmithKline through the trials on the 'orphan' children, remained unpunished as those practices were considered as non-constituent of child abuse. Unfortunately, also some of their little dead bodies were used as part of anatomical science without any sort of consent.<sup>144</sup>

### **3.2.2 'Illegitimate' children: Enough condition to be sold under the means of adoption?**

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<sup>142</sup> Lewis, 1997 p.76

<sup>143</sup> RTE Documentary : Anatomy of a Scandal 10 June, 2014.

<sup>144</sup> Idem.

Following the pattern enshrined by the 'The Pauper Children (Ireland) Act' of 1902 where the attribute of 'Illegitimate' were given to a wide range of children, the 'Illegitimate Children (affiliation orders) Act' in 1930 pointed out in its first section called Definition stated "*—In this Act— the word “mother” means any of the following persons who is with child or has been delivered of an illegitimate child, that is to say, any single woman or any widow, or any married woman living separate from her husband, and includes any married woman not living separate from her husband who before her marriage was delivered of an illegitimate child; and the expression “putative father” means a person adjudged by an affiliation order made under this Act to be the putative father of an illegitimate child*"<sup>145</sup>.

Illegitimate children were noticed as a real scourge to the society by the national and religious authorities. This wording remained until 1982 with the 'Report on Illegitimacy' of the Law Reform Commission when this nomenclature was finally abolished.

In 1951, in the mother-and-baby home of Bessorborough, the hard-and-fast rules were that "*all babies were reared until they were three and then separated from their mothers if they could not come up with 100 Pounds to have them adopted after ten days*".<sup>146</sup> Taking and delivering babies in the closest airport to let them start their journey for adoption by devoted American infertile couples, was considered by those in charge, as their duty, always acting in 'good faith' and 'on behalf of the child'<sup>147</sup>; the disseminated moral conformity was that those babies delivered to America were the 'lucky ones' to have been able to do so.<sup>148</sup>

*"These women stayed in the Home after the birth and worked there until their babies were three years old. The children were then fostered and the mothers were free to go"*<sup>149</sup> Yes, they definitely were 'free' to go back to a home where they were once repudiated, now that

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<sup>145</sup> Illegitimate Children (Affiliation Orders) Act, 1930 – Irish Statute Book.

<sup>146</sup> Goulding, 1998, p.59.

<sup>147</sup> Ibidem p.65.

<sup>148</sup> Scott, cited by Abbie Jones, Chicago Tribune 7 April 1996.

<sup>149</sup> Goulding, 1998, p.16.

those institutions had taken charge of the 'burden'. Those pregnant 'fallen women' arrived to those centres either forced by their 'caste' family and their feeling of rejection or by their own resolution, marked, in the majority of the cases, by the fear of the society's reproach.

According to the readings I performed, I did, come to the conclusion that the Irish system, on cases of illegal adoption of babies and children was clearly divided in two possible tendencies according to the mean of carrying their 'lucrative' network and to perform those 'banishment of babies'.

The first tendency, comprised the situations in which new-born babies were adopted and delivered to America depending on the demand of those infertile American couples. Regarding this first tendency, the documents recording the births, in most of the cases were inexistent, and in some cases the name of the adoptive mother was intentionally placed as the one of the legal biological one, so therefore, the falsification on the information written in official documents was a common practice for those adoptions in which the infants were considered as 'orphans' by the adoptive parents.<sup>150</sup>

On the other hand, the second tendency comprehended the situations of those children who they were brought up in those Institutions until the age of three, maximum age considered to give them into adoption; after that age, if they have not been given up for adoption, those 'illegitimate' children were sent to the Industrial Schools and were considered as 'orphans'.

In this second kind of tendency, the passports for those children until the age of three, were deliberately issued from the Ministry of Foreign Affairs and obtained by the future adoptive parents, with the permission of the Government<sup>151</sup>, with hardly impediment until the enactment of the Adoption Act in 1952, which materialized some boundaries to those real 'exports' of children to the United States.

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<sup>150</sup> Moffett, 31 December, 1998 Pittsburgh Post-Gazette ; Milotte, 2012 p.63.

<sup>151</sup> Milotte, 2012 p.87.

In both situations, the paramount point should lie down in the common despondency of those mothers who did not want to give up their children for adoption under any circumstance, who desired to keep them and educate them; but as long as they were treated as criminals, as pure sinners, they thought they have lost any right to do so, a shame that made them believe that they were not deserved to bring up their own children. Moreover, they were pressured for signing an adoption document without even knowing what about they were signing. Was the dominant power of those Sisters in charge of the Institutions enough explanation to the forced adoption of their babies? Thousands of questions unanswered, thousands of declared rights but useless without their proper recognition.<sup>152</sup>

Before 1952, the first tendency above mentioned was the methodology fairly used to accomplish those banishments of babies, *“the nuns think those babies are their own property and the poor girls have been so browbeaten into believing they are sinners that they do whatever the nuns say. Half the time, the mother superior packs the child off without even telling the mother. No consultation, no consent, no goodbyes (...)”*<sup>153</sup> There was a common believing that the enactment of the Adoption Act would change the situation and would prevent those children to be exported to America in such a vastly way. Those believers were not far from wrong as the system was too suitable for those who got a profit from those exports.

This sort of secret ‘bondage’ relationship was the one that Martin Sixsmith analyse thoroughly in his book ‘The Lost Child of Philomena Lee’ (2009), the real story of the ‘fallen woman’ Philomena Lee who was cloistered away in Sean Ross Mother and Baby Home opened in Roscrea; her story has recently been filmed and brought to the screen by Stephen Frears, shaking therefore, the public awareness. This movie, in fact, shows the truly and spine-chilling story of a mother that incessantly tried, during the last fifty years, to locate the whereabouts of her own child who was given birth when she was a teenager.

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<sup>152</sup> Milotte, 2012 p.158 ; Sixsmith, 2009 pp.51-52.

<sup>153</sup> Sixsmith, 2009 p.29.

In addition to this, the story narrated by Martin Sixsmith expresses how those children were taken away from their biological mother and given up to 'legal' adoption to those Americans clearly avid of new-born acquisitions to their own family. This experience constitutes an evident example of a chronic practice of the badly misunderstood 'charity' of the people who run those institutions.<sup>154</sup>

It is precisely in this case of Philomena where it is displayed the scarcity or nearly absence of kindness to the pregnant mothers in those centres of contention. The refusal given by those 'Sisters' in charge of the institution, those who would have commanded the monitoring process of those women under their 'protection' to proportionate medication and antibiotics in the moment of their childbirth, even when the mother's or the baby's life was on risk and they needed to be intervened with surgery.<sup>155</sup>

The Roman Catholic Church in Ireland has been held accountable for the delivery "*between the end of World War II and 1973 more than 2,132 infants who were illegally adopted out of the country to be placed with wealthy Catholic Americans*",<sup>156</sup> cruelly separated against the will of their biological mothers, for adoption between the 40's and 70's, in exchange of shocking sums of money clearly disguised as 'donations'.<sup>157</sup>

The most shocking fact here and which is paramount to address is that there were no laws in Ireland regulating adoption until 1952 when it was enacted the Adoption Act, entered final version of 1998 is the one that is in effect presently. Before the Adoption Act of 1952, it was the ideal environment for those Institutions to take away those children without any sort of reprisal for their acts.

The promulgation of the Adoption Act had not the result that was expected owe to the main necessity to stop that lucrative business and to keep it on secret. In the section 40 of the Act

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<sup>154</sup> See [www.irlandando.it](http://www.irlandando.it) Attualità 9 June, 2014.

<sup>155</sup> Sixsmith, 2009 p. 13.

<sup>156</sup> Adopted- Illegally Ireland, Letter to the Taoiseach Enda Kenny 19 April, 2013.

<sup>157</sup> Banished Babies in Ireland 15 July 2010 cited TV Documentary Mike Milotte.



it is stated that: 40.—(1) *No person shall remove out of the State a child under seven years of age who is an Irish citizen or cause or permit such removal.*(2) *Subsection (1) shall not apply to the removal of an illegitimate child under one year of age by or with the approval of the mother or, if the mother is dead, of a relative for the purpose of residing with the mother or a relative outside the State.*<sup>158</sup>

As a consequence of that imposition, the forced adoptions in which the women were obliged to relinquish for their ‘illegitimate’ children, appeared as the new proceeding for the delivery of those children; and as it was pointing out in the ‘legal adoption’ form: “*I further undertake never to attempt to see, interfere with or make any claim to the said child at any future time*”<sup>159</sup>

Enshrined in section 12 (2) of that Act 1952, no adoption order could be made unless the applicants fulfil the requirement of the matched religion.—“*(1) An adoption order shall not be made unless the conditions of this section in regard to religion are fulfilled. (2) The applicant or applicants shall be of the same religion as the child and his parents or, if the child is illegitimate, his mother*”<sup>160</sup>. As we shall see in the next chapter, this situation did not change until 1988 when there is not set forth any religious or racial discrimination at the time of the election of the future adoptive parents. Whereas, until 1998 the most important characteristic in the ‘legal’ adoptions was the abidance of the catholic dogma in their future family; the welfare of the child is the primordial mean of the new reformed Adoption Act.

If we look in detail the new adoption policy, the agreement to place those children into adoption “*must have been made freely, with full knowledge of the consequences, and under circumstances where neither the advice of persons engaged in the transaction nor the surrounding circumstances deprived the mother of the capacity to make a fully informed*

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<sup>158</sup> Irish Statute Book (cited by Sixmith, 2009 p.47).

<sup>159</sup> Sixmith, 2009 p.52.

<sup>160</sup> Adoption Act 1952 Section 12.

*free decision*”<sup>161</sup>. So therefore, it would be considered “*not valid if motivated by fear, stress or anxiety or dictated by parents or deprivations*”.<sup>162</sup>

The cases related to in this thesis were mere transactions, mere sale of babies or with less of three-year-old children where the welfare of the child was placed on the background. No consent, or if given, coerced by the pressure exercised by those moral dogmas and by those bondage relationships created under the rule imposed in those confinement institutions.

Unfortunately, most of the infertile American couples who were encouraged to adopt a new Irish daughter or son, were not totally aware neither about the truth of their ‘non-orphan’ origin nor the illegal sale they were paying for. However, some of them were totally conscious of the purchase they were performing and did not arise any sort of awareness about it in order to keep those children, in order to satisfy their own selfish hunger of becoming parents, without asking more than necessary.<sup>163</sup> Those children were escorted and delivered to those couples in America as their last choice to develop their right to have a family.

As the Reporter Mike Milotte affirmed in his 1997’s book “*Banished Babies*”, these cases came in a time where there were brought to light numerous scandals about child abuse so maybe they did not get the attention that they deserve, and so he found that these business constituted a plot highly organized by the Catholic Church. The Church did not want to admit that those cases happened, that effectively there was carried a ‘black-market’ in those babies and the Government agreed with it. They were running “*baby farms*”.<sup>164</sup>

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<sup>161</sup> *S v EHB*, Irish High Court February 1979 ( cited by adoptionpolicy.org and Shatter 2007 p.463).

<sup>162</sup> *McF v G & G*, *The Sacred Adoption Society & Anor* Irish High Court 1983 3 ILRM 228 (HC) ( cited by adoptionpolicy.org Eu-Ireland).

<sup>163</sup> Milotte, 2012 p.204.

<sup>164</sup> *Ibidem* p.15.

### **3. 2.3 On behalf of the 'illegitimate' children: Industrial Schools, the counterbalance of the adoptions-sale of children (a brief mention)**

Following the thought of that severe and strict caste morality in the Irish State, it is difficult to understand the other source of abusive practices against children that were carried in institutions called Industrial Schools for 'illegitimate' children. The Industrial Schools were in their majority composed by orphans, children from poor families, and 'bastards' from unmarried women that were not given up for adoption and after the age of three years they should have abandoned the mother-and-baby homes and send to these sort of 'reformatories'.

Those Industrial Schools were known as such schools to which neglected or delinquent youths are sent for habitation run by the 'Christian brothers' and 'the Sisters of Mercy'. In her book "Suffer the Little Children" alongside with her production of the shocking documentary States of Fear, Mary Raftery, tried to analyse profoundly the realm in which those 'illegitimate' children were incarcerated and obliged to perform any kind of forced labour and suffered sexual harassment and massive abuses.

*"The Children themselves were repeatedly told by their religious keepers that were it not for the charity of the Catholic Church they would have left on the side of the road, abandoned and starving. In the absence of anyone to contradict this, the children themselves accepted it, as did the general population"*<sup>165</sup> However, it was the State who was responsible for those laws established for the education of those children and for the financial source of those institutions.

The Commission to Inquire about Child Abuses, the so-called 'Ryan Report' highlighted the abuse children suffered in industrial schools and other institutions. *"Yet in 2,600 pages, the word "Magdalene" featured just once, in a background chapter"*, James Smith said. This report had as a result, a formal and public apology by the Irish Government in 1999

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<sup>165</sup> Raftery, O'Sullivan, 1999 pp.11, 53.

for the violations of human rights committed. Furthermore, the apology of the Sisters of Mercy, pointed out that *“their orphanages were underfunded, under-staffed, and under-resourced (...) in these circumstances many sisters gave years of dedicated service. Notwithstanding these facts, clearly mistakes were made”*<sup>166</sup>

State permitted on those children confined in those industrial schools and orphanages to be part of those trials for vaccines too, as subjects for clinical trial investigations until the late 70's. Although the official petition for the permission to keep on working on those trials in 1962 was a formal procedure, it was completely rejected based on the ethics of the Nuremberg Code. But that refusal did not stop the practice because consent was never taken as a matter of consideration.<sup>167</sup>

In the Martin McAleese's report<sup>168</sup> can be found that *“the ill treatment, physical punishment, and abuse that was prevalent in the industrial school system was not something they experienced in the Magdalene Laundries”*. But what about those cases in which the unmarried women were physically punished for their acts against the rules established or when they were private of their food as a reprimand for trying to escape of those institutions?

### **3.3 Conclusion: No shame, No guilty, No apologies, No will.**

As noted by Smith in his own book, this 'architecture of containment' *“made undesirable segments of the female population such illegitimate children, single women, and sexually promiscuous women literally invisible”*<sup>169</sup> Later on, withstanding the passing of time those institutions became more vocational and were considered only for punitive functions.

At present, these institutions continue to exist in the public mind primarily at the level of story rather than history, as the people in charge of those institutions denied and still keeps

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<sup>166</sup> Ibidem p. 91.

<sup>167</sup> Winterdyk, Perrin and Reichel, 2012.

<sup>168</sup> Macleese Report, Department of Justice and Equality.

<sup>169</sup> Review on the book James Smith (2009).

denying the right to information when they refuse to open their archival records in order to follow an investigation.<sup>170</sup> The evasion has actually been considered by some scholars like Milotte, as the position taken by the State in those topics; but, as the Archbishop Desmond Tutu in 1997 declared, *“Forgiveness is not a nebulous, unpractical and idealistic (...). Amnesia is not a solution. If a nation is going to be healed, it has to come to grip with the past.”*

*“By law, every birth that occurs in Ireland must be registered in the Register of Births, Deaths and Marriages, and each entry must include the name and the address of the child’s mother whether or not her child was subsequently adopted (...) giving false information (...) is a criminal offence”* said Mike Milotte ( 2012 p. 218).

Ireland is actually part on the European Convention of Human Rights, part of the United Nations Convention on the Rights of the Child and recently ratified the Hague Convention on Intercountry Adoptions (2010).

In spite of the existence of the National Adoption Contact Preference Register (2005) and the abolishment of the Non Fatal Offences Against the Person launched by the Minister of State for Children Mary Hanafin, which considered criminals those parents who tried to seek the whereabouts of their children and tried to put in contact with them; still there is no will to release their archives in order to held accountable<sup>171</sup>.

Meanwhile the formal apologize that the Government enshrined in 1999 faced the reality of the hell lived by the children in the Industrial Schools but not concerning in its extent the abuses carried on the Magdalene’s or the Mother and baby homes. However, public speech of the last Minister for Education, Batt O’Keeffe, showed the denial of the State to assume those abusive practices under its own duty of protection, refuting the arguments against it concealing itself with the mere alibi of the assured privatization of those Magdalen’s and

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<sup>170</sup> Milotte, 2012 pp.200-225.

<sup>171</sup> Interview with Susan Lohan ( Coordinator Adopted Illegaly Ireland).12 May 2014.

the voluntary access to those institutions, did not convince the UN Committee Against Torture (UNCAT)<sup>172</sup>.

This UNCAT criticized the acts performed by the ones in charge of those Institutions and also called for the recognition of the State in order to make the State to stop rejecting the evident abuses allowed by them during nearly fifty years. Unfortunately, this statement only came in June, 2011 and still despite the creation of a Commission of investigation on the Magdalen's, and despite the hard advocacy work that the survival group 'Justice for Magdalene's' (JFM) has been performing in the latest years, no closer to an apology or intention to redress has been accomplished.

Justice For Magdalen's primary goals are “(i) to bring about an official apology from the Irish State and the Catholic Church, and (ii) the establishment of a distinct redress scheme for Magdalene survivors. Once JFM achieves these objectives, the door will be open to every survivor and/or her family and/or other groups representing Magdalene survivors to pursue their own claim for redress” (enshrined in the JFM principles)<sup>173</sup>

Nonetheless, the common and shared attitude towards those practices, from both governmental and religious powers, rested and sadly still rests against the belief of protective charity work, “We protect them from their passions”, joined feeling of acting in ‘good faith’ Eclipsed mothers for a moment then cloistered forever<sup>174</sup>

Marie C. Carroll, a Canadian scholar who studies the Laundries, recently wrote a letter to the Irish Independent entitled “World is Looking at You, Minister” asking, “How can the State openly discriminate against these women and children, as members of your nation?”<sup>175</sup>

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<sup>172</sup> Raftery, The guardian 8 June, 2011

<sup>173</sup> Justice for Magdalenes Principles, website and Facebook page.

<sup>174</sup> Gates, New York Times 9 November, 1999.

<sup>175</sup> Klotz, 15 October, 2009 Irish Central.

Bearing in mind the creation of the Commission of Children and Youth in Ireland, these last years have been existed a crescent level of pressure from the groups formed in support of the victims of those Institutions but even if during these years the Government was slightly willing to do something on the respect of the Truth, Justice and Reparation, they still keep on failing in their most important duty.

The Irish Examiner article written by Victoria White on November 7<sup>th</sup>, 2013 established that : *“The McAleese report into the Magdalene laundries was focused on the issue of redress for the women. It didn’t focus on the deaths of babies. (...) We need a process which attempts to count the babies who died, and shouldn’t have (...)”*

The question that remains is, what happened with those babies who instead lived? Could they reunite in a near future with his or her mother before dying? Is the constitutional right to privacy enough limitation to the right of knowing your own identity as a basic human right?

Irish society and the institutions of State, including the civil service and the professions, took their values, morality and ethics from the overpowering dogmatic influence of the Roman Catholic Church. The origin of and the perpetration of the horrendous abuses of innocent unmarried mother and their defenceless babies must be laid fairly, in my opinion squarely and honestly at the feet of those institutions and the national government in Ireland which have never atoned for its repressive actions.

All people are entitled to be treated with dignity regardless of any nonsense of supposed sins committed. *“To treat babies as the fruits of sin and without basic human rights was heinous beyond belief”*<sup>176</sup>. There is a huge need to put forward the correct proceedings due to the growing seize of the problematic, it is truly required to deal with the past and a fully public accountability of the crimes committed. After numerous years under the Social Reform in Ireland, it seems the Government is taken some steps in order to come to a point

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<sup>176</sup> Comments to the book review of James Smith (2009).

in the will for addressing the issue of tracing those cases and to discover the truth. There is no time anymore to turn a blind eye on it.<sup>177</sup>

Maeve O' Rourke, a barrister who has worked with the Justice for Magdalenes' campaign in calling for reparations for survivors of the Magdalene Laundries, has highlighted that a child should be entitled to the basic human right of preserving "*her identity and family relations without unlawful interference.*" She says Ireland needs to apply its "commitment to human rights standards" at home as well as abroad.<sup>178</sup>

Presently, it has been created the "Philomena Project" run by the person of Philomena Lee and her daughter working alongside with Adoption Illegally Ireland ( with Susan Lohan as representative) urging for the massive aperture of adoption files and records by the main Irish Government but also from UK and International Organizations such as United Nations.<sup>179</sup>

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<sup>177</sup> Response to Justice for Magdalens & ARA Public Inquiry- Flanagan 25 June 2014.

<sup>178</sup> Pollack, 23 January 2014 The Irish Times.

<sup>179</sup> Ídem.



## **Chapter 4: Legal analysis on Spanish and Irish legal instruments. National and International potential custom solutions.**

*“In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.” Albert Einstein.*

### **4.1 Up-to-date National legal frameworks established: revising the domestic spheres.**

In this concluding section, there will be suggested some hypothetical and idyllic remedies to bridge the gap within the cases of the ‘stolen children’ after approaching the two national and international legal spheres. Certainly, it is from an utmost importance to bear in mind that in both, Spanish and Irish cases, the ultimate offence perpetrated is the same, the purchase and sale of those children with the mean of become illegally adopted.

Nonetheless, it is equally important to consider that, the procedures followed in order to perpetrate that offence, vastly differ when it comes to talk about the Spanish or the Irish ‘stolen children’.

This section will deal in depth with the questions of, ‘What would be the perfect legal categorization of those offences if they would have taken place nowadays?’ and besides that, ‘Did the recent legal amendments, within the national and international scopes, alter significantly the perception in which those cases on ‘stolen children’ are taken into consideration?’

In the most recent years, the call for attention brought by those cases to the public eye has increased gradually. This fact could be granted due to the amount of new operating investigations on the topic of ‘stolen children’, which also might be considered as one of the most rousing and sensitive matters of concern as once the Argentinian cases did,

according to the reasoning of Michael J. Lazzara stressed in his article of Kidnapped Memories<sup>180</sup>.

Notwithstanding the fact that Lazzara in his piece of work is exclusively referring to the Argentina's stolen babies, it could also have an enormous effect on the Spanish and Irish cases. To illustrate that fact, in the midst of his article there is a statement in which he declares that *"(...) these now-young adults were deprived of their parents, their names, and their origins.(...) their narratives, spoken in the present, are attempts to pick up the pieces of a shattered existence and to stitch together a coherent story based on minimal information and riddled with difficult questions"*<sup>181</sup>

#### **4.1.1 Current Spanish legal proposals: Hypothetic solutions offered.**

As the lawyer and victim on a personal basis, Enrique Vila Torres, pointed out at the end of his book "Bastardos"<sup>182</sup>, the Spanish Constitution genuinely shelters several rights already neglected to those 'stolen children'. Naming the article 39.2, it is literally recognized the indispensable human right that belongs to each one of those 'stolen children' (now adults) to seek for their real identity, and in addition to that, there is a call of duty to the public offices, services and Registers to ease the situation about those struggling investigations.

After the Ministerial Order of November 23<sup>rd</sup> 1999, the refusal of the mothers to provide to the Civil Registers their compulsory requested personal data, was finally considered unconstitutional. No more 'unknown' mothers in the registration forms. Those mothers were fully protected under the wide extent of their statutory 'Right to Privacy' before that amendment, bearing in mind that this right yet comprehends the 'right to a personal privacy and a family life'<sup>183</sup> as it is clearly enshrined in the article 18 of the Spanish Constitution. The amendments accomplished by that above mentioned Order of 1999, breathed a new life

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<sup>180</sup> Lazzara, 2013 p.320.

<sup>181</sup> Ibidem p.322.

<sup>182</sup> Vila Torres, 2010 p.410.

<sup>183</sup> Free translation of the author.

to the current circumstances of those given up for adoption, in order to permit them to be, once and for all, certain about their origins and their real identities.

At present, pursuing the arguments reported by Mar Soriano in our meeting, as the main coordinator of the Spanish Platform S.O.S Bebés Robados, it is really doubtful to find a specific *ad hoc* crime in the Spanish legal system, as a legal foresight, that would encompass those violations of basic human rights perpetrated in the commitment of these abductions or forced disappearances with the mean of illegal adoptions.<sup>184</sup> Hence, it can lead us to the inference that those cases might be considered ‘on the fringes of the law’ owe to the inexistence of a concrete legal scope for those ‘stolen children’.

Furthermore, the Roman Law Principle, “*nullum crimen nulla poena sine lege*”, entails that “*no human behaviour should be considered as constitutive of a crime, even when it appears to be immoral or opposed to the collective interests, if it is not defined as such in a previous written law ( already categorized or classified in a reliable legal source) (...). The guarantee of this principle consists, therefore, not only in the necessity of a general and abstract foresight which defines prematurely a criminal concept and orders the pertinent sanctions, but also in the necessity that such foresight must be done through a written law promulgated by the competent authority*”<sup>185</sup>.

This principle of “*nullum crimen nulla poena sine lege*” could lead to presume the current necessity of the most convenient legal framework to be appointed in order to ensure the accountability of those violations perpetrated in Spain. Likewise, there is a noteworthy demand of transparency in the possible replies to the query of ‘What should be done when there is a need for a real reparation of a large number of victims who suffered from an offence which, strictly legally speaking, did not exist?’

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<sup>184</sup> Interview in Spanish Mar Soriano 7 April 2014.

<sup>185</sup> Vélez Mariconde, 1986, p. 22 cited in ‘Diccionario legal’ ( Free translation of the author)

Numerous scholars such as Professor Margarita Martínez Escamilla<sup>186</sup>, or Professor Luz María Puente Alba<sup>187</sup> agreed with the point of view stressed by the lawyer Enrique Vila Torres<sup>188</sup>, on the immediate necessity to focus the attention on the details gathered by statutory rights enshrined in the Articles 220, 221 and 222 of the Spanish Penal Code (hereafter SPC). The possibility of a clear specification or conceptualization among those articles in which those cases of ‘stolen children’ could flawlessly fit, or at least be considered within the same wording of the articles but from an aggravated point of view caused by the defenceless situation, should be bear in mind.

Regarding the recognition of those cases in the SPC, it is therefore, highly considered the possibility of lying a larger emphasis on the offences related to the parental authority (‘patria potestad’) and family relations. Those particular offences are gathered on those aforementioned articles, specifically establishing an offence about ‘Supposition of childbirth’, ‘Alteration of paternity or the status or the conditions of the minors’.<sup>189</sup>

In accordance with the suggestion supplied by the Professor Luz María Puente Alba in our meeting, it could be commonly presumed that when a child is sold for the purpose of illegal adoption, alongside with that fact, the creation of a new action on filiation ( a new filiation proceeding) might have been accomplished. This new filiation situation in which the new adoptive parents occupy the legal custodianship, could be considered in compliance with the article 225 BIS of the SPC about ‘Abductions of Minors’.<sup>190</sup>

This article, was promulgated in the SPC in order to face the realm in which several offences were performed and were not suitably categorized under the scope of the Illegal detentions e.g. if the progenitor takes the minor without the appropriate custody right to

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<sup>186</sup> Email Prof. Margarita Martínez Escamilla ( Penal Law, UCM, Madrid, Spain) 14 May 2014.

<sup>187</sup> Email Prof. Luz María Puente Alba ( Penal Law, University A Coruña, Spain) 26 May 2014.

<sup>188</sup> Vila Torres, 2011 p.273.

<sup>189</sup> Free translation of the author.

<sup>190</sup> Cfr. Supra note 187.

base on his or her actions; ergo, that act would be considered as an `abduction of a minor´ under the present Spanish Penal Law.<sup>191</sup>

In addition to those articles, the offence of `Misrepresentation of official (public) documents´<sup>192</sup>, in our cases about falsification of birth and death certificates is widely gathered in the articles 397,398 and 399 of the SPC and plays an outstanding role in the subsequent creation of the new affiliation proceedings.

Conversely, according to the opinions provided by those professors above mentioned, the article 177BIS of the SPC<sup>193</sup>, that gathers the crime of “trata de personas” as THB, is hardly ever taken into account in the examination of the legal basis of the cases. In comparison with the crime of THB stated by the article 177 BIS, in these cases of `stolen children´ the ultimate element of exploitation will remain absent . But it is equally important not to forget that the first two elements in the definition of the THB in the Palermo Protocol, nonetheless, shows compliance with the legal grounds of the Spanish acts that tantamount such an offence.

In these Spanish cases of `stolen children´, the act of “ *recruitment, transportation or transfer*”, “*harbouring or receipt of persons*” “*by means of threat or use of force of other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments of benefits to achieve the consent of a person having control over another person*”<sup>194</sup> should be considered when it comes the call for a more exhaustive evaluation on the current legal possibilities to face those offences committed.

Conforming to this, if it is finally considered the `illegal adoption´ as a form of exploitation<sup>195</sup> and, we take into account the large number of victims who got damaged

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<sup>191</sup> Ídem.

<sup>192</sup> Free translation of the author.

<sup>193</sup> Martos Núñez, 2012 p.100.

<sup>194</sup> Palermo Protocol Article 3 (a).

<sup>195</sup> Smolin, 2004.

(directly or collaterally) by of the commitment of those offences, we could be discussing about a sort of 'crimes against humanity'<sup>196</sup>, as some scholars pointed out and as I mentioned in the first chapter. This sort of crime compiled in the Article 607 BIS of the SPC ('crimen de lesa humanidad'), is, as well, set forth in the International Public Law as directly applicable, as a crime that comprise a massive violation of the dignity and identity of those children as their own and basic human rights.

The contemplation of the Spanish cases as part of the regulation of the Legal Adoptions gathered in the Law 21/1997 enacted on November 11<sup>th</sup> of 1997, in compliance with the International Adoptive Law ( Ley de Adopción Internacional) enacted ten years later, on December 28<sup>th</sup> 54/2007<sup>197</sup>, standardize another wide possibility for creating the most suitable legal framework. From a prior consideration where the focal point was the protection of the identities of those defenceless mothers, rather in the present scenario, the law of 21/1997 highlights the significance of the recognition of the basic rights of the minors that are vulnerably considered for adoption.

But 'what about those cases in which there were any official documents provided in order to demonstrate conclusively that the 'real adoption' had been successfully accomplished?', 'what about those in which the counterfeited public documents and the 'presumption of death' of those 'stolen children' by those naïve mothers were the only evidence of the existence of the offences perpetrated?. Even when those cases are still not recognised in due form as 'adoption' cases, it should be analysed the logic proposal to give them a comparable treatment. So therefore, the fact that these cases also have an appearance of illegal adoption offences and the certainty of the occurrence of a new affiliation proceeding each time an adoption is performed, should be taken into account.<sup>198</sup>

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<sup>196</sup> Free translation of the author.

<sup>197</sup> BOE legislation ley 57/2007.

<sup>198</sup> Email Prof.Luz Maria Puente Alba, Penal Law University A Coruña, 26 May 2014.

In order to strengthen the evidence-based national policies, it is from a paramount importance to execute a meticulous interpretation of all the potential offences that could emerge from those purchases and sell of minors. Furthermore, in the situations that could be highly plausible, suggest the possibility to postulate various amendments concerning the more recent law regulation, as for instance, to aggravate the typical legal nature of those offences or to enshrine fresh and original legal concepts within the broader meaning.

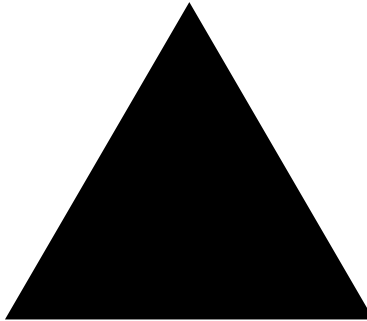
However, the categorization of those cases on 'stolen children' within the legal concept and procedure of Illegal Detentions, gathered from the articles 163 to 168 of the SPC, is one of the most frequent solutions in order to struggle against the prescription of the commission of the offence. Moreover, as the Illegal detention is considered under the Spanish Penal Law as a permanent felony, the prescription should start to count when the detention would have finished so therefore, the lawyers have an incentive to avoid the prescription of those crimes accomplished or at least interrupt it.<sup>199</sup>

Due to the diversity of the posing of the facts in each case, it could be considered very difficult to create a National closed legal framework, but there is still a chance to believe on the creation of a new sort of crime for 'stolen children' with a specific legal basis in the SPC. Thence, that sort of crime would entail the consideration of all the prospects mentioned in the previous paragraphs as a whole in a three-cornered scheme of legal frameworks as the one that follows:

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<sup>199</sup> Email Prof. Margarita Martínez Escamilla, Penal Law UCM Madrid, Spain. 14 May 2014

Considering the possibility of trafficking (177BIS) with purpose of illegal sale of children as exploitative or at least, to raise a new concept with the same means but different purposes



Considering the aggravation of offences  
Abduction

gathered in the Arts. 220, 221,222

‘Supposition of childbirth’ and

‘Alteration of the paternity or the status

of the minor’ alongside with the Arts.

397,398 and 399 about Misrepresenting

public documents.<sup>200</sup>

Considering the Art.225 about

of minors, alongside with the

Art.163 and following about Illegal and

arbitrary detentions.

Due to the likely rejection of individual suits brought to the Provincial Audiencias, as the one of Antonio Barroso in Zaragoza (Director of ANADIR and victim) in order to be recognized as ‘stolen children’ and to call for the urgent release of his own files,<sup>201</sup> it was

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<sup>200</sup> Torres Fernández, 2003; Email Prof. Alba Villanueva Fernández (International Law, University of Granada, Spain) 26 May 2014.

<sup>201</sup> Conversation with Antonio Barroso, Director of ANADIR. 31 March 2014.



taken legal joint action (260 suits) on January 27<sup>th</sup> 2011 to the General Public Prosecutor's Office (Fiscalía General). It was conferred credibility to the 'possible' existence of the offences of 'stolen children' perpetrated, and even if the Public Prosecutor Mr. Conde Pumpido himself dismissed an state-investigation, it was ordered to each of the Provincial Public Prosecutors, the duty to investigate not only the cases already brought to the court but also the future possible ones.<sup>202</sup>

#### **4.1.2 Current Irish legal proposals: Hypothetic solutions offered.**

*"I don't have a case, I have half a life. I don't have an issue, I have a life that is incomplete due to the actions of your predecessors and compounded by current agency, state and church personnel. I don't have a query, I have a right I don't have a file, I have a history, an identity and a heritage which I cannot access"*<sup>203</sup>

In the Irish cases, which were accomplished by means of forced adoptions, as we remarked in the first chapter, some scholars such as Smolin, firmly believe that those illegal and forced adoptions reflected as the ultimate purpose, should be considered as a 'form of exploitation' and so therefore, completely encompassed within the crime of THB. By now, Ireland has enclosed in its own Penal legislation the "Trafficking in Persons and Sexual Offences Bill" in 2006 and the "Human Trafficking Bill" in 2007.

Regarding the Irish Constitution, we should pay attention to the Fundamental Rights enshrined among the Articles 40 to 44, and in which the first of them includes in its third part that *"1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen"*.<sup>204</sup>

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<sup>202</sup> Quílez, El Mundo Niños Robados.

<sup>203</sup> Murphy, 2001 cited by Adoption Rights Alliance (last accessed 10 June 2014).

<sup>204</sup> BUNREACTH NA hÉIREANN – Constitution of Ireland. See further information in [www.taoiseach.gov.ie](http://www.taoiseach.gov.ie).

One of the biggest differences between Spanish and Irish cases, is that in Ireland, those women who were sheltered in those living-working Mother-and-baby Homes or in those Magdalene's laundries, ultimately added their signature to the consent form, under a tangible coercion, of the adoption of their children.

So therefore, if, in the situations that preceded the enactment of the Adoption Act in 1952, those children could had been reflected on the public society as victims of abduction or illegal export to USA without any reliable adoptive certificate to rely on; immediately after the proclamation of the Act, the original context of Irish adoptions was covered-up by a legal appearance.

As Ms Susan Lohan, Adoption Illegally Ireland, stated and was published for the Irish Examiner that *“Illegal birth registrations are a small part of the illegal adoptions that need to be investigated. We also need to examine those rendered illegal as the mother was under the age of consent, where surrender forms were signed before babies had reached the legal date of six weeks, where adoptions were signed off to couples who were not ordinarily resident in the State, and where signatures were routinely forged and consent not freely given.”*<sup>205</sup>

Working alongside with Justice for Magdalene's Research ( hereafter JFMR) and Adoption Rights Alliance ( hereinafter ARA), it is important to emphasize the work accomplished by the Irish Research Council ( IRC) in order to appoint an independent Commission for the Investigations into Mother and Baby Homes and subsequently , investigate in a further and deeper way those violations perpetrated in the Magdalene's laundries.

As they showed in their Inquiry to the Minister of Children and Youth Affairs Charlie Flanagan TD that *“JFMR and ARA suggest that the Commission of Investigation should focus on the issue of children born out of wedlock in Ireland since 1922 rather than institutions per se. We understand that this issue gives rise to six distinct fields of inquiry*

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<sup>205</sup> O'Sullivan,; Ó Fatharta, The Irish Examiner Ms. Susan Lohan Statement. 7 July 2014.

(...) ii. *Adoption practices*; (...) iv. *Forced labour and incarceration of unmarried girls and women who gave birth to babies or were seen to be ‘at risk’ of becoming mothers*; v. *Conditions in the institutions, including neglect, denial of adequate medical care and cruel punishment of unmarried mothers and their infants and children;*(...)”<sup>206</sup>

In order to fully comply with the well-known principles of European and international human rights law (HRL), the investigation suggested by JFMR and ARA, should be performed by an ‘independent and impartial’ Commission which simultaneously shows the independence of its members (isolated from any sort of relation with any institution) and which also provides the involvement of an ‘independent international expert’. This new Commission will have the duty to “*obtain all information necessary to the inquiry*” so therefore the Commission would comply, in an easier manner, with the obligation to take accountability of the violations of human rights carried out.<sup>207</sup>

The operational policy inquiry will rely on the supply of previously estimated “*budgetary and technical resources*” for the future calls of appealing in courts of those who are considered as contributors to the specific case, and for the “*demand the production of evidence*”. Such investigation must be managed and transmitted in a prudential lapse of time, highlighting the paramount importance of the public thorough examination for the transparency of the procedures and the responsibility for the outcomes. The results to which the Commission investigation will reach, will be widely diffused to those victims of the cases above mentioned and to the public sphere, for a more profound concern and understanding.<sup>208</sup>

One of the most paramount points of this policy inquiry is the fact that it should “(…)(g) *involve children born out of wedlock, natural mothers, next-of-kin and representative groups in the procedure such that they are informed of and have access to any hearing and*

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<sup>206</sup> Submission to Mother and Baby Homes Inquiry p. 2. June 2014

<sup>207</sup> Ibidem p.9

<sup>208</sup> Submission to Mother and Baby Homes Inquiry p. 9. June 2014.

*all information relevant to the investigation, and that they have the opportunity to provide evidence and comment on the evidence being examined;(…)*”<sup>209</sup>

About this Inquiry made by ARA and JFMS, the Minister of Children and Youth affairs, Flanagan has very recently admitted in a public discourse the necessity of that Independent Commission “*I am deeply aware that there are people living with the daily reality of these painful experiences, so establishing an appropriate inquiry which is capable of effectively addressing these important matters in a sensitive and timely manner is my primary concern (...)*”<sup>210</sup>

Numerous groups or coalitions of victims have been working hard in the recent years in order to get an Inquiry to redress the violations suffered for a wide range of their members admitting that “*timing is of the essence in ensuring that every living victim can avail of redress without further delays*”<sup>211</sup>

Coalitions such as the one formed the 3<sup>rd</sup> of August of 2012, Adoption Rights Now, introduce in their agenda, also the claim for a Public Inquiry to raise awareness about the gross violations of human rights suffered by the helpless mothers and their children who lived-worked in those Mother and Baby homes, a call of attention to the necessity of the releasing of ‘adoption records’ under the provision established on the Article 7 of UNCRC.<sup>212</sup>

Adoption Rights Now has stressed the primordial importance of a “*sincere, genuine, heartfelt, unqualified apology by both the Catholic and Protestant churches and the State.*”; likewise, there is necessity to shed the light on the article 9 and 10 to regulate and of the UNCRC. And finally to get “*A good faith attempt by all churches and their staff, and the Government, to hand over every scrap of paper relating to historical adoption and the*

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<sup>209</sup> Ídem.

<sup>210</sup> Minister Charlie Flanagan 1st July 2014.

<sup>211</sup> Cfr. Supra note 197, p. 13.

<sup>212</sup> Adoptions Rights Now Presentation Facebook website.

*M&B homes in Ireland to a neutral third party until the future of such records can be agreed and legislated upon.*"<sup>213</sup>. So therefore, the ultimate goal of this Inquiry should be creation of an appropriate legislation in order to do not allow those Irish cases remain unpunished.

The Adoption Board and the Information and Tracing Service providers are supposed to work together to develop those inquiries but "*The Board may, on occasions, decide not to release a birth certificate in cases where a natural mother has been consulted, is opposed to its release, and where the Adoption Board considers a natural mother's privacy or safety might be put at risk by the release of the document.*" <sup>214</sup>

In the Penal Code of Ireland the right to have "*access to one's birth certificate is a matter of dignity – in short, it proves that you were born, that you exist*" do not exist as an automatic and basic statutory right. "*It is possible to apply to the Adoption Authority (AAI), however the AAI and accredited bodies (previously known as adoption agencies) insist upon seeking the permission of natural mothers before releasing birth certificates.*"<sup>215</sup>

*"Despite being the regulatory body for adoptions, the Adoption Authority of Ireland (AAI) has repeatedly refused to deal with the issue of illegal adoptions, stating that because no adoption order existed, no adoption took place and it therefore has no jurisdiction, maintaining this position even when an adoption agency registered by them was proven to have arranged the illegal adoption".*<sup>216</sup>

So therefore, Does in Ireland the right to the natural's mother's privacy weight more than the basic right to an identity of those stolen children (now adults) in research of their real origins?. In the judgment on IOT v B 1998 is stated that "*Clearly, since both rights are not*

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<sup>213</sup> *Idem.*

<sup>214</sup> Protocol November 2007 National Information and Tracing Service p.31.

<sup>215</sup> Adoption Rights Alliance Campaigns and Policies. See further info in <http://www.adoptionrightsalliance.com/campaigns.htm>.

<sup>216</sup> *Idem.*

*absolute, the Court must seek to strike a balance of them (...) the effect on the respective parties in the event of the vindication of one right rather than of the other”<sup>217</sup>*

*“Successive Irish governments have argued that a 1998 Supreme Court ruling prevents them from automatically opening adopted people's birth files because it emphasized the mother's right to privacy, and said mothers should be consulted”<sup>218</sup>. However, in the comments by to that IO’T v B judgement in 1998 is highlighted that, “the Irish High Court held that the Irish constitution entitles an adopted child to know the identity of his or her biological parents. The case also established that biological mothers do not have an absolute right to anonymity, but that they should be given an opportunity to assert a claim of privilege and any other claim to privacy under the Irish Constitution or laws before having their identities disclosed.”<sup>219</sup>*

Even the President of Ireland Mr Michael D. Higgins admitted months ago that “ (...) *It is “horrific” that basic information is denied to adopted people (...)*” and moreover, he said “*there was a “responsibility” on the State and other institutions involved in adoption to provide adequate information to people seeking their identities”*.<sup>220</sup>

Despite the fact to the public apology stressed by Enda Kenny in 2013 against the abuses in the baby homes and the will of the Minister for Justice and Equality, Frances Fitzgerald TD, to establish a new DNA Database System to assist the Garda Síochána in tackling crime as an example of the Government commitment, there are still several future acts of engagement to fulfil.

Since the first petitions on 1996 to the Government for working devoutly in Public Inquiries about those cases, it was not until the current days that the Adoption Authority Ireland (AAI) recognized, as the Irish Examiner stressed, that “*Thousands of Irish people*

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<sup>217</sup> Barron, J, on the Courts judgment IOT v B 1998

<sup>218</sup> Crimmins; Halpin Omagh, Northern Ireland 27 February

<sup>219</sup> Overview of Irish Adoption Law – Center for Adoption Policy p.9 ( based on Irish High Court Judgement IT’O v B April 3rd, 1998)

<sup>220</sup> Ó Fátharta, The Irish Examiner 18 February 2014.

*"must have been illegally adopted, with many taken out of the country". The article keeps on saying that "The controversial claims clash with statements from the then children's minister and now justice minister, Frances Fitzgerald, who told the Dáil last year that every adoption carried out by the State was legal"*<sup>221</sup>

The problem following the point of view on the matter of Adoption Rights Alliance, is that *"(...) there is no statutory mechanism under which to complain about the AAI. The Authority is not covered under the Freedom of Information Acts 1997 to 2003 or the Ombudsman's Act 1980"*

## **4.2 Realm in an International scale: proposing the most suitable international legal framework.**

Bearing in mind that the Universal Declaration of Human Right states in its article 1 that *"All human beings are born free and equal in dignity and rights"*, I will introduce this last section of the fourth chapter recovering from the first chapter, the primordial articles gathered in the UNCRC (1989) about the Right to Identity, those so-called *`artículos argentinos´*<sup>222</sup> numbers 7, 8 and 11 (included in 1998). These articles, alongside with the number 9 and 10 can be used as fundamental basis and source for the present and future acknowledgement of the violations of rights accomplished by the perpetrators of the offences committed in Spain and Ireland.

Not only is important to consider the undeniable basic rights of the child enshrined in the UNCRC, but as well as the offences perpetrated showed several similarities with the crime of *`Forced Dissapearances´*, as I pointed out in the first chapter of this paper work, it is equally important to raise awareness in base on the ICCPED.

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<sup>221</sup> O'Sullivan; Ó Fátharta, The Irish Examiner 7 July 2014

<sup>222</sup> Guinzberg, 2007.

The first paragraph of the Article 7 UNCRC emphasizes the obligation for both, the parents or guardians, and for the civil servants, of the registration of the children “(...) *immediately after birth (...)*”; in the same way, this article stresses the legitimate entitlements that are interwoven to that registration, such as the “(...) *right to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents*”.

In the second paragraph of this article 7, it gives prominence to the recognition and to the reliable application of these mentioned rights by the National legal systems; nevertheless, also the compliance with those obligations are subject of the international regulation scrutiny.<sup>223</sup> In both, Spanish and Irish cases, as we have been able to notice during the previous chapters, the registration of the child-birth was in the vast majority, inexistent, and when those babies were registered ‘in due form’, according to that present law, in most of the documents the biological’s mothers name were replaced with the adoptive ones.

The Article 8 of the UNCRC, enhances firstly the minor’s entitlement “(...) *to preserve his or her identity including nationality, name and family relations (...)*” and secondly, it remarks the duty of the National State in the recuperation of the lost identity in case the child was “(...) *illegally deprived of some or all of the elements of his or her identity (...)*”<sup>224</sup>. Further, the Article 11, impose a severe obligation on the States members which ratified the UNCRC on tackling the complications produced by the “(...) *illicit transfer and non-return of children abroad. (...)*” and the duty to prevent the children to be targeted as victims of abduction or forced disappearances with the generation of diverse sorts of national and international protective instruments.<sup>225</sup>

In the Spanish and Irish cases, those children were totally deprived of their Right to an Identity by illegal means; besides that, it is equally important to mention the fact that in the

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<sup>223</sup> UNCRC 1989 – Article.7.

<sup>224</sup> Ibidem Article. 8.

<sup>225</sup> Ibidem Article 11.



Irish cases, not only those stolen children were private of their right to an identity but also, they were illegally sold to USA through the management of a real business of illegal adoptions.

Not included by the necessity of enshrinement of the Right to Identity, but, nonetheless clearly important in the implementation of the three articles mentioned above, the Article 9 in its first part, points out the obligation of the State to 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*”. In these cases enshrined in this thesis, the children were ‘stolen’, were taken without their mother or parents’ permission, or with the coerced consent; but even what is more impressive, is the fact that in several cases those mothers were told by the civil and church servants, that their children had died in the moment of their birth or in the following days, so therefore they were not even aware of their real existence.<sup>226</sup>

In the third paragraph of the article 9 it is stated that “*States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact*”. For instance, in the Irish cases, the majority of the mothers were coerced and forced to sign a relinquishment of the child for adoption that included the promise to “(...) never attempt to see, interfere with or make any claim to the said child at any future time (...)”<sup>227</sup>

The last article of the UNCRC to which I am referring to in this section, is the Article 10, which highlights, alongside with the first paragraph of the article 9 above mentioned, that the State should put at the service of all the victimized children and families the necessary steps to ease their future reunification. But there are also imposed “(...) *restrictions as are*

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<sup>226</sup> Ibidem Article 9.

<sup>227</sup> Sixsmith, 2009 p.52.

*prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention”<sup>228</sup>*

Going through the Spanish and Irish cases aforementioned by the second and third chapter of this thesis, it is assimilable why those victims are still seeking for the addressing of Truth, Justice and Reparation, due to the fact that the violation of those rights of the child gathered in the articles 7, 8, 9, 10 and 11 of the UNCRC have not been still recognized and taken sufficiently into account.

The current domestic spheres and subsequently, the present policies adopted, as we shall keep in mind, are joining efforts in order to investigate those practices, to identify those ‘stolen children’ and to reunite them with their origins. The relevance of those cases in the International realm, under the scope of the security and the importance of the child welfare against any tendency that violates their basic rights, has been enshrined in the last Report of the UN Commission on the Rights of the Child of 25<sup>th</sup> February 2014 in the Concluding observations on the second periodic report of the Holy See<sup>229</sup>.

In this document it is stated that there is a need to recognize those crimes performed by the catholic congregations in which there were babies forcibly removed from their biological , mothers and urged the Vatican to assist those investigations releasing all the helpful files under their own property and to proportionate light about the actual whereabouts of those ‘stolen’ children.<sup>230</sup>

The former Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M’jid, has stressed in the Report to the Human Rights Council at its twenty-fifth session, pursuant to Council resolutions 7/13 and 19/37 that: “Illegal adoption is also an extremely hidden phenomenon. However, a review of the situation of

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<sup>228</sup> UNCRC 1989 Article 10

<sup>229</sup> UNCRC CRC/C/VAT/CO/2 25 February 2014

<sup>230</sup> Reuters document UNCRC 25 February 2014.

intercountry adoption points to heightened risks of illegal adoption due to the conjunction of various factors. Existing records suggest that there has been an increase in intercountry adoptions worldwide between 2000 and 2004, followed by a significant decrease. Demand for adoption has continued to increase, while supply decreases, creating the conditions for abuse, corruption, excessive fees amounting to the sale of children, and the illegal adoption of children. This phenomenon will require ongoing attention in coming years to ensure that adequate governance frameworks are put in place to prevent and combat illegal adoption”<sup>231</sup>

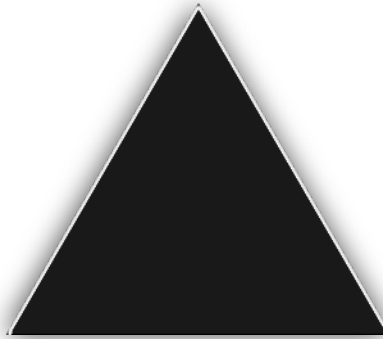
The hypothetical solutions that could bring some light to the regulation of these cases, should take into account another three-cornered situation.<sup>232</sup> Bearing in mind the considered solutions in the different Domestic spheres, there is an urgent need to find a legal framework in which the characteristics and circumstances of both legal instruments, the Palermo’s Protocol (2000) and the Hague Convention on the Inter-Country adoptions (1993), pool resources in order to find the most suitable and approachable legal framework to categorize those cases of ‘stolen children’ without denature those crimes individually considered.

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<sup>231</sup> A/ HRC/ 25 / 48 UNGA p.7 of 23 December 2013.

<sup>232</sup> Interview in Spanish with Prof. Alba Villanueva Fernández 16 June 2014.

Considering the Domestic legislations and provisions enshrined on the UNCRC  
on the Right to Identity



Considering the legislation  
enshrined in Palermo's Protocol  
about THB.

Considering the legislation enshrined  
in The Hague Convention about  
Inter-country Adoptions.

## **CONCLUSION**

The main objective of this study was to assess the importance of raising awareness on the act of purchasing and selling children by means of illegal adoption during the past fifty years as a business regulated by the high demand; developing, as a result, some hypothetical models of legislation as suitable solutions, taking for granted a future deepen investigation for a future ultimate creation of a specific legal framework for those 'Stolen Children'.

In this thesis, I conducted an analysis on two different situations, Spanish and Irish ones, in which the focal point will end up being the commitment of the same crime, perpetrated for the same sort of servants, managed by the same conviction of doing it for the 'best interest of the child' but in exchange of economic 'donations' and with the same social and cultural motivation that became ingrained in each community.

From this analysis, it became apparent the necessity to raise global awareness, to promote public scrutiny and to spread the word for a future legal solution of those unbearable continuous violations of basic human rights; rights such as the one that allows you to have a real identity, the one that is deeply rooted from the so-called right to dignity, unalienable right to every single human being for the mere fact of its existence.

Due to the fact that a large number of investigations and advocacy campaigns has led to recent Reports of United Nations and Governmental amendments willing to tackle the problem once and for all, we can say now that the present scenario is one of the most appropriate ones for shedding some light into the legal limbo in which those 'stolen children' still remain.

Pointing out the negative aspects, even if they are outweighed by the positive aspects, it is from an utmost importance to bear in mind that the solutions to solve this huge problematic need time to be, firstly, deeply and further investigated; secondly, to be considered

adequate to meet the needs of the stolen victims; and thirdly, to be upraised in order to meet the universal principles of Truth, Justice and Reparation.

The greater hope for finding a global solution and for preventing those violations to happen again, has been brought by the ratification for both, Spanish and Irish State, on The Hague Convention about Intercountry adoptions, alongside with the consideration of the Palermo Protocol and the different solutions provided from their own national legal scope.

In my modest opinion, the principal focus of the present and future investigation for a specific legal status of those `stolen children´, should be, to find the truth about their stolen lives and to regain the justice that was denied to them, rather than blame the States for their lack of responsibility in tackling the offences.

I believe in the possibility to reach a specific status for those people who have suffered the loss of their real identity, for those who are anxious to find a proper answer to the request of the why, and for those who have been denied to have a real family life experience without any sort of permission.

Still there is hope for them to become `re-appeared children´; they merely deserve an opportunity to finally discover their stolen lives.

## ANNEX

### *List of Interviews, conversations and Email exchanges*

- Mr. Antonio Barroso (ANADIR Director) – Phone Conversation Madrid- Barcelona  
date: 31 March 2014.
- Mr. Enrique J. Vila Torres (Lawyer SOS Raíces) – Email conversation date: 17 June 2014.
- Mrs. Mar Soriano (S.O.S Bebés Robados Coordinator of the Platform) – Meeting in  
Madrid date: 7 April 2014.
- Mrs. Margarita Martínez Escamilla (Penal Law, University Complutense Madrid UCM) –  
Email date: 14 May 2014.
- Mrs. Rita Baptista ( Director OTHB Lisbon) – Meeting Coimbra date: 20 May 2014.
- Mrs. Susan Lohan ( Adoption Rights Alliance) – Skype conversation date: 12 May 2014.
- Prof. Alba Villanueva Fernández (International Law University Granada) –  
Email date: 9-12 May; 11 June 2014 Skype conversation date: 16 June 2014.
- Prof. Carmen Pérez Gonzalez (International Law University Carlos III) –  
Meeting in Madrid date: 5 June 2014.
- Prof. Joana Wrabetz – Meeting Coimbra date: 28 March 2014.
- Prof. Luz María Puente Alba (Penal Law, University A Coruña) –  
Meeting in Coimbra: 20 May 2014 Email conversation date: 26 May 2014.
- Prof. María Joao Guia (CINETES, Coimbra) – Meeting in Coimbra: 20 May 2014.
- Prof. Olivas Cabanillas (Natural Law UCM) – Meeting date: 2 April 2014.
- Prof. Rodriguez Iglesias (Communitarian Law UCM) – Meeting date: 1 April 2014.





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